

PART III

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Citizenship and Community

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## The Citizenship Agenda

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**W**HEN IT CAME to citizenship, the founders were full of paradox. Washington, Madison, and the rest were prepared to die for their vision of the union, but when it came to writing their commitment to American citizenship into the Constitution, they fell silent. They knew that most of their countrymen would not join them in giving federal citizenship priority over more local attachments, and so the original Constitution failed to mention, let alone define, one of its key premises: The founders speak in the name of We the People, but never tell us who “we” are.

The question returned after four bloody years of the Civil War. And the Fourteenth Amendment answered it squarely: It explicitly established the primacy of national citizenship in the new constitutional order. Henceforth, state citizenship was derivative: Americans gained it by choosing to reside in whatever state they liked, and the amendment forbade the states from “abridg[ing] the privileges or immunities of citizens of the United States.” But then it fell silent, leaving the courts, and the rest of us, to figure out the precise contours of these privileges and immunities.

The open-ended character of this great guarantee was immediately recognized. It was the Citizenship Clauses, not Due Process or Equal Protection, that originally provoked a great debate over the rights

guaranteed by the new nation emerging out of the bloody sacrifices of millions.

But then, another historical paradox. Precisely because the Citizenship Clauses were understood as most important, they were the centerpiece of the first great Supreme Court decision construing the Reconstruction amendments: the *Slaughterhouse Cases* of 1873. And precisely because the language of national citizenship was so new, the Supreme Court had trouble giving it legal meaning. By a 5–4 vote, the justices refused to believe that the American people had now put national citizenship at the core of their Constitution. They trivialized citizenship’s “privileges,” suggesting that they included little more than the right to move from state to state, to obtain a passport, and to claim diplomatic protection abroad. Anything more robust, the majority feared, would endanger familiar principles of federalism.

Over the next century, the Supreme Court reversed course, recognizing the Fourteenth Amendment as a source of a broad panoply of fundamental rights and requiring the states to comply with its commands. But it accomplished its nationalizing mission by promoting other clauses, most notably Due Process and Equal Protection, to central place. The Citizenship Clauses remain more or less a dead letter: Robert Bork was only exaggerating a bit when he said that they had as little legal meaning as an “inkblot.” Despite his professed fidelity to the original understanding, Bork made this pronouncement<sup>1</sup> with supreme self-satisfaction as he cast this central Reconstruction text into the wilderness. But for the rest of us, the century-long silence should provoke a certain wonder.

We are in a curious situation. The Constitution assures us that “We the People of the United States” have created and reconstructed our supreme law over the generations. And yet the Court has refused to contribute to a robust constitutional discourse about the very citizenry that the Constitution celebrates.

The Court’s silence contrasts with the eloquent efforts by twentieth-century Americans to expand and deepen the privileges of national citizenship. Women’s suffrage during the Progressive Era, Social Security during the New Deal, the antidiscrimination laws of the civil rights era—all provide notable examples. All were initiated by political movements seeking to end second-class citizenship; but when they were received into our constitutional tradition, judges and lawyers dressed them up with other legal doctrines that belied their originating impulse. To this day, American politics revolves around efforts by one or another group to end second-class citizenship—but this phrase loses its resonance in our courts of law. This disjunction between law and politics

is not inevitable. Despite centuries of silence, America's lawyers may yet reclaim the lost promise of national citizenship for the twenty-first century.

They won't be able to do it alone. The citizenship agenda will only become alive if Americans can once again affirm that their country isn't merely a vast free market zone, where individuals go their separate ways within a safe haven guarded by a mighty military. Lawyers have much to contribute to such a civic revival—but they won't get anywhere by trying to convince the current Supreme Court to restore the Citizenship Clauses to their central place. Despite professions of originalism, our right-wing judiciary will be in no rush to vindicate the privileges of citizenship against the economic forces threatening their effective exercise. In the run-up to 2020, the greatest legal contribution lies outside the courts. We must use our legal talents in a larger effort to reconstruct the institutional foundations of modern citizenship.

Many of our inherited civic institutions are dead or dying. Vietnam killed the citizen army. Television killed the political party as a popular institution. The citizen jury is on the fringe of everyday life. The only significant institution that still involves ordinary people is the public school, and it too is under attack.

Progressives have been fighting a rearguard battle in defense of the civic achievements of the twentieth century, including public education and progressive taxation, Social Security and Medicare, civil rights and environmental protection, union rights and workplace safety.

Many of these old progressive ideas deserve a central place in twenty-first-century life. But if the past is any guide, it won't be good enough to defend them against right-wing attack. From the American founding to the civil rights revolution, we have built our democracy through acts of bold institutional innovation—some more successful than others, but all pushing forward the movement to greater political inclusion, individual freedom, and social justice. If we are to move further down this path, there is an imperative need for large acts of institutional imagination.

This is the pressing task for the next generation of American lawyers. We should proceed in the distinctive spirit of realistic idealism. As realists, we should try to design institutional initiatives that will *actually work* in the real world, using all the tools of modern policy analysis for a hardheaded exploration of real-world options. Good intentions aren't enough. And yet we should also be unembarrassed idealists: We should not content ourselves with narrow variations on the status quo, but aim for practical frameworks that would enable ordinary Americans to take charge of their political and economic lives. We should seek to establish

that the meaningful exercise of American citizenship is no pipe dream, but a practical project well worth a tough political struggle.

This has been the spirit of three collaborations with friends of mine that aim to kick off a new round of debate over the shape of the citizenship agenda: *Voting with Dollars*, with Ian Ayres; *Deliberation Day*, with Jim Fishkin; and *The Stakeholder Society*, with Anne Alstott (all Yale University Press paperbacks). In setting out three planks for a new citizenship agenda, we tried to rediscover the art of talking about big ideas in ordinary English, staying clear of Beltway techno-babble. This is the only way to convince millions of Americans that meaningful citizenship is a real-world possibility—if they only will take the future into their own hands.

I won't mind if you find our proposals wrongheaded or counterproductive; nobody can please everybody, and you may be provoked to come up with better ideas than we have offered. But I will have utterly failed if you find my proposals obscure or pedantic.

Let's begin with the problem of big money in politics. Only one-third of 1 percent of American registered voters gave \$200 or more to presidential candidates in the 2004 election cycle, but more than 65 percent of all contributors donated more than \$200. Traditional forms of campaign reform won't change this reality. The 2002 McCain-Feingold law increased contribution limits from \$1,000 to \$2,000, making it likely that the balance of financial power will become more top-heavy in the future. To democratize the system, we need something new: Give all voters a special credit card account containing \$50 that they can spend only on federal election campaigns. Armed with their cards, voters could go to local ATM machines whenever they liked and send their "patriot dollars" to favored candidates and political organizations. A little over 120 million Americans went to the polls in 2004. If they also had a chance to go to their ATMs, they would have injected more than 6.1 billion federally funded patriot dollars into the campaign—greatly diluting the power of the private \$4 billion spent by all candidates for federal office in the 2004 electoral cycle.

Patriot dollars would invigorate the politics of ordinary citizenship. When each American voter has 50 patriot dollars in his or her pocket, candidates will have a powerful incentive to reach out and grab that money. Fund-raising will become a community affair; a box lunch for 100 could gross \$5,000! These outreach efforts will provoke millions of conversations: Who should get the money? Who is a charlatan and who is really concerned about the country?

Patriot dollars have many merits, but one great limitation. Once citizens go to their ATMs to beam their patriot money onward, the

candidates will continue to spend most of their money on sound-bite appeals on hot-button issues. Patriotic finance will redistribute the sound bites, emphasizing themes with greater resonance for ordinary citizens. But we will still be living in a sound-bite democracy, and this isn't good enough. The next challenge is to provide citizens with the tools they need to move beyond the media blitz and engage in thoughtful political discussion. An exemplary model is the American jury. Twelve men and women begin in total ignorance, but they learn a lot during the course of the trial. After hearing competing arguments, and reasoning together, they regularly—if not invariably—come up with perfectly sensible conclusions.

The task is to design a similar format for politics. Stanford political scientist Jim Fishkin and I have come up with a practical proposal based on a new technique, deliberative polling, which has been field-tested in thirty-five settings throughout the world—from Australia to Bulgaria, China to Denmark, Baton Rouge to Philadelphia.

Each poll invites a few hundred citizens to spend a weekend deliberating on major issues of public policy. Before they arrive, participants respond to a standard questionnaire that explores their knowledge about, and positions on, the issues. They then answer the same questionnaire after completing their deliberations. Comparing these before and after responses, social scientists have rigorously established that participants greatly increase their understanding of the issues and often change their minds on the best course of action. Ten percent swings are common. No less important, participants leave with a more confident sense of their capacities as citizens.

These experiments suggest a new way of thinking about democratic reform. Fishkin and I urge the creation of a new national holiday: Deliberation Day, which will be held two weeks before presidential elections. It will replace Presidents' Day as an official holiday; Americans will no longer honor Washington and Lincoln by searching for bargains at Presidents' Day sales. Instead, ordinary business will come to a halt, and citizens will be invited to gather at neighborhood centers to discuss the central issues raised by the leading candidates for the White House. Nobody will be forced to attend, but as with jury service, participants will be paid a stipend for the day's work of citizenship. DDay would begin with a nationally televised debate between the presidential candidates, who would discuss the leading issues in the traditional way. But then citizens would deliberate in small groups of 15 and later in larger plenary assemblies. The small groups begin where the televised debate leaves off. Each spends an hour defining questions that the national candidates

left unanswered. Everybody then proceeds to a 500-citizen assembly to hear their questions answered by local representatives of the major parties. After lunch, participants repeat the morning procedure. By the end of the day, citizens will have moved beyond the top-down television debate by the leading candidates. They will have achieved a bottom-up understanding of the choices confronting the nation. Discussions begun on DDay will continue during the run-up to Election Day, drawing tens of millions of other citizens into the escalating national dialogue.

If Deliberation Day succeeds, sound-bite democracy would come to an end. Candidates would have powerful incentives to create longer and more substantive infomercials. Newscasts would be full of exit polls determining the extent to which citizen discussion had changed voting preferences—framing the intensifying debate that culminates on Election Day. While there will always be plenty of room for a politics of personality, the new system would put the focus where it belongs: on the crucial issues determining the future of the United States. Our initiative took an important step forward during the 2004 presidential elections, when seventeen PBS stations throughout the country assembled scientific samples of citizens from their regions to engage in a pilot Deliberation Day. Larger media efforts in the future will help to dramatize the proposal further, serving as a vital preliminary for the great leap forward to the new national holiday.

For now, it's more important to place the proposal into the larger context defined by the patriot dollar initiative. In our present sound-bite democracy, voters are bombarded by hot-button slogans generated by well-financed special interests. The point is to arouse knee-jerk reactions, not informed judgments. So it's no surprise that most Americans go to the polls with only the vaguest understanding of the issues. But once they are provided with new tools for engagement, Americans will be in a position to take their citizenship seriously. From the very beginning of the presidential campaign, candidates will be reaching out to them with great vigor—if only to pick their pockets and get at their patriot dollars. As citizens begin to “vote with their dollars,” Deliberation Day will loom on the horizon. Candidates no longer will spend most of their money on ten-second sound bites. They will be beaming longer infomercials to enable partisans to state their case intelligently on DDay. By the time Election Day arrives, voters will be going to the polls with a far better sense of the stakes before the nation and of the nature of the rival responses proposed by the candidates.

I have no need to exaggerate. I am not conjuring some mythic version of Periclean Athens. I am not asking Americans to don togas, but to

march with credit cards to their ATM machines and talk to their neighbors at local centers—this time acting as citizens, not consumers. I am not longing for some brave new world, but one where ordinary citizens can compete with big money on more equal terms.

Real reform in politics comes cheap. Patriot dollars will cost about \$2 billion on an annualized basis (\$6 billion during presidential elections, \$2.5 billion during midterm elections). DDay will be even cheaper. Running the facilities will cost about \$2 billion if 50–70 million Americans show up (plus a citizen stipend for those attending). Once again, this cost won't be incurred every year. Until DDay proves itself, let's start small and only schedule the holiday for presidential elections.

But once we move from political to economic citizenship, we confront big price tags. Only a large initiative has the chance to stop the spiraling inequalities that endanger the future of democratic life. There can be no disputing the basic facts: Since the 1970s, the average annual salary in the United States has only risen \$4,250—from \$32,500 in 1970 to \$36,750 in 2002. That's about a 13 percent increase. But the pay of the top 100 chief executives went from \$1.3 million to \$18.5 million—from 39 times to more than 500 times that of an average worker. Such radical disparities in income have had a big impact on the distribution of wealth. Over the eighteen years from 1983 to 2001, the share of disposable wealth owned by the top 1 percent has moved up from 33 to 39 percent. The United States could be a poorly disguised oligarchy by 2020, with the top 1 percent controlling an enormous share of the disposable wealth, with more and more billionaires following the Bushes and Bloomborgs into the public sphere.

Below the oligarchs, the United States has become a three-class society. About 30 percent of America's children will graduate from four-year colleges and move into the ranks of the symbol-using class. But the vast middle class, who graduate high school or a two-year college, will fail to share in the prosperity of the symbol users. To be sure, they won't confront the long-term unemployment that will threaten the bottom fifth who drop out of high school. But that is small consolation.

Over the last half century, progressive lawyers have fashioned one new legal tool to struggle against these forces of economic exclusion: civil rights law. They have spent numberless hours seeking to pry open more good jobs for blacks, women, and other subordinated groups. For all the half-steps, the result has been a great triumph for economic citizenship. But by itself, this does nothing to address the widening gap

among the oligarchs, the minority of privileged symbol users, and the broad middle class in the United States.

If we don't do anything to confront these gaps, conservatives will continue to use them to generate middle-class hatred against a welfare state that seeks to help the bottom fifth of Americans sustain a minimal economic livelihood. There is a big hole here in the progressive vision of economic citizenship, and Anne Alstott and I have tried to fill it in *The Stakeholder Society*. Our idea is simple: As a birthright of citizenship, each American should be guaranteed a stake of \$80,000 as he or she confronts the challenges of life as a young adult.

This stake will cover four years of tuition at a good private college, allowing the typical college graduate to start off life without a crippling debt burden.<sup>2</sup> But the initiative will yield even greater gains for the seven out of ten Americans who never gain the economic autonomy that a four-year degree provides. An \$80,000 nest egg will provide middle-class Americans with a rough-and-ready sense of economic independence, permitting them to confront the labor market with their heads held high.

Stakeholding creates a new institution—citizenship inheritance—to compete with traditional family inheritance. In contrast to right-wing efforts to eliminate the “death tax” on the rich and super-rich, the citizenship agenda offers a more democratic vision. The nation's wealth, after all, is the product of generations of work by all Americans—the police officer on the beat and the teacher in the school, no less than the financial wizards on Wall Street. Stakeholding recognizes this basic point by granting all citizens a share of the nation's wealth as they start out in life, when they need it most.

In order to lay claim to their \$80,000, Americans will have to complete high school. The 15 percent who drop out will only receive the interest on their stake, not the principal. But for the rest, there will be no strings attached. For the first time in a long time, ordinary Americans will have the real taste of economic freedom.

Some might throw away their \$80,000 on frivolities. But the abuse of freedom by a few should not deprive the many of genuine opportunities to shape their lives while they are young. Thomas Jefferson's promise of the pursuit of happiness will no longer be reserved for Fourth of July declamations. It will describe the living truth of American life. The stakeholder society expands the progressive vision of economic citizenship. It gives a head start to the young and most vital elements of American society, while continuing to provide a safety net for the poor and elderly.

All this comes, of course, with a new tax, but one that gets to the heart of the problem, hitting only Americans in the top 10 or 15 percent in the wealth distribution and forcing the top 1 percent to pay about 40 percent of the total. Using data from 2001, Alstott and I show that an annual wealth tax of 2 percent, with a family exemption of \$450,000, will finance our initiative—even assuming 30 percent tax evasion. The upshot is a new social contract, in which those who succeed in the market economy provide a citizen’s inheritance for all Americans in the next generation.

Writing in the midst of the Republicans’ ongoing campaign against the death tax, stakeholding may seem a pipe dream. But the idea is already taking off in Great Britain. Tony Blair made the citizen’s inheritance into the “big idea” of his successful reelection campaign in 2001, and his Labour government followed through by enacting a variant of stakeholding into the law of the land.

As of September 1, 2002, all children born in Britain are provided with a bank account. Every child starts with £250, and kids get an extra £250 if their parents are in the lower third of the income distribution. This small stake accumulates with interest until the children reach eighteen, when the citizens receive their inheritance. The government plans to add additional amounts when children reach seven and perhaps at later ages as well. Starting in 2020, young Britons reaching eighteen each will be receiving a couple of thousand pounds—maybe more—as they start out in life.

To be sure, a few thousand pounds isn’t \$80,000. But the Blair example suggests that our vision of a citizenship agenda for 2020 shouldn’t be entirely obscured by the darkness that has presently descended on the United States. We *will* recover from the politics of fear that the Bush administration has exploited with such great skill. Nothing lasts forever: The future will continue to be surprising; the day after tomorrow will bring new opportunities.

But will we be able to seize the moment by bringing dynamic new ideas to the table, or will we content ourselves with rehashing noble-but-tired variations on twentieth-century themes?

The year is 2020. Citizens have voted with their patriot dollars; they have debated stakeholding at Deliberation Day; and they have voted for a dynamic progressive president who has pledged to outdo the British in creating a substantial citizen’s inheritance for every American. Or maybe progressive debate has left these initial proposals far behind, and we have come up with a more attractive and effective citizenship agenda to bring before the American people.

In any event, it is only within this context that we can expect the Supreme Court to get serious about the Citizenship Clauses. With a progressive president and Senate sending a new generation of justices onto the bench, the notion that citizenship has its privileges will no longer be derided, in Borkish terms, as constitutional nonsense. The unfulfilled promise of the Fourteenth Amendment will instead be viewed as a central challenge for interpretation of the twenty-first century; the “citizenship agenda” enacted by Congress may, over time, be understood as part of every American’s constitutional birthright.<sup>3</sup>

But we have now moved far beyond 2020 to the next generation’s struggle to redeem the promise of American life.

### *Notes*

1. Robert Bork, *The Tempting of America* 166 (New York: Free Press, 1990).
2. According to the College Board, the average, private, nonprofit, four-year college charged \$21,235 in 2005–2006. Multiplied by four, that’s \$84,940. See <http://www.collegeboard.com/press/releases/48884.html>.
3. See Bruce Ackerman, *The Holmes Lectures: The Living Constitution*, 120 Harv. L. Rev. 1737 (2007).