Center for American Progress

Creating a Federal Right to Vote

By Joshua Field June 25, 2013

Today the Supreme Court struck down Section 4 of the Voting Rights Act, a vital piece of legislation that was widely hailed as the nation's most effective civil rights law. Shelby County, Alabama, had challenged the law, arguing that it was unconstitutional to require "covered" states and localities with a history of voter discrimination to get permission or "preclearance" from a federal court or the Justice Department before changing voting procedures.

In a 5–4 decision, the High Court gutted[1] a law that was renewed by Congress just seven years ago, and has protected voters from—among other acts of discrimination—purposeful vote dilution, overly restrictive voting procedures, and voter intimidation.[2] The Court held that the formula that identifies the states and localities that are required to "preclear" their voting procedures and laws is unconstitutional and can no longer be used as a basis to subject those states and localities to oversight. Although the Court admits that "voting discrimination still exists,"[3] its decision currently leaves voters with fewer protections against potentially discriminatory voting laws.

The Court's decision is clearly a blow for voting rights, but it also serves as a wake-up call for Americans to become educated about the lack of protections in place to combat voting discrimination. Even with the Voting Rights Act, lawmakers have played politics with state voting laws and imposed political ideology at the expense of disenfranchised Americans. We should consider what legal protections remain for voters, as well as what can be done to ensure that all eligible voters can freely and easily participate in our democracy. A vote cast in Miami, Florida, should carry as much weight—and be just as unconstrained—as one cast in Daniels County, Montana.

Do we have a constitutional right to vote?

The simple answer is no.

A vast majority of Americans believe that their right to vote is one of the most important rights in a democracy.[4] Many Americans, however, might be surprised to know that there is no explicit, affirmative declaration of the right to vote in the U.S. Constitution. The Court has long deferred to state action with regard to voting rights—including the rights of states to disenfranchise specific groups of people[5]—and specifically held in *Bush v. Gore* that individual citizens have no "federal constitutional right to vote for electors for the President of the United States."[6]

A look back into American history demonstrates that suffrage has been far from universal, and the expansion of voting rights and efforts against voting discrimination have been hard-fought battles. Disenfranchising someone because of their race was forbidden by the 15th Amendment. Fifty years later, women were enfranchised by the 19th Amendment. In 1971 the 26th Amendment provided that the voting rights of citizens ages 18 years and older could not be infringed by state or federal governments. Yet relying on these amendments alone to guarantee all Americans the constitutional right to vote is not enough.

The Court has been relatively hands off when it comes to voting cases, and, unlike the First Amendment, which affirmatively guarantees the right to free speech, these amendments protect citizens only in the negative.[7] Rather than defining the rights of citizens to vote, the Court's voting-related rulings have usually focused on what states cannot do regarding discrimination against certain classes, technical issues such as reapportionment and redistricting,[8] and one person, one vote.[9]

Further complicating things, the Supreme Court has sent mixed signals regarding the legal significance of voting. Fundamental rights are those without which "neither liberty nor justice would exist"—laws that may infringe on these rights are scrutinized by courts very closely.[10] The Court has said that voting is a fundamental right; in practice, it has deferred to state-based voting laws (notwithstanding the Court's recent decision in *Arizona v. Inter Tribal Council of Arizona* that invalidated a state voting law due to federal-law preemption rather than because of a fundamental-right analysis[11]). This deference suggests that it is not applying the strictest level of review necessary to ensure that American voters are properly protected against burdensome state laws.[12]

For example, the Court recently upheld an Indiana law that requires voters to show government-issued identification before they are allowed to cast their ballot.[13] Instead of stating a coherent approach to election-law cases, the Court issued four different opinions that each described the proper application of voting law in different ways. University of Kentucky College of Law Professor Joshua Douglas notes, "Conspicuously missing from the Court's decision was a discussion of when an election law implicates the fundamental right to vote."[14] This fractured ruling by the Court makes it hard to define the level of protections that individual voters are entitled to use against restrictive state laws. The result is legal deference to state voting laws.

So are the states handling this deference well?

Again, the simple answer is no.

Although Americans vote for one president, one U.S. representative, and usually one U.S. senator, every county in the United States could have a unique way in which federal elections are administered. In this sense, it is not surprising that we see so many voting issues throughout the country. The result is a "patchwork voting system" run independently by 50 states and more than 3,000 counties and 13,000 voting districts, "all separate and all unequal."[15]

In most states, ballot design, voter education, poll-worker training, voter-registration maintenance, and polling locations, hours, and standards are all left to individual counties. As a result, a voter in Miami-Dade County could have a wildly different voting experience than one in Okeechobee County, despite the fact that both counties are in Florida. County-by-county and state-by-state differences can be even more dramatic due to various degrees of federal and state support and population density.[16]

State policymakers and legislative bodies have used this relative freedom to disenfranchise political opponents and make it harder for specific populations to vote. After Reconstruction, states passed laws implementing poll taxes, literacy requirements, and grandfather clauses aimed at restricting African American voting.[17] Unfortunately, manipulating voting laws to serve one's political or ideological objectives is not limited to the past. Who can forget the astonishing claim by Pennsylvania House Majority Leader Mike Turzai that Pennsylvania's restrictive law that requires voters to show government-issued identification before they can vote "is gonna [sic] allow Governor Romney to win the state of Pennsylvania"?[18]

Beyond political rhetoric, the sheer number of cases that were reviewed by the Department of Justice, or DOJ, based on Section 5 of the Voting Rights Act (which today's *Shelby County* decision left unchanged, but rendered insignificant), paints a clear picture of voter discrimination that continues to exist. When Congress reauthorized the Voting Rights Act in 2006, it conducted weeks of hearings and created a massive record that included evidence of contemporary racial discrimination, including:

> *… reinstituting a Jim Crow-era system designed to make it more difficult for black people to register; relocating polling places so that blacks and Latinos would have to travel to remote or hostile venues in order to vote; cancelling elections or abolishing elected bodies at the moment that black or Latino candidates were on the verge of gaining a majority of seats on a governing body; using quotas in conducting annexations of unincorporated areas to prevent blacks from becoming a majority of the voting population; requiring Latino voters to attend citizenship hearings when their right to vote was challenged because they had a Spanish surname; and threatening students at a historically black college with prosecution if they registered to vote.*[19]

Further, just six years ago, the Supreme Court ruled that Texas—a state covered by Section 5 of the Voting Rights Act—had "rigged its redistricting process to deny Latino citizens in the Laredo area the ability to participate effectively in electing members of Congress," barring the state from bailing out of the Voting Rights Act until at least 2016.[20]

Although the Court argues in *Shelby County* that "things have changed dramatically" from the days of overt discrimination,[21] using the Section 5 review process, the DOJ has blocked 86 state and local submissions of election-law changes over the past 15 years.[22] The DOJ's watchdog power extends beyond formal decision making because states often alter their behavior once they have realized that the DOJ would be reviewing their actions. Between 1999 and 2005, 153 state and local voting-law changes were withdrawn and 109 were altered after the DOJ requested more information.[23] This past election cycle alone, the Department of Justice refused to preclear "voter ID laws in Texas and South Carolina, early voting cutbacks in Florida, and redistricting maps in Texas" under Section 5 because it deemed the laws to be discriminatory.[24]

Today state governments continue to attempt to pass laws that restrict voting behavior. The Brennan Center for Justice, a public policy and law institute, reports that in 2013 alone, at least 80 restrictive voting bills—including laws that require photo ID, demand proof of citizenship, make it more difficult for students to register, and reduce early voting opportunities—have been introduced in 31 states.[25] Lawmakers in 9 of the 15 states fully or partially covered by Section 5 of the Voting Rights Act have introduced restrictive voting laws.[26]

While some of these measures may be constitutional, others likely are not. Many of the laws are, however, "likely to have a disproportionate impact upon minority citizens, the elderly, students, and indigent citizens."[27]

The effects of these restrictive laws are felt throughout the electorate. A study of the 2008 presidential election led by the Massachusetts Institute of Technology found that 4 million to 5 million voters did not cast a single ballot because they encountered procedural problems related to voter registration and absentee balloting. An additional 2 million to 4 million registered voters were "discouraged" from voting due to administrative hassles, such as long lines and voter-identification requirements.[28]

With the decision in *Shelby County*, the Court not only gutted a law that has successfully combatted voting discrimination, but it also convinced itself of a false reality. The Court's ruling implicates that, as a nation, we have evolved beyond the days that voting-related laws were created and manipulated to advance political agendas and disenfranchise certain populations. One need not look further than the data outlined above to know that our "right" to vote is far from secure.

Because Americans lack a constitutional right to vote, and now lack significant Voting Rights Act protections, it is important to consider other options to ensure that we have a right to vote and participate in our democracy.

Can anything be done to enhance federal voting rights?

This time, the answer is yes.

A constitutionally guaranteed right to vote "would provide citizens and civil rights groups with standing to make demands on the system for consistent national rules, adequate funding of election operations, and an end to the gerrymandering of legislative and congressional districts."[29] Reps. Keith Ellison (D-MN) and Mark Pocan (D-WI) recently announced legislation to amend the U.S. Constitution to guarantee that every U.S. citizen of legal voting age has the fundamental right to vote, and that Congress has the power to enforce and implement the amendment by appropriate legislation.[30] Several organizations, including Color of Change,[31] have endorsed the effort to pass a constitutional amendment that would guarantee this right to vote.

Because Americans lack this right, and the courts have failed to clarify the issue, a constitutional declaration of voting rights could force the courts to impose the highest levels of judicial scrutiny to voting laws. Proponents of the voting rights amendment hope greater judicial scrutiny would result in heightened protections and discourage ideologically motivated attempts to restrict voting.

In fact, recent state cases demonstrate that constitutional right to vote can result in greater protections than currently exist at the federal level. Several state constitutions confer a right to vote to state citizens.[32] Courts have ruled that this constitutionally codified right provides voters in these states greater protections than federal law, invalidating politically drawn redistricting plans and restrictive voting procedures such as voter ID laws.[33] Similar to how state citizens evoked their state-based constitutional right to vote, citizens could invoke the federal amendment to argue that their right to vote was constructively denied because of things such as voter intimidation, long lines, and disproportionate lack of voting-administration resources.

Ratifying U.S. constitutional amendments is an arduous process that requires a constitutional convention process, or agreement from two-thirds of both the House and the Senate and ratification by three-quarters of the states.[34] Even if a constitutional amendment were to pass, it would not be an instant fix to our nation's voting problems. Litigants would have to use the judicial system to allege constitutional voting rights' violations, and the judiciary would have to grapple with how far the amendment goes to protect voters.

But despite these hurdles, a campaign for a right-to-vote amendment could provide needed attention and focus on the voting rights' issues that face our nation. Our right to vote is not guaranteed; once Americans learn this, maybe they will take action to change it.

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Endnotes

1 Shelby County v. Holder, No. 12–96, slip op. (U.S. June 25, 2013), 570 U. S. ____(2013), available at http://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf.

2 Jeffrey Toobin, "Casting Votes," The New Yorker, January 14, 2013, available at http://www.newyorker.com/talk/comment/2013/01/14/130114taco_talk_toobin#ixzz2LHQ4a2ma.

3 Shelby County, No. 12-96, slip op at 2.

4 Brian Pinaire, Milton Heumann, and Laura Bilotta, "Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons," Fordham Urban Law Journal 30 (2) (2002). This shows that 93.2 percent of survey respondents believe that the right to vote is either the most important or one of the most important rights in a democracy.

5 Minor v. Happersett, 88 U.S. 162 (1875). This holds that the petitioner, as a woman, did not have a constitutionally conferred right to vote.

6 Bush v. Gore, 531 U.S. 98 (2000).

7 Lani Guinier, "The Battle, Not the War, on Voting Rights," The New York Times, Room for Debate blog, June 22, 2009, available at http://roomfordebate.blogs.nytimes.com/2009/06/22/the-battle-not-the-war-on-voting-rights.

8 Colegrove v. Green, 328 U.S. 549 (1946).

9 Reynolds v. Simms (1964).

10 Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937).

11 Arizona v. The Inter Tribal Council of Arizona, 570 U. S. ____ (2013).

12 Richard L. Hasen, "Bush v. Gore and the Future of Equal Protection Law in Elections," Florida State University Law Review 29 (377) (2001), available at http://www.law.fsu.edu/journals/lawreview/downloads/292/Hasen.pdf.

13 Crawford v. Marion County Election Board, 553 U.S. 181, 202-203 (2008).

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15 "Four Reasons to Support a Right to Vote Amendment," available at http://www.fairvote.org/four-reasons-to-support-a-right-to-vote-amendment#.UboMmpzJb-I (last accessed June 2013).

16 FairVote, "Right to Vote Frequently Asked Questions," available at http://www.fairvote.org/right-to-vote-f-a-q#.UcR5iHyglRc (last accessed June 2013).

17 Jamelle Bouie, "Making Voting Constitutional," The American Prospect, January 30, 2013, available at http://prospect.org/article/making-voting-constitutional.

18 "Turzai: Voter ID Will Allow Romney to Win Pa.," available at http://www.youtube.com/watch?v=EuOT1bRYdK8 (last accessed June 2013).

19 Lani Guinier, "No Affirmative Right to Vote," The New York Times, Room for Debate blog, June 26, 2009, available at http://roomfordebate.blogs.nytimes.com/2009/06/22/the-battle-not-the-war-on-voting-rights/.

20 Pamela S. Karlan, "Validating Congress's Approach," The New York Times, Room for Debate blog, June 22, 2009, available at http://roomfordebate.blogs.nytimes.com/2009/06/22/the-battle-not-the-war-on-voting-rights/.

21 Shelby County, No. 12-96, slip op at 13.

22 Myrna Perez and Vishal Agraharkar, "If Section 5 Falls: New Voting Implications" (New York: Brennan Center for Justice, 2013), available at http://www.brennancenter.org/sites/default/files/publications/Section_5_New_Voting_Implications.pdf.

23 Ibid.

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25 Andrew Cohen, "The Voting Rights Act Becomes More Vital by the Day," Brennan Center for Justice, April 9, 2013, available at http://www.brennancenter.org/analysis/voting-rights-act-becomes-more-vital-day.

26 Ibid.

27 Ibid.

28 Ian Urbina, "Hurdles to Voting Persisted in 2008," The New York Times, March 10, 2009, available at http://www.nytimes.com/2009/03/11/us/politics/11vote.html?_r=0.

29 John Nichols, "Time for a 'Right to Vote' Constitutional Amendment," The Nation, March 5, 2013, available at http://www.thenation.com/article/173200/time-right-vote-constitutional-amendment#ixzz2W7IVqIlp.

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31 "Free to Vote," available at http://www.freetovote.org (last accessed June 2013).

32 See, for example, Wis. Const., Pa. Const., Ky. Const.

33 Josh Douglas, "State Constitutions: A New Battleground in Voting Rights," JURIST, April 3, 2012, available at http://jurist.org/forum/2012/04/joshua-douglas-voter-id.php; Milwaukee Branch of the NAACP, 2012 WL 739553; League of Women Voters of Wisc. Education Network, Inc. v. Walker, Case No. 11-cv-4669 (Wisc. Cir. Ct. Mar. 12, 2012); Fischer v. Grimes, No. 2012-SC-000091-T & No. 2012-SC-000092-T (Ky. Sup. Ct.)

34 U.S. Const. art. V.