Government by the People: Why America Needs a Constitutional Right to Vote

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INTRODUCTION

Do you know who has a guaranteed right to vote in the United States of America? No one. Even though electing our leaders is one of the most fundamental principles of any democracy, even though Abraham Lincoln promised us that government “of the people, by the people, and for the people shall not perish from the Earth”\(^2\), and even though the right to vote is the most important right granted to U.S. citizens according to the United States government\(^3\), the Constitution does not guarantee the right to vote.\(^4\) There have been amendments to the Constitution which prevent states from restricting the right to vote for certain reasons, such as race, prior servitude, gender, and the inability to pay a poll tax\(^5\), but even though these amendments exist, there are still voting laws that discriminate against certain minorities and that sometimes restrict eligible voters from participating in elections.

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\(^2\) See Abraham Lincoln, *Gettysburg Address*. November 19\(^{th}\), 1863.  
\(^3\) Until recently, in order to become a citizen of the United States, one had to answer the question “What is the most important right granted to U.S. citizens?” the correct answer was “the right to vote”.  
\(^4\) Contrary to popular belief. Most people I have talked to about this issue had no idea that wasn’t a Constitutional right to vote and I personally didn’t know myself until I started taking my Political Science courses in college. It’s just such a key part of democracy and one would think that it would be guaranteed to any citizen of a democracy.  
\(^5\) U.S. Const. amend. XV, XIX, XXIV, XXVI
Other than the Constitutional Amendments mentioned above and a small number of federal statutes, The Voting Rights Act, for example, the question “who has the right to vote?” is mostly left to the states to decide. Congressmen Keith Ellison of Minnesota and Mark Pocan of Wisconsin have decided to take a stand and attempt to put an affirmative right to vote in the U.S. Constitution. The text of the amendment looks like this:

SECTION 1: Every citizen of the United States, who is of legal voting age, shall have the fundamental right to vote in any public election held in the jurisdiction in which the citizen resides.

SECTION 2: Congress shall have the power to enforce and implement this article by appropriate legislation.

This amendment would guarantee the right to vote for every citizen of voting age, provide protection for voters against attempts to disenfranchise individually, grant Congress the power to set national electoral standards, and ensure that each vote that is cast is counted correctly. Thomas Paine once said compared the lack of voting rights to slavery, “for slavery consists of being subject to the will of another, and he that has not a vote in the election of representatives is in this case.” America needs the amendment proposed by Pocan and Ellison to be added to the Constitution, so that no American citizen would ever be subjected to a “slavery-like” state in the words of Paine because they would be guaranteed the right to vote.

I. HISTORY OF THE RIGHT TO VOTE

A. 1787-2010

The original Constitution of the United States of America does not include an explicit right to vote for Americans citizens. Article I, Section II states “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” From the start, the right to vote was not guaranteed for all American citizens. The question “who should have voting rights?” has been around for some time. The answer to this question has differed over time, since when the U.S. was in its early years, African Americans, women, and those who didn’t own property did not have the right to vote.

In 1866, The Civil Rights Act granted Citizenship to native-born Americans, but this did not include the right to vote. Throughout the years, Constitutional Amendments have been made to prevent states from restricting the right to vote for certain reasons, such as race, prior servitude, gender, age, and the inability to pay a poll tax. Still, none of these amendments provide a guaranteed right to vote. There have been different laws put into place by states over time that restricted the right to vote from certain minorities. Examples of these types of laws start all the way back in the 1800’s when Louisiana

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7 Fairvote.org
passed their “grandfather clauses” to keep those who were formerly slaves from voting, as well as their descendants. There were also the Jim Crow laws of the 1940’s that included literacy tests and poll taxes and kept the percentage of African American voters at 3%.

Poll taxes were deemed as unlawful in the 24th Amendment in 1964, but it was in 1965 that one of the biggest events in the history of the right to vote occurred: the Voting Rights Act was signed into law. The Voting Rights Act was put into place to enforce the 15th amendment, to outlaw literacy tests, provide for appointment of federal registrars and election observers, and Section 5 provided for a “preclearance” for “covered jurisdictions”. Essentially, Section 5 meant that states that had used electoral “tests” or “devices” and/or had fewer than 50% of their voting-age population registered to vote in 1964, 1968, or 1972 would have to go through federal preclearance before they could change their voting laws. The law had a great effect on African American voter suppression. The Voting Rights Act was extended several times after it first passed in 1965, due to its large success.

B. Voting Rights Today

Since 2010, there have been 18 Section 5 objections to voting laws in several states, and in 2011, there was a record number of voting restrictions nationwide. Some of these voting restrictions that have passed have been discovered to have a disproportionate effect on minorities. Some of these restrictions have been particularly tight. In spite of the fact that there was a record number of voting restrictions in recent years, in June of 2013, the U.S. Supreme Court struck down a key part of the Voting Rights Act in Shelby County v. Holder. In this case, Shelby County, Alabama filed a suit,

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9 U.S. Const. art. I §2 cl. 1
10 Infra Note 3
11 Signed into law by President Lyndon B. Johnson
12 “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.” 15th Amendment, U.S. Constitution.
14 Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Also, particular counties in California, Florida, New York, North Carolina, and South Dakota, and two specific townships in Michigan.
15 One of the key laws passed during the Civil Rights Movement.
16 By the end of 1965, 250,00 new black voters were registered. At the end of 1966, only 4 out of the 13 Southern States had less than half of African Americans registered to vote.
18 Texas, South Carolina, Georgia, North Carolina, Mississippi, and Louisiana.
19 Aclu.org
20 Florida made restrictions to registration for voting and cut back on those who could vote early. South Carolina passed an ID law that restricted 180,000 African Americans from voting.
claiming that Section 5 and Section 4(b)\textsuperscript{21} of the Voting Rights Act were unconstitutional. The court ruled in favor of Shelby County, saying that section 4 was unconstitutional because the current burdens that it caused were no longer a response to current conditions in the districts that were in question.\textsuperscript{22} This was a very complicated case, and the legislative record is 15,000 pages. In her dissent, Justice Ruth Ginsburg argued that if the law had been working, there would be no current evidence of discrimination to justify the current burdens. According to her, “throwing out preclearance when it has worked and is continuing to work is like throwing away your umbrella in a rainstorm because you’re not getting wet.”\textsuperscript{23} She made a good point. There wasn’t evidence of racial discrimination or unfair voting laws because the VRA had been preventing those things from happening in the specified jurisdictions since 1965. Since the Court’s ruling in June of 2013, nine of the “preclearance states” have tightened their voting laws.\textsuperscript{24}

II. VOTING RIGHTS CASE LAW

\textit{Shelby County v. Holder} is the most recent of big cases that involve the right to vote and the Voting Rights Act, but it is certainly not the only case. There have been several suits filed over elections and those who can and cannot participate in them. In many cases, the election system can just seem like a big mess. By taking a look at some of the well-known cases in U.S. history, one can start to see how a constitutional right to vote would avoid a lot of complications and problems in United States elections.\textsuperscript{25}

In the case of \textit{Lassiter v. Northampton County Board of Elections} (1959), a law requiring citizens to pass a literacy test before voting was called in question of a violation of the Equal Protection Clause. The literacy test was upheld because requiring the voters to be literate furthered the state interest. The state interest, according to this case was “promoting intelligent use of the ballot.” Now, this probably seems somewhat fair to a lot of people because requiring those who are voting to understand how to read the ballot

\begin{itemize}
  \item \textsuperscript{21} Section 4(b) was the preclearance formula that determined which states had to go through the Federal Government before changing their voting laws.
  \item \textsuperscript{22} See \textit{Shelby County v. Holder}, 679 F. 3d 848
  \item \textsuperscript{23} Also in her dissent, Ginsburg discussed how in 2006 when Congress decided that the current jurisdictions still needed to be covered by clearance there was sufficient evidence of the preclearance stopping many discriminatory voting changes, as well as evidence that there was higher voting racial polarization in the jurisdictions covered in the Voting Rights Act than there was elsewhere.
  \item \textsuperscript{24} North Carolina, Texas, Florida, Virginia, South Carolina, Mississippi, Alabama, Arizona, and South Dakota.
  \item \textsuperscript{25} Many of the cases that I will discuss in this section involve voter ID laws, or other means of restricting voters which, in my opinion, is just ridiculous. Some of the so-called “state interests” that are used as justification for these tight voting restrictions are that they prevent voter fraud or uphold the integrity of the state’s elections/give the people more confidence in the system. However, many times there is little to no evidence to support that this fraud even exists, and studies have shown that these types of voting restrictions rarely affect the level of confidence that people have in the voting systems.
\end{itemize}
sounds reasonable. However, some of these literacy tests had unreasonable content that even an educated person would not be able to get one hundred percent of it right, which is what was required in some places that had literacy tests. For example, in the Louisiana literacy test that we took in one of my classes, one of the questions asked me to “divide a vertical line in two equal parts by bisecting it with a curved horizontal line that is only straight at its spot bisection of the vertical.” There were a total of 30 questions on this test and whoever was taking it was only given 10 minutes to complete it. I don’t know about you, but I don’t think drawing random bisecting lines and curves promotes “intelligent use” of the ballot. Now, Section 4(a) of the Voting Rights Act outlawed literacy tests in 1965, and thankfully, this section has not been struck down. I just wanted to use this case as an example of how long voters have been disenfranchised, and some of

26 In my Law and Politics class this semester, our professor handed out an actual copy of a real literacy test that had been used in the state of Louisiana. Now, this was an upper-level class, with most of the students being junior and senior Political Science majors. These were young adults who were actually specializing in American Politics, and guess what? Many of us had no idea what to put for some of these questions. I know that I personally did not get every one of them right, so if that literacy test had been a requirement for me to vote, I would have been unable to participate in the election.

27 You can see the literacy test that I described here: www.slate.com/blogs/the_vault/2013/06/28/voting_rights_and_the_supreme_court_the_impossible_literacy_test_louisisan.html

28 The text of section 4: SEC. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: Provided, That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff. An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.
the unreasonable voting standards that have been allowed in the history of the United States.

In the case of *Crawford v. Marion County Election Board*, the court ruled that the voter ID law in question was valid because the burdens the law imposed were not “severe”. The dissenting opinion said that “Indiana’s Voter ID Law threatens to impose nontrivial burdens on the voting rights of tens of thousands of the State’s citizens, and a significant percentage of these individuals are likely to be deterred from voting.” One of the “state interests” that the court used to justify its ruling in favor of the law was to deter and detect voter fraud. The type of voter fraud that ID laws could prevent is in-person impersonation fraud. A study was done on the voter ID law from *Crawford v. Marion County Election Board*, the results showed that voter impersonation is very, very rare, and in the ruling of the case, the court was unable to find that this type of fraud had ever occurred in the state of Indiana. The results also determined that the ID requirement was significantly impacted by age, race, and income. The law had a disproportionate effect on people of these different categories. A Georgia law requiring a photo ID was at first blocked being considered as a poll tax, since obtaining an ID cost money, so it was changed so that the IDs had no cost. The state interest for passing this law was also to eliminate voter fraud, however, Georgia had no-excuse absentee voting. A study that empirically assessed the Georgia law found that the law produced a suppression effect, it lowered turnout by about four-tenths of a percentage point.

As seen in the rulings of the court cases mentioned above, the court has ruled in favor of laws in the past that have negative effects on the voter turnout, disproportionate effects on minorities, justifying it with a state “interest” that doesn’t even have evidence to support that a problem that the law would fix even exists. It’s doesn’t make much sense especially since the reasoning for striking down section 4 of the Voting Rights Act was that the burdens it imposed were not a response to current problems. The voter ID law in the Indiana case was passed to deter a type of fraud that they couldn’t find evidence of ever having occurred in the state. For the Indiana law they reasoned that in-person voter impersonation fraud had occurred in other places in the country. Using that logic, the argument could be made that unfair and discriminatory election policies had

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29 I would argue that not being able to vote because you forgot your ID or couldn’t afford one is pretty severe. We are talking about voting rights here, the most important right that an American citizen has. The most fundamental right in any democracy. The very little amount of impact the courts give that sometimes amazes me.


31 11.5 point gap is access to ID between black people and white people, for example.

32 This doesn’t make much sense because there is more evidence of mail/absentee voter fraud than there is evidence of in-person voter fraud.


34 There are also other court precedents not mentioned in this paper that show carelessness in terms of whether American citizens have their voting rights taken away, or don’t have their votes counted.
been put into place in these covered jurisdictions in the past and section 4 should still be considered Constitutional.

CONCLUSION

The right to vote is so important, and it shouldn’t be taken away from any American citizen. Especially not for something such as non-existent voter fraud in certain states. The data and court rulings of the past that have been discussed in this paper are just a few of the key reasons that America needs a right to vote to be put into the Constitution. The proposed amendment by Congressmen Ellison and Pocan would begin a movement to show that America can live up to the ideal of the right to vote, and it would provide a solid foundation for Congress to set electoral standards, something that needs to be done to improve voter confidence in American elections and ensure that each vote that is cast will be counted correctly, putting an end to the dysfunctional election cycles that have occurred more than once throughout American history. Some may think that this amendment would be unnecessary since many believe that they do have a guaranteed right to vote, but Bush v. Gore recognized in 2000 that there is not, in fact, a constitutional right to vote. If the proposed amendment were to pass, no more minorities would lose the right to have a say in who runs their country based on some ID law made up by the state to disenfranchise voters, no eligible voters would lose their right because their name was similar to that of a convicted felon or because they forget their ID at home or couldn’t afford one. If this amendment passes, the United States of America would truly be, in the words of Abraham Lincoln, a government of the people, by the people, and for the people.

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