

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

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This article was written for the forthcoming September 2008 issue of Social Education magazine, the journal of the [National Council for the Social Studies](#).

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 nearly 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 identification 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 some form of identification be presented at the polls by all voters. 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 lawsuits 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 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 thus 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 held 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

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 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 can not 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 forty-eight state laws is different. While all prohibit voting while an individual is incarcerated, some continue the restrictions 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 the completion of their 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 cumbersome and complex as to

realistically prevent many ex-felons from pursuing it. 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 can not 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% 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. Therefore, some have argued 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, 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 they 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 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, although not required 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 undergone 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 Alaskan 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 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, to 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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The views expressed in this article are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

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] *Id.* at 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!* 91, 96 (Benjamin E. Griffith ed., 2008).

[7] *Richardson v. Ramirez*, 418 U.S. 24 (1974).

[8] THE SENTENCING PROJECT, *supra* note 5.

[9] *Id.*

[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, *supra* note 5.

[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*, WASH. POST, July 10, 2006, at A16.

[14] Steve Tetreault, *VOTING RIGHTS ACT: Heller offers English-only bill*, LAS VEGAS REVIEW-J., May 7, 2008 available at

<http://www.lvrj.com/news/18721214.html>.