SYMPOSIUM

Voter-ID Laws Discourage Participation, Particularly among Minorities, and Trigger a Constitutional Remedy in Lost Representation

Richard Sobel, *Northwestern University*
Robert Ellis Smith, *Privacy Journal*

Because voter-identification laws discourage voter turnout, particularly among identifiable minority groups, their implementation abridges a fundamental constitutional right. The U.S. Constitution includes a little-known remedy for denying or abridging the right to vote that reduces a state's congressional representation in proportion to the extent of the abridgements.

The voter-ID requirements disparately impact the following minority groups:

Poor voters often do not have access to, nor frequently use, government-issued photo identification because they lack cars and rarely travel by air. Many, particularly the homeless or those living with relatives, may not have the permanent addresses needed for government-issued photo identification. They are also more likely to have difficulties traveling to government offices to obtain IDs. They may lose or have their identification stolen. Many in this category are minorities, particularly African Americans and Hispanic Americans.

Minority voters who tend to be poorer and less educated are less likely to have driver's licenses or the resources to obtain official photo identification. Because black voters, in particular, have been the target of previous discriminatory measures like poll taxes, re-registration or residency requirements, grandfather clauses, and voter-list purging, they are likely to be discouraged by similar barriers to voter registration. From this long history of denial of the franchise, minorities are particularly sensitive to being subjected to barriers to in-person voting.

Elderly voters are also likely to encounter greater difficulty in traveling any distance to obtain identification. They may lack the experience to "negotiate the system" such as in identifying, contacting, and locating the appropriate agency to provide them with credentials needed to obtain voter-ID identity documents. They may have been born before birth certificates were mandatory or in rural areas where birth registrations were delayed or erratic.

Women voters whose family names have changed or become hyphenated risk having the name on their photo identification differ from, and hence not "conform" to, the one on their birth certificates. Even small mismatches may complicate getting documents to qualify for voter registration.

Disabled voters may experience much greater difficulty in traveling to obtain identification or in communicating with government officials. They may not have frequent need for government photo IDs, for instance, to drive.

Minority-language voters whose identity documents are not in English may have difficulty in reading, understanding, and writing English and may need to pay to have the documents translated or to have translators accompany them to obtain records or IDs. They may have difficulty in obtaining underlying documents from their countries of origin. They are more likely to be intimidated by the labyrinth of paperwork and procedures necessary to obtain a birth certificate and other documentation required for obtaining photo identification. If they have matrilineal names, they run the risk of having the name on their photo identification not conforming to the matching name on the voter-registration list.

To the extent that any members of these groups are already registered to vote, each one has a vested right in the electoral franchise that can now subsequently be denied simply for lack of a government ID. Requiring such individuals to obtain photo identification as a condition to exercise that vested right amounts to a modern-day, higher-tech re-registration requirement that constitutes a denial of fundamental political rights and due process. The violation of the right to vote need not be an absolute denial of a voter's entry into the polling booth. Abridgement may lie in the creation of burdens that discourage one's qualifying for or exercising of the right of voting.

If voter identification requirements reduce overall turnout by 3% (Drew 2007), and there are approximately 4.5 million eligible voters in Indiana (www.census.gov), about 135,000 potential voters may be deterred from voting. Yet, there is no evidence of even one instance of in-person fraud in recent Indiana history (*Crawford* 2007a, 954; 2007b), but there is the likelihood that a significant group of otherwise eligible Indiana voters would be deterred by voter-ID requirements.

doi:10.1017/S1049096509090271

THE VOTER-IDENTIFICATION LAW VIOLATES THE VOTING RIGHTS ACT PROHIBITIONS ON RACIAL DISCRIMINATION IN VOTING

Congress enacted the Voting Rights Act of 1965 (42 U.S.C. 1973(a)) under its authority to enforce the Fifteenth Amendment's proscription against voting discrimination (*Lopez v. Monterrey County* 1999, 269). The act's purpose is "to rid the country of racial discrimination in voting" (*Beer v. United States* 1976, 140). It aims at both obvious and subtle state laws that deny citizens the right to vote because of their race. Further, the act was "intended to reach any state enactment which alter[s] the election law of a covered State in even a minor way" (Allen 1969, 566).

Section 2 of the act states that "no voting qualification or prerequisite to voting . . . shall be imposed . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in certain minority-language groups (42 U.S.C. 1973(a)). In essence, the section challenges "electoral law[s], practice[s], or structure[s]" that "interact[] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives" (*Thornburg v. Gingles* 1986, 47). Proof of intent to discriminate is not required.

Under the act, the issue is whether, as a result of a law, citizens "do not have an equal opportunity to participate in the political processes and to elect candidates of their choice" (*Thornburg v. Gingles* 1968, 44; *Johnson v. De Grandy* 1994, 1014). A section 2 violation occurs if the "totality of the circumstances" shows the challenged law results in denying a racial or language minority an equal opportunity to participate in the political process (42 U.S.C. 1973(b); *Thornburg v. Gingles* 1968, 46).

The complexity of obtaining "breeder" documents and government identification constitutes a modern-day equivalent of an education or literacy test for voting; historically, these have been the most "popular" devices for disenfranchisement (Keyssar 2000, 142, 266). A "strict scrutiny" review requiring a compelling state interest should apply because the groups whose rights to vote are most likely to be abridged by the voter-identification law tend to be members of insular minority groups (*United States v. Carolene Products. Co.* 1938, 152).

REQUIRING A PHOTO IDENTIFICATION TO VOTE DENIES OR ABRIDGES GROUPS' EQUAL OPPORTUNITY TO VOTE

As the appellate dissent in *Crawford* noted, the voter-identification law "is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic" (*Crawford* 2007a, 954). Moreover, these "folks" are "mostly . . . people who are poor, elderly, minorities, disabled, or some combination thereof" (955). The Indiana law would result in the "denial or abridgement" of the right to vote of many of these citizens.

The pragmatic concerns, like difficulty in traveling to obtain identification, lack of necessary documentation, and infrequency of other occasions for identification, are issues for minorities in particular that flow directly from the voter-identification law. They deny or abridge the equal opportunity of voters to participate in the political process. Indiana's statute is exactly the kind of "qualification or prerequisite to voting . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" that the Voting Rights Act prohibits. It has a disparate impact on minority voters. As "history demonstrates" to Justice Thomas in his dissent about other "electoral reforms," the result is not to purify the public process but "to protect incumbents" (*Colorado Republican Fed. Campaign Comm. V. FEC* 1996, 644). The original recommendation of Justice Department staff that a similar Georgia voter-ID law fail pre-clearance under the Voting Rights Act was overruled by higher officials in the department (Eggen 2005).

THE APPELLATE COURT EXAGGERATES HOW COMMON PHOTO-ID REQUIREMENTS ARE AND UNDERSTATES THEIR DETRIMENTAL IMPACT

Writing for the appellate majority, Judge Richard Posner incorrectly assumes that photo-identification requirements are so common in today's society that without photo IDs it is impossible to complete routine tasks (*Crawford* 2007a, 951). Indeed, this justification misstates the actual extent to which government-issued photo identifications are required today. It thereby underestimates the impact of such an ID requirement on voters' abilities and motivation to vote.

The appellate court's suggestion that it is impossible to enter a federal courthouse without a government-issued photo identification is inaccurate. The Dirksen federal court house in Chicago, for example, where the Seventh Circuit sits, reveals that citizens who do not possess a driver's license or passport can nevertheless enter the courthouse if they have some other form of non-government-issued photo identification, such as a work or school identification. The Moakley federal courthouse in Boston similarly reveals that, while the preference is for any kind of photo identification, a person can gain access to the courthouse using non-photographic identification such as credit cards or other similar items. In fact, no identification is required to enter the Supreme Court of the United States.

Because of the First Amendment right to petition for the redress of grievances and the privilege and immunity to travel to the "seat of government" (*Slaughterhouse Cases* 1873; *Corfield v. Coryell* 1823), requiring an ID to get into a courthouse would be especially suspect. As at the Supreme Court, the electronic search of possessions and people addresses physical security concerns that IDs do not provide.

Judge Posner also mistakenly claimed that it is impossible to fly without government-issued photo identification. Contrary to this assertion, possession of a government-issued photo identification is not an absolute requirement in order to board a commercial airplane in this country. In *Gilmore v. Gonzales* (2006), a citizen challenged the constitutionality of the airlines' policy requiring photo identification in order to fly (1129–30). The court noted that the "Security Directive" that was being challenged "require[s] airline passengers to present identification *or be a 'selectee'*" who receive additional screening (1133). In short, it *is* possible to fly

without photo identification (see also Foreman et al. 2007, 5). Moreover, recent U.S. Transportation Security Agency changes still permit flying without government identification (www.tsa.gov) for "selectees" who "cooperate" in verifying their identity in other ways under a restricted right to travel.

As the Crawford plaintiffs and *amici* note, as a matter of privacy and unburdened exercise of fundamental rights, many citizens prefer not to provide ID, or lack IDs. Requirements for voter identifications should not be used as levers toward developing a national identification card or "Real ID" system (Groth et al. 2007, 4, 12–20; Sobel 2002, 329). Having a photo identification is not nearly as vital to maneuverability and access in today's society as the appeals court claimed. The courts failed to appreciate the significance and discriminatory effect, particularly for those identifiable groups most acutely impacted by voter-ID rules, of the requirement that all voters present government-issued photo identification. Instead, the court improperly concluded that such a requirement is not a constitutionally cognizable infringement upon the right to vote.

THE CONSTITUTIONAL REMEDY FOR ABRIDGEMENT OF THE RIGHT TO VOTE IS A REDUCTION IN A STATE'S CONGRESSIONAL REPRESENTATION

Well known is the Fifteenth Amendment's promise that the "right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." Yet, the Fourteenth Amendment spells out an earlier constitutional remedy for the abridgement of the right to vote. This little-known passage in section 2 of the amendment says that "when the right to vote" in an election is "denied" or "in any way abridged," a state's congressional "representation . . . shall be reduced" proportionally (see, e.g., Groth et al. 2007, 2; also Amar 2005, 394; Karlan 2008, 46–47).

Identifying the abridgement of the right to vote does not require finding complete denial of voting rights, but rather evidence of a burden that discourages the exercising of the right. This occurs when a law makes it less likely that an individual or member of a group will try to or succeed in exercising the elective franchise. When the right of citizens, including disparately impacted minority groups, is widely abridged, the remedy in the Fourteenth Amendment for Indiana's voter-ID law is the reduction in the size of the state's congressional delegation. This reduction, according to the Constitution, is in proportion to the percentage of its population whose right to vote is abridged or denied, in this case, by the voter-identification law.

The abridgement of the right to vote could consist in being asked for identification without reasonable suspicion of committing a crime, such as voter fraud, if the lack of ID could prevent voting. More pointedly, the abridgement could consist in a state's passing a voter-ID law when there is a significant proportion of the citizenry that does not have governmental identification.

The first group would include, for instance, virtually all valid in-person voters in Indiana asked for a government ID without reasonable suspicion (see Smith and Sobel 2009). The second group would include anyone who did not have governmental identification with a photograph and current expiration date. According to Barreto, Nuño, and Sanchez the group without government ID constitutes about 17% of white Indiana residents and about 28% of black voters (2009, 17) (roughly 18% overall). Hence, approximately one-sixth of Indiana voters may have their right to vote abridged by a voter-ID law, and Indiana would lose one-sixth of its representation in Congress.

Additionally, evidence that minority groups, particularly blacks and Hispanics, are less likely to have required identification and are more likely to be burdened in its acquisition and employment could also constitute evidence of abridgement to trigger the remedy (see Drew 2007; Barreto, Nuño, and Sanchez 2009). Not every member of the group needs to be prevented or discouraged as long as there are objective reasons to show that a substantial proportion of members within the class are more likely to be discouraged from voting by the photo-ID requirement.[1]

Following the Fourteenth Amendment's prescription of proportional reduction of representation for voter abridgements, Indiana would lose one-sixth, or one, of its nine seats in the House. Hence, it would also lose one of 11 electoral votes.

Regardless of the exact numbers, the consequences of the Fourteenth and Fifteenth Amendment proscriptions are that governmental actions that "in any way" abridges the right to vote, as the voter-identification law does, must fail constitutional scrutiny. Whether Indiana should lose representation or have its voter-ID law stricken from the books, both underscore the unconstitutionality of voter-ID laws because they substantially abridge the franchise, particularly among minorities.

CONCLUSION: VIOLATIONS OF CONSTITUTIONAL STANDARDS

The Indiana voter-identification law burdens the right to vote, without meeting the constitutional standard for ID demands. It also has a disparate impact on the minority franchise under the Voting Rights Act and the Fourteenth and Fifteenth Amendments. It denies minority groups the equal opportunity to participate in the political process by imposing a "qualification or prerequisite to voting" that unfairly disadvantages such groups.

The Fourteenth Amendment prescription for Indiana's abridgement of the right to vote would reduce the state's number of congressional representatives based upon the proportion of citizens' whose right to vote is diminished. In Indiana, the abridgement of one-sixth of the state's voters' rights would result in a reduction in the number of congressional representatives and electoral votes by one.

Denying any voters the opportunity to exercise the fundamental right to vote is too severe a burden to withstand constitutional scrutiny. The constitutional remedy need not deprive Indiana of a congressional seat for the protectors of our founding document in the U.S. Supreme Court to recognize that voter-ID laws are inherently suspect and unconstitutional. ■

NOTE

1. An earlier version of this article appeared as part of an amicus brief for Crawford *(Albano et al. 2007)*.
2. A different approach to a similar proportion focuses on disparate impacts on minority population (though the Fourteenth Amendment does not require discrimination, only abridgement). Indiana's 2000 voting-age population (VAP) was 4,407,679 (www.census.gov). The VAPs of African Americans and Hispanics, two groups most disadvantaged by the voter-ID law, was 342,087 and 136,266, respectively (with an additional 45,200 considering themselves of two or more races). The total of these identifiable minority groups is 523,553, or 11.6% (one-ninth), of Indiana's VAP, and a basis for reduction in representation. The proportion whose voting rights are abridged is larger by accounting for other groups facing discrimination. These include women as half the population and elderly as about one-eighth (12%). Adding discouraged blacks and Hispanics to discouraged women and elderly (and accounting for the overlaps) could again reach the threshold of abridgement for the loss of one seat. While section 2 of the Fourteenth Amendment refers only to male citizens 21 years and older, the Nineteenth (women's suffrage) and Twenty-Sixth (18-year-old vote) Amendments, respectively, invalidate any such limitation (see Amar 2005, 392–94).

REFERENCES

Albano, Jonathan, Timothy H. Madden, Jennifer Banting MikoLevine, Jason Lane, and Bingham McCutchen LLP. 2007. "Brief of *Amici Curiae* Cyber Policy Project, Privacy Journal, Privacy Activism, Liberty Coalition, U.S. Bill of Rights Foundation, Robbin Stewart and Joell Palmer in Support of Petitioners." Amicus Brief for the Plaintiffs in *Crawford v. Marion County Election Board*. 553 U.S. (2008). http://moritzlaw.osu.edu/electionlaw/litigation/documents/Rokita-BriefamicuscuriaeofCyberPrivacy.pdf.

Allen v. State Bd. Of Education. 1969. 393 U.S. 544.

Amar, Akhil. 2005. *America's Constitution: A Biography*. New York: Random House.

Barreto, Matt, Stephen Nuño, and Gabriel Sanchez. 2009. "The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana." *PS: Political Science and Politics* 42 (January): 111–16.

Foreman, Michael J., Jon M. Greenbaum, Robert A. Kengle, Walter E. Dellinger, Sri Srinivasan, and Charles E. Borden. 2007. "Brief for the Lawyers' Committee for Civil Rights under Law, Service Employees International Union, American Federation of State, County and Municipal Employees, Common Cause, Jewish Council for Public Affairs, National Council of Jewish Women, and American Jewish Committee as *Amici Curiae* in Support of Petitioners." *Crawford v. Marion County Election Board*. 553 U.S. (2008). http://brennan.3cdn.net/91ffa0e1c41aa9b0a6_3bm6b54ig.pdf.

Beer v. United States. 1976. 425 U.S. 130.

Colorado Republican Fed. Campaign Comm. v. FEC. 1996. 518 U.S. 604.

Corfield v. Coryell. 1823. 6 Fed. Cas. 546.

Crawford v. Marion County Election Bd. 2007a. 472 F.3d 949 (7th Cir.).

Crawford v. Marion County Election Bd. 2007b. 484 F.3d 436 (7th Cir.) en banc.

Drew, Christopher. 2007. "Lower Voter Turnout Is Seen in States That Require ID." *New York Times*, February 21.

Eggen, Dan. 2005. "Criticism of Voting Law Was Overruled, Justice Department Backed Georgia Measure Despite Fears of Discrimination." *Washington Post*, November 17, A1.

Gilmore v. Gonzalez. 2006. 435 F.3d 1125 (9th Cir.).

Groth, William, et al. 2007. Brief for Petitioners. *Indiana Democratic Party et al. v. Todd Rokita*. No. 07-25. http://brennan.3cdn.net/e715892d06ef26a6c8_rpm6bhvi8.pdf.

Johnson v. De Grandy. 1994. 512 U.S. 997.

Karlan, Pamela. 2008. "Forum." In *Race, Incarceration and American Values*, ed. Glenn Loury. Boston: Review Press.

Keyssar, Alexander. 2000. *The Right to Vote, A Contested History of Democracy in The United States*. New York: Basic Books.

Lopez v. Monterrey County. 1999. 525 U.S. 299.

Smith, Robert Ellis, and Richard Sobel. 2009. "Demands for Voter Identification Require a Constitutional Standard of Reasonable Suspicion of Illegal Activity." *PS: Political Science and Politics* 42 (January): 103–05.

Sobel, Richard. 2002. "The Demeaning of Identity and Personhood Under the National Identification Systems." *Harvard Journal of Law & Technology* 15: 319–83.

Slaughterhouse Cases. 1873. 83 U.S. 36.

Thornburg v. Gingles. 1986. 478 U.S. 30.

United States v. Carolene Prods. Co. 1938. 304 U.S. 144.