

POLITICAL PARTICIPATION: VOTER IDENTIFICATION, VOTER REGISTRATION AND STUDENT VOTING REQUIRMENTS

Introduction

Throughout our nation's history, many have struggled for the right to vote, both as a matter of law and in practice, while others have sought to suppress votes. Voter suppression efforts sometimes took form as intentional and targeted acts, such as physical violence and intimidation, but were also reflected in laws that were ostensibly neutral but had the known purpose and effect of disenfranchising minority voters, such as poll taxes and literacy requirements.

Changes to the legal landscape including, most notably, the Voting Rights Act, dramatically improved minorities' ability to vote. Nevertheless, efforts to suppress voter turnout continue. For example, before the 2002, 2004 and 2006 elections, fliers were distributed in a number of localities that misstated key pieces of information such as the date of Election Day and the location of polling places, and/or falsely claimed certain groups were ineligible to vote, including immigrants (without distinguishing between those who were naturalized and those who were not) or people who had unpaid debts such as rent, parking tickets or child support.¹ In addition, there are repeated examples of local officials or residents misstating that students are not eligible to vote in the community where they go to school and will lose benefits or be criminally prosecuted if they do.²

Political participation may also be limited in other ways. State election laws or procedures, such as voter identification or registration requirements, though facially neutral, can result in significant numbers of voters, particularly among students and traditionally disenfranchised groups, losing their ability to cast a ballot, according to critics of such laws. Supporters of such measures claim they help to combat voter fraud. While many issues and practices may affect individuals' ability to vote, this program guide focuses on voter identification requirements, which are increasingly being enacted at the state level and are the subject of two cases before the Supreme Court this term, *Crawford v. Marion County Election Board* and *Indiana Democratic Party v. Rokita*;

¹ See NAACP LDF and MALDEF Uncover Significant Voter Intimidation Attempts During Recent 2006 Election Cycle, *available at* http://www.naacpldf.org/content/pdf/barriers_to_voting/Voter_Intimidation_Statement_MALDEF_LDF.pdf; Incidents of Deceptive Practices and Voter Intimidation in the 2006 Election, *available at* http://lccr.3cdn.net/d6af26cb31ff5ee166_vdm6bx6x5.pdf; Jo Becker, *Groups Say GOP Moves to Stifle Vote*, WASH. POST, August 26, 2004, *available at* <http://www.washingtonpost.com/wp-dyn/articles/A33798-2004Aug25.html>; *Run Up to Election Exposes Widespread Barriers to Voting*, *available at* http://www.house.gov/judiciary_democrats/widebarriersrpt.pdf; *The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today*, *available at* <http://www.pfaw.org/pfaw/general/default.aspx?oid=16373>. Senator Obama has introduced the "Deceptive Practices and Voter Intimidation Protection Act of 2007," S. 453, which would, *inter alia*, make it illegal to knowingly deceive any other person about voter eligibility or the time, place or manner of conducting any federal election.

² See incidents listed at Rock the Vote, Campus Campaign, *available at* http://www.rockthevote.com/rtv_campuscamp_dorights.php (last visited on Dec. 20, 2007).

other voter registration requirements, which may also limit political participation; and issues affecting the rights of student voters.

Given the timeliness and critical importance of these issues, ACS encourages its chapters to hold topically related events in 2008. From Supreme Court arguments on Indiana's voter ID laws in January through the November 2008 national (and in many cases local) elections, these issues will be relevant throughout the year. To assist chapters in conducting such programming we are providing this program guide along with a speaker list identifying experts on the topic. For more information, we suggest reviewing related posts online at www.ACSBlog.org (post on these topics can be selected by clicking the "Democracy and Voting" tab on the left margin of the blog). Other useful resources for those seeking in-depth treatment of a subject are the publications available at www.acslaw.org. Finally, you also may find it helpful to review the *Harvard Law and Policy Review*, ACS's new official journal, and the online version at www.HLPRonline.org. Additional substantive information also may be found on the websites of the organizations associated with the speakers identified on the speaker list.

Voter Photo ID requirements

Background

In recent years, there have been a number of proposals at the state and federal level to require citizens to provide photo identification when they register to vote or go to the polls on Election Day.³ A number of states have enacted photo identification laws (including but not limited to Arizona, Indiana, Missouri and Georgia) and such laws have also been considered at the federal level. On the other hand, in a number of states, such as California, Wisconsin and Pennsylvania, voter photo ID laws have been rejected by the legislature or vetoed.⁴ Across the country, these measures have created significant controversy.

Supporters of strengthened identification requirements claim that such measures are a reasonable way to combat fraud and improve the integrity of elections. A majority

³ States have varied on whether and what type of documentary evidence they require of voters in order to cast a ballot. A number of states requests evidence but allow it to take many forms, including a utility bill, paychecks or affidavit signed under penalty of perjury. Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 640-641 (Feb. 2007). This program guide is not focused on those types of laws, but rather laws that make photo ID a requirement to vote at the polls.

⁴ See National Conference of State Legislatures, *Requirements for Voter Identification* (2007), <http://www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm>; Electiononline.org, *2007 Voter ID Legislation* (2007), <http://www.electionline.org/ResourceLibrary/ElectionAdministrationHotTopics/2007VoterIDLegislation/tabid/1125/Default.aspx>. For states that have rejected this legislation see e.g., *Assemblyman Bob Huff's Voter ID Bill Fails Passage in Committee*, <http://republican.assembly.ca.gov/members/a60/Index.aspx?page=PR&pr=3769> (last visited January 2, 2008) (California); Steven Walters, *Doyle vetoes voter ID bill, but fight continues*, MILWAUKEE JOURNAL SENTINEL, August 13, 2005 (Wisconsin); Edward G. Rendell, *Veto Message of Pennsylvania House Bill 1318* <http://www.governor.state.pa.us/governor/cwp/view.asp?a=3&q=445679> (last visited January 2, 2008) (Pennsylvania).

of the Carter-Baker Commission on Federal Election Reform recommended an ID requirement for just these reason.⁵ The Supreme Court, ruling on a motion to preliminarily enjoin the Arizona ID law, noted that “Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate voters will be outweighed by fraudulent ones will feel disenfranchised.”⁶ Similarly, the Seventh Circuit stated that “voting fraud impairs the right of legitimate voters to vote by diluting their votes” and characterized Indiana’s photo ID law a reasonable “preventive action.”⁷

Critics of photo identification laws point out that there is little or no evidence of in-person voter fraud, i.e. impersonation fraud at the polling place, and that such laws can disenfranchise many legitimate voters. While our election system may be vulnerable to a variety of problems, such as the misuse of absentee ballots or technical glitches with voting machines, voter photo ID laws do nothing to remedy those problems. Critics note that although voter fraud appears to be much more of an issue with absentee ballots than with in-person voting, photo identification laws leave untouched or even loosen the requirements for absentee voting.⁸ The only problem voter photo ID laws address, that of an individual impersonating another voter at the polls, is “an occurrence more rare than getting struck by lightning,” according to a recent report by the Brennan Center that evaluated numerous allegations of voter fraud.⁹

In addition, photo ID laws can prevent many legitimate voters from voting and there is evidence suggesting that they have a disproportionate impact on the poor, minorities, people with disabilities, the young and the elderly.¹⁰ George Washington University law professor Spencer Overton, a member of the Carter-Baker Commission who dissented from the ID recommendation, notes that supporters of identification laws fail to show that such laws will prevent one fraudulent vote from being cast for every 1,000 votes excluded.¹¹ Moreover, because voter identification laws generally deem driver’s licenses to be an acceptable form of identification, but limit other forms of identification, they disproportionately impact the voting rights of those who do not have a driver’s license or another designated form of ID. According to the 2001 Carter-Ford

⁵ See FEDERAL COMMISSION ON ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS (September 2005) 18-21. The Commission stated any required voter ID must be available without expense, and that citizens should be provided convenient opportunities to obtain these IDs. *Id.*

⁶ Purcell v. Gonzales, 127 S.Ct. 5, 7 (2006) (per curiam).

⁷ Crawford v. Marion Cty. Election Bd., 472 F.3d 949, 952-53 (7th Cir. 2007).

⁸ See, e.g., *Voter Suppression in Missouri*, N.Y. TIMES, Aug. 10, 2006 at A22.

⁹ JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD 6 (Brennan Center for Justice 2007).

¹⁰ Tova Andrea Wang, *Fraud, Reform, and Political Power: Controlling the Vote, from Nineteenth-Century America to Present Day Georgia* at 1, The Century Foundation Issue Brief (October 2006) available at http://www.tcf.org/Publications/electionreform/wang_historyvoterfraud.pdf. A recent study from the Caltech/MIT Voting Technology Project found that photo ID requirement depressed voter turnout, particularly among registered voters who were poor or less educated; the study found that the effect was not more profound on nonwhite voters, controlling for other variables, especially income and education. R. Michael Alvarez et al., *The Effect of Voter Identification Laws on Turnout* (CalTech-MIT Voting Technology Project Working Paper, October 2007), available at http://vote.caltech.edu/media/documents/wps/vtp_wp57.pdf.

¹¹ Spencer Overton, *Stealing Democracy: The New Politics of Voter Suppression* 153 (2006).

Commission, an estimated 6% to 10% of voting-age Americans (up to 19 million potential voters) do not possess a driver's license or other state-issued identification.¹² Over 3 million people with disabilities do not have identification issued by the government.¹³ AARP of Georgia estimated that over 150,000 Georgians who actually voted in the last election lack driver's licenses and are unlikely to have other government-issued photo ID.¹⁴ A June 2005 study in Wisconsin found that among Wisconsin men ages eighteen to twenty-four, 36% of whites, 57% of Latinos, and 78% of African Americans lacked a valid driver's license.¹⁵ While voter identification laws allow for voters to present other government-issued identification, there are often significant costs to obtaining the documentation needed to obtain that ID: A certified copy of a birth certificate costs from \$10 to \$45 depending on the state, a passport costs \$85, and certified naturalization papers cost \$19.95.¹⁶ This has lead critics of ID laws to equate them to a "poll tax."¹⁷ In addition, obtaining photo ID can involve significant time and administrative burdens, which could further discourage eligible voters from exercising their rights.¹⁸

Critics of such laws are also concerned that voter photo ID laws are being enacted for partisan advantage. Seventh Circuit Judge Evans, dissenting in *Crawford v. Marion County Election Board*, which concerned the constitutionality of Indiana's voter photo ID law, described the measure as "a not-too-thinly veiled attempt to discourage election day turnout by certain folks believed to skew Democratic."¹⁹ Judge Posner, writing for the majority, acknowledged that "most people who don't have photo ID are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates," but did not find that fact to trigger heightened scrutiny of the law at issue.²⁰

Court Challenges

Voter identification laws in a number of states, including Indiana, Arizona, Georgia, New Mexico and Missouri have been challenged as violating the federal Constitution and, in certain cases, federal and state laws.²¹ These challenges have met with mixed results; for example, the Missouri law was struck down as unconstitutional

¹² *Id.*

¹³ *Id.*

¹⁴ Barbara Basler, *Smile—Or Lose Your Right to Vote: Do Photos IDs Safeguard Elections—Or Disenfranchise Voters?*, AARP Bulletin (Sept. 2005), available at http://www.aarp.org/bulletin/yourlife/voter_id.html (last visited Aug. 17, 2006)

¹⁵ SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 153 (2006).

¹⁶ *Id.*

¹⁷ *Voter Suppression in Missouri*, N.Y. TIMES, Aug. 10, 2006 at A22.

¹⁸ NAACP LDF Factsheet, *Restrictive Voter Identification Laws: A Barrier at the Ballot Box for Eligible Voters*, available at http://www.naacpldf.org/content/pdf/photo_ids/Voter_ID_Fact_Sheet.pdf (last visited Dec. 12, 2007).

¹⁹ *Crawford*, 472 F.3d at 954 (Evans, J., dissenting).

²⁰ *Id.* at 951.

²¹ See Election Law @Moritz, *Voter ID Litigation Nationwide*, available at <http://moritzlaw.osu.edu/electionlaw/news/2006VoterIDLitigationChart4.php> (last visited Dec. 17, 2007).

under the state constitution²² while the Indiana law was upheld by a divided panel on the Seventh Circuit.²³

The constitutionality of the Indiana law under the First and Fourteenth Amendments is now before the United States Supreme Court, which heard oral argument on January 9, 2008 and will likely issue a decision by the end of June 2008. The issues before the Court include whether the Indiana law triggers heightened scrutiny, and whether the burdens the law places on voters are justified by the state's asserted interest in preventing voter fraud. The Court's resolution of the issue will likely have significant national impact, and influence whether and how other states enact and implement additional voter ID requirements.

Other Voter Registration Requirements

Critics note that registration requirements other than identification laws can also limit political participation. According to Bert Neuborne, Legal Director of the Brennan Center for Justice at NYU, "early voter registration deadlines[] persist in dampening overall voter participation and stratifying the voting and non-voting populations along demographic lines, such as income and education level."²⁴ Potential voters may miss deadlines or may have their registrations rejected without having an opportunity to cure any defects, and therefore not be able to vote on Election Day. Laws governing voter registration procedures may also limit participation. For example, Florida, Georgia and Ohio enacted regulations that pose additional requirements and risks on private, non-partisan organizations that register voters, though preliminary injunctions against those laws are currently in effect.²⁵

On the other hand, some registration laws are structured to increase political participation. The National Voter Registration Act (NVRA, also known as "Motor Voter") requires, inter alia, that states make voter registration forms and assistance available at state motor vehicle offices and public assistance agencies. Voting rights advocates assert that many states have not complied with the public assistance provisions of the law, but those that are in compliance have registered a significant number of low-

²² *Wienschenk v. State*, 203 S.W.3d 201 (Mo. 2006)

²³ *Crawford*, 472 F.3d 949.

²⁴ Report of "Eliminating Barriers to Voting" Conference (Nov. 30, 2001) 8, available at http://www.brennancenter.org/resources/downloads/EDR_report_113001.pdf (last visited August 10, 2006); see generally Ian Urbina, *New Registration Rules Stir Voter Debate in Ohio*, N.Y. TIMES, Aug. 6, 2006 at A16.

²⁵ *Acorn v. Cox*, No. 1:06-cv-01891-JTC (N.D. Ga. Aug. 14, 2006) (order granting preliminary injunction) available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/ORDERgrantingPlaintiffsMotionforPreliminaryInjunction_000.pdf; *League of Women Voters of Florida v. Cobb*, No. 06-21265-CIV-JORDAN (S.D. Fla., May 18, 2006) (order granting preliminary injunction) available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/fladecision.pdf>; *Project Vote v. Blackwell*, No. 1:06-cv-01628-KMO (July 6, 2006) (order granting preliminary injunction) available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ordergrantingpreliminjunction.pdf>.

income citizens.²⁶ For example, within a year of “re-implement[ing]” the public assistance provision, North Carolina reported a five-fold increase in public assistance registrants.²⁷

Several states operate Election Day Registration (EDR or “same-day registration”) regimes.²⁸ Although critics view these systems as more prone to fraud, proponents deny those claims and tout the benefits in terms of voter access. Citizen interest does not peak until shortly before Election Day, after most states’ registration deadlines have passed, so many interested citizens who are not registered are unable to vote.²⁹ The 2004 elections showed the expected positive impact on turnout. Same-day registration states averaged 73.8% turnout, while other states averaged 60.2%.³⁰ Proponents of such systems note that they may also specifically increase turnout among underrepresented groups.³¹

Student Voting

Student disenfranchisement has been “a perennial issue ever since the voting age changed,” and was lowered to 18, according to Renee Paradis, counsel for the Brennan Center.³² While young voters tend to vote at lower rates than other voters, advocates conclude that may well be attributable to barriers youth and student voters face, as opposed to apathy. Though students have the same rights as other voters—they “are entitled to register and vote in the community that they regard as their principal residence,” even if they live in a dorm—procedural requirements and, at times, harassment and misinformation prevent student voters from exercising their rights.³³ For example, there are numerous instances of students being threatened that, if they vote at school, they will lose their financial aid or health care or even face criminal

²⁶ Brian Kavanagh et al., Ten Years Later, A Promise Unfulfilled: The National Voter Registration Act and Public Assistance Agencies, 1995-2005 (July 2005), available at <http://demos.org/pubs/NVRA91305.pdf> (last visited on Dec. 17, 2007).

²⁷ Lisa Danetz and Scott Novakowski, Demos, Expanding Voter Registration for Low-Income Citizens: How North Carolina is Realizing the Promise of the National Voter Registration Act (Nov. 19, 2007) available at <http://demos.org/generatePub.cfm?pubID=1446> (last visited on Dec. 17, 2007).

²⁸ Idaho, Maine, Minnesota, New Hampshire, and Wyoming. Montana allows same-day registration for certain local office elections. For information on Iowa’s recent campaign for election day voter registration see, STEVEN CARBO, DEMOS, ANATOMY OF A SUCCESSFUL CAMPAIGN FOR ELECTION DAY REGISTRATION IN IOWA (Winter 2008). North Dakota does not require voter registration. Center for Policy Alternatives, Election Day Registration, <http://www.stateaction.org/issues/issue.cfm/issue/ElectionDayRegistration.xml> (last visited August 7, 2006).

²⁹ *Id.*

³⁰ Demos, High 2004 Turnout for States with Election Day Registration (Jan. 10, 2005), available at <http://www.demos.org/pub417.cfm>.

³¹ R. Michael Alvarez, Stephen Ansolabehere, and Catherine H. Wilson, *Election Day Voter Registration in the United States: How One-Step Voting Can Change the Composition of the American Electorate* (Caltech-MIT Voting Technology Project Working Paper, June 2002).

³² Adam Doster, American Prospect Online, One Student, No Vote (Dec. 6, 2007) available at http://www.prospect.org/cs/articles?article=one_student_no_vote (last visited Dec. 20, 2007).

³³ Brennan Center Policy Brief on Student Voting at 1, available at http://www.brennancenter.org/dynamic/subpages/download_file_10178.pdf (last visited on Dec. 20, 2007)

prosecution.³⁴ Recently, in Statesboro, Georgia a citizens group challenged the registration of over 900 student voters, but dropped the challenge post-election, conceding that the law did not support their position.³⁵

Because student voters tend to be geographically mobile, registration and identification laws can pose particular obstacles to them. For example, as discussed earlier, some states require that a voter present ID with his or her current address; this requirement could disenfranchise a student who has not changed her license to reflect her school address.³⁶ One student voting rights group has embraced election day registration as a means of increasing turnout among those, including many students, who change their residence shortly before an election.³⁷

In addition, advocates note, colleges and universities could do more to assist student voters. Precinct locations are not always convenient for students or lack adequate numbers of voting machines. And a 2004 study found that one-third of colleges and universities were not complying with a law that “requires schools receiving federal funding to provide students with a mail-in registration form.”³⁸ Students themselves, however, are taking measures to register and educate voters on their campuses and around their country about their right to vote.³⁹ A list of resources for students interested in becoming more involved with these efforts will be available on the ACS website in the coming months.

Conclusion

While America has made important progress in expanding the franchise over the last half-century, political participation rates still fall below those of many other democracies. Student voting rights, as well as the role of new measures like photo ID laws and traditional requirements like voter registration deadlines in suppressing voter participation, are all topics ripe for discussion and programming.

³⁴ See *id.* at 2; Doster, *supra* note ____.

³⁵ See Phil Boyum, Voter Challenges Dropped, Statesboro Herald (Nov. 14, 2007) available at <http://www.statesboroherald.com/news/article/6688/> (last visited Dec. 20, 2007)

³⁶ Brennan Center Policy Brief on Student Voting at 2. In addition, Under the Help America Vote Act (HAVA), first-time voters who register by mail must provide identification; some states do not specify student identification cards as an acceptable form of identification. *Id.*

³⁷ See http://savevoting.org/policy_reform.html (last visited on Dec. 20, 2007).

³⁸ Doster, *supra* note ____.

³⁹ *Id.*