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## Introduction

# WHY WE NEED A REAL RIGHT TO VOTE

Throughout U.S. history, too many Americans have been disenfranchised or faced needless barriers to voting. And the blame for these weak voting rights falls in large part on the U.S. Constitution that never has contained, and still does not contain, a general affirmative right to vote.

Among other groups, African American voters and women were mostly disenfranchised from the very founding of the United States solely on the grounds of their race or gender. Sometimes these disenfranchised Americans looked to the constitution and the courts for a legal argument recognizing their right to vote. That is what Virginia Minor did in the 1870s.

Minor described herself in a court filing as “a native born, free, white citizen of the United States, and of the State of Missouri, over the age of twenty-one years, wishing to vote for electors for President and Vice-President of the United States, and for a representative in Congress, and for other officers, at the general election held in November, 1872.” Missouri officials would not let her vote because of a provision in the state constitution limiting the franchise to otherwise eligible male citizens.<sup>1</sup>

Minor argued in an 1874 Supreme Court case, *Minor v. Happersett*, that her disenfranchisement by Missouri violated the then-recently-ratified Fourteenth Amendment of the U.S. Constitution, which barred states from making or enforcing “any law which shall abridge the privileges or immunities of citizens of the United States.” Voting, she contended, was just such a privilege of citizenship, and Missouri therefore could no longer disenfranchise women after the Fourteenth Amendment’s passage.

The Supreme Court agreed that women were citizens of the United States, but it held that the Fourteenth Amendment did not require enfranchising women because voting was not a “privilege” of citizenship. Voting rights instead were left up to each state. The all-male Supreme Court was “unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void.”<sup>2</sup>

Minor’s lawsuit was unsuccessful, but her efforts were not in vain. Her case came in the middle of a decades-long struggle to end voting discrimination against women by amending the constitution. It was an important step along the way. As historian Ellen Carol Dubois explained, in *Minor v. Happersett*, “the Supreme Court had essentially vitiated federal control over voting,” leaving states “with almost full control over the franchise. Suffragists began to refocus on amending state constitutions to grant women suffrage rights.” As women gained the right to vote state by state, they built momentum toward a national constitutional amendment expressly prohibiting gender discrimination in voting.<sup>3</sup>

Even with the ratification of the Nineteenth Amendment in 1920 barring discrimination in voting “on the basis of sex”

throughout the United States, the Supreme Court refused to read the amendment as fully guaranteeing a right to vote regardless of gender. In a 1937 case, *Breedlove v. Suttles*, the court held it would be constitutional to exempt only women from paying a poll tax in order to be able to vote: “In view of burdens necessarily borne by them for the preservation of the race, the State reasonably may exempt them from poll taxes.” When the court overturned the constitutionality of the poll tax in state elections in a 1966 case, *Harper v. Virginia State Board of Elections*, it did not overturn that aspect of *Breedlove* allowing men to face a burden to voting that women did not.<sup>4</sup>

State and local voting laws still sometimes discriminate on the basis of gender. Some states, for example, require that voters provide photographic identification from a limited list of acceptable documents, such as a driver’s license, before voting. Women are more likely than men to change their names upon getting married, and that can create problems in states with stringent voter ID laws when the name on an older form of acceptable identification does not match the name contained in a state’s voter registration database. Women face a greater risk than men of disenfranchisement under these laws, which studies have shown do not stop any serious amount of voter fraud.<sup>5</sup>

The issues are even more severe for transgender voters. Consider the plight of Henry Seaton, a transgender man who went to vote for the first time upon turning eighteen in a suburb of Nashville, Tennessee, where a photo identification for voting is required. According to an NBC News report, “Seaton showed his state ID. But the poll worker gave him a confused look and called over another poll worker to look at Seaton’s identification. Then, in front of the Nazarene church where he was supposed to vote, the poll workers asked him about what they saw as a discrepancy between his ID and his appearance.” “I had to out

myself as transgender,” Seaton told NBC News. His ID still said he was a “female.”<sup>6</sup>

Nationally, according to an analysis by the Williams Institute at UCLA, approximately “414,000 voting-eligible transgender Americans live in the 31 states that both (1) primarily conduct their elections in person at the polls, and (2) have a voter ID law. Nearly half of these, or 203,700 individuals, do not have an ID that correctly reflects their name and/or gender. Of voting-eligible transgender people who live in states with voter ID requirements, 64,800 live in the states with the strictest voter ID laws.” Further, “Black, indigenous, or people of color, young adults, students, people with low incomes, people experiencing homelessness, and people with disabilities are overrepresented among” transgendered voters lacking acceptable forms of identification in some states.<sup>7</sup>

Discrimination in voting hardly is confined to issues of gender or gender identity. In the middle of the COVID-19 pandemic during the 2020 presidential election season, when many people thought it was safer to vote by mail, Texas voters sued their state, claiming that its law allowing only those over the age of sixty-five to vote by mail without providing an excuse for not voting in person violated the Twenty-Sixth Amendment, which bars age discrimination in voting for those at least eighteen years of age. The U.S. Court of Appeals for the Fifth Circuit held there was no violation, reasoning that because there was no constitutional right to vote by mail (even in the middle of a pandemic), there was no problem with the state offering an easier (and healthier) way of voting to just older Texans.<sup>8</sup>

For much of American history, African American voters were formally denied the vote, and other racial and ethnic groups faced disenfranchisement as well. Today, well after the passage of the Fifteenth Amendment and the 1965 Voting Rights

Act, minority voters still sometimes face extra hurdles in voting. For example, Native Americans who live on reservations faced special burdens with voting during the pandemic because of the great distances to travel both to physical polling places and to areas with regular postal service. But courts often have not recognized that these special burdens require accommodations to assure that these voters have the same access to the ballot as everyone else.

Or consider a Kansas law requiring that those registering to vote to show documentary proof of citizenship, such as a birth certificate or naturalization papers, before state officials would accept the registration. Most people do not walk around with such papers or have easy access to them when they come across an opportunity to register. About thirty thousand Kansans were denied the ability to register until a lawsuit put an end to the practice. Kansas's then-Secretary of State Kris Kobach sought to defend the law on the grounds that it would prevent a great deal of illegal noncitizen voting, offering scant evidence of fraud that he termed "the tip of the iceberg." But a federal district court found that the amount of illegal noncitizen voting in Kansas was an "icicle," and the law therefore would disenfranchise tens of thousands of eligible Kansans for no good reason.<sup>9</sup>

The suit by Kansas voters followed a now-familiar pattern ever since the constitution was amended to bar certain forms of explicit discrimination, such as those based on race or gender. A state enacts a restrictive voting rule and voters have to rely upon the courts to strike it down or limit it. Voters often can show that these laws do not prevent a lot of voter fraud, instill voter confidence, or do much of anything that helps secure election integrity. But many courts these days are hardly protective of voting rights, and without robust protection of voting rights in the U.S. Constitution, far too often these voters end up

losing. The disenfranchised Kansans were lucky they had good lawyers and a reasonable judge.

There has to be a better way than waiting for the government to impose new voting restrictions and then suing over them to an uncertain judicial result. That way is to pass and ratify a constitutional amendment affirmatively guaranteeing all eligible voters their right to vote.<sup>10</sup>



The angst this country endures each presidential election cycle over whether we can hold free and fair elections is the product of a dysfunctional, decentralized, partisan election system administered under a national constitution that does not adequately protect voters' ability to vote and to have each eligible ballot fairly and accurately counted.

Many of the discriminatory laws described above were adopted in states with Republican legislatures and election officials. Whether it is regulating voting by students, by minorities such as Native Americans, or by former felons who (at least in theory) have had their voting rights restored, Republicans have too frequently imposed registration and voting barriers, sometimes out of a belief—often wrong—that making it harder for people to vote will give their party electoral advantage. They claim that these laws are necessary to prevent fraud and promote voter confidence, but they do neither. Instead, these laws require some people, often people of color, to put in tremendous efforts just to freely cast a ballot. Effort that could have been put into campaigning or get-out-the-vote drives is wasted on something that should be guaranteed to every eligible American voter.<sup>11</sup>

Democratic states generally do better at protecting the right to vote, though in earlier generations many southern Democratic states were the worst vote suppressors (and even today some Democrats enact voting rules meant to stifle competition within the party). It seems that in every generation there will be some who think that voting restrictions are worth pursuing to try to limit voting by people likely to vote for the other side.

Further, Democratic legislatures and election officials sometimes enact policies or administer elections in ways that raise legitimate concerns about the integrity of the election system. Voter rolls are sometimes bloated with the names of voters who have died or moved, either because the system is run inefficiently or because Democrats worry they might remove eligible voters if they are too aggressive about keeping their registration lists clean, thus hurting their party's chances. California recently loosened its rules to allow the unlimited collection of absentee ballots (also known as "mail-in" or "vote-by-mail" ballots). The state did so despite evidence that this third-party ballot collection, sometimes derided as "ballot harvesting," raises a real, if rare, risk of election fraud. Democrats, too, operate on the mistaken theory that making voting easier inevitably helps Democrats.<sup>12</sup>

In addition to state divisions over proper voting rules, we now face new challenges. When Donald Trump emerged on the political scene during the 2016 election season, he introduced a whole new set of concerns about the resilience of the U.S. election system. He stoked Republican fears about election fraud and convinced many of his supporters, despite all evidence to the contrary, that the system was "rigged" against Republicans and against Trump in particular. The matter caused a national crisis in 2020, when Trump lost in his presidential reelection bid

to Democrat Joe Biden and falsely claimed that Democrats stole the election from him.<sup>13</sup>

Trump came far closer than many people realize to blocking Biden from assuming the presidency by exploiting weaknesses in the set of uniquely American rules for choosing the president via the Electoral College. This risk of election subversion remains real and serious, although the risk somewhat lessened in 2022 with the defeat of election denialist candidates in swing states and the passage of new federal legislation governing the counting of Electoral College votes.<sup>14</sup>

Throughout all of these skirmishes, in what I have called “the voting wars,” courts have been called upon to assure that we have fair elections. Yet courts have not been the great protectors of voting rights that we might hope for, even as they did what was necessary to thwart Trump’s attempts to subvert the 2020 election. Indeed, in recent years courts have been the last place that voting rights activists have wanted to be to protect the right to vote, because the conservative Supreme Court has been actively hostile to both constitutional claims and to many claims under federal statutes, most importantly the Voting Rights Act.<sup>15</sup>

Part of the reason for the lack of success in voting rights claims before the judiciary is the constitution itself. Many Americans assume that the constitution includes an affirmative right to vote, but shockingly, it does not. It stipulates no right of any person to vote for members of the House of Representatives, the Senate, or the president. The United States stands in marked contrast with many other countries whose constitutions affirmatively guarantee the right to vote.

Article I guarantees a popular vote for the House of Representatives, but the provision enfranchises only those who are qualified under state law to vote for the state’s most nu-

merous legislative house. The Seventeenth Amendment extended the same rule for Senate elections. Voting rights therefore depend in part upon state law, not a federal constitutional guarantee.<sup>16</sup>

Many of the protections that some Americans enjoy today for voting rights come not directly from the text of the constitution but rather from a generous reading of the Fourteenth Amendment in Supreme Court opinions from the 1960s, during the period known as the Warren Court. These precedents, emerging when Earl Warren was the chief justice of the United States, protected most citizen, adult, resident, nonfelons from certain forms of disenfranchisement.<sup>17</sup>

These precedents are important but are not enough. They leave a great deal of room for discriminatory voting laws that do not directly disenfranchise people but instead burden their right to vote. They leave some people who should be eligible to vote unprotected or underprotected. And we currently face an ultra-conservative Supreme Court supermajority that gives every benefit of the doubt to states that pass laws intended to make it harder to vote. Even worse, there are worrying signs that some of the earlier Warren Court voter-protective precedents are in danger of being overturned.

The current court's chary protection of voting rights is much more in line with the bulk of the court's history than with that short period of the Warren Court. People must stop thinking of the Warren Court as representing the Supreme Court's typical approach to voting rights; it was the anomaly. It was the Supreme Court in 1874 that told Virginia Minor that she had no constitutional right to vote because she is a woman, despite the passage of the Fourteenth Amendment. As we will see in the next chapter, it also was the Supreme Court in 1903 that told Jackson W. Giles, an eligible African American voter, that it

could do nothing to assure that he could vote in Alabama, despite the passage of the post–Civil War Fifteenth Amendment barring discrimination in voting on the basis of race.

In some ways, the current Supreme Court majority is more dangerous than earlier Supreme Court majorities because it has not just been skimpy with constitutional protection of voting rights. It has also read Congress’s power to protect voters’ rights very narrowly. Even though a half-dozen provisions in the constitution empower Congress to protect voting rights, such as provisions in the fourteenth and fifteenth amendments providing that Congress “shall have power to enforce” each amendment “by appropriate legislation,” the conservative majority is much more protective of states’ rights to run elections as they see fit than of Congress’s constitutional prerogatives, even if the states are disenfranchising voters. It has been unwilling to treat Congress as an equal branch of government entitled to proactively protect voters.

It was this Supreme Court majority in 2013 that struck down a key part of the Voting Rights Act in *Shelby County v. Holder*. The voting law, overwhelmingly enacted and reenacted by bipartisan congresses and presidents, mandated federal oversight of states and localities with a history of racial discrimination in voting. The law was remarkably effective in protecting minority voters from discrimination, but the court held there was not enough evidence of current discrimination in those states covered by the law to justify continued federal oversight. With federal oversight gone, discrimination unsurprisingly quickly reemerged.<sup>18</sup>

Today, protectors of voting rights essentially play defense, leading to a flood of litigation each election cycle between the political parties over the minutiae of registration and voting rules. Some egregious voting rules get rolled back, but many do

not. Often the judges deciding the cases break down on ideological and party lines, with judges running as or appointed by Republicans being more protective of states' rights and more hostile to voting rights legislation than judges running as or appointed by Democrats.

The litigation almost never fully resolves disputes. When a law is struck down, a legislature often enacts a new or revised version of it, and the litigation starts anew. New campaign finance rules and a hyperpolarized political system create incentives to pursue as much election litigation as possible. Democrats sue when voting restrictions are severe and even when they are not. Republicans, too, often sue when states or localities loosen rules to make it easier for voters to register and vote. If politics these days is a game of inches, then election litigators are the ones scuffling in play after play. It is a vicious cycle with no ending or realistic resolution.<sup>19</sup>



This book is about a proposed constitutional amendment providing an affirmative right to vote, which would be the Twenty-Eighth Amendment to the constitution, assuming no other amendments are ratified first. It is about how an amendment can more fully protect voting rights than the current constitution, make elections more secure, and deter election subversion.

The basis for an amendment is the concept of political equality. In a modern democracy, the people should rule, and the primary way they do so is by voting for president, members of Congress, and state and local leaders. Among those people who meet basic citizenship, residency, and adulthood eligibility requirements, voter registration and voting should be easy in a

system designed to assure integrity and prevent fraud. Each voter's ballot should be weighted equally and fairly counted.

The idea of such an amendment is not new. Some supporters of the original Fifteenth Amendment after the Civil War wanted a broad law protecting the voting rights of more Americans. People considered an amendment affirmatively guaranteeing a constitutional right to vote again starting in 1959, when the civil rights movement was getting going, and yet again after the disputed presidential election of 2000. Those efforts have not yet borne fruit. We have always needed an affirmative right to vote in the constitution, but current fights over voting and voting rules make the matter more urgent.

An affirmative constitutional right to vote would put voting rights advocates in a much better position. It would provide much more direct protection for voting rights and shift the burden of proof in the courts so that states would have to come forward with real and compelling reasons to make it harder to vote. It would make it more difficult for courts to reject voting rights claims.

In addition to assuring that all voters are treated equally and do not face undue burdens on voting, a constitutional right to vote would protect the right to have ballots equally and fairly counted. It would protect minority voters from discrimination more directly than the Fifteenth Amendment. It would facilitate systems for automatic voter registration and national voter identification. It would give Congress broad powers to protect voting rights and instruct courts not to unduly interfere with those powers. These provisions would create a system where eligible Americans each have the same opportunity to participate in the political process and to elect representatives of their choice.

But a constitutional right to vote would also deescalate the voting wars and decrease the amount of election litigation by simultaneously protecting voter access and assuring election integrity. It would be written clearly enough that it would be hard for the Supreme Court to ignore its commands and continue to thwart voter protections, and it would enhance Congress's powers to protect voters if the Supreme Court continues to resist. A system of automatic voter registration coupled with voter identification could minimize the need for litigation, assure that all eligible voters will be able to cast a vote, and deter election fraud by those who exploit the current system. And it would do so without mandating a federal takeover of the election process.

A constitutional right-to-vote amendment would also thwart election subversion and safeguard American democracy. An explicit guarantee of the right to vote for president, for example, would moot and obviate any attempt to get state legislatures to override the voters' choice for president through the appointment of alternative slates of electors, as Trump and his allies tried to do in 2020. Rules that guarantee not only the right to vote but the right to have that vote fairly and accurately counted would provide a basis for suing election officials who seek to disrupt the integrity of election systems. Leaks of voting system software or an administrator's lack of transparency in counting ballots could become constitutional violations that voters could remedy by suing.

In short, a constitutional right to vote would protect core voting rights while simultaneously dealing with some of the particular pathologies of the electoral system that have served to make the United States a laggard rather than a world leader on the question of democracy. It is possible to promote election

integrity and fairness for voters while preserving much of our decentralized system for running elections.<sup>20</sup>



Readers who have gotten this far into this introduction and who are sympathetic to its mission are nonetheless likely to think that calls for a constitutional amendment are futile. The skepticism is well founded.

After all, even when Democrats controlled the presidency, the House of Representatives, and the U.S. Senate in 2021 and 2022, they could pass neither a comprehensive set of voting reforms known as the “For the People Act,” nor the “John R. Lewis Voting Rights Advancement Act,” to update the Voting Rights Act and reverse the Supreme Court’s *Shelby County* decision. While those bills passed the House and got a bare majority vote in favor in the Senate, they could not overcome the Senate filibuster, and at least two Democratic senators, Joe Manchin of West Virginia and Kyrsten Sinema of Arizona, refused calls to eliminate the filibuster to pass the legislation.<sup>21</sup>

Moreover, passing a constitutional voting rights amendment would be much harder than enacting legislation. It would require two-thirds affirmative votes of both houses of Congress and ratification by three-quarters of the state legislatures. The last voting-related amendment to be ratified was the Twenty-Sixth Amendment (lowering the voting age to eighteen) in 1971, before most of the current U.S. population was born. Since then, American politics has become much more polarized, and the prospects of any constitutional amendment gaining supermajority support in both Congress and the states seems fanciful—much less one on as charged a subject as voting rights.<sup>22</sup>

For three reasons, however, I believe that pursuing a constitutional right-to-vote amendment makes sense, especially now. First and foremost, movements for constitutional amendments take a long time and pay important dividends as the amendment progresses. The Nineteenth Amendment, protecting women's right to vote, is a good example; it took decades of political organizing and coalition building to get the amendment passed. Along the way, state after state passed constitutional amendments that enfranchised women. Indeed, by the time of the Nineteenth Amendment's ratification in 1920, women's suffrage was a reality in thirty states. State action built a groundswell of support for women's suffrage that eased the ultimate passage of the Nineteenth Amendment, thereby locking in its gains for future generations in case of attempted backsliding or a failure of an amendment to pass on the national level.<sup>23</sup>

Second, a constitutional right to vote could actually promote the voter integrity that Republicans and conservatives say they favor. For example, provisions for automatic voter registration coupled with unique voter identification numbers will clean up the voting rolls and make double voting significantly harder. Further, increasing turnout can also work to the benefit of Republicans and conservatives, especially with the Republican Party's recent turn toward courting working-class voters.

Third, an amendment would deter election subversion, something in the interest of all democracy-supporting Americans. We face new dangers of stolen elections and an urgent need to safeguard our democracy.

There are many forms such an amendment could take, and later in this book I sketch out two possibilities. First I present a basic version that provides the key protections for those who should already be enfranchised by those Warren Court

precedents (citizen, adult, resident, nonfelons) and that creates a rational voter registration and identification system. Second, I consider a more robust version that could go beyond these basic provisions to enfranchise felons who have completed their sentences and residents of U.S. territories such as Puerto Rico; eliminate the Electoral College and replace it with a national popular vote for president; and change the composition of the Senate to reflect one-person, one-vote concepts otherwise accepted in U.S. politics and law.

It will be up to those who lead a popular movement toward a new constitutional right-to-vote amendment to decide whether to go basic and appeal more widely across the political spectrum, or to go more robustly toward political equality and enfranchisement at the risk of alienating some potential political allies. The end of this book discusses those tradeoffs more fully.



I make the case for a constitutional right to vote through stories of how different states have made it harder for different populations to vote over the last few decades. The focus is as much on what is broken as how it can be fixed.

Chapter 1 examines the inconsistent role of the courts in protecting voting rights. Beginning with an example of Texas discriminating against military voters, and the Supreme Court's rare rejection of that discrimination, it shows how most of the time the Supreme Court has failed to be a broad protector of voting rights, and that instead it has been the people, through advocacy for passage of constitutional amendments, who have stepped up for enfranchisement.

Just as chapter 1 shows how Texas made it hard for military voters, chapter 2 describes how that state has long gone after

student voters, and, in particular, students at its largest Black college, Prairie View A&M University. The attacks on student voting undermine a core value of current American democracy: political equality. The chapter explores the key provisions of a proposed constitutional amendment that promotes political equality by granting fully equal voting rights to all citizen, adult, resident, nonfelons.

Chapter 3 then turns to potential expansions within a constitutional right to vote: to felons who have completed their sentences, to residents of at least some U.S. territories, and through changes in how we elect the president and members of the U.S. Senate. This book's appendix offers a few versions of the potential constitutional right to vote, considering the various permutations.

Although political equality is the primary motivation for passage of a constitutional amendment containing an affirmative right to vote, the amendment also would serve two other major purposes. First, as chapter 4 explains, a constitutional amendment would reduce litigation and polarization over the voting process itself, deescalating the voting wars. Second, as detailed in chapter 5, an affirmative right to vote in the constitution would make it harder for unscrupulous politicians to subvert election results and turn election losers into winners.

Chapter 6 concludes the book by grappling with the "how to get there" question. It looks at prior efforts to place an affirmative right to vote in the constitution and how earlier voting rights amendments passed. It considers why red states might support a constitutional right to vote, a key question given that amending the constitution requires supermajority support from both houses of Congress and ratification by three-quarters of state legislatures. The chapter explains that a constitutional right to vote would not federalize American elections, and it

would come with benefits for red states. The chapter debunks the common wisdom that turnout increases invariably help Democrats, and it shows that a constitutional right to vote can help Republicans win elections as much as it can help Democrats. A constitutional amendment also would lessen the risks of election fraud and limit voter confusion.

Still, in today's polarized society getting any constitutional amendment through both Congress and state legislatures, much less one that could have an effect on who is elected to office in those bodies, is going to be a hard slog. There is no sugarcoating the difficulties of the task ahead.

But even the attempt to pursue a constitutional amendment would have great benefits for democracy. Continued Republican intransigence to a constitutional right-to-vote amendment could embolden Democrats to take more aggressive statutory steps to protect the right to vote, potentially generating new conflict with the Supreme Court that could in turn generate further democratic reform.

The status quo is unsustainable and dangerous to our democracy. Pursuing a constitutional amendment protecting the right to vote is the most sensible way forward, even if it takes more than our generation to get there.

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