

Ensuring Access to the Ballot Box: Voting Rights in the United States

Elizabeth M. Yang and Kristi Gaines

The process of voting is a fundamental right and privilege of any democracy. In fact, *Merriam-Webster* defines the word democracy as “a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections.” The history of voting rights in the United States has been a long and evolving process that continues to this day.

Many people would probably be amazed to know that the Constitution, as written by the founders of our nation in 1787, only allowed the states to bestow the right to vote on white males, over the age of 21, who either owned property or paid poll taxes.¹ The franchise of voting was gradually expanded over the course of the next 200 years, through amendments to the Constitution and by enactment of federal legislation.

The prospect of voting rights today is certainly brighter and more inclusive than it was at the founding of our nation. There is, however, a need for continued vigilance and study as changes in our society and technology affect our electoral process. Modern times require a look at issues that were not contemplated by our founding fathers or perhaps even by the authors of major twentieth-century voting rights legislation, including the Civil Rights Act and the Voting Rights Act. A closer look at some current issues related to voting rights—voter identification laws, felon disenfranchisement, and “English only” laws—suggests how voting rights can be

adversely affected by the most seemingly ordinary requirements.

Voter Identification Laws

On its face, the concept of presenting voter identification at the polls is not a bad one. It serves to confirm the identity of the voter and can provide proof of residency, which is often a requirement of voting. So, one might ask, what is the harm? Everyone has a driver’s license, right? Actually, the simple answer is no. Not everyone has a form of government-issued identification. The answer becomes even more complicated when a breakdown of individuals without identification, or the means to obtain it, is revealed to be generally comprised of the elderly, minorities, the poor, and the homeless.

This tension between the legitimate government interest to prevent voter fraud and the need to protect the more vulnerable portions of our population is being played out in Congress and in our courts today. To date, although there have been attempts to federally legislate a government-issued photo identifica-

tion as a requirement to voting in federal elections, the only requirement that has passed is a part of the Help America Vote Act of 2002 (HAVA). HAVA requires first time voters who register by mail without providing a form of identification to present some form of identification upon arriving at the polls to vote.²

Several states have gone beyond HAVA and require that all voters present some form of identification at the polls. The requirement for the type of identification varies. Indiana is one of the most restrictive, requiring government-issued photo identification for all voters, and has been the subject of several suits challenging the law. The state of Virginia, on the other hand, will accept a Virginia voter registration card or driver’s license, employer-issued photo identification card, any identification issued by the government or military, or a social security card. In the instance where such identification is not available, the voter may sign an affidavit affirming identity.

On April 28, 2008, in the case of *Crawford v. Marion County Election Board*, the Supreme Court upheld the validity of Indiana’s voter identification requirement, determining that “on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes ‘excessively burdensome requirements’ on any class

Constitutional Amendments

Several amendments to the Constitution have expanded the right to vote. These include:

The Fifteenth Amendment – Elimination of Racial Barriers to Voting – ratified in 1870

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The Nineteenth Amendment – Suffrage: A Woman’s Right to Vote – ratified in 1920

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

The Twenty-Fourth Amendment – Repeal of the Poll Tax – ratified in 1964

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

The Twenty-Sixth Amendment – Reduction of Voting Age – ratified in 1971

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Federal Legislation

Congress has also enacted key protections of voter rights, including:

Civil Rights Act of 1964

Literacy tests were often used as a method of determining whether or not a voter was “qualified” to vote. The desired result of such tests was the “disqualification” of minorities from voting. Title I of the Civil Rights Act of 1964 did not abolish literacy tests, but it did require that if a voter qualification test was to be applied, it had to be given to every voter.¹

Voting Rights Act

The Voting Rights Act of 1965 and its subsequent amendments have been an effective method of the continued protection of voting rights and access to the ballot box to the present day. Section 2 of the Voting Rights Act repealed literacy tests, and Section 5 required that jurisdictions with a history of discrimination could not make any changes to their voting procedures without the pre-clearance of the attorney general, who would be responsible for determining whether or not such changes would have a discriminatory effect.² In 1975, the Voting Rights Act was amended to require that oral assistance or bilingual ballots (in the minority languages of American Indians, Asian Americans, Alaska Natives, and Spanish-heritage citizens) be offered in political subdivisions where at least five percent of the population or more than 10,000 voting age citizens belong to a single language minority group and have limited English language proficiency.³ The Voting Rights Act was renewed for another 25 years and was signed into law on July 27, 2006.⁴

Notes

1. Civil Rights Act of 1964, Pub. L. No. 88-353 (1964).
2. Voting Rights Act of 1965, Pub. L. No. 89-110 (1965).
3. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73 (1975).
4. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246 (2006).

of voters.”³ The petitioners in *Crawford* sought to have the entire law invalidated as unconstitutional, instead of portions of the law. In order to prevail, they had to meet an extremely high burden of proof that there was an undue burden on specific segments of the population that would prevent them from voting. The Court’s decision was based on the fact that Indiana’s Bureau of Motor Vehicles provides photo identification cards free of charge, and that the petitioners did not actually prove that individuals were unable to vote as a result of the identification requirement. Specifically, the Court noted that “the record does not provide us with the number of registered voters without photo identification,” and that the evidence “does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification.”⁴

While this opinion would appear to have the last word on the constitutionality of requiring a government-issued photo identification card to vote, the rationale for the opinion suggests that this debate is actually far from over. The decision in *Crawford* was based on the determination by the lower courts and the Supreme Court that the evidence presented did not conclusively prove that someone could not vote as a result of the law. This issue will likely be revisited when a plaintiff can show that a government-issued photo identification requirement had the actual effect of violating an individual’s right to vote. A future court will then have to balance the burden of requiring the identification against the state’s interest in preventing voter fraud.

Felon Disenfranchisement

As we have noted, there are a number of constitutional and federal statutory provisions that ensure the fundamental right to vote in our country. Does this mean that an American citizen’s right to vote can never be suspended or terminated? The answer is no. Many are surprised to learn that American citizens can temporarily or permanently lose their right to vote after being convicted of certain crimes, depending on the state in which



Supporters for a bill that would automatically restore voting rights to convicted felons upon their release from prison hold up signs during a news conference, February 9, 2006, in front of the State House in Montgomery, Alabama. (AP Photo/Rob Carr)

they reside. In fact, today an estimated 5.3 million Americans have lost their right to vote under these felon disenfranchisement laws.⁵

The Constitution provides that states are responsible for determining who is eligible to vote, but that states cannot deny the voting rights of otherwise eligible citizens, “except for participation in rebellion, or other crime.”⁶ The Supreme Court, in 1974, affirmed that states could prohibit citizens who had been convicted of a felony from voting.⁷ Since that time, 48 states have enacted laws disenfranchising convicted felons.⁸ Maine and Vermont are the only two states that permit incarcerated felons to vote. Each of the remaining 48 state laws is different. While all prohibit voting during the time that an individual is incarcerated, some continue the restric-

tions while a person is on parole, and some extend the prohibition to those on probation as well.

Similarly, states’ laws differ on whether and how a convicted felon’s voting rights may be restored following completion of a prison sentence. While many states provide for some form of automatic restoration of voting rights for ex-offenders, others do not. Even in those states where there is an opportunity for restoration, the process involved may be so complex and cumbersome that it discourages many ex-felons. In Mississippi, for example, an ex-offender must get an individual bill passed by the state legislature and signed by the governor. Currently, an estimated 2.1 million of those disenfranchised nationwide have actually completed their sentences, but have not had their right to vote restored.⁹

There continues to be debate about and challenges to several aspects of the felon disenfranchisement laws, particularly on the grounds of racial discrimination. States cannot enact felony disenfranchisement laws that intentionally discriminate on the basis of race or gender.¹⁰ However, statistics show that felon disenfranchisement laws do have a disproportionate impact on minorities. Over 1.4 million or 13 percent of all African American men have been disenfranchised based on felony convictions, which is seven times the national average.¹¹

In addition, some states’ restoration laws require the individual to pay substantial fees or require that the individual pay all legal debts to the state, including victim restitution, costs of incarceration, and court fees, before they are eligible to

pursue restoration. Many ex-felons who have completed their sentences and met all other requirements needed to restore their voting rights may not have the financial resources to meet this requirement for many years, or in some cases, ever. Some have argued, therefore, that these laws constitute a modern-day equivalent to an unconstitutional poll tax.

Felony disenfranchisement laws can also affect the voting rights of American citizens who have never been convicted of a crime. There have been many reported instances where, in an attempt to purge voter registration rolls of individuals who have been convicted of a felony and are therefore no longer eligible to vote, a state has inadvertently removed individuals with the same (or similar) name as a convicted felon. Some of these individuals do not find out they have been removed until they arrive at the poll to vote and therefore may not be able to resolve the issue in time to vote in a particular election.

There is no doubt that legal challenges to felon disenfranchisement laws will continue to be brought in the

courts. However, in recent years many states have begun to change their laws to make it easier for ex-offenders to seek to restore their right to vote. For example, the state of Maryland, in 2007, repealed all provisions of its lifetime voting ban and put in place an automatic restoration policy for those who have completed their sentences. Debate of this issue has been undertaken in Congress, as well. In fact, in 2008, several members of Congress have indicated their intent to introduce legislation to allow individuals on parole or probation, or who have otherwise served their sentences, to vote in federal elections.

English Only Laws

In several areas of law and society there have been efforts to establish or enforce English-only language requirements. This is true in certain areas of election law and administration, as well.

In 2007, some 660,477 individuals became naturalized U.S. citizens and, if otherwise qualified, were then eligible to register and vote in federal and state elections.¹² U.S. law requires that each

applicant for naturalization demonstrate that he or she can read, write and speak words in ordinary usage in the English language. However, certain individuals are exempt from this requirement. In addition, voting instructions can be written in confusing language and concepts such as provisional ballots and the mechanics of various voting methods can be complex. Basic English skills may not be sufficient for an individual to fully understand the rights and requirements of voting.

In 1975, recognizing that language barriers should not prevent otherwise eligible Americans from exercising their voting rights, Congress amended the Voting Rights Act to include certain language provisions. In political subdivisions where at least five percent of the population or more than 10,000 voting age citizens belong to a single language minority group and have limited English language proficiency, information related to the electoral process must be provided in the applicable minority language. Today, nearly 500 jurisdictions in 31 states are required to provide election materials and information in more than one language, and five states must provide such assistance state-wide.¹³

The language minority provision of the Voting Rights Act did not receive unanimous support at the time it was enacted, and even today there are opponents of the law who believe that electoral materials should be provided only in English.

Proponents of bilingual ballots insist that the minority language requirements are necessary to ensure that many Americans are able to fully and fairly exercise their right to vote and that such requirements do not impose a significant burden on the states. Moreover, they claim that providing bilingual ballots assists in preventing election fraud by unscrupulous individuals who might give inaccurate information to those individuals who do not fully comprehend the necessary information in English. Opponents of bilingual ballots say that having to print multiple ballots is costly for the state or locality and that enabling non-English speakers to use bilingual

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Voter Identification and the Right to Vote – James H. Landman

Earlier this year, the Supreme Court decided *Crawford v. Marion County Election Board*, a case that challenged an Indiana law requiring voters to show a state-issued photo identification when voting in primary and general elections. The Court upheld the Indiana law by a margin of 6 to 3, but there was no majority opinion in the case. Three justices signed a plurality written by Justice Stevens and another three joined a concurring opinion written by Justice Scalia. Justice Souter wrote a dissenting opinion joined by Justice Ginsburg, and Justice Breyer wrote a second dissenting opinion.

In this activity, students will research the positions that divided the Court's decision on voter identification and then debate the constitutionality of scenarios affecting the right to vote.

Estimated Time

2 – 3 class periods.

Background

Students should be aware of the Court's decision in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). In that decision, the Supreme Court struck down a Virginia law that imposed a poll tax of \$1.50 on persons voting in Virginia state elections. The Court held that, because voter qualifications have no relation to wealth, a requirement tied to the affluence of a voter or payment of a fee violated the Equal Protection Clause of the Fourteenth Amendment. The *Harper* decision is cited frequently in the *Crawford v. Marion County Election Board* decisions.

Activity

Step One. Share with students the main components of the Indiana voter identification law. Students can either read the description of the law at the beginning of Justice Stevens' plurality opinion, or you can share the components, listed below, on a handout or on the board. The components include:

Voters at primary and general elections are required to show a state-issued photo identification. No identification is needed for absentee ballots submitted by mail. Exemptions also apply to persons living in state-licensed facilities such as nursing homes.

Indigent voters or voters who object to being photographed for religious reasons may cast a provisional ballot. These ballots will be counted, however, only if the voter files an affidavit with a county election board or a circuit court clerk within 10 days of the election.

Persons seeking photo identification for the first time are required to show a birth certificate, a naturalization certificate, a U.S. veteran photo identification, a U.S. military photo identification, or a U.S. passport.

No photo identification is required to register to vote, and the state offers free photo identifications to qualified voters who can establish their residence and identity.

Ask students for their first impressions of the law. Why might the state require voters to show photo identification when they vote? Would showing a photo identification as described in the

law pose substantial obstacles to any voters? Would the burdens of obtaining a photo identification exceed the burdens already involved in registering and going to vote? Have students keep a record of their first impression of whether the law seems reasonable.

Step Two. Divide the class into groups of 4 to 6 students. Assign each group to one of the four opinions filed in the *Crawford* case (Stevens plurality opinion, Scalia concurring opinion, Souter dissenting opinion, and Breyer dissenting opinion). Make sure that at least one group is assigned to each of the four opinions. Ask the groups to read and summarize the main arguments of their assigned decision. As the groups report their summaries to the class, check for understanding of these key points from each of the decisions:

Stevens Opinion

Restrictions are invidious when they are irrelevant to voter qualifications.

Evenhanded restrictions that protect the integrity of the voting process are judged by balancing the interests put forward by the state and the burdens imposed by the state's rule.

The state's interests in this case were legitimate and relevant, while the burdens imposed in obtaining a free identification were not substantial, or even a significant increase over the "usual burdens of voting."

Although the law may have imposed a special burden on some voters, not enough evidence had been assembled to show the severity of that burden.

Scalia Opinion

The primary question is whether the challenged law severely burdens the right to vote. Ordinary and widespread burdens are typically not severe. This law imposed a single burden—that of presenting an identification—on all voters.

A generally applicable law that has "disparate impacts" (affects people differently) is not unconstitutional without proof of discriminatory intent.

RESOURCES

The American Bar Association is offering information on voter rights and responsibilities, summaries of landmark election law decisions, and state-by-state information on voter registration and elections on its www.abanet.org/vote website. The ABA's Constitution Day website is also focusing on the vote this year, with a special interactive feature, "Uncle Sam's Attic," that asks visitors to assemble a scrapbook of key voting rights amendments. Constitution Day lesson plans for a variety of grade levels are also available at www.abaconstitution.org.

Several websites are focused on empowering, educating, and encouraging young people to register and vote. Two of the best are Declare Yourself, at www.declareyourself.com, and Rock the Vote! at www.rockthevote.com.

Candidate websites are a good place to start for information on the positions candidates are taking on major issues. The websites for the two major parties' presidential candidates, John McCain and Barack Obama, are www.johnmccain.com and www.barackobama.com. Also of interest is Project Vote Smart, a nonprofit, non-partisan research organization that collects and distributes information on candidates for public office. Its website is www.votesmart.org.

TEACHING ACTIVITY (CONTINUED)

Souter Opinion

The state should be required to make a particular, fact-based showing that the threats to its interest in protecting the voting process outweigh the burdens it has imposed on voters. The majority did not insist enough on this showing of fact by the state; no evidence of in-person voter impersonation had been shown.

Specific burdens on voters were demonstrated. There were far fewer places to obtain an identification than there were places to vote. And although identifications were free, the most common documents to establish the identity of first-time applicants for identification (birth certificates and passports) were available only upon payment of a fee.

Breyer Opinion

The restrictions imposed by the state went too far. More moderate models in states such as Florida (which allowed a wider range of voter identifications) and Georgia (which allowed a greater range of documentation to establish one's identity) struck a more appropriate balance between the state's interest in protecting the voting process and the burdens placed on voters.

Step Three. Ask the students to consider whether the arguments made in the opinions in the case changed their first impressions of the law. Did the law

strike an appropriate balance between the state's interests and the burdens it placed on voters? Did the requirements raise legitimate equal protection concerns under the Fourteenth Amendment? For those students who think that the law should be struck down, would they accept one of the more moderate laws highlighted in Justice Breyer's opinion?

Step Four. Conclude the activity by asking students to debate the constitutionality of the following proposals, based on their understanding of the opinions in *Crawford*:

- A state requires individuals to show a state-issued photo identification to register to vote.
- A state requires a state-issued photo identification to vote, and requires payment of a \$2 fee to help defray its expenses.
- A state enacts a law similar to the Indiana law, but deletes the provisional ballot exception for indigent voters or voters who object to being photographed.

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ballots may prevent their full assimilation into American society. Further, they argue that English is the language of the United States and that an individual who cannot understand English cannot responsibly participate in political debate or the electoral process.

Many states and localities, though not required to by language minority provisions of the Voting Rights Act, voluntarily offer election materials and information in languages other than English. However, some of these state actions

have sparked legal challenges. Most recently, the state of Iowa had offered information and voter registration forms in a select number of foreign languages on the secretary of state's website. This action was found to violate an Iowa law passed in 2002 that requires all official governmental communication to be made in English.

Attempts to implement English-only provisions in election law have been made on the federal level, as well. Forty-eight members of the U.S. House

of Representatives have co-sponsored legislation introduced in May of 2008 to require that ballots be provided only in English. H.R. 5971, the American Elections Act of 2008, includes an exemption for American Indian and Alaska Native dialects because, in the words of one sponsor, "they were here first."¹⁴ Previous attempts to enact an English-only restriction for election materials on the federal level have failed. While it is not anticipated that this legislation will be enacted, many

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believe that efforts such as this damages the perception of America as a free and fair democracy and undermines our historical tradition as a nation of immigrants.

The Future of Voting Rights

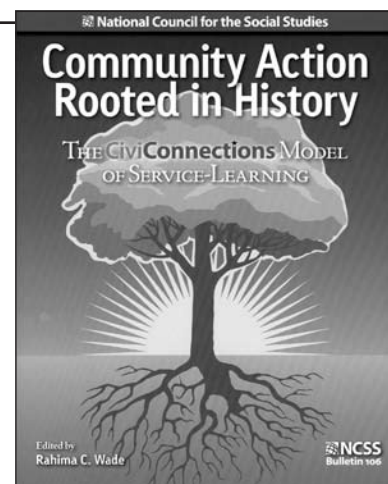
The act of voting is the crowning achievement of any democracy. In order to ensure the future of a representative form of government, citizens must be able to cast votes, without fear of reprisal, for the candidates and issues of their choice. It is important to realize that the physical act of voting is only one part of the success of democracy. The entire process of voting—from voter registration to assistance at the polls, from who can vote to how they vote—is just as important. All aspects of the electoral process must remain open and accessible to all. The United States has a strong history of voting rights, but we cannot rely on our past achievements. We must remain vigilant that no one is left behind as we continue to move forward. As our electoral process evolves, we must make sure that the important needs and concerns of government and society are balanced very carefully against the equally important need to protect the ability and right to vote for all eligible citizens. 🗳️



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Notes

1. U.S. Const. art. I, § 2.
2. Help America Vote Act of 2002, Pub. L. No. 107-252 (2002).
3. *Crawford v. Marion County Election Board*, No. 07-21, slip op. at 18 (U.S. Apr. 28, 2008).
4. *Ibid.*, 17.
5. The Sentencing Project, “Fact Sheet on Felony Disenfranchisement Laws in the United States” (March 2008).
6. John C. Keeney, Jr., “Felon Disenfranchisement,” in *America Votes! A Guide to Modern Election Law and Voting Rights*, ed. Benjamin E. Griffith (ABA Section of State and Local Government Law, 2008), 91, 96.
7. *Richardson v. Ramirez*, 418 U.S. 24 (1974).
8. The Sentencing Project.
9. *Ibid.*
10. See *Hunter v. Underwood*, 471 U.S. 222 (1985) and *Hobson v. Pow*, 424 F.Supp. 362 (N.D. Ala. 1977)
11. The Sentencing Project.
12. Office of Immigration Statistics, Department of Homeland Security, Naturalizations in the United States: 2007, Annual Flow Report (July 2008).
13. Editorial, Yes on Bilingual Ballots, *The Washington Post*, July 10, 2006, A16.
14. Steve Tetreault, “Voting Rights Act: Heller Offers English-Only bill.” *Las Vegas Review-Journal*, May 7, 2008, www.lvrj.com/news/18721214.html.



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Edited by Rahima C. Wade
NCSS Bulletin No.106, 78 pp. 2007

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