

Election Day Registration: Giving All Americans a Fair Chance to Vote

Brooke Lierman*

In 2005, Americans watched as Iraqis participated in their first “free and fair elections.”¹ Several months later in his State of the Union address, President Bush praised the Iraqi citizens who voted.² But in doing so, he failed to draw attention to an irony in America’s exportation of democracy: not only did Iraq have a higher turnout in its election than the United States did in 2004, but Iraq’s turnout was made possible in part by a U.S.-sponsored system of automatic voter registration,³ precisely the type of registration system that most states in the United States have refused to adopt. With the aid of U.S. supervisors and funding, Iraq has joined the host of other democracies that use automatic voter registration, while the United States remains one of the few democracies in the world that places the entire burden of voter registration on each individual citizen. Is it time for the United States to adopt some form of automatic registration to make more of its eligible voters part of the democratic process?

The United States has fifty different sets of election laws because under Article I, Section 4 of the Constitution, elections fall within the purview of the states.⁴ As a result, the laws governing a citizen’s ability to vote depend to a dramatic extent on where he or she lives. In no place is this inconsistency more apparent than in voter registration laws. Some states allow citizens to register on Election Day while other states require them to register anywhere from a week to a month beforehand.

* J.D. Candidate, University of Texas School of Law, 2008.

¹ FREEDOM HOUSE, FREEDOM IN THE WORLD—IRAQ (2006), <http://www.freedomhouse.org/template.cfm?page=22&year=2006&country=6983>.

² The White House Office of the Press Secretary, President Bush Delivers State of the Union Address (Jan. 31, 2006), <http://www.whitehouse.gov/news/releases/2006/01/20060131-10.html> (“And we’re writing a new chapter in the story of self-government—with women lining up to vote in Afghanistan, and millions of Iraqis marking their liberty with purple ink . . .”). Indeed, Bush had no shortage of praise for Iraq’s first election. See *Transcript of Bush Address on Iraq Election*, (Jan. 30, 2005), <http://www.cnn.com/2005/ALLPOLITICS/01/30/bush.transcript/index.html>.

³ See New Am. Found., Automatic Voter Registration 1 (Nov. 10, 2006) (white paper), available at <http://www.newamerica.net/files/Automatic%20Voter%20Registration.pdf>.

⁴ See U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

At a time when there is concern about declining voter turnout⁵ and Americans work longer hours than citizens of any other nation,⁶ the United States should be looking for ways to reduce the burdens associated with voting to encourage more citizens to actively participate in our democracy. Currently, almost twenty-eight percent of eligible citizens are not registered to vote.⁷ Even worse, the populations that are disenfranchised by restrictive registration laws are, by and large, the same groups that have historically had to fight for their voting rights: young people, minorities, and members of the poor and working class.

One important method for reducing the burdens associated with voting would be national Election Day Voter Registration (“EDR”). Though EDR is not the only solution to America’s participatory woes, it strikes an effective balance between political feasibility and increased political enfranchisement. Part I of this Essay examines the nature of voter registration and its traditional justifications. Part II brings to light the discriminatory origins of registration at the turn of the twentieth century. Part III addresses the arguments made by EDR’s opponents. Finally, with this backdrop, Part IV lays out the case for EDR.

I. VOTER REGISTRATION: A BRIEF INTRODUCTION

Voter registration exists primarily to ensure that each citizen is both eligible to vote and only votes once per election. A list of eligible voters enables states to both verify voter eligibility and control the legitimacy of the balloting process.⁸ In practice, registration in most states involves local governments compiling a list of citizens who are eligible to vote in each precinct (or ward) and distributing that list to polling places so that, on Election Day, poll workers can verify that each potential voter is eligible to vote at that polling place.⁹ Voting in most parts of the United States is thus a two-step process: first, eligible voters must register; and second, they must be present at the correct polling place on Election Day. Potential voters must take affirmative steps both to discover how to register and then to actually

⁵ There is disagreement over whether or not voting has actually declined and the proper way to measure voter turnout. See United States Election Project, http://elections.gmu.edu/voter_turnout.htm (last visited Dec. 1, 2007).

⁶ See Int’l Labor Org., *Americans Work Longest Hours Among Industrialized Countries* (Sept. 6, 1999), http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang—en/WCMS_071326/index.htm.

⁷ See KELLY HOLDER, U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, PUB. NO. P20-556, *VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004 2* (2006), available at <http://www.census.gov/prod/2006pubs/p20-556.pdf>. The Census Bureau estimated that there were 142,070 million American citizens eighteen and older who were registered to vote in 2004, out of a total of 197,005 million American citizens eighteen years of age or older. *Id.*

⁸ Keith Archer, *Overview of Voter Registration*, in ACE ELECTORAL NETWORK, ACE ENCYCLOPAEDIA (2006), <http://aceproject.org/ace-en/topics/vr/vr10>.

⁹ See *id.*

register. They must often do so well before campaigns have even started to “heat up.”¹⁰

Unsurprisingly, many studies have linked the registration requirements to the depression of voter turnout. As one group of investigators noted:

The longer before an election people must act to ensure their eligibility to vote, the more likely they will fail to do so Early closing dates, by requiring people to register long before campaigns have reached their climax and mobilization efforts have entered high gear, depress voter participation in American elections.¹¹

Many other studies have confirmed that if states had more liberal registration laws, turnout among voters would undoubtedly increase.¹²

In fact, the correlation between voter registration and turnout can hardly be overstated. Though only 64% of eligible Americans voted in the 2004 election, 89% of registered voters cast a ballot.¹³ The more Americans succeed in registering, the more likely it becomes that eligible voters will participate in the democratic process by voting.

Beyond depressing voter turnout overall, registration has a particularly harsh effect on traditionally disenfranchised voters. As one study notes, “[S]ixty-day closing dates reduce the turnout of the poorest Americans by 6 percent [but] depress the turnout of the wealthiest Americans by only 3 percent. They diminish the turnout of the grade-school educated by 6 percent but lessen the turnout of the college-educated by only 4 percent.”¹⁴ It is no surprise that those with the least resources are most hurt by the two-step voting process.

II. THE UNDEMOCRATIC ORIGINS OF VOTER REGISTRATION

Most Americans today take registration systems for granted. However, most states have required registration for fewer than 100 years. North Da-

¹⁰ Legislation, such as the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA), has attempted to make registration easier. See *infra* text accompanying notes 22–26. Nevertheless, registration is still an unfamiliar hurdle to be crossed—and not one that is taught in social studies class.

¹¹ STEVEN J. ROSENSTONE & JOHN MARK HANSEN, *MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA* 208 (Longman 2003)(1993).

¹² See, e.g., Andre Blais & Agnieszka Dobrzynska, *Turnout in Electoral Democracies*, 33 *EUR. J. OF POL. RES.* 239 (1998); Stephen Ansolabehere & David M. Konisky, *The Introduction of Voter Registration and its Effect on Turnout*, 14 *POL. ANALYSIS* 83 (2005); Staci L. Rhine, *Registration Reform and Turnout Change in the American States*, 23 *AM. POL. Q.* 409 (1995); Mark Fenster, *The Impact of Allowing Day of Registration Voting on Turnout in U.S. Elections from 1960 to 1992: A Research Note*, 22 *AM. POL. Q.* 74 (1994).

¹³ See U.S. Census Bureau, U.S. Dep’t of Commerce, U.S. Voter Turnout Up in 2004, *Census Bureau Reports* (May 26, 2005), available at <http://www.census.gov/Press-Release/www/releases/archives/voting/004986.html>.

¹⁴ ROSENSTONE & HANSEN, *supra* note 11, at 208.

kota still does not require voter registration in any form.¹⁵ An examination of registration's roots reveals that its depressive effect on democratic involvement, far from being an unintended byproduct, was one of the primary motivations for establishing the registration system in the first place.

Before the late 1800s there were no personal voter registration requirements for eligible voters (that is, for white men).¹⁶ As a consequence, by 1840, as many as 80% of eligible Americans were voting, and turnout remained high until the turn of the century.¹⁷ At that time, "political movements in both the North and the South transformed the voting process by shifting the burden of maintaining voter eligibility from the government to the individual."¹⁸ In the South, states created poll taxes and other obstacles to voting to disenfranchise African Americans. In the North, the influx of immigrants and the burgeoning working class contributed to the fears of middle-class voters.¹⁹

Besides establishing substantive criteria such as literacy tests, states also created new procedural hurdles, including pre-election day registration. Though these procedures were ostensibly designed to prevent fraud, they had the additional—and arguably desired effect—of dramatically hindering a segment of the population's ability to vote. Registration requirements impeded working people from voting, for example, because those people could not get to registration offices during the limited times the offices were open.²⁰ As Alexander Keyssar notes, most registration laws "emerged from a convergence of partisan interest with sincere concern about electoral fraud" as conservative state legislatures adopted rules aimed at limiting the influence of new urban immigrant voters.²¹

Despite ongoing technological and societal changes, only two major federal laws have been passed dealing with voting in the past twenty years: the National Voter Registration Act of 1993 ("NVRA")²² and the Help America Vote Act of 2002 ("HAVA").²³ The NVRA, also known as the "Motor Voter Act," expanded the range of places where voters can register. Most notably, section 5 required states to provide individuals the opportunity to register to vote when they receive their driver's license.²⁴ In the wake of the problems surrounding the 2000 election, Congress passed HAVA,

¹⁵ See U.S. Election Assistance Comm'n, State Voter Registration Deadlines, <http://www.eac.gov/voter/Register%20to%20Vote/deadlines> (last visited Nov. 1, 2007).

¹⁶ See Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370, 373 (1991).

¹⁷ See Jason P.W. Halperin, Note, *A Winner at the Polls: A Proposal for Mandatory Voter Registration*, 3 N.Y.U.J. LEGIS. & PUB. POL'Y 69, 74 (1999/2000).

¹⁸ Cunningham, *supra* note 16, at 373.

¹⁹ Halperin, *supra* note 17, at 74.

²⁰ ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 156 (2000).

²¹ *Id.*

²² 42 U.S.C. §§ 1973gg—1973gg-10 (2000).

²³ 42 U.S.C.A. §§ 15301—15545 (2005).

²⁴ See U.S.C. § 1973gg-3 (2000).

which created requirements for all voting systems.²⁵ Of particular relevance, HAVA mandated that states update their voter registration systems, in part by creating an electronic database of voters.²⁶

Though both the NVRA and HAVA were positive steps, they left the burden of pre-election day voter registration firmly in place. Without further action, Americans will continue to be needlessly disenfranchised. The problem does not lie only in the racism, classism, and partisanship that have so often tainted the registration process in American history. Even if approached in a fair, nonpartisan manner, administering an accurate registry of over 140 million voters would present enormous challenges.²⁷ Fortunately, an effective response exists: Election Day Registration. However, the opponents of EDR have succeeded in bringing its expansion almost to a halt.

III. THE CASE AGAINST ELECTION DAY REGISTRATION

Election Day Registration allows eligible voters to both register to vote and cast a ballot on Election Day. Currently, seven states have adopted EDR: Maine, Minnesota, Wisconsin, Idaho, New Hampshire, Wyoming, and Montana.²⁸ States with EDR consistently boast turnout rates ten to twelve percentage points higher than states that do not have EDR.²⁹ In 2006, for instance, EDR states averaged 48.7% voter turnout as compared to the 38.2% average turnout of non-EDR states.³⁰

Given these impressive results, why have so few states chosen to adopt EDR? Part of the problem may be that courts have never found registration barriers to be unconstitutional, so long as the barriers remain nondiscriminatory. It may also be that legislators, having already been elected under the existing rules, possess a systematic bias against making registration reform a top priority. Even legislators who could receive more votes under a changed system might hesitate to dedicate political capital to registration reform if their seats are already secure.

The two main arguments offered by opponents of Election Day Registration are that EDR would prove too expensive and logistically challenging and that EDR encourages fraud.

²⁵ See, e.g., 42 U.S.C.A. § 15481(a)(1)(A)(i) (2005) (requiring that all voting systems allow voters to verify their ballots).

²⁶ See U.S.C.A. § 15483 (2005).

²⁷ In the November 2004 election, total registration reached 142 million. HOLDER, *supra* note 7, at 2.

²⁸ DEMOS, VOTERS WIN WITH ELECTION DAY REGISTRATION 1 (2007), http://www.demos.org/pubs/voters_win_web.pdf.

²⁹ *Id.*

³⁰ *Id.*

A. *EDR: Too Logistically Challenging?*

Even election officials who favor EDR in principle, might worry that its implementation would create an administrative nightmare. After all, EDR seems to collapse the two-step voting process into a single day—Election Day—when the resources of voting administrators are already stretched to their limits. However, the examples of states that have adopted EDR, including some that have used it for over thirty years, should provide comfort.

Contrary to the worry that costs might be prohibitive due to the need for added staff at polling places,³¹ is the successful example of Minnesota. When Minnesota instituted EDR, the state sent \$800,000 to its counties to help defray costs, but only a small amount of that money was actually necessary, and most of it was spent by the smaller counties that had never required registration and had to implement it for the first time.³² Surely such a small increase in election funding would be justified by a potential 10% rise in turnout.

Another logistical objection to EDR is that it would be impossible to implement in states with highly localized election systems because independent local election officials might be incapable of managing the registration and voting process. But Minnesota also operates in a decentralized way and has successfully implemented EDR by training election officials. As an election administrator from St. Paul noted:

Given that our system of local government is based on the New England model, most election activities are carried out at the city and township level. So, while the voter registration activity is a county activity per se, in reality, it is administered at the polling places by election judges who are appointed, trained and paid by the cities and townships. The main barrier to be overcome in our larger communities was to recruit a larger number of election judges and train them to conduct voter registration. After a couple of elections, our city and township officials learned how many judges to appoint for specific elections The registration activity is fairly consistent from year to year.³³

Given adequate resources for training, even states with localized election procedures could likely adapt to EDR. As noted above, thanks to the HAVA,

³¹ An EDR bill recently introduced in Texas went so far as to require two voting registrars at every polling place, which would require an additional expenditure of over \$2 million per election. See H.B. 265, 80th Leg. (Tex. 2007), available at <http://www.capitol.state.tx.us/tlodocs/80R/billtext/pdf/HB00265I.pdf>. For the cost estimate, see Legis. Budget Board, Fiscal Note In Re: HB265, 80th Leg. (Tex. 2007), available at <http://www.capitol.state.tx.us/tlodocs/80R/fiscalnotes/pdf/HB00265I.pdf>.

³² E-mail from Joseph Mansky, Ramsey County Elections Manager (Mar. 20, 2007, 10:33 EST) (on file with author).

³³ *Id.*

all states now possess a statewide computerized database that would help in the transition.³⁴

Perhaps the strongest argument for the logistical viability of EDR is in the complexity and disarray of the current registration system. Simply in terms of size, the task faced by election administrators in the United States is astounding. The number of potential eligible voters stands at over 200 million and is growing.³⁵ In addition, Americans are always on the move, and the voter rolls must change accordingly. In just one year, between March 1999 and 2000, over 15% of eligible voters moved locations.³⁶ The registration system must be accessible, accurate, and fraud-proof. Many states struggle to compile registration data in time for distribution to precincts on Election Day. Decentralization also increases the chances of name duplication on separate precinct lists. American voters and the 200,000 polling places they visit are distributed across over 3000 jurisdictions, each managing its own registration information.³⁷ In light of the existing sources of registration chaos, a properly administered Election Day Registration program might ultimately result in a simplification of administrators' tasks, rather than a creation of added burdens that EDR's critics fear.

*B. "Fraud Is a Real Issue. It's Also a Red Herring."*³⁸

When registration was first implemented, the specter of fraud served in part as a pretext for establishing barriers between rising classes of voters and the ballot box. Registration policies continue to be justified by their proponents primarily as a means of preventing fraud.³⁹ Prevention of voter fraud, however, simply no longer requires these policies.

It can be hard to separate voter fraud fact from fiction in such a highly politicized context. A 2005 U.S. Senate Republican Policy Committee report asserted, "Voter fraud continues to plague our nation's federal elections, diluting and canceling out the lawful votes of the vast majority of Americans."⁴⁰ In the 2004 election, it conceded, "the nation dodged a bullet so that the ultimate election results were unaffected," but investigations into

³⁴ See *supra* note 26 and accompanying text.

³⁵ See CALTECH/MIT VOTING TECHNOLOGY PROJECT, VOTING: WHAT IS, WHAT COULD BE 26 (2001), available at <http://www.secstate.wa.gov/documentvault/TheCaltechMITVotingTechnologyProjectVotingWhatIsWhatCouldBeJuly2001-1025.pdf>.

³⁶ See *id.* at 28.

³⁷ See *id.*

³⁸ BRENNAN CTR. FOR JUSTICE & DEMOS, ELIMINATING BARRIERS TO VOTING: ELECTION DAY REGISTRATION 23 (2001), available at http://www.brennancenter.org/dynamic/subpages/EDR_report_113001.pdf.

³⁹ Voter fraud is defined as "the intentional corruption of the electoral process by the voter," which includes giving false information to establish voter eligibility and illegally conspiring to encourage illegal voting. LORRAINE MINNITE, PROJECT VOTE, THE POLITICS OF VOTER FRAUD 3 (2007), available at http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf.

⁴⁰ U.S. SENATE REPUBLICAN POLICY COMM., THE NEED FOR NEW FEDERAL REFORMS: PUTTING AN END TO VOTER FRAUD 1 (2005), available at <http://rpc.senate.gov/files/Feb1504VoterFraudSD.pdf>.

voter fraud in Milwaukee and East St. Louis (both of which contain large African-American communities) were still ongoing.⁴¹ Often, studies claiming high rates of voter fraud are sponsored by organizations that have conservative roots. For instance, the American Center for Voting Rights Legislative Fund recently released a study claiming that voters in the 2004 election were subjected to “a coordinated effort by members of some organizations to rig the election system through voter registration fraud.”⁴² The head of this organization is Mark Hearn, former national election counsel to Bush-Cheney ’04. In 2002, Attorney General John Ashcroft created the Ballot Access and Voting Integrity Initiative (“BAVII”) and announced that all voter fraud cases would be treated as “high priority.”⁴³ Despite the many claims of widespread conspiracy, however, the Department of Justice secured only twenty-four convictions from 2002 to 2005.⁴⁴ Of those, nineteen involved people ineligible to vote (five because they were felons, fourteen because they were not U.S. citizens) and five people who voted twice.⁴⁵ Beneath the partisan rhetoric, it seems that voter fraud is far from a widespread problem in America today.

Nonetheless, opponents of EDR continue to claim that adopting EDR would enable voter fraud. Dishonest people, they suggest, would be able to vote in many locations or in places where they are not eligible to vote. Based on evidence from states that have implemented EDR, this argument simply holds no water. States with EDR have all taken steps to mitigate concerns about voter fraud and have reported problems no greater than states with pre-election day registration. Minnesota “makes document requirements more stringent for Election Day or mail-in registration,” and in Maine, “voter eligibility rules and the penalties for fraud are posted in all polling places.”⁴⁶ Further, in Maine, if a voter cannot present the required identification, he or she is given a “challenged ballot,” and if “any race is close enough for the challenged ballots to make a difference, registrars investigate and make sure that the voter casting the ballot actually lives in the district and did not vote at any other polling place.”⁴⁷

Rather than enabling more fraud, good EDR systems could actually help stop fraud while simultaneously protecting voters’ rights.⁴⁸ Accurate

⁴¹ See *id.* at 2.

⁴² AM. CTR. FOR VOTING RIGHTS LEGISLATIVE FUND, VOTE FRAUD, INTIMIDATION AND SUPPRESSION IN THE 2004 PRESIDENTIAL ELECTION 3 (2005), available at http://www.foxnews.com/projects/pdf/Vote_Fraud_Intimidation_Suppression_2004_Pres_Election_v2.pdf.

⁴³ Mark Follman et al., *How U.S. Attorneys Were Used to Spread Voter Fraud Fear*, SALON, Mar. 21, 2007, available at http://archive.salon.com/news/feature/2007/03/21/us_attorneys/index.html.

⁴⁴ MINNITE, *supra* note 39, at 8 (citing U.S. DEP’T OF JUSTICE, CRIMINAL DIV., PUB. INTEGRITY SECTION, ELECTION FRAUD PROSECUTIONS & CONVICTIONS, BALLOT ACCESS & VOTING INTEGRITY INSTITUTE, OCT. 2002–SEPT. 2005).

⁴⁵ *Id.*

⁴⁶ BRENNAN CTR. FOR JUSTICE & DÉMOS, *supra* note 38, at 24.

⁴⁷ *Id.* at 25.

⁴⁸ The wiping of legitimate voters off the voter rolls is in fact a bigger problem than voter fraud. For instance, the Hearn report cited that 300 people had committed vote fraud in Mil-

and up-to-date registration is one of the most effective ways of both keeping incidents of fraud very low and ensuring the right to vote. Election administration errors have disenfranchised Americans in far greater numbers than the dilution of votes caused by any voter fraud that has occurred. A Caltech/MIT study found that between 1.5 and 3 million votes were lost because of the cumbersome registration process in the 2000 election.⁴⁹ Interactive state-wide databases help to both alleviate concerns about administrative issues and allay fears of fraud by allowing poll workers to check a potential voter's status and enter new information as necessary. If the database is programmed to allow for changes made in real-time, all polling places would have access to the most up-to-date voter registration information. Such a system would prevent people from voting multiple times at different locations.⁵⁰

IV. THE CASE FOR ELECTION DAY REGISTRATION

By implementing automatic voter registration in Iraq, the Bush Administration implicitly acknowledged what many Americans believe to be true: the more people who vote, the more legitimate the results. Every constitutional amendment or federal law passed in the last fifty years pertaining to voting has liberalized that right—for example, by allowing eighteen-year-olds to vote;⁵¹ mandating that states allow potential voters to register when they receive a driver's license;⁵² and mandating provisional voting.⁵³ Since passage of the NVRA, registration has increased. Seventy-six percent of the U.S. voting-age population was registered in 2000, up from 70.8% in 1992.⁵⁴ Almost a third of the registrations leading up to the 2000 election took place at DMVs.⁵⁵ The NVRA and HAVA have enabled people to register to vote more easily, but registration nonetheless remains a hurdle to casting a ballot. Implementing EDR would be consistent with the constitutional and legislative trend toward liberalizing voting rights.

waukee in 2004. AM. CTR. FOR VOTING RIGHTS LEGISLATIVE FUND, *supra* note 42, at 8. But the GOP attempted to have 5619 names wiped from the voter rolls before Election Day, claiming the addresses were vacant. A bi-partisan Electoral Commission denied the GOP claim, and the voters were kept on the list. See Greg Borowski, *GOP Fails to Get 5,619 Names Removed From Voting Lists*, MILWAUKEE JOURNAL-SENTINEL, Oct. 28, 2004, at A1, available at <http://www.jsonline.com/story/index.aspx?id=270603>.

⁴⁹ CALTECH/MIT VOTING TECHNOLOGY PROJECT, *supra* note 35, at 8.

⁵⁰ Even without databases that allowed for real-time changes, for someone to vote at two different polling places under an EDR system, he or she would have to possess several forms of identification with addresses in different precincts. See BRENNAN CTR. FOR JUSTICE & DEMOS, *supra* note 38, at 25.

⁵¹ U.S. CONST. amend. XXVI.

⁵² The National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-2(a)(1) (2000).

⁵³ The Help America Vote Act of 2002, 42 U.S.C.A. § 15322 (2005).

⁵⁴ DEMOS, EXPANDING THE VOTE: THE PRACTICE AND PROMISE OF ELECTION DAY REGISTRATION 5 (2002), http://www.demos.org/pubs/EDR_-_Expanding_the_Vote.pdf [hereinafter EXPANDING THE VOTE].

⁵⁵ *Id.*

A. *Pre-Election Day Registration Disenfranchises Citizens*

Pre-election day registration, though neutral on its face, can also be discriminatory in effect. A cumbersome voting process automatically disengages particular groups of Americans. Working-class Americans, young voters, and even Americans who move often are inhibited—or prevented—from voting due to the extra hurdles created by pre-election day registration.

Pre-election day registration can be an insurmountable obstacle to new residents. In 1998, only 43.2% of those who lived in one place for less than 6 months were registered to vote.⁵⁶ Low registration rates for mobile Americans are significant because around 16% of the U.S. population moves each year.⁵⁷ According to the U.S. Census Bureau and a Dēmos report, recent movers also tend to be “disproportionately younger (the majority are in their twenties), non-white, and poor—three groups already less likely to vote.”⁵⁸ Americans earning less than \$50,000 a year tend to be registered at substantially lower levels than those with incomes of \$75,000 or over—fewer than half of the former group were registered in 1998, whereas over 77% of the latter group were registered.⁵⁹ Registration rates also correlate with education levels—only 43.4% of people without a high school diploma reported being registered in 1998, while 73.8% of people with a bachelor’s degree were registered.⁶⁰ Finally, young people (ages eighteen to twenty-four) have the lowest rates of registration among different age groups, with only 43.6% registered in 1998.⁶¹ The conclusion is clear: some Americans are unable or unwilling to surmount the challenge of pre-election day registration. Whether they have no driver’s license to enable them to take advantage of the NVRA’s motor voter registration provisions, recently moved and did not have time to register, or simply do not know how to register, these people are disenfranchised because of unnecessary barriers created by pre-election day registration.

Furthermore, many people who have taken the time to register go to the polls on Election Day only to find their names absent from the rolls. According to an August 2001 congressional report, “[e]ligible voters in at least 25 states went to the polls in the 2000 presidential election and found their names were illegally purged from the rolls or not added in a timely fashion.”⁶² Though these prospective voters had taken the time to register and show up on Election Day, they were denied the right to vote, and no recourse was available to them. The numerous lawsuits over voter registration issues filed around the country before the 2006 election provide further evi-

⁵⁶ *Id.*

⁵⁷ *See id.* (reporting data from the time period from March 1999 to March 2000).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* (quoting DEMOCRATIC INVESTIGATIVE STAFF OF H. COMM. ON THE JUDICIARY, 107TH CONG., HOW TO MAKE A MILLION VOTES DISAPPEAR: ELECTORAL SLIGHT OF HAND IN THE 2000 PRESIDENTIAL ELECTION 4 (Comm. Print 2001)).

dence of the problems caused by pre-election day registration.⁶³ For a country that prides itself on its democracy, such voter disenfranchisement should be unacceptable. Many, if not all, of these problems could be solved if EDR were available in all fifty states.

B. *Election Day Registration Would Improve Elections*

Instituting EDR would represent a significant and positive change in American democracy in four important ways.

First, as discussed above, with EDR in place overall voter turnout levels would increase. In 1996, all six states that used EDR ranked in the top eleven states in turnout.⁶⁴ Though the increase in turnout would vary among demographic groups, EDR has been shown to increase youth turnout by 14% in presidential elections.⁶⁵

Second, if all states had EDR, there would be a significant increase in voter turnout by (and as a result political attention paid to) often-ignored segments of the community. Because the voting population is determined as early as a month before the election due to pre-election day registration laws, politicians and campaigns tend to focus on that particular segment of the population, often neglecting demographic groups less likely to have registered. Traditionally marginalized communities have the potential to become more politically engaged with the implementation of EDR because campaigns would be less likely to ignore these potential voting blocs.

Young voters provide a clear example of a traditionally marginalized community that has a strong potential to become more engaged through the implementation of EDR. One study from the Center for Information and Research on Civic Learning and Engagement (CIRCLE) showed that some alternative voting methods—EDR in particular—have the “potential to alter the political landscape by changing the way that young people participate in elections, the way that political parties mobilize voters, as well as who participates in elections.”⁶⁶ Studies have shown that EDR “boosts youth voting activity in presidential elections by an estimated fourteen percentage points, and by an estimated four percentage points in midterm congressional elections.”⁶⁷ One reason young people may not vote is because they are not targeted by campaigns that know young people traditionally do not turn out to vote. However, in states with EDR, not only does youth turnout increase, but candidates are also more likely to pay attention to young voters. Young citizens are 11% more likely to be contacted by campaigns in states with

⁶³ See Catherine Rampell, *Voter Registration Issues Cloud Elections*, USA TODAY, July 10, 2006, at A5.

⁶⁴ Halperin, *supra* note 17, at 106.

⁶⁵ EMILY KIRBY & MARK LOPEZ, CIRCLE, STATE VOTER REGISTRATION AND ELECTION DAY LAWS FACT SHEET 1 (2004), http://www.civicyouth.org/PopUps/FactSheets/FS_StateLaws.pdf.

⁶⁶ Mary Fitzgerald, *Easy Voting Methods Boost Youth Turnout* 1 (CIRCLE Working Paper, 2003), <http://www.civicyouth.org/PopUps/WorkingPapers/WP01Fitzgerald.pdf>.

⁶⁷ *Id.* at 9.

EDR during presidential cycles and 18% more likely during congressional midterm elections.⁶⁸ This important statistic represents a phenomenon that likely applies to other traditionally marginalized populations.

Third, because EDR expands the electorate by engaging traditionally non-voting groups, the adoption of EDR will lead to substantive improvements in campaigns and more representative election results. Currently politicians need only cater to those people registered to vote. Were EDR in place nationally, politicians would be forced to pay attention to the entire electorate because they would all potentially be registered voters come Election Day. In states with EDR, the electorate's transformative abilities have changed elections and forced candidates to develop political platforms that take into account the concerns of all the state's citizens.

For instance, in the 1998 Minnesota Governor's race, third party candidate Jesse Ventura bested two opponents when 332,000 new voters registered—about 16% of the total vote of that day.⁶⁹ Exit polls showed that almost all of the new registrants went to the polls to vote for Ventura. Ventura's candidacy, coupled with EDR, galvanized a new subset of voters to act. Indeed, although voter turnout nationally was only 36%, in Minnesota that year it was 61%.⁷⁰ Similarly, in 2006, Montana had a highly contentious race for U.S. Senate and had also recently enacted an Election Day registration law.⁷¹ On Election Day, 3947 voters registered and voted, and Jon Tester, the Democratic challenger, beat incumbent Conrad Burns by 3562 votes.⁷²

Finally, from a purely administrative standpoint, EDR will reduce problems at the polls. As noted above, there are always logistical problems on Election Day—voters who were registered were not added in a timely fashion; voters who were registered but have not voted have been mistakenly purged; voters thought they registered but did not. EDR solves each of these problems. EDR states are not immune to defects in their voter rolls, but when it is possible to re-register (or register) on Election Day itself, no one becomes disenfranchised due to mistake, whether it be the administrator's or voter's. For instance, in 2000, officials in Portland, Maine were accused of illegally purging the names of up to 15,000 voters. Fortunately, because Maine has EDR, voters were able to re-register on Election Day and then vote.⁷³

⁶⁸ See *id.* at 14.

⁶⁹ See Halperin, *supra* note 17, at 105.

⁷⁰ See *id.*

⁷¹ Jerry Calvert, Mont. Conservation Voters Educ. Fund, *Election Day Registration Brings Greater Turnout*, http://www.mtvotersedfund.org/newsroom/clip/2007/03/election_day_registration_brings_greater_turnout (last visited Nov. 1, 2007).

⁷² *Id.*

⁷³ EXPANDING THE VOTE, *supra* note 54, at 8.

CONCLUSION

The logistical challenges to implementing EDR are not so great that we should prefer to disenfranchise voters. Concerns over potential fraud with the EDR system are likewise negligible when compared with the valid votes missing in the current inaccessible system. EDR can help address administrative problems caused by current pre-election day registration systems while enfranchising a marginalized slice of the American electorate.

State legislatures and governors have been very slow to accept EDR, so in order to pass Election Day Registration citizen groups must continue to apply pressure to their state representatives and Governors. In the last few years, several state legislatures have voted to implement EDR. However, other states have rejected EDR and implemented more restrictive voting measures. Most recently, in October 2007, Governor Schwarzenegger of California vetoed S.B. 382, which would have allowed new citizens the chance to vote by registering on Election Day.⁷⁴

Existing federal measures will ease the cost of implementing EDR. Under the Help America Vote Act, the federal government has already allotted money to states to modernize their registration systems. The costs of implementing EDR as part of or as an extension to these updates will be significantly less than it would have before the HAVA.

Controlling costs is important, but you cannot put a price on the right of American citizens to vote. Our antiquated and burdensome voter registration laws are unnecessary and unfortunate. Election Day Registration is the most politically-feasible plan that would keep fraud low while enfranchising more Americans. Citizens, policy groups, and elected officials must continue to work towards a day when all states will have implemented Election Day Registration, thereby empowering all Americans to participate in our democracy.

⁷⁴ See Patrick McGreevy, *Gov. Vetoes Election Day Registrations for New Citizens*, L.A. TIMES, Oct. 12, 2007, at B8.

