



NEW STATE VOTING LAWS: BARRIERS TO THE BALLOT?

Hearing Before the Senate Judiciary Subcommittee
on the Constitution, Civil Rights and Human Rights

September 8, 2011

Project Vote is pleased to submit this testimony to the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights. We are grateful to Assistant Majority Leader Durbin for holding this hearing on new barriers to voting imposed by state laws.

Project Vote is a national nonpartisan, nonprofit organization that promotes voting in historically underrepresented communities. Project Vote takes a leadership role in nationwide voting rights and election administration issues, working through research, litigation, and advocacy to ensure that our constituencies can register, vote, and cast ballots that count.

In 2011, the same year that a monument to Dr. Martin Luther King, Jr., was erected on the National Mall, state legislatures were busy *contracting* civil rights in this country, and nowhere is the rollback more evident than in the area of voting rights. The rhetoric accompanying this widespread effort has featured appeals to voters' fears that their democracy is being undermined by an epidemic of voter fraud, that their own votes are being neutralized by legions of unauthorized voters—and, yes, even non-citizens—assaulting polling places across America and stealing elections. It has been very effective rhetoric indeed. But nothing could be further from the truth.

Voter ID

Perhaps the most obvious and well-publicized attack on voting rights has occurred in the form of restrictive photographic identification laws, which have passed in the states this year with unprecedented frequency. A number of states that have repeatedly considered and rejected voter ID laws in the past have now enacted them. In a few cases, governors have vetoed them. Alabama, Kansas, Rhode Island, Tennessee, and Wisconsin bills were passed and signed. Texas and South Carolina are in the preclearance process.ⁱ Minnesota, North Carolina, and New Hampshire's bills were vetoed, as was Missouri's, but the latter veto was overridden by the legislature. There will be a ballot measure before Missouri voters in 2012 to amend the state's Constitution to allow the legislature to enact a photo ID law. At this writing, at least two more state legislatures (NJ and PA) are still considering strict voter ID laws as most legislative sessions have recessed for the year.

A photographic identification requirement was upheld by the United States Supreme Court in a facial challenge to an Indiana law, *Crawford v. Marion County Election Board*,ⁱⁱ which denied

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the relief sought based upon the Fourteenth Amendment to the United States Constitution. The court found that plaintiffs could not prove (prospectively) that a significant class of people would be injured by the law, and found that that Indiana provided numerous avenues for obtaining the requisite ID at no cost.ⁱⁱⁱ

However, the Court explicitly left open the possibility of an “as-applied” challenge to the Indiana law^{iv} and litigators are likely to mount such challenges to similar laws that have been enacted more recently in other states. In Wisconsin, for example, legislators opposing the photo ID law, who were ultimately unsuccessful, compiled voluminous data on the limited availability of the required IDs, particularly in rural areas of the state, and compared it to Indiana during debate on the bill. It is expected that these statistics will be featured prominently in any lawsuit challenging the Wisconsin law.^v

“The Indiana case” (*Crawford*) was a constant invocation uttered by proponents of photo ID in state legislatures in 2010-2011. The fact that the case was a pre-implementation challenge and that the court found plaintiffs’ proof of injury wanting—none of the particulars seemed to faze the legislators in other states, who assumed that the Supreme Court had “blessed” photo ID for all time and under all circumstances. In addition to the oft-cited need for voter ID to combat fraud,^{vi} the policy argument most frequently advanced is that “we need IDs to rent a movie or take an airplane—why not require it for voter registration?” And the corollary argument: “Everyone has a photo ID these days; what’s the problem?” We examine each of these propositions in turn. First, neither renting a movie nor taking a flight is a fundamental right. The prerequisites to engaging in such economic transactions have no constitutional dimension, whereas the ability to exercise a fundamental right must meet constitutional standards.

Second, certain populations are less likely to have the required ID. These include the young, the elderly, and racial minorities. For example,

- 11% of citizens do not have current, government-issued photo ID
- 15% of citizens earning less than \$35,000 do not have current photo ID
- 18% of citizens over 65 do not have current photo ID
- 25% of African American citizens do not have current photo ID^{vii}

Finally, most states that have considered restrictive ID laws have learned the lesson that these laws are much more likely to pass and to withstand a legal challenge if free ID is provided by the state. But “free” is a relative concept. In most cases, a birth certificate is required in order to obtain the ID. (And, amazingly, 17 states require a photo ID in order to obtain a copy of a birth certificate!) Those who do not have their birth certificates generally must pay a fee to obtain one. In some cases, especially among the elderly living in rural areas, a birth certificate may not be available at all.

Costs to obtain ID cards can be substantial.

- A current US passport costs between \$85 and \$145
- Naturalization papers cost \$200
- In many states, a copy of a birth certificate costs \$20 or more.^{viii}

A recent article in the Wisconsin State Journal also reported on long waits to obtain the free ID promised by the recent legislation, and some clerks erroneously attempted to charge for it. An even more shocking article in the Capital State Journal of September 7, 2011, reveals a directive from the state's Department of Transportation to the effect that free ID should not be given unless it is explicitly asked for!^{ix}

Another feature of the legislative debates in this era of tight state budgets has been the high cost of implementing photo ID procedures, particularly where "free" ID is provided. States have estimated costs ranging from six million dollars in the first year (Missouri) to "no fiscal impact" (Nebraska). What is notable is how inconsistent the states are in assessing fiscal impact, in some instances leaving out public education and poll worker training costs entirely.^x

It is certain the latest crop of ID bills will be challenged under the National Voter Registration Act of 1993 (NVRA) and the First Amendment to the United States Constitution. (In addition, the Help America Vote Act of 2002, in Sec. 303(b)(2), requires voters who registered by mail to present an ID upon voting for the first time, but provides a wide array of acceptable ID options. It would be anomalous indeed if a first-time voter in strict photo ID states has more latitude than someone who has voted at the same polling place for decades.)

Proof Of Citizenship

In contrast to the spate of activity on voter ID, proof of citizenship laws have been enacted less frequently, and are experiencing more setbacks in the courts. Like photo IDs, citizenship documents are more difficult to obtain by certain demographic groups:

- 7% of US citizens (13 million people) do not have ready access to citizenship documents
- 12% of citizens earning less than \$25,000 a year do not have ready access to citizenship documents
- 34% of women do not have ready access to citizenship documents with their current legal name.^{xi}

In 2011, proof of citizenship bills were filed in Alabama, Kansas, and Tennessee, all of which passed and were signed by their respective Governors. Colorado's bill advanced but was ultimately "postponed indefinitely" in April.^{xii} Although bills were introduced in several other states, none progressed in the legislative process. This relatively low level of activity might be because legislators are waiting for a major test of proof of citizenship laws to make its way through the federal courts.

The test is *Gonzalez v. Arizona*,^{xiii} where plaintiffs raised both statutory and constitutional challenges to Arizona's Proposition 200, a successful ballot initiative that requires proof of citizenship for voter registration (and voting). The NVRA claim was based on the statute's prohibition on notarization or formal authentication requirements.^{xiv} Nevertheless, the trial court rejected the claim, reasoning that the statute does not prohibit documentation requirements, and indeed permits states to "require such identifying information...as is necessary to enable...election official[s] to assess the eligibility of the applicant."^{xv} This result was particularly troubling given the legislative history of the NVRA,^{xvi} which makes it clear that Congress considered but rejected the inclusion of proof of citizenship requirements in the statute. The case was appealed to the Ninth Circuit Court of Appeals, where one of the issues was whether the district court's ruling contravenes Sec. 6(a)(1) of the NVRA, that states must "accept and use" the federal mail form.

The Ninth Circuit resoundingly rejected the district court's decision, ruling that Proposition 200's citizenship provision directly conflicts with the NVRA by requiring additional information to be provided with the federal form.^{xvii} Relying on the Elections Clause of the Constitution, the court found that the NVRA pre-empted the Arizona state requirement that prospective voters provide documentary proof of citizenship. The Elections Clause, said the court, requires states to "affirmatively implement Congress's superseding regulations."^{xviii} The court concluded "the NVRA's central purpose is to increase voter registration by streamlining voter registration procedures." While Arizona may require documentary proof of citizenship with its state voter registration form, anyone choosing to register with the federal form cannot be required to provide proof of citizenship. This case was certified for rehearing en banc, and was argued on June 21, 2011.

Same Day Registration and Early Voting

Same day registration and early voting largely escaped the "epidemic" of legislative rollbacks this year, but two negative developments are worth noting.

"Same day registration" (SDR), often called Election Day registration, has been adopted by a number of states in the past. It is currently the law in Idaho, Iowa, Minnesota, Montana, New Hampshire, North Carolina, Wisconsin, Wyoming, and the District of Columbia.^{xix} However, Maine, which had a successful SDR program for decades, repealed it in the 2011 legislative session.^{xx} Interestingly, SDR states consistently lead the nation in voter turnout^{xxi}—adding credence to the proposition that voter registration itself (in advance) is actually a major barrier to voting. While several states passed SDR in recent years, not one did in 2011. Same day registration has been a boon to civic participation and has had none of the security or fraud problems feared by its detractors. It is truly unfortunate that it should be a casualty of the current wave of disenfranchisement legislation.

Early voting has been a growing trend across the country, but nowhere with more success than in Florida, where 2.1 million people voted early in 2008. Racial minorities are particularly likely to take advantage of an early voting period. In 2008, 22% of the early voters were African American, though only 13% of the electorate was. More surprisingly, nearly 54% of the African Americans voting in that election cast their ballots early! Unfortunately, this year's omnibus election "reform" bill in Florida has significantly restructured the state's early voting period, including eliminating early voting on the Sunday before Election Day Tuesday. This could have a significant negative impact on African American voters, according to Justin Levitt, Associate Professor of Law at Loyola in Los Angeles, who found that that Sunday was the choice for many minority voters in 2008 and 2010 in several of the more urban Florida counties that offered early voting that day. State Rep. Perry Thurston added that a number of African American ministers actively urged their congregants to go and vote that day.^{xxii}

Burdens on Voter Registration Drives

As the pre-eminent organization conducting and giving technical assistance to voter registration drives, Project Vote is especially concerned about state laws impeding our ability to perform this indispensable service.

Community groups jumped into the breach to register voters in part because of the lack of federal enforcement of Section 7 ("agency registration") of the NVRA over many years. In addition to Project Vote, these groups include religious institutions, the League of Women Voters, advocates on behalf of racial minorities, and many others. Some of them routinely organize voter registration drives—often staffed by volunteers—across the country. Others are less frequent and more local. However, the success of these drives has had an unintended consequence. Some state legislators, perhaps alarmed by the numbers, party affiliation, and voting behavior of the new registrants, have proposed laws to curtail third party drives' activities and effectiveness. Some of the legislation has passed; some has been the subject of litigation, with varying results.

In one of the most direct threats to the efficacy of organized voter registration drives, some states have required registration workers to be "deputized" or otherwise made official agents of the state. Texas requires any person who distributes and collects a voter registration application to be a deputy registrar, and that person may only collect applications in the county in which she is appointed. Legislation in 2011 added a new training requirement to the Texas deputy registrar statute.^{xxiii}

In general, formal state requirements, such as deputation, training, registration of the program with the state, and strict time limits on the submission of applications have become more ubiquitous in recent years as devices to control registration drives by community organizations.

Earlier this year, Florida passed an omnibus election "reform" package that includes significant burdens on third-party drives: a 48-hour deadline for submission of applications, onerous paperwork requirements, and a provision that drives must "account for" every form given to

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them. The law also imposes fines and penalties for violations--as well as the possibility of an injunction to stop the drive altogether.^{xxiv} Currently, key provisions of the law are in the Section 5 preclearance process in the United States District Court for the District of Columbia.^{xxv}

Several states have prohibited compensation that is based on the number of applications collected, reasoning that such a compensation plan encourages the submission of false or duplicative forms. However, the effect of such laws is to prevent organizations from establishing any reasonable performance standards for employees; taken to their logical conclusion, they could prohibit termination of an underperforming employee, even one who fails to assist a single voter with registration. A law passed in Texas in 2011^{xxvi} makes it a misdemeanor to engage in "performance-based compensation." (This law is subject to Section 5 preclearance, but at this writing has not been submitted to the Department of Justice or the U. S. District Court for the District of Columbia.)

While some of these rules may seem reasonable on the surface, they significantly impair the ability of community groups to help voters to register, a constitutionally protected activity. Besides, there are usually less onerous alternatives that accomplish the legitimate purpose of promoting the integrity of the registration process.^{xxvii}

Procedural impediments to registration may seem mundane but nonetheless have a significant impact on the process. In addition to state statutes that operate to restrict registration drives, numerous administrative rules or informal practices and procedures tend to make registration more difficult. Many of these, whether by design or not, hamper the efforts of community-based voter registration drives that were, in part, spawned by the enactment of the NVRA and the creation of the simplified registration form that could be submitted by mail.

Despite the fact that Section 6 of the NVRA explicitly imposes a duty upon the states to make forms "available for organized registration programs," the day-to-day operation of election offices often undermines this obligation.^{xxviii} These offices frequently limit the number of state forms they distribute at one time, necessitating many return trips to the office by registration drive workers, who are often volunteers paying for their own transportation. In Georgia in 2004, for example, the Secretary of State tried to cap the total number of forms given to one particular registration group at 10,000, even though the group expected to register many more, and in fact ultimately registered over 22,000 voters.^{xxix}

Federal forms are rarely available at election offices at all—instead, they must be downloaded and printed from a website--and if a drive wants to use the federal form (for example, because it is operating in a metropolitan area on both sides of a state line), the group must bear the expense of making hundreds or thousands of copies. (In Ohio in 2004, this expense was compounded by a directive of the Secretary of State dictating a particular weight of paper that was required! The directive was only rescinded after a loud outcry heard across the country.^{xxx})

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In New Mexico, state law requires that election officials provide a traceable number on all registration forms so that there is a record of each application processed by a registration drive.^{xxxii} A similar statute is in effect in Nevada.^{xxxiii} While such a requirement seems benign enough, a missing numbered form gives election officials a pretext to harass community registration drives if they fail to turn in all the forms they were given, whatever the reason. One can easily envision a registration drive operating at a county fair, for example, where a mother asks for a form to take home to her 18-year old daughter, who then never sends it back. The registration drive should not be held responsible for this, and yet under such a law, it could.

It should also be emphasized that, in enacting the NVRA, Congress clearly envisioned that voter registration drives would be an indispensable strategy in reaching out to previously underrepresented groups in the electorate--but apparently did not envision the many ways in which the states, with an assist by the courts, would hamper the efforts of those drives to accomplish that goal. Notwithstanding the clear language of the NVRA that the states must "accept and use"^{xxxiv} the mail form, as a practical matter the myriad of restrictions on the groups disseminating the form—as well as the courts' permissive attitude toward the form itself—amount to very real frustration of the NVRA's purpose.

Given the spotty state compliance with the NVRA (particularly its requirement that social service agencies offer registration) and the numerous procedural barriers to registration, community voter registration drives remain a necessity in reaching hard-to-reach populations. Only with a combination of significant improvement in NVRA compliance and enforcement and the easing of registration restrictions on the state level will their importance recede.

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As long as we have voter registration in this country—and 49 states do--there will be barriers to getting on the rolls. But it is the *expansion* of the franchise that should guide legislators and election officials in making policy for registration and voting in the United States of America. And it is the enforcement of the federal laws protecting voting rights that should guide the United States Department of Justice. With a re-energized NVRA and a re-dedicated law enforcement effort, we can move toward a society where it is no more difficult for poor and minority Americans to register than it is for their richer White neighbors.

It is fitting and timely that this Subcommittee, and the Congress as a whole, examines the current and alarming trend of state-based efforts to reverse the dramatic expansion of the franchise we have enjoyed since the “voting rights revolution” of the Twentieth Century. We sincerely hope that this is a first step toward re-asserting Congress’s historic role as a guardian of those rights. Project Vote stands ready to offer whatever assistance it can as you consider future legislation, oversight, or enforcement efforts.

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ⁱ The Voting Rights Act of 1965, 42 U.S.C. §§ 1973 et seq., requires certain jurisdictions (listed at http://www.usdoj.gov/crt/voting/sec_5/covered.htm) to seek “preclearance” of any voting changes before they may go into effect, either by submitting the changes to the Department of Justice or suing the United States in the U.S. District Court for the District of Columbia.

ⁱⁱ *Crawford v. Marion County Election Board*, 555 U.S. 181 (2008).

ⁱⁱⁱ However, the notion of “no cost” identification is really illusory, as discussed below.

^{iv} *Crawford*, 553 U.S. at 200.

^v In fact, the Wisconsin League of Women Voters has announced its intention to file a legal challenge. See: http://campusprogress.org/articles/wisconsin_voter_id_law_to_face_legal_challenge/

^{vi} See, Justin Levitt, Brennan Center for Justice, *The Truth About Voter Fraud*, <http://www.brennancenter.org/page-/The%20Truth%20About%20Voter%20Fraud.pdf> (2007) (Demonstrating that voter impersonation fraud is virtually nonexistent). See also generally, Lorraine Minnite, *The Myth of Voter Fraud*, (Cornell Univ. Press) (2010).

^{vii} Brennan Center for Justice, *Citizens Without Proof*, www.brennancenter.org/page/-d/download_file_39242.pdf (2006).

^{viii} Advancement Project, *What's Wrong With This Picture?*

<http://www.advancementproject.org/sites/default/files/publications/Picture%20ID6%20low.pdf> (2011).

^{ix} Doug Erickson, *Need a Free Photo ID to Vote? Be Prepared to Wait*, Wisconsin State Journal, http://host.madison.com/wsj/news/local/govt-and-politics/article_e1412868-a434-11e0-bc0c-001cc4c002e0.html (July 2, 2011). Jessica Vanegeren and Shawn Doherty, *Top DOT official tells staff not to mention free voter ID cards to the public—unless they ask*, http://host.madison.com/ct/news/local/govt-and-politics/capitol-report/article_335f59fa-d8fe-11e0-8a23-001cc4c03286.html

^x See generally, Pew Center on the States, *Electionline Weekly*, March 17, 2011.

^{xi} *Citizens Without Proof*, *Supra* n. xvii.

^{xii} 2011 Ala. Laws 535 (Signed in June 2011 as part of omnibus anti-immigrant package); 2011 Kan. Sess. Laws 56 (Signed in April 2011); 2011 Tenn. Pub. Acts 235 (Signed in May 2011, requires election officials to check citizen database before enrolling voter rather than requiring applicant to present documentary proof of citizenship); 2011 Colo. HB 1252.

^{xiii} *Gonzalez v. Arizona*, 435 F. Supp. 2d 997 (D. Ariz. 2006).

^{xiv} 42 U.S.C. § 1973gg-7(b)(3).

^{xv} 42 U.S.C. § 1973gg-7(b)(1). *Gonzalez v. Arizona*, 435 F. Supp. 2d 997, 998 (2006).

^{xvi} Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 103-66 §13, at H2083 (1993)

^{xvii} *Gonzalez v. Arizona*, 624 F.3d 1162, 1180 (9th Cir. 2010).

^{xviii} *Id.*, at 1173.

^{xix} Dēmos, *Voters Win with Same Day Registration: 2010 Midterm Elections Factsheet*,

http://www.Demos.org/pubs/Voters_Win.pdf (May 2011).

^{xx} 2011 ME H.P. 1015 (NS) (June 21, 2011).

^{xxi} In the 2008 presidential election, for example, average turnout in SDR states was 69%, as compared to 62% in non-SDR states. Steven Carbó & Regina Eaton, Dēmos, *Voters Win with Same Day Registration*, http://www.Demos.org/pubs/voterswin_feb032010.pdf (updated January 2010).

^{xxii} See, e.g., Lloyd Dunkelberger, *New election law unfairly impacts blacks, critics say*, Gainesville Sun, June 13, 2011.

^{xxiii} Tex. Elec. Code Ann. § 13.031 (2009). The training requirement is codified at §13.047.

^{xxiv} 2011 Fla. Laws 40 (West).

^{xxv} *State of Florida v. United States of America et al.*, Case No. 1:11-cv-01428-CKK (Three Judge Court)

^{xxvi} 2011 Tex. Sess. Law Serv. 1002 (West).

^{xxvii} For example, requiring one representative of the organization conducting the voter registration drive to file papers with the state in case election authorities need to contact the drive is a reasonable alternative to forcing every person employed by or volunteering with the drive to register. Allowing drive workers to receive training online is far less onerous than requiring an in-person training course that is offered infrequently at limited locations.

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^{xxviii} Although prevention of fraud is the stated rationale for these, and many other, restrictions on voter registration drives, voter registration fraud is exceedingly rare. For example, *amici* in the *Crawford* voter ID case (*See text accompanying notes ii and iii.*) cited a mere 10 cases of *alleged* voter impersonation fraud (and not one case of proven fraud) during the period 2000-2007, a period in which over 400 million general election ballots were cast! *See* http://brennan.3cdn.net/45b89e6d14859b0f8e_i2m6bhcv9.pdf

^{xxix} The issue that year was further complicated by a HAVA-imposed redesign of forms. In several states, old forms were in wide circulation, and unsuspecting applicants were eventually rejected despite properly filling out the only form they had. Welfare offices and other agencies were especially likely to give out old forms until they ran out. Even as recently as 2008, old forms surfaced in Indiana, causing the registrations of many elderly residents of a nursing home to be rejected until Project Vote filed a lawsuit and obtained an order requiring that the provisional ballots of such applicants be counted. (Despite that order, however, the named plaintiff was denied a provisional ballot at her polling place and was unable to vote. It is not known how many others had the same experience.)

^{xxx} See Mary B. Beazley and Edward B. Foley, Commentary, *Stealing Votes Before Election Day*, Sept. 29, 2004, http://moritzlaw.osu.edu/electionlaw/ebook/partI/eligibility_rules08.html.

^{xxxi} N.M. Stat. Ann. §§ 1.10.25.8(C), 1.10.25.10(B) (West 2011).

^{xxxii} Nev. Rev. Stat. Ann. 293.425 (West 2011).

^{xxxiii} 42 U.S.C. § 1973gg-4 (2011).