

**RAGGED REPUBLIC :
THE FRAGILITY OF POLITICAL DEMOCRACY IN AMERICA**

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“Why is George Bush in the White House? The majority of Americans did not vote for him. I tell you this morning that he’s in the White House because God put him in there.”

Lieutenant-General William Boykin, Deputy Undersecretary of Defense for Intelligence, United States Department of Defense¹.

AMERICA’S STRUCTURAL DEMOCRACY DEFICIT

As an American living in France and visiting at Sciences-Po last year, I was frequently asked by French people how a majority of Americans could have possibly voted for George W. Bush in 2000. My stock answer was that a majority of Americans did *not* vote for George W. Bush in 2000. Vice-President Gore received more than 500,000 more votes than Bush nationally and Gore and Ralph Nader together beat Bush by more than 3 million votes. The problem for progressive voters was not their *numbers* but their *location*, as well as the dubious intervention by a 5-4 majority on the Supreme Court which halted vote-counting in Florida. This response only puzzled and troubled my interlocutors, and my protracted attempts to explain the American “electoral college” in French never quite succeeded. Thus, I am taking up this kind invitation from EN TEMPS RÉEL to elaborate how political democracy remains a fragile and constantly threatened value in American society.

To be sure, there are those in the United States, like President Bush, who would never question the strength of democracy in our country since they *define* democracy with reference to America itself. Indeed, the whole world knows these days that we are running a healthy trade surplus in official rhetoric about democracy, although our triumphal spirit has grown a bit more muted in the last several months. Still, the Iraq war, which was originally about weapons of mass destruction, is now routinely justified as a war to implant democracy in the soil of Mesopotamia.

But, at the same time that we spend hundreds of millions of dollars promoting democracy abroad through various federal programs and untold billions on wars for democracy, we suffer at home from a growing domestic *deficit* in the political rights that are actually essential to democratic government. This democracy deficit reflects several problems, but none so fundamental as this one: In the United States, the people do not enjoy a constitutional right to vote. The rather stunning absence of a constitutional right to vote means that, in our decentralized and fragmented electoral system, we have not yet realized other associated and essential democratic values, including majority rule and popular sovereignty, national electoral institutions, universal suffrage and equal freedom of political participation.

In this essay, I shall explore several critical dimensions of America’s democracy deficit: the suppression of majority rule by the presidential electoral college at both the state and national levels, the continuing systematic disenfranchisement of millions of people at all levels of government, the absence of effective national electoral institutions and practices which disenfranchises millions more, and the routine discrimination against “minor” political parties and candidates by the so-called “two-party system.”

The pervasive weakness of democratic values in our political institutions reflects the character of our historical development. While our last great Republican president, Abraham Lincoln, famously spoke of “government of the people, by the people and for the people,” the U.S. began as a slave republic of Christian white male property owners over the age of 21. Even for this privileged demographic group, our Constitution established no federal right to vote or participate. Instead, it left the question of suffrage entirely to the state legislatures, which

imposed from the beginning a series of race, gender, religious, property, wealth, and age requirements for participation in voting. These and many other peculiarities of our electoral institutions bear the imprint of our British origins. In fact, the U.S. is one of fewer than a dozen democratic nations on earth whose constitution does not provide for universal suffrage for the people, and nearly every nation on this list is a former colony of the United Kingdom.

These problems cannot be addressed effectively without amending our Constitution to advance universal suffrage rights. It is both an historical imperative in our history and a plain requirement of international law that the United States join the vast majority of nations on earth that explicitly provide in their constitutions for the rights of universal voting and popular democratic election of representatives. But this is no simple task since a constitutional amendment requires a two-thirds majority vote in both the U.S. House of Representatives and the U.S. Senate and then ratification by three-fourths of the state legislatures (38). Moreover, the goals of universal suffrage and greater democracy remain deeply controversial ones and many parts of society do not regard the following problems as problems at all.

In presidential elections, the electoral college system does not respect the principle of majority rule.

The American president is not elected in a national popular election but through the mechanism of the “electoral college.” In this system, each state casts a number of votes equal to the number of members it sends to the U.S. House of Representatives, which varies according to state population, and the U.S. Senate, which is always two. Thus, Florida has 27 electors, New York has 31, California has 55 and North Dakota and tiny Vermont each has three, which is the least number of electors a state can have.

Now, the vast majority of states award their electors on a winner-take-all basis, which means that if a candidate wins a state even by a single vote in its popular election, all of the state’s electors will be awarded to that candidate. This is essentially what happened in Florida in the 2000 election: after the U.S. Supreme Court halted the counting of ballots in the state, Bush defeated Vice-President Gore by several hundred votes out of 6 million cast and thus captured all of the state’s electors, providing him the margin he needed to reach 270, which is the threshold of victory in the electoral college.

However, two states - Maine and Nebraska - do not have a winner-take-all system. They award one elector for each U.S. House district carried by a presidential candidate and then give two electoral college votes to the candidate who wins a majority or plurality statewide. Thus, the electors in those states can be divided between different candidates. Complicating matters further, in the 2004 election, at the same time they go to vote for president, citizens in Colorado will decide whether to change the state’s method of awarding its nine presidential electoral votes by moving to a system of proportional allocation. This is a move favored by Democrats since the state has been moving steadily in a Republican direction and it would allow the Democratic candidate to cut into the Republicans’ growing dominance of the state’s presidential electors. (The Colorado initiative is one of the likeliest sources of post-election controversy and litigation in the 2004 election.)

If no candidate collects a majority in the national electoral college, which has happened several times, our Constitution provides that the presidential election shall be thrown into the U.S. House of Representatives. In this so-called “contingent election”, each state will cast a single vote, with the state’s delegation deciding how to cast it.

In any event, the important thing to see is that, because presidential elections are controlled by the electoral college process, the United States does not operate on the basis of popular majority rule in presidential elections. In 2000, for example, Vice-President Al Gore won better than 500,000 votes more than George W. Bush in the national popular vote but was defeated by Bush in the electoral college by six votes.ⁱⁱ The winner of the popular vote lost; the loser of the popular vote won. This direct negation of popular democracy has occurred three times before “in 1824, 1876 and 1888” but in the 21st century, these numbers simply do not add up to modern political democracy. The electoral college directly contradicts the sovereignty of the people.

Furthermore, the U.S. electoral college has the magical power not only to frustrate majorities at the national level but to roll over political minorities at the state level and reduce voter participation. The winner-take-all character of the electoral college depresses voter turnout. In lopsided Democratic states like Massachusetts or New York, where John Kerry is certain to win in 2004, Republicans have little incentive to compete and get out their vote. Similarly, in strong Republican states like Texas, Alabama or Georgia, Kerry surrendered to Bush before the campaign even began. It is wiser to spend resources where you have a chance to win.

Indeed, in most of the country, there is simply no competitive election. In 2000, George W. Bush never tried to challenge Gore’s presumptive victory in states like New York, California, Connecticut, Massachusetts, Oregon, Maryland, Vermont, Hawaii, Rhode Island, and the District of Columbia. Similarly, Gore never spent any of his precious campaign time or money competing for votes in Republican strongholds like Mississippi, Alabama, Georgia, Virginia, Texas, South Carolina, Mississippi, Kentucky, North Dakota, Montana, Utah, or Alaska. The race was a foregone conclusion in two-thirds of the country, with the whole election turning on the outcome in about a dozen “swing states,” with Florida, Ohio and Pennsylvania being the most important. These dynamics would have actually been much worse in 2000 had Ralph Nader’s surprisingly forceful candidacy not thrown up for grabs several ordinarily safe Democratic states like Wisconsin, New Mexico and West Virginia.

When one of the major party candidates decides not to compete in a state, this political surrender not only dramatically lowers turnout among that party’s faithful but drags down participation by the dominant party’s supporters as well since their victory is assumed. Indeed, there is no structural incentive to get out the vote nationally because most voters, all those in safe states, are superfluous to victory. Scarce campaign resources go to persuade “swing voters” in “swing states.” In 2000, the voting rate in Florida, which was a fiercely contested battleground, soared over 70%, but most states were consigned to the safe Democratic or Republican column long before Election Day and saw no real campaign. The overall turnout rate sat at the dismal 47% level, putting the U.S. behind every major democracy on earth.ⁱⁱⁱ Thus, the electoral college system helps to produce elections in which half of Americans do not vote. In 2000, less than half of the half that did vote, or less than one-quarter of the nation, determined the victor through the bizarre interaction of the electoral college and a 5-4 majority on the Supreme Court.

But the president of the United States, like the president of Mexico or Canada, should be the elected leader of the entire nation and not of the patchwork of electoral majorities from selected states that deliver him their electors. The electoral college system encourages our candidates and parties to think of the country in the red-and-blue terms of a CNN election-night map: friendly regions, where the base needs constant watering and replenishment, and unfriendly regions that should be avoided and left fallow. If we move to a direct popular vote where every

vote counts, presidents will have effective voting constituents everywhere, even in the most “hostile” areas, and will be motivated to represent the full breadth of the nation rather than strategic electoral hamlets.

There is another important reason rooted in history to discard the electoral college and adopt a direct popular election of the president. The electoral college is intertwined with the institutions and movements of white supremacy. At the time the Constitution was written, the slave states in the South championed the electoral college because it had several clearly advantageous features for them when compared to a direct popular election of the president. The white population in the south was much smaller than in the north and feared that, in a direct popular vote, the country would elect presidents opposed to slavery. So their agenda was to entrench their political power in the fabric of the Constitution and this they did with remarkable skill.

The first trick was to count slaves as part of the census for the purpose of determining how many seats in the U.S. House of Representatives each state would receive. Thus, the slaves, who obviously could not vote, would increase the size of the southern congressional delegations. The slave states argued that slaves should be counted as full persons in the census while the northern states argued that they should not be counted at all. The two sides settled on the infamous “Three-Fifths” provision - counting each slave as three-fifths of a person, which was a clear victory for what people called “the slave power.”

Article II of the Constitution then reproduced this pro-slavery political effect in presidential elections by awarding presidential electors equal to the number of congressional representatives in the state. The two “add on” electors for each state’s senators gave further disproportionate power to the less populous states - that is, the slave states.

All of this maneuvering worked like a dream as the “slave power” proved extremely effective at winning and manipulating presidential elections. Four of the first five U.S. presidents were Virginia slave masters who brought their slaves with them into the presidency: George Washington, Thomas Jefferson, James Madison, and James Monroe. The history is too dense to record in detail here, but the electoral college continued to operate to favor our most reactionary political forces even after the Civil War. In the 20th century, racist Southern politicians cleverly used the electoral college to resist any forward motion on civil rights for African-Americans. Racist southern Democrats Strom Thurmond (1948), Harry Byrd (1960), and George Wallace (1968) left the Democratic Party and ran for president as Independents, taking substantial chunks of presidential electors with them and sending a message to the national Democrats to stop progress towards integration.

Today, the “Solid South” bloc of electoral college votes provides the majority of votes in Bush’s electoral college coalition. Because of the nation’s racial demographics, the winner-take-all method means that most of the votes cast by African-Americans in presidential elections will count literally for nothing. In 2000, more than 90% of African Americans voted for the Democrat, Al Gore, but 58% of African Americans live in states that gave 100% of their electoral college votes to Bush. This means that most African Americans voted in states where their ballots ended up having no effect on the ultimate outcome of the election. The one Southern state where the African-American vote clearly might have made a critical difference in 2000 was Florida, which makes all of the devious strategies to cancel out African-American votes there all the more appalling.

The electoral college is a direct insult to popular sovereignty, majority rule and multi-racial democracy. Unfortunately, it will take the smaller states some time to recognize that the

electoral college does not, in fact, bolster their political interests, which is a central article of faith in political circles.^{iv} This is why we may have to act first simply to create a constitutional right to vote and then turn later to the more difficult task of abolishing the electoral college.

In the 2004 election, the presidential candidates have bypassed hundreds of millions of voters living in three-fourths of the states - the so - called “safe states”- in hopes of persuading a few million undecided “swing voters” in a dozen “swing states.” This relatively tiny number of people--mostly white and suburban, sometimes called "soccer Moms" and "office park Dads"- becomes the focal point of the presidential campaigns and the object of hundreds of millions of dollars worth of television campaign ads. This quadrennial geographic and demographic narrowing process distorts our politics, consistently giving emphasis to tax cuts and conservative religious values while leaving behind the concerns of America’s vulnerable racial minority groups.

Some of our key safe states are among the "whitest" states in the union, such as New Hampshire, Iowa, Wisconsin, Ohio and West Virginia. Meantime, the vast majority of the nation’s African-Americans live in “safe states” that are ignored by the major party presidential candidates, either the Republican-controlled Southern states like Mississippi or Alabama or safe Democratic states like New York, Maryland, and California. According to the Center for Voting and Democracy, while African-Americans make up 13% of the population in safe states, they are less than 10% in the swing states. These dynamics also affect Hispanics, though not so badly. The major Hispanic populations living in California (safe Democratic), Texas (safe Republican), New York (safe Democratic) and Puerto Rico (safely disenfranchised) are sidelined by the crude and arbitrary arithmetic of the electoral college, although Hispanics have begun to play a more meaningful role in the swing states of Florida, New Mexico, Arizona and Colorado. Yet, the overall dynamics are clear: one electoral college vote in the nearly all-white state of Wyoming represents 167,081 people while one electoral college vote in California, which embodies the nation's true multi-racial and multi-ethnic character, represents 645,172 people. The electoral college is a racial throwback.

Even within the electoral college system, the people have no constitutional right to vote for president and no right to control the selection of their state’s presidential electors. Although most Americans dimly understand that the popular vote does not control who wins in the presidential election, most people assume that the popular vote must at least control which candidate wins the electoral college votes in their own state. But the 2000 presidential election taught us that this is false.

In 2000, the Florida Supreme Court ordered a statewide manual recount of 175,000 ballots that could not be read for various reasons by the state’s obsolescent punchcard machines. At that point, the leaders of the Republican-controlled Florida legislature in 2000 declared that the legislature would simply select the state’s electoral college members even if the vote-counting produced a popular majority in the state for Al Gore. This announcement stunned many Americans. Harvard Kennedy School of Government Professor Alexander Keyssar likened it to “a half-forgotten corpse” that “had suddenly been jarred loose from the river bottom and floated upward into view.” Florida’s Republican leaders were suggesting that the people’s votes in presidential elections may be disregarded by the state legislatures, which retain “plenary” power to appoint the members of the electoral college (“Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors”).^v

But during its consideration of *Bush v. Gore*, the Supreme Court’s decision about the counting of ballots in Florida, the Court majority emphasized that the Florida legislature was

acting well within its powers. The Court stated that the individual citizen has no federal constitutional right to vote for electors for the President of “the United States”. Thus, whenever the right to vote in presidential elections is granted by state legislators, they can always revoke it and simply “take back the power to appoint electors.”^{vi} Thus, even if the people wanted to bind themselves in their state constitutions to abide by a popular vote for president, they could never restrain legislatures determined in the future to appoint electors of their own choosing.

The events of 2000, however extreme they seemed at the time, may prefigure the collapse of already fragile democratic norms in close presidential elections. We can expect to see the return of aggressive partisan tactics by politicians in state legislatures - and their lawyers in the Supreme Court and other tribunals working to accumulate 270 electors. Indeed, the Texas Constitution was amended shortly after the 2000 election to provide that if the popular vote seems ambiguous or difficult to count, the Texas legislature shall have the right to immediately appoint electors of its choosing.^{vii} This provision is redundant, of course, given the Court’s analysis of the problem, but it is properly read as a statement of collective political intentions by a flagship Republican legislature that also moved heaven and earth to “gerrymander” U.S. House districts to favor Republicans with ferocious partisan precision in 2003.^{viii} The American electorate, especially in swing states, is just as divided in 2004 as it was in 2000 and much more polarized. If the majority of state legislatures in the hands of the Republican party decide to take advantage of confusion and controversy on the ground to assemble a national electoral college majority without regard to the popular vote, it will be deeply controversial but the people will likely have no recourse.

The electoral college thus presents a massive challenge to democratic values and a standing invitation to political mischief. But, even if we assume that we are stuck with it for the time being, the electors should at least be directly chosen by the people of each state. But the only way to strip the state legislatures of their dangerous power over selection of the electors and establish real popular control of each state’s electoral votes is by way of constitutional amendment.

In every election, millions of Americans entitled to vote are disenfranchised by bad technology, voter registration obstacles, and tactical suppression of voting, which are problems engineered or tolerated by state election managers who operate with relative impunity under current laws.

Because America has no constitutional right to vote, it also has no national electoral commission to protect voting rights and fair elections. Rather, we have thousands of partisan elected officials at the state and local level supervising our elections - people like Florida’s Secretary of State in 2000, Katharine Harris, who was co-chair of the George W. Bush for President campaign in Florida. We have no national ballot but a maze of state ballots. We have no single system of voting but everything from punchcard machines to the “optical scan” method to the “black box” computers without paper receipts which are giving many people nightmares now. Our election systems are designed not really by public agencies but mostly by private corporations, many of them run by political activists. The CEO of the Diebold Corporation, which is the largest maker of the new voting computers, spent a weekend at President Bush’s ranch and wrote a fundraising letter to fellow Republicans in which he pledged to deliver Ohio’s electoral college votes to President Bush.

In this electoral jungle, voting rights are weak but voting wrongs are found everywhere. Our votes are lost, miscounted, passed over, and suppressed in every election. This reality was

proven by the outrageous practices that came to light in Florida in 2000. Journalist Greg Palast documented that up to 50,000 persons “half of them African American or Latino” were falsely accused of being felons and then illegally removed from the state voter registration list before the election by a private company with which Secretary of State Katherine Harris contracted to purge felons from the rolls.^{ix} These tens of thousands of citizens were beyond the 600,000 convicted felons who were already disenfranchised by law. After the election, the state promised to restore the illegally purged voters and not to do it again, but in the meantime the presidential election had been decided and a government formed against this scandalous backdrop.

Meantime, the irregularities multiplied. Thousands of Florida voters who actually made it into the voting booth lost their votes to that masterpiece of design error, the Palm Beach “butterfly ballot.” Tens of thousands more “overvote” ballots where voters followed ambiguous instructions and checked off the name of “Al Gore”, for example, and then also wrote it in separately were cast aside and forgotten^x. Above all, more than 175,000 ballots were simply left uncounted when they failed to register on the punchcard ballot tabulations. Although the Florida Supreme Court ordered all of the ballots to be counted, a 5-4 majority on the U.S. Supreme Court quickly moved in to stop the vote-counting.

Florida was illustrative, not aberrational, of what took place in 2000 generally. According to the CalTech and MIT Voting Technology Project, “between four and six million presidential votes were lost in the 2000 election.^{xi}” Some 2 million votes were simply never counted primarily because of “faulty equipment and confusing ballots”; between 1.5 and 3 million votes were lost in the maze-like vagaries of the voter registration process; and up to 1.2 million votes were lost “because of polling place operations”, meaning technical malfunctions, problems with lines and hours, negligence, understaffing, and underfunding. Significantly, this study reports that these problems are even *worse* in state elections than federal ones^{xii}.

After 2000, we became convinced that all we needed was technological reform to improve the picture. The Help America Vote Act of 2002 (HAVA) put millions of dollars into state efforts to replace the punchcard machines with electronic voting and, most positively, required state provisional voting laws that will allow voters to cast challenged ballots if there is a problem at the polls.

But HAVA did not fundamentally change the picture of official indifference to voting rights and, in some ways, it made things worse for citizens. The statute created no legal redress for voters who are wrongfully excluded from the voter rolls nor did it pass any criminal or civil penalties for officials who actually violate a person’s right to vote. There are no real teeth in the statute when it comes to defending voting rights against government misconduct. Some features of HAVA are already having reactionary effects. Voting rights activists see that the new statutory requirement of a centralized statewide voter registration database in every state is allowing officials to engage in more Florida-style downsizing of voter lists. Martin Luther King III, the President of the Southern Christian Leadership Conference, and Greg Palast wrote in the Baltimore Sun that, under “the absurdly named ‘Help America Vote Act,’” every state must replicate Florida’s system of centralized, computerized voter files before the 2004 election.” Meantime, the effective regulatory “controls on the 50 secretaries of state are few” and the temptation to purge voters of the opposition party enormous. African-Americans, whose vote concentrates in one party, are an easy and obvious target.^{xiii}

Voting rights lawyer Anita Earls has pointed out new perils embedded in HAVA’s numerous “anti-fraud” provisions.^{xiv} Consider the voter identification requirements under which new voter registrants must provide a driver’s license or the last four digits of their social security

number, and all new data entered in the voter registration database must correspond to information already in the state's motor vehicle database.^{xv} Earls asks what happens if there is no perfect match. Take the not fanciful example of a woman who gets married, takes her husband's name and moves to a new dwelling where she completes a voter registration form and sends it into her voter registrar, all before notifying the motor vehicles department of her change of name and address. If the voter and auto data do not match up, according to a Department of Justice letter rendering advice about this issue, the voter application "must be denied"^{xvi}.

Another problem that has surfaced in the 2004 election relates to the casting of "provisional ballots." HAVA provides that, if a voter's name does not appear on a registration list, he or she may nonetheless cast a provisional ballot. Afterwards, there will be an administrative process later to determine whether the person actually had a right to vote and the ballot will be counted. But many states are now saying that they will disqualify these ballots if they are cast in the wrong *precinct* even though the citizen is a qualified voter in the *state*. This is an outrageous interpretation but little can be done to reverse it.

Without a constitutional right to vote granting every possible presumption in favor of the people, almost any electoral policy can be turned by partisan state elections officials against the electorate- and the temptation to interfere with voting grows worse as election day approaches. The history of American voting teaches that incumbent state officials remain tolerant of slippery voting practices that have benefited them and their parties in the past. Meantime, Congressional interest in the subject rises and falls according to partisan interest and the push and pull of other agendas. Only a federal constitutional amendment enforceable in federal and state court will compel the states to undertake the continuing reforms needed to provide voters trustworthy voting technologies and practices. Only a federal constitutional amendment could establish the basis for an independent national electoral commission, a national ballot, national voting systems and a national vote-count, all of which we still do not have.

More than eight million American citizens, a majority of them African-Americans and Hispanics, remain absolutely or substantially disenfranchised by virtue of territorial or felon disenfranchisement policies that the courts have found constitutionally acceptable or even obligatory.

Unlike the haphazard disenfranchisement that randomly affected millions of people in 2000, there is a larger institutionalized disenfranchisement taking place that rarely enters the headlines. More than 8 million Americans, a majority of them racial and ethnic minorities, still belong to communities that are absolutely or substantially disenfranchised by law. This is a population of voteless persons larger than the combined populations of Wyoming, Vermont, Alaska, North Dakota, South Dakota, Montana, Delaware, Maine and Nebraska. The unrepresented fall into three groups:

There are 570,898 taxpaying, draftable U.S. citizens living in the District of Columbia who lack any voting representation in the U.S. Congress. Although Washingtonians pay more federal taxes per capita than the residents of every state but Connecticut, are subject to military conscription and can vote in presidential elections under the terms of the Twenty-Third Amendment, they have been continually frustrated in their efforts to achieve voting representation in the United States Senate and House of Representatives. This is a double injustice since Congress acts not only as their national legislative sovereign but ultimately as their local legislature as well under the terms of the Constitution's "District Clause" (U.S. CONST. art. I, 7, cl. 8), which confers upon Congress "exclusive Legislation" over the District. District residents have only a non-voting Delegate in the House, Rep. Eleanor Holmes Norton, who has

been nimble but so far unsuccessful in promoting equal democracy for her constituents against the frosty indifference of most politicians.

The District's effort to climb up to a level of equal membership in America has been a lonely one, and the Constitution has been effectively mobilized as an enemy to the cause of both statehood and democracy for the District. In the early 1990s, a bill to grant a petition for statehood for D.C. failed by a 2-1 margin in the House of Representatives and never saw the light of day in the Senate^{xvii}. Members of Congress repeatedly invoked the District Clause as a warrant for continuing disenfranchisement.

In 2000, just a few months before its decision in *Bush v. Gore*, the Supreme Court rejected an Equal Protection attack on Congressional disenfranchisement of the District by affirming a 2-1 decision of the United States District Court for the District of Columbia in a case called *Alexander v. Mineta*^{xviii}. The plaintiffs in the suit, which was brought by the District's top lawyer, alleged that their disenfranchisement in the U.S. Senate and House of Representatives was unconstitutional. The District Court majority found that: "The Equal Protection Clause does not protect the right of all citizens to vote, but rather the right of all *qualified* citizens to vote." To be a "qualified" citizen for purposes of national legislative representation, you must live in a state and have the state grant you the vote. Thus, the District population, nearly 70% of which is African-American, Hispanic and Asian-American, is simply in the wrong place.

The effort that has come nearest to accomplishing voting rights in Congress for District residents was the proposed D.C. Voting Rights constitutional amendment, which would have treated the District constituting the Seat of Government as though it were a state for the purposes of congressional representation.^{xix} The proposed amendment passed Congress in 1978 by more than a two-thirds majority in both the House and Senate, with overwhelming Democratic support and substantial Republican backing as well. It failed in the states when it found itself desperately short of national allies against a ferocious conservative opposition.

There are 4,129,318 American citizens living in the federal Territories of Puerto Rico, Guam, American Samoa and the U.S. Virgin Islands who have no right to vote for president and no voting representation in the Congress. Several million U.S. citizens living in the Territories are subject to the sovereignty of Congress under the "Territorial Clause" of the Constitution (art. IV, 3, cl. 2). But they have no mechanism for participation in federal elections and no voting representation in national government. The largest Territorial population is in Puerto Rico, home to 3,808,610 people as of the 2000 Census. In 1917, the Jones Act gave all Puerto Ricans U.S. citizenship and in 1952 the island gained "Commonwealth" status. But, like the District's Eleanor Holmes Norton, the Puerto Rican "Resident Commissioner" still acts only as a non-voting Delegate in the House of Representatives. Also like residents of the District of Columbia, Territorial residents are shut out of the Senate completely. Unlike Washingtonians, Puerto Ricans have no voice even in presidential elections.

Citizens living in the Territories have all the responsibilities of other American citizens except that they do not pay federal taxes (unless they work for the federal government). Some people believe that this exemption justifies complete disenfranchisement. This is certainly not the view of Puerto Ricans and other Territorial residents, who pay heavy local taxes, serve in the armed forces, are subject to the draft, and consider themselves part of the country. According to the U.S. Court of Appeals for the Second Circuit, the "exclusion" of U.S. citizens residing in the territories from participating in the vote for the President of the United States is the cause of immense resentment in those territories "resentment that has been especially vocal in Puerto Rico^{xx}." As Judge Leval observes, the political exclusion of Puerto Ricans fuels annual attacks

on the United States in hearings in the United Nations, at which the United States is described as hypocritically preaching democracy to the world while practicing nineteenth-century colonialism at home^{xxi}.

Yet, repeated lawsuits against the disenfranchisement of Puerto Ricans in presidential elections have failed. The Constitution presently makes no provision for Territorial residents to be represented in the national government. Without a right-to-vote amendment, the Constitutional structure reduces citizens living in Territories to colonial status. This second-class seating is a central obsession of Puerto Rican politics and equally significant in other Territories. There is little sympathy for seeking independence from the U.S., which seems an ever more farfetched option. But Congress has refused to act in an effective way to grant Puerto Ricans a real choice among statehood, independence, the status quo, and “enhanced commonwealth” status. The political rights of citizens in the Territories should not wait any longer for a choice of political forms that never emerges.

The 23rd Amendment, which gave residents of the District the opportunity to vote in their first presidential election in 1964, set a precedent for using constitutional amendments to enfranchise citizens who have no residence in a state and to recognize them as a permanent part of the national community. But there are no amendments yet enfranchising Territorial residents. While such residents are U.S. citizens, there remains the hypothetical possibility that the Territories could be surrendered and granted their independence, which is what happened with the Philippines. Thus, an argument can be made that seats in Congress should not be reserved for people who may still be transient members of the national community. A further problem is that, while Puerto Rico’s population of more than 3.8 million people would clearly justify two U.S. Senators, it is very hard to sustain the same argument for Guam (population 154,805), the Virgin Islands (population 108,612) or American Samoa (population 57,291)^{xxii}. And there remains the politically difficult problem of all Territorial residents being generally exempt from federal individual income taxes.

Yet citizens are citizens, and we have long since recognized the citizenship of Puerto Ricans. So the disenfranchisement remains essentially indefensible. The citizens of Puerto Rico and other Territories have repeatedly protested their “colonial” relationship with the U.S. government. Recent federal lawsuits insisting upon the right to vote for president make clear the depth of feeling about this problem.

One middle ground position would be to follow the path of the 23rd amendment and build language into the right-to-vote amendment granting all territorial residents of the nation the right to vote for president, specifically presidential electors equal to the number of electors to which they would be entitled if they were all part of a single state. Thus, the current Territorial residents would have the right to appoint (elect) approximately nine electors, which is the number equal to two Senators plus an estimated seven U.S. Representatives. Although this leaves the problem of congressional representation unresolved for the time being, it will give Territorial residents both the political leverage in presidential elections and the public momentum necessary to break the impasse over their status, at least with respect to Puerto Rico. It is, obviously, far from an ideal solution but it would be a major improvement over the *status quo*. How would Puerto Ricans and other Territorial residents react to this proposal? Theirs, obviously, are voices central to the discussion.

There are approximately 3,900,000 citizens disenfranchised, many of them for the rest of their lives, in federal, state and local elections as a consequence of a felony criminal conviction.^{xxiii} According to the Sentencing Project, which has brought the issue to America’s attention,

citizens who have been disenfranchised in their states because of criminal convictions amount to about 2% of the country's eligible voting population. In four states "Florida, Mississippi, Virginia, and Wyoming" citizens disenfranchised because of their criminal records constitute fully 4% of the adult population. In the 2000 elections, Texas (whose Governor Bush became president) and Florida (whose Governor Bush helped make that happen) each disenfranchised more than 600,000 people for having criminal records.^{xxiv} The Florida Secretary of State even used its felon disenfranchisement policy to falsely purge tens of thousands of lawful voters, disproportionately people of color, whose only crime was to have names roughly similar to those of ex-felons.

Felon disenfranchisement is much less a strategy of individual moral rehabilitation than of mass electoral suppression. This analysis seems especially compelling when we consider that 1.4 million *ex-offenders*, mostly African-Americans, are permanently disenfranchised in eight states. Back in Florida, 600,000 voteless citizens are former felons who did their time and paid their dues to society. They will never get their suffrage rights back under current law, which operates like a political death sentence. As one might expect in a period of racially-tilted law enforcement, these policies have dramatic effects on the electorate. In Florida, a shocking 31% of all African-American men are permanently disenfranchised. In both Delaware and Texas, 20% of African-Americans are disenfranchised. In Virginia and Mississippi, about 25% of the black male population "one out of four people" has been permanently locked out of the electoral process.

Felon disenfranchisement is at odds with the principle of universal suffrage, which is why the policy has begun to fall around the world. Last year, the Canadian Supreme Court in *Sauve v. Canada (Chief Electoral Officer)* struck it down as violative of Canada's constitutional right to vote, holding: "Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy."^{xxv}

But our Constitution creates the contrary implication. In 1974, the U.S. Supreme Court in *Richardson v. Ramirez* found that felon disenfranchisement does not violate the requirement of "equal protection" in Section 1 because Section 2 explicitly authorizes states to disenfranchise persons convicted of "rebellion, or other crime" without losing any congressional representation^{xxvi}. Only a federal constitutional amendment can, in one fell swoop, enfranchise all people who have been convicted of felonies and stripped of their voting rights (3.9 million citizens) or, alternatively, the sub-group of ex-offenders in thirteen states who have successfully served their time but still remain disenfranchised (1.4 million citizens).

When the Canadian Supreme Court in *Sauve v. Canada* overturned the disenfranchisement of the country's felons, it ruled that the presence of the right to vote in the Canadian Constitution shifted the burden to the government to justify its policy, a burden it was unable to sustain. The Court found that the "right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament's claim to power"^{xxvii}. This is precisely the right that we lack in the United States.

Minority party and Independent candidates face drastic and discriminatory restrictions on their electoral rights that make it nearly impossible for them to compete against the two major parties.

The absence of a constitutional right to vote has enabled our Supreme Court to ignore the political rights of American citizens who challenge the two major parties. When states impose discriminatory laws against “third party” and Independent voters and candidates, the Court defends them as “reasonable” regulations in favor of the “two party system”, which is taken to be official and compulsory despite the fact that the U.S. Constitution does not mention political parties, much less a “two party system” or two specific parties.

This undemocratic doctrine was set forth originally by the Supreme Court in a 1971 decision called *Jenness.v. Fortson*^{xxviii}, where candidates from the Socialist Workers Party (SWP) of Georgia challenged Georgia’s discriminatory ballot-access regime. Under this system, candidates from parties which received at least 20% of the vote in the most recent election received an automatic place on the general election ballot. Candidates who failed this test were forced to collect signatures equal to at least 5% of the electors who were eligible to vote in the last election. Thus, Linda Jenness, the SWP candidate for governor, had to collect an eye-popping 88,175 valid signatures, and the SWP’s two House candidates had to collect more than 10,000 signatures apiece. Given the ordinary rate of invalid signatures, Jenness had to collect more than 100,000 signatures to come close to her target and the congressional candidate needed 13,000. For anyone who has tried to get office mates to sign a get-well card for a colleague or members of the same family living in different neighborhoods to sign a birthday card, you will comprehend what an astounding thing it is to require candidates for public office to collect from tens of thousands of citizens, mostly belonging to competitor political parties, their printed names, signatures, accurate addresses, and zip codes, all for the right to appear on a ballot that “major party” candidates achieve access to on the basis of the candidate’s personal autograph alone.

Yet, in *Jenness*, the Supreme Court upheld Georgia’s irrational busy-work system, never explaining why political parties should have to convince random pedestrians and people from other parties to sign their petitions simply in order to run for office. This decision not only validated a law in Georgia that has frustrated every third party’s signature bid for ballot status in a Georgia congressional race since 1943, but also approved political discrimination across the land. In the 2004 election, the threat that Ralph Nader poses as a “spoiler” to John Kerry has caused Democratic lawyers from across the country to challenge his petitions and signatures in an agonizing and laborious process. But why should voters in Florida have the right to vote for Nader but not voters in New Mexico? What do these signature lawsuits have to do with a candidate’s seriousness and eligibility for public office? The ceaseless battles over ballot access in 2004 reflect the weakness of a principled constitutional commitment to electoral rights.

The Supreme Court has consistently authorized states to enforce other manipulative and discriminatory rules against minor political parties and independents. In *Timmons v. Twin Cities Area New Party* (1997), the Court in a 6-3 decision affirmed Minnesota’s “anti-fusion” law that prevented political parties from joining together to “cross-nominate” candidates, a practice that gave vibrant life to progressive third parties in the nineteenth century. Rather than begin with the fundamental right of the citizen to vote, from which would follow a collective right of groups of citizens to organize and nominate candidates of their choosing, Chief Justice Rehnquist saw the case through the screen of “political stability” and the “two party system”:

- The Constitution permits the Minnesota legislature to decide that political stability is best served through a healthy two-party system^{xxix}.

Thus, the state has an interest in promoting the fortunes of two political parties that defeats the non-existent right of voters to organize other political parties and nominate candidates that they want. With no right to vote in play, the ballot itself belongs to the states - not the citizenry.

The Court now upholds the open partisan discrimination that saturates our politics. In a shocking 6-3 decision called *Arkansas Educational Television Commission v. Forbes* (1998), the Court affirmed the exclusion of an Independent candidate for Congress from a government-sponsored televised candidate debate that featured his Democratic and Republican opponents^{xxx}. The Court's majority approved his exclusion based on the candidate's alleged lack of "viability", a wholly arbitrary bureaucratic judgment that bizarrely disregarded the fact that he had won 46% of the vote as a Republican candidate for Lieutenant Governor just two years before. Yet, the government's circular and self-fulfilling prediction of the plaintiff's "viability", based on his campaign funding (which was greater than several major party candidates invited to debate in other districts) and perceptions of media commentators, inverts the proper relationship between citizens and government in democracy. The *people* should determine which candidates are viable, based on their campaign statements and public debates. Voters should cast their judgment on election day, and this should be controlling; it is not up to the *government* to declare who is viable in advance and then rope off candidate debates and public dialogue on the basis of unaccountable official predictions.

But the Supreme Court has even allowed sharp restrictions in the casting of the ballot itself. In *Burdick v. Takushi* (1992), the Court allowed Hawaii's practice of narrowing ballot access to favor the two major parties and then *throwing away* all ballots where voters write in the names of other preferred candidates. Despite the harshness of this result, the Court candidly explained that it cast its favor upon "reasonable, politically neutral regulations that have the effect of channeling expressive activities at the polls."^{xxxii} Like Hawaii, several other states now actually forbid write-in ballots, a rather graphic demonstration that the ballot presently belongs to the state, not the people. Even if write-in candidates never win, which is assuredly *not* the case, it can never be right to deny citizens the ultimate right to cast ballots for the candidates of their choice.

These indefensible decisions follow logically from the citizen's lack of affirmative political rights. The establishment of a constitutional right to vote would change the treatment of cases like the ban on write-in ballots, the ban on electoral fusion, and the exclusion of outside candidates from publicly sponsored debates. Right now the Supreme Court reasons backwards and upside-down from the imagined needs of the "two party system" or "political stability", rather than forward and ground-up from the essential political rights of the citizen, the only standpoint from which a truly open and competitive democracy can grow. If we reason from the mythical needs of the "system", rather than from the rights of the people, we will never develop the kind of free markets in political ideas and programs that flourish under national constitutions that protect political rights. For example, in 2002, the Canadian Supreme Court in a case called *Figueroa v. Canada* struck down a law governing registered party status that transparently discriminated against minor parties. It held that the right-to-vote provision of the Canadian Constitution actually protected every citizen's right "to play a meaningful role in the electoral process."^{xxxiii}

Catching Up to the World and Ourselves

This essay has examined the central and surprising flaw of American politics - our missing right to vote. But, in a certain sense, this essay only scratches the surface of our difficulties. For we have other great institutional problems to confront. The U.S. Senate creates tremendous political inequities since tiny states such as Delaware and Rhode Island each have two U.S. Senators, the same as huge states with 20 times their population, such as California, Texas or New York. Furthermore, through the Court-validated process of "gerrymandering,"

partisan state legislators essentially draw their own legislative districts and those of their friends in the U.S. Congress. For that reason, the U.S. House reelection rate is huge, usually exceeding 95%. In the 2004 election, out of 435 U.S. House races, fewer than 25 are considered to be at all competitive. And I have mentioned nothing about the problem of big money distorting government priorities, driving out competition, suppressing new political choices and corrupting elections.

But these are all second-generation issues that cannot be addressed effectively until we deal with the primary problem first. Our structural democracy deficit reflects the fact that we have not protected voting as an affirmative constitutional right. In the global context, this departure of American constitutionalism from well-established international norms is ironic. For the United States was the first nation conceived in popular insurgency against tyranny and in favor of representative constitutionalism. Our nation helped give real meaning to the democratic ideas of Rousseau, Voltaire and Montesquieu, and our founding revolutionaries - Ben Franklin, Tom Paine and Thomas Jefferson - fought for popular suffrage. It was our modern Civil Rights Movement, battling the political oppression of apartheid Mississippi, which produced the slogan of “one person, one vote” that swept the earth, from Poland to South Africa, at the end of the 20th century.

Today, our political Constitution looks frail and incomplete in the face of modern universal suffrage principles visible all over the world. We are the only nation on earth that disenfranchises the people of its capital city. Our felon disenfranchisement policies are backward compared to those of other advanced democracies. Our election systems are raggedy, and our electoral practices disfavor real electoral competition among parties.

The world was shocked to witness our electoral train-wreck in 2000, and we Americans were astonished to read the Supreme Court’s pronouncement that we have no constitutional right to vote for president. But no one should have been surprised, for the evidence is all around us. A right-to-vote constitutional amendment is necessary not only to redeem the demoralizing chaos we experienced in the election of 2000 but to maintain the trajectory of our democratic development against competing forms of government also lurking within our society, such as empire and national security state. Already the entire Congressional Black Caucus has endorsed the right-to-vote amendment proposed by Congressman Jesse Jackson, Jr and dozens of other members of Congress have voiced their support as well.

The history of the United States can be read as a struggle for inclusive democracy against structures of domination and exclusion. Many of the amendments we have added since the Bill of Rights have been suffrage-expanding or democracy-deepening amendments: states cannot discriminate against people in voting based on race (the 15th amendment) or sex (the 19th). But they have an *ad hoc* and improvisational flavor and sharply limited effect. We should have the political maturity as a nation now to inscribe the people’s right to vote in the people’s covenant.

- ⁱ Newsweek World News, *And He's Head of Intelligence?: This is surely the first time a conservative evangelical has argued that Bill Clinton's election was caused by divine intervention*, (Oct. 19, 2003), available at <http://www.msnbc.msn.com/Default.aspx?id=3225695&pl=0>. *somewhere*
- ⁱⁱ Election 2000 National Results, available at <http://www.cnn.com/ELECTION/2000>. <http://www.fec.gov/votregis/Internatto.htm> [clarification: the TO in internatto was incorrect. Should be lower cased as here].
- ⁱⁱⁱ Our presidential voting rate for 2000 was lower than presidential turnout in dozens of nations, from Algeria, Argentina, Armenia and Australia to Finland, Iceland, India and Italy through Venezuela and Zambia. See Federal Election Commission data, available at <http://www.fec.gov/votregis/Internatto.htm>. [clarification: the TO in internatto was incorrect. Should be lower cased as here].
- ^{iv} Jamin Raskin *Overruling Democratie* 45-47 (Routledge 2003)
- ^v U.S Const. art II, 1
- ^{vi} 531 U.S 98,104 (2000)
- ^{vii} The Governor shall convene the Legislature in special session to appoint presidential electors if the Governor determines that a reasonable likelihood exists that a final determination of the appointment of the electors will not occur before the deadline proscribed by law to ascertain a conclusive determination of the appointment. The Legislature may not consider any subject other than the appointment of electors at that special session. TEX. CONST. art. IV, ' 8b (amended 2001), available at <http://www.capitol.state.tx.us/txconst/sections/cn000400-000800.html>.
- ^{viii} See Ralph Blumethal, *Texas GOP is victorious in Remapping*, The NY Times, Jan 7, 2004, at A12; see also Steven Hill & Rob Richie, Editorial, *Drawing the Line on Redistricting*, The Wash. Post, July1, 2003, at A13
- ^{ix} See <http://www.gregpalast.com/detail.cfm?artid=177&row=1>; see also <http://news.bbc.co.uk/1/hi/events/newsnight/1174115.stm>.
- ^x Jake Tapper, *Down and Dirty* 41-60 (Little, Brown and Company 2001).
- ^{xi} . CALTECH MIT Voting Technology Project, *Voting: What Is, What Could Be*, July 2001, at 8
- ^{xii} *Id*
- ^{xiii} . Martin Luther King, III & Greg Palast, Editorial, *Jim Crow Revived in Cyberspace*, THE BALT. SUN, May 8, 2003.
- ^{xiv} . Anita S. Earls, Election Reform and the Right to Vote (Nov. 21, 2003) (paper prepared for the Right-to-Vote Amendment Roundtable, on file with author).
- ^{xv} . *Id.* at 12
- ^{xvi} . Letter from Hans A. Von Spakovsky, Counsel to the Assistant Attorney General, Civil Rights Division, to Judith A. Arnold, Esq., Assistant Attorney General, Counsel for Election Laws, Maryland, September 8, 2003, available at http://www.usdoj.gov/crt/voting/hava/maryland_itr.htm.
- ^{xvii} . The New Columbia Admissions Act [H.R.51] failed in the 103rd Congress, 153 ayes to 277 noes. The bill's text and other details are available at <http://www.loc.gov>.
- ^{xviii} . *Alexander v. Mineta*, 90 F.Supp.2d 35 (D. D.C. 2000), *af'd* by 531 U.S. 940.
- ^{xix} . The proposed amendment provided: AFor purposes of representation in the Congress, election of the President and Vice President, and article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State.© H.R.J. Res. 554, 95th Cong., 2d Sess., 92 Stat. 3795 (1978).
- ^{xx} . *Romeu v. Cohen*, 265 F.3d 118, 127 (2d Cir. 2001) (citing *Igartua II*, 229 F. 3d at 85-90 (Torruella, J., concurring)).
- ^{xxi} . *Id.*
- ^{xxii} . Population figures for Guam, the Virgin Islands, and American Samoa are from the 2000 U.S. Census, available at <http://www.census.gov/prod/cen2000/island/GUAMprofile.pdf> , http://factfinder.census.gov/servlet/DTTable?_ts=91200701460 , and <http://www.census.gov/prod/cen2000/island/ASprofile.pdf>, respectively.
- ^{xxiii} . *Losing the Vote: The Impact of Felony Disenfranchisement*, The Sentencing Project and Human Rights Watch, <http://www.hrw.org/reports98/vote/usvot98o-01.htm>. All statistics cited in this essay come from this fine report.
- ^{xxiv} . Texas, in a significant victory, recently repealed its two-year waiting period for voting rights after completion of a sentence.
- ^{xxv} . 2002 SCC 68. File No: 27677
- ^{xxvi} . 418 U.S. 24, 56 (1974).
- ^{xxvii} . *Sauve v. Canada*, section 34.
- ^{xxviii} . 403 U.S. 431 (1971).
- ^{xxix} . 520 U.S. 351, 367 (1997)
- ^{xxx} . 523 U.S. 666 (1988).
- ^{xxxi} . 504 U.S. 428, 438 (1992).

^{xxxii}. *Figueroa v. Canada*, 227 D.L.R. (4th) 1; 2003, sec. 37.