

IN PURSUIT OF AN AFFIRMATIVE RIGHT TO VOTE

Strategic Report July 2008

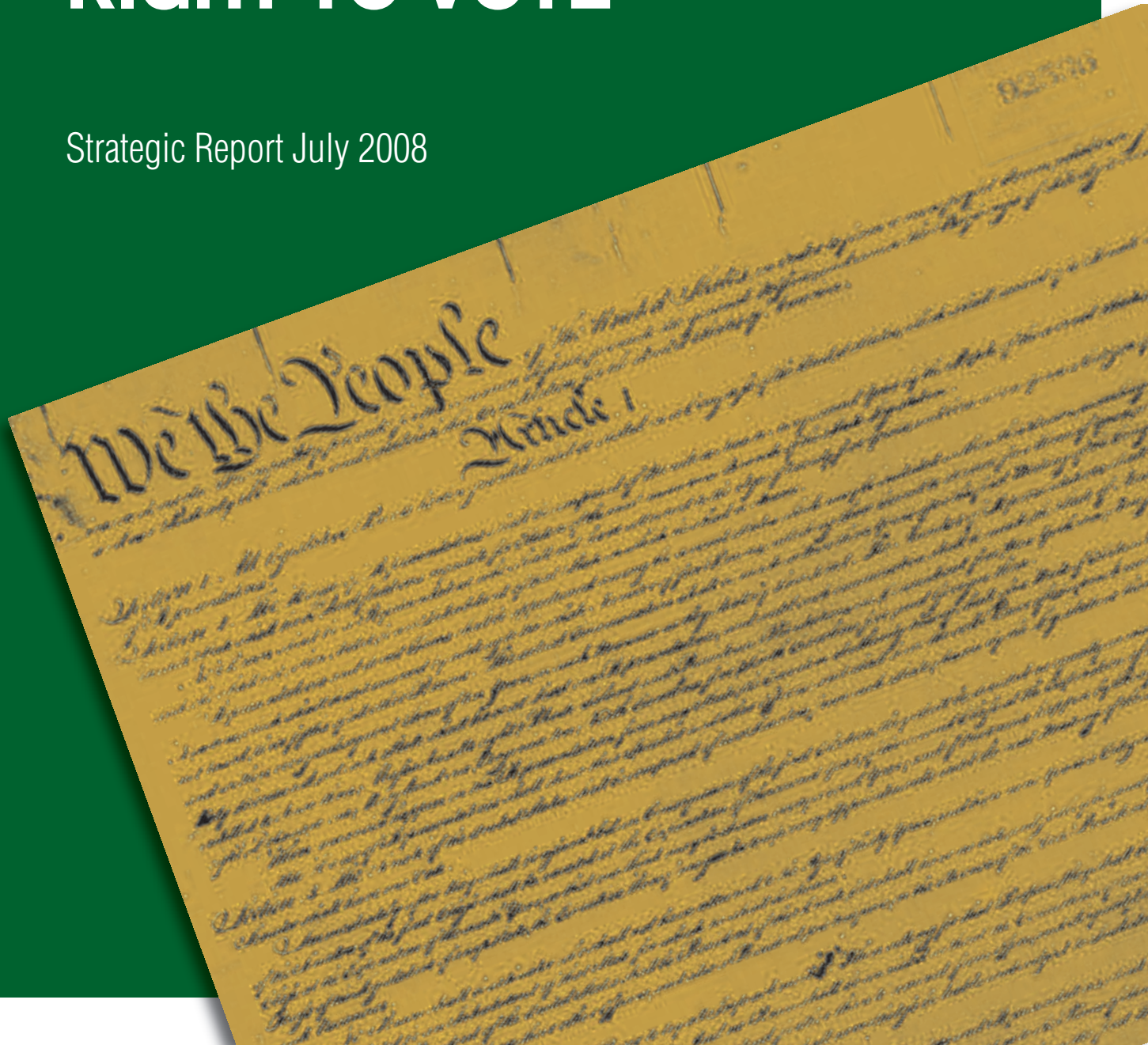


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CIVIL RIGHTS MARCH

INTRODUCTION

Affirmative Right to Vote: Vision for a New Movement

Most Americans would probably be surprised to learn that there is no provision of the Constitution or federal law that affirmatively guarantees all citizens the right to vote. Neither the U.S. Constitution¹ nor the 1965 Voting Rights Act nor any other federal law explicitly ensures such a right. Even the post-Civil War amendments to the Constitution do not explicitly guarantee the right to vote to all citizens.

Now is an ideal time to ensure the right to vote for people of color, who are disproportionately disenfranchised, and all Americans. Over the past two years, Advancement Project has been working to devise a way to guarantee voting rights in federal law to end practices that unnecessarily disenfranchise voters. We have identified the strategies that would be most effective in raising public awareness about limitations on the right to vote and the need for major reform.

The absence of an explicit federal provision conferring this fundamental right has left Americans at the mercy of state constitutions, state legislatures, local bureaucrats, and the judiciary. The states determine who is qualified to vote and establish the rules and conditions for holding elections. Not

surprisingly, the combination of unduly burdensome procedures, underfunded bureaucracies and partisan officials has created a patchwork of arbitrary practices tending to contract, rather than expand, the franchise. The result, as documented by scholars, is that more than nine million Americans are known to be disenfranchised by idiosyncratic legal restrictions on who is qualified to vote.² Millions more are excluded by unnecessary hurdles to registration and voting and by election administration errors. In this heated election season, state legislatures throughout the nation are considering bills that would further complicate the process by requiring photo identification and citizenship documents in order to vote.

According to one academic researcher, the U.S. is one of only 11 democratic countries that do not explicitly provide the right to vote in their constitutions.³ According to Professor Jamin Raskin, one of the leading academic authorities on voting rights, constitutional silence on a basic right to vote leaves the United States in company with such regressive nations as Iran, Libya, and Singapore.”⁴

Advancement Project analyzed the possibility of amending the Constitution to guarantee explicitly that all citizens have a fair, equal, and inclusive voice in our

democracy. We also looked at the option of seeking a federal statute to enshrine the right to vote in federal law. Focus groups show that public opinion strongly favors a constitutional right to vote.

Enshrining an affirmative right to vote explicitly in the Constitution or federal law would ensure a uniform set of voting laws throughout the nation, rather than an assortment of inconsistent voting guidelines. A constitutional amendment provides more certain and solid protection of the right to vote than a federal statute. However, amending the Constitution is a difficult, arduous, and lengthy process. It may be useful to work toward passing both a federal statute and a constitutional amendment.

An explicit right to vote guaranteed by a constitutional amendment could be compared to the First Amendment right guaranteeing free speech because free speech rights are the same regardless of the voter's state of residence. If incorporated into the Constitution, the right to vote – like the right to speak one's mind – will become a right that travels with the citizen.

Enshrining an affirmative right to vote is more than a single, isolated initiative. It requires a broad, national movement. It is a long-term undertaking.

1. In fact, in the *Bush v. Gore* case, the Supreme Court's majority stated that "the individual citizen has no federal constitutional right to vote for electors for the President of the United States," 531 U.S. 98, 104 (2000). In the case of *Adams v. Clinton*, which was affirmed by the Supreme Court under the name of *Alexander v. Mineta*, 531 U.S. 940 (2000), the D.C. Court of Appeals reiterated Supreme Court precedent which held that "the Equal Protection Clause does not protect the right of all citizens to vote, but rather the right 'of all qualified citizens to vote.'" 90 F.Supp.2d 35, 66 (D.D.C. 2000) (three judge court) (*per curiam*), *aff'd sub nom. Alexander v. Mineta*, 531 U.S. 940 (2000).

2. Jamin B. Raskin, *Lawful Disenfranchisement: America's Structural Democracy Deficit*, HUMAN RIGHTS MAGAZINE, Spring 2005, at 32 (570,000 tax-paying U.S. citizens in the District of Columbia, four million citizens in the U.S. territories, and 4.7 million citizens with a felony criminal conviction are disenfranchised), available at <http://www.abanet.org/irr/hr/spring05/lawful.html>.

3. Alexander Kirshner, *The International Status of the Right to Vote*, DEMOCRACY COALITION PROJECT, (2003), at 9, available at http://www.demcoalition.org/pdf/International_Status_of_the_Right_to_Vote.pdf. These eleven countries include: Australia, the Bahamas, Bangladesh, Barbados, Belize, India, Indonesia, Nauru, Samoa, United States of America, and the United Kingdom. *Id.*

4. Jamin B. Raskin, *A Right to Vote*. THE AMERICAN PROSPECT, Aug. 27, 2001, at 12. Professor Raskin counts 135 nations with a right to vote in their constitutions.

PLANNING PROCESS: SUMMARY OF OUTREACH AND WORKSHOPS

Advancement Project engaged a diverse group of stakeholders and experts in brainstorming and strategy sessions held in Boston and Washington, D.C., respectively.

On September 16, 2005, we convened a group of legal experts.⁵ The group focused on identifying the ideas, beliefs and myths that must be addressed to promote understanding of an explicit right to vote. For example, the group discussed whether those who oppose extending the right to vote to people with felony convictions consider the franchise a privilege or societal luxury, rather than a fundamental element of a democracy that should be shared by all.

The group also debated the distinction between “qualifications,” which refers to a voter’s eligibility to vote and “administrative requirements,” which refers to steps in the registration and voting process, such as whether or not voting documents were adequately signed and completed.

The Boston discussion also touched on issues of public perception and effective communication. Participants noted that concerns about the right to vote may be different among those who are economically well off and working people of more modest means. Many asked whether the latter group

would embrace this initiative. Several meaningful and definitive questions emerged from the meeting, including: What do those of more modest means worry about in connection with their right to vote and, assuming they feel like they have the right to cast a ballot, do they worry about their ballot not being counted? Do the less economically advantaged really believe that the system works for them? Does the right to vote bring with it civic duty?

A second meeting was held on November 17, 2005 at the Leadership Conference on Civil Rights in Washington, D.C. During this meeting, leading experts⁶ in policy and legislative process discussed the purpose and progress of an affirmative right to vote movement, the political and international contexts of this initiative, and considered the pros and cons of various strategies for enshrining an explicit right to vote.

We tapped into the collective wisdom of all participants to gauge their comfort level and interest in the initiative. Some of the organizations that were most active in the renewal of the Voting Rights Act acknowledged that enshrining a right to vote into U.S. law is likely to be the next fundamental voting rights issue that they tackle.

The Leadership Conference meeting materials included a summary of the initial set of focus group sessions. We also shared findings from research on comparative voting rights, specifically regarding restrictions that various democratic governments place on voting rights in their respective countries. Attendees reviewed examples of what constitutional right to vote language looks like in other countries, including relevant language from the Constitution of the Republic of South Africa. Overall, the dialogue centered on how best to gauge public opinion on the subject, and the pros and cons of various strategies to enshrine the right to vote.

Apart from the brainstorming sessions described above, Advancement Project connected with national leaders, local grassroots groups, and individual stakeholders across the country to inform them of the initiative and gauge their level of interest in the issue. We gained valuable insight from these conferences and conversations. Most importantly, we formed alliances with scores of activists and leaders who are interested in being part of a right to vote movement.⁷

5. These leaders included: Jacqueline Berrien (NAACP/Legal Defense Fund); Professor Heather Gerken (then Harvard Law School, now Yale Law School); Professor Lani Guinier (Harvard Law School); Penda Hair (Advancement Project); Professor Pamela Karlan (Stanford Law School); Professor Alexander Keyssar (Harvard University, Kennedy School); Brenda Wright (Then National Voting Rights Institute, now Demos); and Thomasina Williams (Ford Foundation).

6. The distinguished roster included: Wade Henderson, Julie Fernandez, and Daniel Wolf (Leadership Conference on Civil Rights); Brenda Wright (Then National Voting Rights Institute, now Demos); Thomasina Williams (Ford Foundation); Professor Spencer Overton (George Washington University School of Law); Professor Jamin Raskin (American University, Washington College of Law); Professor Heather Gerken (then Harvard Law School, now Yale Law School); Gary Flowers (then Rainbow/PUSH, now Black Leadership Forum); Heather Dawn Thompson (Appleseed Foundation); Deborah Goldberg (Brennan Center for Justice); Lloyd Leonard (League of Women Voters); Marvin Randolph (Center for Community Change); Rob Richie and David Moon (FairVote); Damon Silvers (AFL-CIO); Destiny Smith (SEIU); Penda Hair, Eddie Hailes, and Sabrina Williams (Advancement Project); and Lida Rodriguez-Taseff and Scott Jablonski (Advancement Project consultants).

7. Individuals who expressed interest in the initiative include: Andrea Kaminski, Executive Director, League of Women Voters of Wisconsin; Rev. Jennifer Kottler, Deputy Director, Protestants for the Common Good; Donnell R. White, Youth and Education Outreach Specialist, NAACP, Detroit Branch; Edwin C. Yohnka, Director of Communications, American Civil Liberties Union of Illinois; Ilir Zherka, Executive Director & Eugene Dewitt, Outreach Director, DC Vote; Alonzo Morado, Raza Development Fund; Rosalind Gold, Senior Director of Policy, Research & Advocacy, National Association of Latino Elected Officials; Cesar Perales, President & General Counsel, Puerto Rican Legal Defense and Education Fund; Juan Cartagena, General Council, Community Service Society; Bobbie Brinegar, Senior Political Advisor, Verified Voting Foundation; and Amalia Anderson, Project Director, Main Street Project, League of Rural Voters.

THE VOTING RIGHTS CRISIS

The Need for Fundamental Reform

The ability of Americans to vote, and to know that their votes will be properly counted, is under attack and is eroding. This is particularly true for people of color and low-income Americans.

In the wake of the 2000 election debacle in Florida, where illegal purges and “hanging chads” disenfranchised millions of voters, Advancement Project systematically examined our error-ridden voting system to identify and understand the myriad impediments to democratic practice. Our subsequent report, “America’s Modern Poll Tax,” locates the causes and consequences of mass structural disenfranchisement that pervade the current system. An MIT study found that four million *qualified* voters were shut out in 2000 and that registration errors and purges accounted for half of them. Professor Jamin B. Raskin further observed that certain categories of voters – citizens of the District of Columbia, citizens of U.S. territories, and citizens with felony convictions – are *disqualified* altogether: “Today more than nine million American citizens are structurally disenfranchised, a population larger than the combined populations of Alaska, Delaware, Maine, Montana, Nebraska, North Dakota, South Dakota, Vermont, and Wyoming. Most citizens who remain completely or partially disenfranchised belong to minority groups



historically consigned to the margins of American politics.”⁸

At nearly every stage in the election process, discriminatory and illegal barriers to voting are found.⁹ Some examples:

- Hundreds of African-American voters in Ohio were deprived of voting machines, given faulty ballots, and confronted with malfunctioning machines during the 2004 election.¹⁰ When polls officially closed in Ohio, lines of those still waiting to vote were extremely long. By the time the 1,175 voters in Gambier, Ohio had all cast their ballots, it was almost 4:00 a.m., and many had waited for up to 11 hours.¹¹ Then, in 2006, the Ohio legislature enacted a law that

significantly impeded voter registration and imposed criminal penalties for minor violations of the law.¹²

- According to a recent report, for more than 30 years Alaska has continued to conduct English-only elections despite the fact that 19 percent of its population is Native and 80.5 percent of new Native voters have difficulty comprehending English-only ballots.¹³
- Just days before Election Day in 2005, the city of Lawrence, Massachusetts improperly sent letters to 15,000 mostly Latino voters declaring that they were on the inactive list, creating confusion about whether they could vote.¹⁴
- In New York City in 2004, some Asian American voters were “subjected to racial

8. Raskin, *supra* note 4.

9. See generally Spencer Overton, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION (W.W. Norton & Co. 2006).

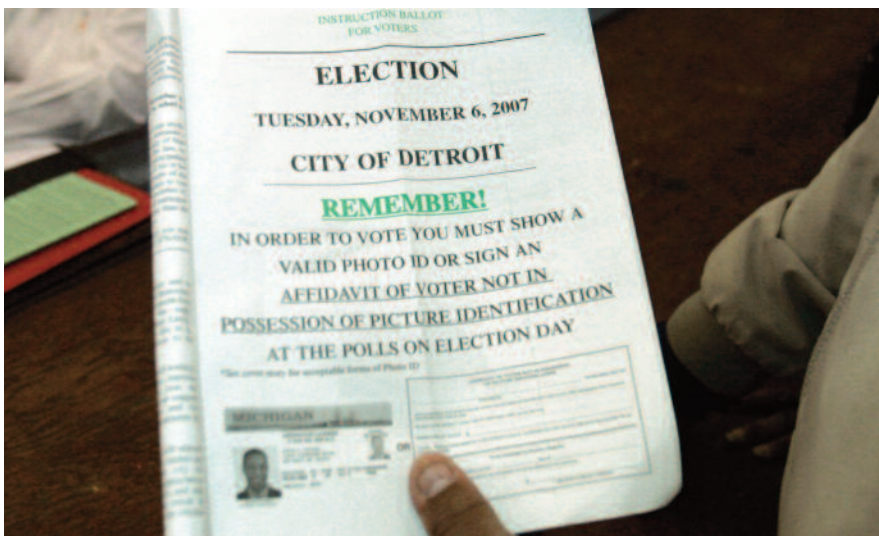
10. Bob Fittrakis et al., DID GEORGE W. BUSH STEAL AMERICA'S 2004 ELECTION? ESSENTIAL DOCUMENTS, Introduction (Bob Fittrakis, Steve Rosenfeld & Harvey Wasserman, eds., THE FREE PRESS 2005), available at <http://www.uncommonsensetv.org/elections-and-electronic-black-box-voting/2005/06/25/weNxfF2c/>.

11. Christopher Hitchens, *Ohio's Odd Numbers*, VANITY FAIR, March 2005, at 214. Ohio voters were also subjected to massive challenge campaigns orchestrated by the national Republican Party. Advancement Project brought a successful suit to enjoin some of these challenges. See *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, No. 81-3876 (D. N.J. 2004) (enjoining use of challenge lists on behalf of Intervenor Ebony Malone), *aff'd*, 2004 U.S. App. LEXIS 22687 (3d Cir. 2004), *vacated and stay granted*, 2004 U.S. App. LEXIS 22689 (3d Cir. 2004) (en banc), *application to vacate stay denied*, 543 U.S. 1304 (2004).

12. See *Project Vote v. Blackwell*, 455 F. Supp.2d 694 (N.D. Ohio 2006). The district court has permanently enjoined implementation of the voter registration restrictions. See Order Granting Permanent Injunction, Case No. 1:06-cv-01628-KMO (N.D. Ohio 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ProjectVote-Order2-11-08.pdf>.

13. Tyler Lewis, *New Report: Voting Rights Act Protections Still Needed in Alaska*, (Leadership Conference on Civil Rts./Leadership Conference on Civil Rts. Education Fund, Washington, D.C.) April 17, 2006, at http://www.civilrights.org/press_room/buzz_clips/new-report-voting-rights-act-protections-still-needed-in-alaska.html (last visited Feb. 27, 2008). The Voting Rights Act, which covers American Indians, Asian Americans, Alaskan Natives, and Spanish-heritage citizens, requires ballots and other voting materials be translated when the number of voting-age U.S. citizens of a single language group is either more than 10,000, more than 5 percent of all voting age citizens, or on an Indian reservation, where it exceeds 5 percent of all reservation residents; and the illiteracy rate of the group is higher than the national illiteracy rate. See Civil Rights Div., U.S. Dep't of Justice, *About Language Minority Voting Rights*, http://www.usdoj.gov/crt/voting/sec_203/activ_203.htm#coverage (last visited on Feb. 27, 2008).

14. Stephanie Ebbert, *Lowell Voting Problems Probed*, The Boston Globe, March 19, 2006, at B1.



it onto the rolls. In 2005, for example, one Virginia county registrar's arbitrary (and unlawful) treatment of homeless, student, and military voters required them to fill out an additional form to register to vote.¹⁸

One would think that the recent national spotlight on massive voting problems, not just in Florida and Ohio, but nationwide, would lead to positive reforms. (Same-day registration, early voting, and improvements in voting technology are just several examples.) Instead, opponents of an inclusive democracy have effectively sidetracked much of the positive reform agenda and are seeking to institute a tidal wave of regressive measures. A raft of new ID requirements is sweeping the nation, with restrictive measures enacted in several states since 2000 and proposals pending in many more.¹⁹ These measures require IDs that many voters, disproportionately lower income voters of color and the elderly, do not have and cannot easily obtain.²⁰

As Professor Spencer Overton observed:

According to the Georgia chapter of AARP, 36% of Georgians over age 75 do not have a driver's license. Nearly 10 percent of the 40 million Americans with disabilities – or about 4 million people with disabilities – lacked any form of state-issued identification. A June 2005 study in Wisconsin found that the rate of driver's license possession among African Americans was half that for whites, and that only 22% of black males age 18 to 24 had a

profiling at the polls, since they were routinely asked for identification in order to establish their eligibility to vote, even when it was not required."¹⁵

- In Florida, several county election officials in 2004 rejected registration applications for failure to check a duplicative box on the form.¹⁶ In 2005, the Florida legislature enacted a law that severely limits the ability of "third party" organizations to conduct voter registration drives by imposing onerous filing requirements and threatening prohibitive fines for even unintentional violations of the law.¹⁷
- In 2006, the Michigan Secretary of State began a program under which it compared its statewide voter database with an outdated list of individuals who had purportedly died. After conducting this match, the secretary of state immediately canceled the registrations of 40,000

individuals with no voting histories and sent notices to 20,000 other registered voters who had a voting history – giving them a deadline to respond before they would be removed from the rolls. Approximately 400 individuals contacted the state saying that they were not in fact deceased. Advancement Project does not know the total number of people who did not contact the state about being wrongly identified as deceased.

The less dramatic, year-round election administration apparatus can be just as harmful to the right to vote as intentional voter suppression strategies. State, county, and local election officials have broad discretion in accepting and rejecting registration applications. Human error, unreasonable rules, and fiscal limitations are responsible for the failure of literally millions of would-be voters to make

15. Tova Andrea Wang, 2004: *A Report Card*, The American Prospect, Jan. 4, 2005, at A4, available at <http://www.prospect.org/web/page.vw?section=root&name=ViewPrint&articleId=8961>.

16. Advancement Project sued to challenge this practice and the Florida Legislature responded by requiring all counties to reject such applications. A federal district court recently rejected Advancement Project's challenge to this Florida statute, in particular to the prohibition on the processing of corrections to timely submitted voter registration applications after the book closing deadline. See *Diaz v. Hood*, 342 F. Supp. 2d 1111 (S.D. Fla. 2004) pending sub nom. *American Federation of Labor-Congress of Industrial Organizations v. Browning* (No. 04-22572-CIV-KING).

17. Advancement Project and co-counsel Brennan Center, along with a private law firm, filed a lawsuit in federal court challenging this law. *League of Women Voters v. Browning*, No. 06-21265-CIV-Seitz/McAilley (S.D. Fla. 2006). The court blocked the enforcement of this law. *League of Women Voters v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006). In 2007, while that decision was on appeal, the Florida legislature amended the restrictions on third party voter registration groups, effective January 1, 2008. Advancement Project, the Brennan Center, and a private law firm recently filed a lawsuit to challenge the amended law. *League of Women Voters v. Browning*, No. 1:08-21243-CIV-ALTONAGA (S.D. Fla. 2008). On September 28, 2006, a federal district court judge enjoined Georgia's similar law restricting third party voter registration. *Ass'n of Cmty.Orgs. For Reform Now v. Cox*, 2006 U.S. Dist. LEXIS 87080 (N.D. Ga. 2006).

18. See Letter from Andrew A. Rivera, Elizabeth Westfall and Aurora Vasquez, Advancement Project, to the Honorable Jean Jensen, Secretary of the Commonwealth of Virginia (Nov. 1, 2005) (on file with Advancement Project).

19. A recent Georgia law requires voters to show one of six government-issued forms of ID. See GA. CODE ANN. § 21-2-417 (2007). Both a federal district court and a state court enjoined the Georgia law prior to the 2006 federal election. *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005); *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006); *Lake v. Perdue*, No. 2006CIV119207 (Fulton County Super. Ct. Sept. 19, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Statenjunction.pdf>. However, in 2007, both cases were dismissed for lack of standing. *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333 (N.D. Ga. 2007); *Perdue v. Lake*, 647 S.E.2d 6 (Ga. 2007). Thus, the Georgia ID law was enforced for the first time during the February 5, 2008 presidential preference primary. Initial reports suggest that "poll workers were bogged down comparing IDs with computer registration records" causing voters to wait on lines of up to 90 minutes long. Deborah Hastings, *Polls Flooded but No Major Problems*, ASSOCIATED PRESS, Feb. 6, 2008. Arizona's and Indiana's restrictive identification laws are discussed in more detail later in this report.

20. In 2006, the Missouri Supreme Court invalidated an ID law on these grounds, finding that 3-4 percent of Missouri citizens, or up to 240,000 people – particularly minorities, the elderly and people with disabilities - lacked adequate ID. *Weinschenk v. State*, 203 S.W.3d 201 (Mo. banc 2006).

driver's license. The lack of government-issued photo ID is particularly acute among Native Americans, some of whom have religious objections to having a photo ID.²¹

In a splintered decision, the U.S. Supreme Court upheld the constitutionality of Indiana's voter identification law on April 28, 2008 – in *Crawford v. Marion County Election Board*, 553 U.S. ____ (2008) – as a valid means of preventing voter fraud. Indiana has the most restrictive ID laws in the nation, requiring voters to have an unexpired photo ID issued by the state or the federal government. In the pivotal opinion,²² Justice Stevens, joined by Justices Roberts and Kennedy, finding no concrete evidence of a burden on the right to vote, applied a lenient level of scrutiny in concluding that the Indiana law did not unconstitutionally burden the franchise. In contrast, if the right to vote were explicitly enshrined in the Constitution, “strict

scrutiny” would have required the law to serve a “compelling interest” and be tightly related to that purpose. Because a more lenient standard was applied, Indiana's controversial ID requirement was upheld as preventing the risk of voter fraud even though the court acknowledged that there was no evidence of any actual voter fraud in Indiana. Justice Stevens' opinion did leave open the possibility that Indiana's or similar photo ID requirements could be challenged in future cases where stronger evidence of the burden on voters is presented.

If photo identification requirements were not enough, we are starting to see a new trend of state laws and proposals requiring additional proof of *citizenship* prior to registering and/or voting. Previously, voters have been required to swear under penalty of perjury that they are U.S. citizens, and there is no evidence of significant fraud by noncitizens. But again,

many of the most vulnerable voters do not possess the required citizenship documents and will be disenfranchised by these new laws. Arizona's Proposition 200 is the first state law of this kind in the nation. Its costly identification requirements deny many of those who are low-income, elderly, persons with disabilities, young, Hispanic, and Native American of the right to vote. Since the law went into effect, more than 35,000 voter applicants have attempted to register to vote but have been initially rejected because the applicant did not provide documents proving citizenship. Only one-third of those applicants subsequently “cured” their application, making it on to the rolls.²³

Alarming, such bills were introduced in the legislatures of 19 other states during the 2007-08 legislative session.²⁴ In addition to their discriminatory impact, these requirements, if enacted, would chill voter registration groups

21. See Spencer Overton, Dissenting Statement to the Report of the Commission on Federal Election Reform, Building Confidence in U.S. Elections (Sept. 2005), available at <http://www.carterbakerdissent.com/dissent.php>.

22. In a separate opinion Justice Scalia, joined by Justices Thomas and Alito, also voted to uphold the Indiana law. Justices Souter, Breyer and Ginsburg dissented.

23. American Bar Association, Section of Individual Rights and Responsibilities, Teleconference/Audio Web Cast, *The Brewing Storm: Implications of State Voter ID Laws and Other Restrictions on the Right to Vote* (Mar. 20, 2008) (comments of Nina Perales, counsel for plaintiffs in *Purcell v. Gonzalez*).

24. The proposals are:

California: Assemb. B. 2317, 2008 Reg. Sess. (Cal. 2008).

The California proposal requires proof of citizenship upon registration. The bill assumes that those who registered prior to January 2009 have proved citizenship. However, citizens must provide proof of citizenship when attempting to re-register after moving from another California county. The bill was introduced in February 2008 and failed to pass out of committee in April 2008.

Colorado: H.B. 1177, 66th Gen. Assem., Reg. Sess. (Colo. 2008).

The Colorado proposal requires proof of citizenship upon registration. The bill assumes that those who registered prior to July 2008 have proved citizenship. However, citizens must provide proof of citizenship when attempting to re-register after moving from another Colorado county. The bill was introduced in January 2008 and was postponed in February 2008.

Delaware: S.B. 196, 144th Gen. Assem., Reg. Sess. (Del. 2008).

The Delaware proposal requires proof of citizenship upon registration in the Town of Milton. The bill was introduced in January 2008 and was passed in March 2008.

Florida: Amend. 183932 to S.B. 866, 2008 Leg., Reg. Sess. (Fla. 2008).

The Florida proposal requires proof of citizenship upon registration when the person is registering to vote for the first time. The bill was introduced in April 2008 and also withdrawn in April 2008.

Georgia: H.B. 43, 153rd Gen. Assem., Reg. Sess. (Ga. 2007).

The Georgia proposal requires proof of citizenship upon registration. The bill was introduced in January 2007, and the legislative session ended in April 2008 without its passage.

Georgia: H.B. 1175, 153d Gen. Assem., Reg. Sess. (Ga. 2008).

The Georgia proposal requires proof of citizenship upon registration. The bill assumes that those who registered prior to July 2008 have proved citizenship. However, citizens must provide proof of citizenship when attempting to re-register after moving from another Georgia county. The bill was introduced in February 2008, and the legislative session ended without its passage in April 2008.

Illinois: S.B. 103, 95th Gen. Assem., Reg. Sess. (Ill. 2007).

The Illinois proposal requires proof of citizenship upon registration. The bill assumes that those who registered prior to the bill's passage have proved citizenship. However, citizens must provide proof of citizenship when attempting to re-register after moving from another Illinois county. The bill was introduced in January 2007 and was referred to committee in January 2007.

Kansas: S.B. 169, 2008 Leg., Reg. Sess. (Kan. 2007).

The Kansas proposal requires proof of citizenship upon registration. Included is a provision requiring photo identification upon voting. The bill was introduced in January 2007 and passed the Senate in February 2007. A House substitute bill was introduced in March 2008 and passed as amended in March 2008.

Kansas: H.B. 2019, 2007 Leg., Reg. Sess. (Kan. 2007).

The Kansas proposal requires proof of citizenship upon registration. The bill assumes that those who registered prior to July 2007 have proved citizenship. However, citizens must provide proof of citizenship when attempting to re-register after moving from another Kansas county. Included is a provision requiring photo identification upon voting. The bill was vetoed by the Governor of Kansas.

Maryland: S.B. 34, 2008 Leg., Reg. Sess. (Md. 2008).

The Maryland proposal requires proof of citizenship upon registration. The bill assumes that those who registered prior to October 2008 have proved citizenship. The bill was introduced in January 2008, and the legislative session ended in April 2008 without its passage.

Maryland: H.B. 884, 2008 Leg., Reg. Sess., (Md. 2008).

The Maryland proposal requires proof of citizenship upon registration. The bill assumes that those who registered prior to October 2008 have proved citizenship. The bill was introduced in February 2008 and reported unfavorably from committee in March 2008.

Massachusetts: H.B. 648, 184th Gen. Ct., Reg. Sess. (Ma. 2007).

The Massachusetts proposal requires proof of citizenship upon registration. The bill was introduced in January 2007, and the Joint Committee on Election Laws ordered a study in April 2008.

Michigan: H.B. 5337, 94th Leg., Reg. Sess. (Mich. 2007).

The Michigan proposal requires proof of citizenship upon registration. Citizens must provide proof of citizenship when attempting to re-register after moving from another Michigan county. The bill was introduced in October 2007 and was referred to committee in October 2007.

Mississippi: H.B. 1127, 2008 Reg. Sess. (Miss. 2008).

The Mississippi proposal requires proof of government-issued photo identification (for which proof of citizenship is required) upon voting. The bill does provide an exception allowing voters to provide a sworn statement if the applicant is unable to provide valid government-issued photo identification. The bill was introduced in February 2008 and failed to pass out of committee in February 2008.

because of the difficulties and costs involved in obtaining the required documents. Further, such laws arguably violate the National Voter Registration Act (NVRA),²⁵ which established uniform national standards that take into consideration a state's legitimate interest in preventing noncitizens from voting while maximizing the opportunity of citizens to register to vote successfully.

Opponents of a broader franchise have mounted a very successful public relations campaign to convince the public that voting fraud is rampant and that stricter voting requirements are needed to combat this menace. The claims of voting fraud are massively exaggerated and seem to mask the real motive of suppressing turnout by people of color and other vulnerable voters.²⁶

Minnesota provides a recent example of overblown claims of fraud being used to promote draconian voting rules. An article in the *Minneapolis-St. Paul Star Tribune* discusses a bill before the Minnesota Legislature in 2006 that would have required "that registering voters provide a copy of their birth certificate, passport or naturalization papers."²⁷ The article notes that while the bill's supporters suggested that "fraud is rampant" in Minnesota, the truth is otherwise. The number of cases of fraud is so minuscule that even the bill's supporters did not reveal the actual number. Indeed, "[i]n the entire United States, the Department of Justice charged 89 individuals with voter fraud between October 2002 and August 2005. During that same time period, 196,139,871 voters cast a ballot. This amounts to a minuscule voter fraud percentage" of just .000045%!²⁸

The specter of massive voting fraud was used in Congress to derail positive reform after the 2000 election. In the misleadingly titled Help America Vote Act (HAVA),²⁹ opponents of inclusion used fraud arguments to insist on several provisions that make it much more difficult for vulnerable voters to register and vote. For example, first-time voters who have not registered in person must produce identification at the polls. While HAVA did institute several needed reforms – such as funding for new voting machines and the right to a provisional ballot where the voter's eligibility is in doubt – its authors stopped far short of the comprehensive and progressive reforms that had been promised.

Missouri: H.B. 1317, 94th Gen. Assem., Reg. Sess. (Mo. 2008).

The Missouri proposal would have started the process of amending the state constitution to authorize the General Assembly to require government-issued photo identification upon voting in order to prove U.S. citizenship. The legislation passed the House on May 8, 2008, but was defeated in the Senate before the Legislature adjourned in May 2008.

New York: S.B. 6543, 2008 Leg., Reg. Sess. (N.Y. 2007).

The New York proposal requires proof of citizenship upon registration. The bill assumes that those who registered prior to the bill's passage have proved citizenship. The bill was introduced in December 2007 and was sent to committee in January 2008.

Oklahoma: H.B. 1803, 2007 Leg., Reg. Sess. (Okla. 2007). S.B. 417, 2007 Leg., Reg. Sess. (Okla. 2007).

The Oklahoma proposal requires proof of citizenship upon registration. The bill assumes that those who registered prior to the bill's passage have proved citizenship. However, citizens must provide proof of citizenship when attempting to re-register after moving from another Oklahoma county. The bill was introduced in January 2007 and was sent to both House and Senate committees in February 2007.

Oklahoma: S.B. 874, 2007 Leg., Reg. Sess. (Okla. 2007).

The Oklahoma proposal requires proof of citizenship upon registration. The bill assumes that those who registered prior to the bill's passage have proved citizenship. Included is a provision requiring photo identification upon voting. The bill was introduced in February 2007 and was referred to committee in February 2007.

South Carolina: H.B. 3343, 117th Leg., Reg. Sess. (S.C. 2007).

The South Carolina proposal requires proof of citizenship upon registration. The bill assumes that those who registered prior to July 2007 have proved citizenship. However, citizens must provide proof of citizenship when attempting to re-register after moving from another South Carolina county. The bill was introduced in January 2007.

Tennessee: H.B. 408, H.B. 409 2007 Leg., Reg. Sess. (Tenn. 2007). S.B. 1610, S.B. 1611 2007 Leg., Reg. Sess. (Tenn. 2007).

The Tennessee proposal requires proof of citizenship upon registration. The bill assumes that those who registered prior to the bill's passage have proved citizenship. However, citizens must provide proof of citizenship when attempting to re-register after moving from another Tennessee county. The bill was introduced in January 2008 as H.B. 3050, H.B. 3052 2008 Leg., Reg. Sess. (Tenn. 2008) and S.B. 2794, S.B. 2810 2008 Leg., Reg. Sess. (Tenn. 2008). Included in this bill is a provision requiring photo identification upon registration.

Utah: S.B. 210, 2008 Leg., Gen. Sess. (Utah 2008).

The Utah proposal requires proof of citizenship upon registration. The bill was introduced in February 2008, and the legislative session ended without its passage in March 2008.

Virginia: H.B. 68, 2008 Leg., Reg. Sess. (Va. 2008).

The Virginia proposal requires proof of citizenship upon registration. The bill assumes that those who registered prior to January 2009 have proved citizenship. The bill was introduced in December 2007, and the legislative session ended in March 2008 without its passage.

Washington: H.B. 1468, 2007 Leg., Reg. Sess. (Wash. 2007).

The Washington proposal requires proof of citizenship upon registration. Included is a provision requiring photo identification upon voting. The bill was introduced in January 2007, and the legislative session ended without its passage in March 2008.

Washington: H.B. 1774, 2007 Leg., Reg. Sess. (Wash. 2007).

The Washington proposal requires proof of citizenship upon registration. The bill assumes that those who registered prior to January 2008 have proved citizenship. The proposal requires proof of government-issued photo identification (for which proof of citizenship is required) upon voting. The bill was introduced in January 2007, and the legislative session ended in March 2008 without its passage.

Washington: S.B. 6474, 2008 Leg., Reg. Sess. (Wash. 2008).

The Washington proposal requires proof of citizenship upon registration. The bill was introduced in January 2008, and the legislative session ended in March 2008 without its passage.

Washington: S.B. 6862, 2008 Leg., Reg. Sess. (Wash. 2008).

The Washington proposal requires proof of citizenship upon registration. Citizens must provide proof of citizenship when attempting to re-register after moving from another Washington county. The bill was introduced in January 2007, and the legislative session ended in March 2008 without its passage.

25. 42 U.S.C. §§ 1973gg to 1973gg-10 (2000). The Mexican American Legal Defense and Educational Fund has challenged Prop. 200 in federal court. No. CV 06-1268-PHX-ROS, 2006 U.S. Dist. LEXIS 93477 (D. Ariz. Sept. 11, 2006). Prior to the 2006 federal election, the District Court refused to enforce this law, 2006 U.S. Dist. LEXIS 76638 (D. Ariz. 2006), a decision that the Ninth Circuit Court of Appeals reversed, case nos. 06-16702, 06-16706 (9th Cir. 2006) (order granting injunction); the United States Supreme Court vacated the injunction, *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006), and remanded the case to the Ninth Circuit, which affirmed. *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007). The District Court held off setting a trial date pending the Supreme Court's decision in *Crawford v. Marion County Election Board*. The Supreme Court decided *Crawford* on April 28, 2008 (upholding Indiana's ID requirement), thus setting the stage for a trial in *Gonzalez* in the near future.

26. See Advancement Project, "Myth or Fact – The 411 on Claims of Voter Fraud," (Nov. 2006), available at <http://www.advancementproject.org/ourwork/power-and-democracy/voter-protection/alerts/110206-vpalert.php>; see also Brief Amicus Curiae of the Brennan Center for Justice et al. in Support of Petitioners in *Crawford v. Marion County*; Lorraine C. Minnite, PROJECT VOTE, THE POLITICS OF VOTER FRAUD 3-4 (2007) (poor election administration and voter mistakes are sometimes inappropriately labeled fraud, but "intentional corruption of the electoral process by the voter" rarely occurs), available at http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf

27. Joshua Schenck Winters & Bridgette Rongitsch, *Rampant voter fraud? Don't believe it*, STAR TRIBUNE, Apr. 15, 2006. http://www.markritchie2010.net/Research/Other%20Articles/startribune_4_15_06.html

28. *Id.*

29. 42 U.S.C. § 15301 (2002).

ADVANTAGES OF AN AFFIRMATIVE RIGHT TO VOTE STRATEGY

Current battles about who is permitted to vote and what types of burdens and obstacles can be placed in the way of voters are being waged on multiple fronts – in state legislatures, in efforts to monitor and improve local election administration, in the courts, in Congress, and at the polls on Election Day.³⁰

Current battles typically involve a single issue. Pro-democracy forces pursue Election Day registration in several states, and many of the same groups also seek to eliminate or ameliorate felony disenfranchisement laws and practices. But, the two efforts are not generally united, nor can they easily be combined in the current context. Similarly, supporters of inclusive democracy are litigating to oppose discriminatory ID laws in one state and onerous voter registration regulations in another state. The amount of work being done by various groups is massive, differing from state to state.

This work in the trenches is crucial and is producing some positive results. But, overall, we are not on the road toward dramatic improvements, nationally. Thus, Advancement Project has asked whether there is another, more proactive, strategy that supporters of an inclusive democracy can pursue while continuing the critically important work on the ground.

Unifying Pro-Democracy Efforts

A movement to codify an affirmative right to vote is a proactive approach to correcting problems in the existing system. Such an effort could incorporate all the needed reforms and allow voting rights advocates to coalesce around a uniform strategy that could be deployed everywhere. It could also unify disparate progressive efforts into a more powerful movement for change. For example, civil rights groups seeking stronger protection from discriminatory practices could join with other progressives who are seeking tamper-free voting machines.

Sparkling Grassroots Passion

A proposal to enshrine an affirmative right to vote could be an inspiring vehicle for collective, purposeful organizing. Introducing the proposal in every congressional session while engaging in grassroots voting rights activities could keep the issue alive in the media and on the national policy agenda. The effort could become a successful social movement with political roots and implications, especially when combined with aggressive communications strategies.

In the words of one ally, the broadest possible proposal that addressed all the problems voters and potential voters experience could spark a “paradigm of passion,” releasing grassroots energy that is hard to organize over very technical election issues.³¹ The benefits of such a proactive and aggressive approach also are likely to be felt “in the trenches” where ongoing battles will continue to be fought. Warriors on the front lines would benefit from increased public understanding of the issues, increased grassroots activism, and increased scholarship.

Is a Right to Vote Initiative Worth It?

Some potential allies who support voting reform are not convinced that a right to vote initiative is the appropriate strategy. They note that the U.S. Constitution already implicitly includes a right to vote.³² Other constitutional experts point out that cases based on an implicit constitutional right to vote, such as the Florida felony disenfranchisement challenge,³³ have generally not been successful in recent years.³⁴ When compared to the tremendous benefits of a well-crafted, powerful explicit federal right to vote, on balance, they conclude that it makes sense to pursue the explicit right.

30. Since 2000, Advancement Project has undertaken an extensive program to protect the vote and to improve election administration in more than 10 states. Scores of other national, state, and local organizations are involved in efforts at the national, state, and local level to reform and improve a variety of election procedures.

31. Gary Flowers, Vice President for Pub. Policy, Rainbow PUSH Coal., Statement at the Meeting on Advancement Project’s Right to Vote Initiative (Nov. 17, 2005).

32. See Deceptive Practices and Voter Intimidation Prevention Act of 2007, S. 453, 110th Cong. § 2 (2007) (sponsored by Senator Barack Obama, the bill includes the finding that “[t]he right to vote is a fundamental right accorded to United States citizens by the Constitution”), available at www.thomas.gov.

33. *Johnson v. Bush*, 214 F. Supp.2d 1333 (S.D. Fla. 2002) (holding that Florida’s law denying individuals with felony convictions the right to vote did not violate the Constitution or Voting Rights Act), *aff’d in part rev’d in part*, 353 F.3d 1287, (11th Cir. 2003), *vacated and rehearing en banc granted*, 377 F.3d 1163 (11th Cir. 2004), *aff’d*, 405 F.3d 1214 (11th Cir. 2005) (affirming summary judgment in favor of defendants), *cert. denied*, 546 U.S. 1015 (2005). In 2007, Florida Governor Charles Crist and the state clemency board revised Florida’s policy such that certain individuals with felony convictions will have their civil rights restored without application to or hearing by the clemency board. See American Civil Liberties Union, State Legislative and Policy Reform to Advance the Voting Rights of Formerly Incarcerated Persons, <http://aclu.org/votingrights/exoffenders/statelegispolicy2007.html#text> (last visited Feb. 27, 2008).

34. On this point, Professor Pamela Karlan notes:

More than a century ago, in *Minor v. Happersett*, 88 U.S. 162, 178 (1874), the Supreme Court expressed itself “unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one.” It took ratification of the nineteenth amendment to overturn *Minor’s* holding that states could deny women the right to vote. More recently, in *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam), the Court expressed a similar sentiment when it declared that “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College.”

As a textual matter, although the Constitution contains a number of provisions protecting voting rights, they are either phrased as prohibitions on particular forms of disenfranchisement or depend on antecedent state-level decisions about the franchise. For example, the 15th amendment provides that citizens’ right to vote shall not be denied “on account of race, color, or previous condition of servitude;” the 19th amendment forbids denials “on account of sex;” and the 26th amendment forbids denials “on account of age,” at least for citizens who are eighteen or older. Similarly, the 24th amendment prohibits denial or abridgement of the right to vote “by reason of failure to pay any poll tax or other tax.” Pamela S. Karlan, *Congressional Power to Establish an Affirmative Right to Vote* (July 2005) (unpublished paper, on file with Advancement Project).

The Supreme Court's recent *Crawford* decision, upholding Indiana's extremely restrictive voter ID requirement, suggests that if an implicit constitutional right to vote exists, it is fairly weak.³⁵ In any event, if an initiative to enshrine an explicit right to vote moves forward, steps can be taken to reduce the risk of undermining arguments that the right to vote is already implicit in the constitution. For example, all supporters of an explicit right to vote should make clear that the purpose of the initiative is to make explicit a right that is already implicit.³⁶ For that reason, this report avoids terminology such as "creating" or "establishing" a right to vote and instead uses "enshrining" the right.

Some pro-democracy supporters are skeptical of a right to vote initiative because it may be dangerous to open up the Constitution and/or federal voting law to any amendments or changes. An effort that begins as a positive reform may be hijacked and turned into a negative reform, as happened with the Help America Vote Act.³⁷ Also, some politicians, when asked to vote for anti-gay rights or anti-choice amendments that are popular with their constituents, now explain that they are opposed to *any* constitutional amendment. Such politicians might not vote for the right to vote amendment because it would deny them the "cover" they want for not supporting regressive proposed amendment changes.

Another concern is that a right to vote initiative may drain resources from the day-to-day work of advocates who are already stretched too thin promoting reforms, defending against regressive measures, and achieving incremental improvements in electoral administration. These current efforts are extremely important and a broad new right to vote initiative should only be undertaken if new funding is available so it doesn't detract from the daily work needed. With adequate funding, front-line advocates would be well situated to develop an affirmative right to vote effort. Advocates working on the front lines to protect voters can offer first-hand knowledge of how an explicit right to vote would strengthen their efforts to counter barriers to voter participation. Their daily work would underscore the need for an affirmative right to vote.

35. Indiana's law would likely have not survived if a higher level of constitutional scrutiny had been applied, as would be the case under the right to vote amendment. The Missouri Supreme Court struck down an ID law similar to Indiana's based on the state constitution's *explicit* guarantee of a right to vote, which the court said required any restrictions on voting to be subject to strict scrutiny. *Weinschenk v. State*, 203 S.W.3d 201 (Mo. banc 2006)

36. See, e.g., Wade Henderson, *Claiming Our Democracy*, in *THE COVENANT WITH BLACK AMERICA*, 130-31, 135-36 (Tavis Smiley ed., Third World Press 2006). Henderson emphasized that the federal constitution implicitly guarantees the right to vote but points out that the United States is one of only 11 nations in the world that do not provide an explicit right to vote in their constitutions. Henderson stresses that a right to vote amendment is needed because voter registration processing errors, lost or miscounted votes, language barriers, felony convictions, and targeted voter disenfranchisement cost millions of U.S. citizens their access to the franchise. *Id.*

37. See, e.g., Daniel P. Takaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206 (2005).

LANDSCAPE OF RIGHT TO VOTE EFFORTS

Pioneering Voice for the Constitutional Amendment Strategy

Rep. Jesse Jackson, Jr. has been the most significant national figure in support of a constitutional amendment to enshrine the right to vote. Beginning in 2001, and in each session of Congress thereafter, Jackson has introduced the Voting Rights Amendment, currently titled House Joint Resolution 28.³⁸ H.J. Res. 28 would enshrine an explicit constitutional right to vote for all U.S. citizens 18 years and older; require states to administer elections in accordance with standards set by Congress; allow state regulations that are narrowly tailored to produce efficient and honest elections; require election day registration; and require each state's electors to vote for the candidates who received the majority of the popular votes in the state or district.³⁹

Jackson notes that right-wing politicians have put forward numerous constitutional amendments based on their "values." Among other issues, they have introduced amendments banning abortion, setting term limits, requiring a balanced budget, lowering federal taxes, banning flag desecration, requiring prayer in school, allowing the Ten

Commandments to be posted in public places, including God in the Pledge of Allegiance, defining marriage as heterosexual, and mandating English as the official language.⁴⁰ He argues that while it is unlikely that any of these proposals would ever become part of the Constitution, their proponents use them to keep their "culture wars" visible and to keep their conservative base engaged during and after elections. These amendments help organize and focus their advocacy. For example, legislative proposals, such as "partial birth" abortion bills, are often put forward to promote specific ideas and values.

Jackson also contends that promoting value-driven constitutional amendments would help harness and increase grassroots energy for progressives as it has for conservatives. He recognizes that many progressives are loath to open up the Constitution to any amendment because they believe that the Constitution is "good just the way it is" and they fear that consideration of any amendment might open the door further for those pushing a right-wing agenda. But Jackson believes that enshrining the right to vote in federal law would have far more currency with Americans than many of the proposals pushed by extreme conservatives.⁴¹

In arguing specifically for his right to vote amendment, Jackson criticizes the current system as resting on a "states' rights" theory that is steeped in racism. He argues that the present system is separate and unequal because of the lack of federal law and guidelines. Voting in the United States is controlled by "50 states, 3,067 counties, and 13,000 different local election jurisdictions," which means that the amount of access Americans have to vote depends on where they live and their social circumstances.⁴²

Jackson also notes the inconsistency of national leaders attempting to export democracy abroad – including the constitutional right to vote – while not pursuing those same rights at home. He describes his proposed constitutional amendment as a human rights amendment that is non-partisan, non-ideological, non-programmatic, and non-special interest.⁴³

The Amendment has gained some support over time. It had 45 co-sponsors in 2003 and 51 co-sponsors in 2007.⁴⁴ However, despite Jackson's efforts, the right to vote amendment has languished in a congressional subcommittee.

38. H.J. Res. 28, 110th Cong. (2007). It reads:

SECTION 1. All citizens of the United States who are eighteen years of age or older shall have the right to vote in any public election held in the jurisdiction in which the citizen resides. The right to vote shall not be denied or abridged by the United States, any State, or any other public or private person or entity, except that the United States or any State may establish regulations narrowly tailored to produce efficient and honest elections.

SECTION 2. Each State shall administer public elections in the State in accordance with election performance standards established by the Congress. The Congress shall reconsider such election performance standards at least once every four years to determine if higher standards should be established to reflect improvements in methods and practices regarding the administration of elections.

SECTION 3. Each State shall provide any eligible voter the opportunity to register and vote on the day of any public election.

SECTION 4. The Congress shall have power to enforce and implement this article by appropriate legislation.

39. H.J. Res. 28 is part of a package of nine constitutional amendments that Rep. Jackson has proposed. Because the last successful constitutional amendment is No. 27, Jackson has reserved House Resolutions 28 through 36 in each session of Congress for his package of proposed amendments. Jackson intends to keep introducing these amendments until they are enacted. Rep. Jesse L. Jackson, Jr., Remarks at a Meeting with Frank Watkins (Chief of Staff for Rep. Jesse L. Jackson, Jr.), Penda Hair (Advancement Project), and Lida Rodriguez-Taseff (Advancement Project consultant) (Nov. 17, 2005).

40. See Jesse L. Jackson, Jr., *Democrats Should Fight for a "Right to Vote" Amendment*, THE NATION, Nov. 15, 2005, available at <http://www.jessejacksonjr.org/query/creadpr.cgi?id=6908>.

41. *Id.*

42. *Id.*

43. See Jesse L. Jackson, Jr., *The Right to Vote*, at <http://www.house.gov/jackson/VotingAmendment.htm> (last visited Feb. 28, 2008).

44. See H.J. Res. 28: Co-Sponsors, at <http://thomas.loc.gov/>.

Pro-Democracy Organizations and Scholars: Advancing the Cause

Several nonprofit organizations support a right to vote amendment. Rainbow PUSH is a leader on this effort.⁴⁵ Among other activities, it has featured sessions on this idea at its conventions.⁴⁶ FairVote also is a strong advocate of a right to vote amendment and has drafted suggested language. In July 2004, FairVote held an important convening in Boston, at which leading academics and activists deepened their knowledge of the proposal. FairVote's website includes key resources, such as academic analyses, opinion editorials, and advocacy materials.

After the 2004 election, the National Voting Rights Institute (NVRI), which became a part of Demos in 2007, began working with allies to generate public support for a constitutional amendment guaranteeing the right to vote. NVRI has worked with Rep. Jesse Jackson, Jr. and other members of Congress on a model resolution for a right to vote amendment; prepared background materials on the need for an amendment; and co-sponsored a forum on the proposal with Lesley College in April 2005.

In November 2007, a coalition of Civil Rights organizations, including Advancement Project, ACLU, Brennan Center, DC Vote, FairVote, U.S. PIRG, and others, convened for the



Claim Democracy 2007 conference in Washington, D.C.⁴⁷ The conference brought together national and local election reformers to discuss the expansion of D.C. voting rights, ex-felon disenfranchisement, the role of the media in elections, redistricting and other voting rights issues. Its focus was on the 2008 elections and the need to create a pro-democracy movement to challenge the recent election debacles.

Several scholars have completed in-depth research on issues related to the right to vote. American University Professor Jamin Raskin is a leading academic expert on this topic, having authored numerous articles and opinion pieces.⁴⁸ Harvard Professor Alexander Keyssar also has written extensively on this topic and is a strong supporter of the idea.⁴⁹

Civil rights organizations such as the NAACP, NAACP LDF, MALDEF, ACLU, and the Leadership Conference on Civil Rights (LCCR) were deeply involved in the renewal of the Voting Rights Act, portions of which were set to expire in 2007. These groups were adamant that the concept of a broader right to vote should not be linked to the Voting Rights Act renewal. However, several of these civil rights groups have participated in our gatherings and have expressed interest in becoming active on a broader right to vote effort, now that the expiring provisions of the Voting Rights Act have been renewed.

45. See Jesse L. Jackson, Sr., *Ensuring Voting Rights*, IN THESE TIMES, Apr. 18, 2005, at 13, available at <http://www.inthesetimes.com/article/2035/>.

46. FairVote's language is less detailed than that of H. J. Res. 28. Its substantive sections read:

Section 1. All citizens of the United States, who are eighteen years of age or older, shall have the right to vote in elections for federal office, and in any other public election held in the jurisdiction in which the citizen resides. The right to vote shall not be denied or abridged by the United States, any State, or any other public or private person or entity.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

E-mail from Rob Ritchie, Executive Director, FairVote, to Lida Rodriguez-Taseff, Advancement Project Consultant (Nov. 17, 2005).

47. Claim Democracy 2007 Conference, <http://www.claimdemocracy.com/about.php> (last visited Nov. 15, 2007).

48. See Citations for Jamin Raskin, <http://library.wcl.american.edu/facbib/profbib.php?ProflD=44> (last visited Feb. 28, 2008).

49. See Faculty Profile of Alexander Keyssar, http://ksgaccman.harvard.edu/publications/Search_Faculty.asp?PersonID=70 (last visited Feb. 28, 2008).

MEANING AND SCOPE OF RIGHT TO VOTE PROPOSALS

Proponents of a right to vote initiative must decide how broad to make the proposal. The issues related to the scope of the proposal fall into three categories: election administration, voter qualifications, and coverage. Election administration covers a plethora of rules, regulations, and practices that are generally adopted and implemented by state and local authorities, with an overlay of federal law protections and requirements. Proponents must consider how a right to vote proposal would affect issues such as voter registration and deadlines. Would it require Election Day registration, for example, as is the case with Rep. Jackson's proposed amendment? How would it affect the type and allocation of voting equipment, polling place administration, length of time voters may wait in line in order to vote, challenges, etc.?

Voter qualifications now are largely the prerogative of the states, which have enacted inconsistent rules on persons with a felony conviction or mental disability.

Coverage includes a description of the individuals who would be guaranteed the right to vote under such an initiative (e.g., citizens of the U.S. states; residents of the District of Columbia; residents of U.S. territories and/or noncitizen immigrant residents of the U.S.) as well as the issues beyond casting a ballot (e.g., direct election of the president). The U.S. Constitution or federal law typically decides the coverage issues now.

A related question is how specific to make the language and legislative history. Should the right to vote proposal be a simple statement as

it is in South Africa's constitution, which states: "Every adult citizen has the right: a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and b) to stand for public office and, if elected, to hold office."⁵⁰ Or, should the Proposal anticipate and address as many of the specific issues as possible, along the lines of Rep. Jackson's detailed proposed constitutional amendment.

In this section, we lay out considerations and arguments related to several major decisions that must be made by proponents of any right to vote proposal. In the section on strategy below, we will suggest when and how such decisions might be made.

Rules of Order: Defining Administrative Requirements

One of the biggest roadblocks to voting in the United States is the dense thicket of administrative requirements, rules, and procedures to which voters are subject to in registering, being allowed to vote, and in having their votes counted. In the absence of an explicit, affirmative right to vote in U.S. law, states have been free to enact almost any administrative requirements, rules, and procedures they have deemed fit, subject only to their own laws and constitution, and federal anti-discrimination laws that protect voters, such as the Equal Protection Clause and the Voting Rights Act along with certain other specific requirements (e.g., NVRA and HAVA). However, by setting forth the basic voting qualifications explicitly in the U.S. Constitution (by way of constitutional amendment) or in a strong federal statute, the

ability to vote would be protected with much more force against administrative rules and procedures that make registering and voting difficult. For example, if the right to vote were guaranteed in the Constitution, administrative requirements that place restrictions on the right to vote of otherwise qualified citizens would be upheld only when those administrative requirements are necessary to promote a compelling state interest.⁵¹ A similarly strict compelling state interest requirement could also be included in a federal right to vote statute.

In practice, this would mean that the patchwork of state imposed administrative requirements would have to be analyzed in the context of whether each requirement is actually necessary to promote a compelling state interest. In fact, many of the administrative requirements in place today would fail precisely because they burden the right to vote of otherwise qualified voters and because they provide no appreciable benefit for fraud prevention, election integrity, or better election administration.

A good example of this is the new Indiana voter ID program (SEA 483), which was upheld as constitutional by the U.S. Supreme Court.⁵² Under the law, with a few minor exceptions, every voter must present a government-issued photo ID when voting in person. Despite the law's likely burden on many voters, with a disproportionate impact on eligible low income and elderly people, the Court's lead opinion upheld the law under the lenient level of constitutional scrutiny that applies to rights that are not "fundamental." However, if federal legislation or a constitutional amendment

50. S. AFR. CONST., *supra* note 3.

51. For an analysis of the evolution of the jurisprudential formula for reviewing restrictions on the franchise, see Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right To Vote*, 71 U. Cin. L. Rev. 1345 (2003).

52. *Crawford v. Marion County Election Bd.*, *supra* note 22.

recognizing the fundamental right to vote were in place, the courts would have had no choice but to apply “strict scrutiny” to Indiana’s law. Undoubtedly, the statute would fail to meet its burden of being “narrowly tailored” to meet a “compelling state interest” because the state could produce no evidence of a voter fraud problem to support its claim that the law was necessary to *prevent* voter fraud.

A recent Missouri Supreme Court decision illustrates the critical difference between the lenient constitutional scrutiny of burdens on non-fundamental interests and the stringent scrutiny of burdens on fundamental rights. Holding that voting is a fundamental right under the Missouri state constitution, the Missouri Supreme Court barred enforcement of that state’s ID requirements. *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006).

Similarly, voting systems that do not ensure that votes are recorded or counted accurately would likely fail the higher level of scrutiny created by a right to vote amendment. This would mean that activists who have been fighting for accurate and verifiable elections (a growing movement) would have reason to support an amendment to enshrine an explicit right to vote. Indeed, as demonstrated by the meetings held with Bobbie Brinegar and David Dill of Verified Voting Foundation, groups pushing for accurate, verifiable, and secure elections would likely support a right to vote movement. This is especially the case

if the proposal includes the right to have the vote accurately recorded and counted.

Tackling the Question of Qualifications

The effectiveness of the right to vote will depend on the breadth or narrowness of the defined qualifications. In other words, the greater the number of qualifications, the less universal the right and greater the number of people who would be left out of the democratic process. The fewer the qualifications, the greater the number of people who would be able to participate in the democratic process, and the more representative the democracy. What qualifications, if any, would strike the appropriate balance between broadening democratic participation and ensuring that voting is left to those who should be the decision makers?

AGE REQUIREMENTS

Unlike most qualifications, the U.S. Constitution speaks directly to the question of voting age. The 26th amendment states that “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”⁵³ Under this language, a state may not set the voting age at higher than 18 years but it would be permissible for a state to set a lower voting age. Several nonprofit groups advocate lowering the voting age, including the

National Youth Rights Association and Kids Voting USA. Some states are taking the initiative to lower the voting age in order to allow students to vote earlier and get them into the habit of civic participation. At least 11 states allow 17-year-olds to vote in the primary if they turn 18 by the general election date. These states include Delaware,⁵⁴ Indiana,⁵⁵ Iowa,⁵⁶ Kentucky,⁵⁷ Maine,⁵⁸ Maryland,⁵⁹ Mississippi,⁶⁰ Nebraska,⁶¹ North Carolina,⁶² Ohio,⁶³ and Virginia.⁶⁴ And, a number of other states, including Arizona, Connecticut, Illinois, Minnesota, New Hampshire, and Pennsylvania, have proposed legislation or initiatives to lower the voting age.⁶⁵ A minimum age of 18 is consistent with the age requirement in countries that Freedom House has designated as the world’s strongest democracies.⁶⁶

CITIZENSHIP REQUIREMENTS

The cornerstone of democracy is the right of voters to elect the decision-making bodies of political assemblies at regular intervals. If the right to vote is to be truly universal, it must be granted to all residents of the territory concerned... Universality, in the original sense of the word, would imply that all residents, irrespective of nationality, are included in the electorate.

- European Commission to the European Parliament⁶⁷

There is a growing movement to extend the right to vote to noncitizens in the United

53. U.S. CONST. amend XXVI, § 1.

54. DEL. CODE ANN. tit. 15, § 1701 (2008).

55. IND. CODE ANN. § 3-7-13-2 (1995).

56. IOWA CODE § 43.91 (2008).

57. KY. REV. STAT. ANN. § 116.055 (1998).

58. ME. REV. STAT. ANN. tit. 21-A, § 111-A (2005).

59. MD. CODE ANN., ELEC. LAW § 3-102 (2007).

60. MISS. CODE ANN. § 23-15-11 (1997).

61. NEB. REV. STAT. § 32-110 (1994).

62. N.C. GEN. STAT. § 163-59 (1995).

63. OHIO REV. CODE ANN. § 3503.011 (1981).

64. VA. CODE ANN. § 24.2-544 (2000).

65. See Susan Vermeer, *Voting Age*, Issue Brief: Citizenship Education (Education Commission of the States, Denver, CO), May 2004, available at <http://www.ecs.org/clearing-house/51/42/5142.doc>.

66. See André Blais, Louis Massicotte, & Antoine Yoshinaka, *Deciding Who Has the Right to Vote: A Comparative Analysis of Election Laws*, 20 Electoral Studies 41 (2001); Louis Massicotte, André Blais & Antoine Yoshinaka, *Establishing the Rules of the Game: Election Laws in Democracies* (University of Toronto Press), 2004. These analyses rely on country ratings by Freedom House in comparing election rules in democratic countries. Freedom House is a well-known non-governmental organization that measures freedom around the world based on numerous variables that it has determined are commensurate with democratic governance. See <http://www.freedomhouse.org>; see also *Memorandum on Research on Universal Suffrage and Voting Administration* (Nov. 3, 2005) (on file with Advancement Project).

67. Ron Hayduk, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES* 57 (Routledge 2006) (citing Michael Walzer, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 61-62 (Basic Books 1983)).

States. History and case law suggest that American citizenship does not have to be a prerequisite for voting. Until 1928, a number of states allowed and even encouraged noncitizen voting.⁶⁸ The end of immigrant voting rights coincided with other efforts to disenfranchise Americans through poll taxes, literacy tests, and restrictive residency requirements.⁶⁹ Because the Constitution specifically cites citizenship in several other places (in reference to the qualifications for holding office), it is fair to conclude that the Framers “did not intend to create a U.S. citizenship suffrage qualification.”⁷⁰ Further, the Supreme Court has consistently defended the concept of noncitizen voting, though often in the name of federalism (states rights).⁷¹

Ron Hayduk, a renowned expert on immigrant voting rights, argues that “political exclusion of noncitizens raises troubling questions about the nature of our democracy.”⁷² Hayduk explains that

immigrant voting is not a new phenomenon. In fact, “noncitizen immigrants enjoyed voting rights for most of America’s history and in much of the country. . . . The notion that noncitizens should have the vote is older, was practiced longer, and is more consistent with democratic ideals than the idea that they should not.”⁷³ Understanding the reality that America historically included and embraced immigrants in the voting process is central to making a case for restoring immigrant voting rights today. Noncitizens even held public office from the Colonial Era through the 1920s. Today, as immigrant populations swell in many major cities, scholars, politicians, and American voters are beginning to reconsider extending voting rights to noncitizens.⁷⁴

Efforts to reinstate voting rights for noncitizen residents – which were widespread in 40 states and federal territories until the demise of the practice in the early 1900s⁷⁵ – kicked into high gear in 2005.

Proposed legislation or other efforts to this end have been pursued in Massachusetts,⁷⁶ Minnesota,⁷⁷ New York State and New York City,⁷⁸ California,⁷⁹ Connecticut,⁸⁰ Illinois,⁸¹ Maine,⁸² Maryland,⁸³ North Carolina,⁸⁴ Texas,⁸⁵ Washington D.C.,⁸⁶ and Wisconsin.⁸⁷

MENTAL COMPETENCE

Almost all strong⁸⁸ democracies restrict voting rights on grounds of a lack of mental competence.⁸⁹ In the United States, state laws vary greatly regarding mental competence and voting. Adjudication of general incompetence (or incapacity, unsound mind, etc.) appears to be the most widespread basis for disability-based disenfranchisement. At least a few states require a specific finding of incapacity to vote before an individual may be disenfranchised.⁹⁰ Nineteen states bar voting by people under guardianship or who are *non compos mentis* (“not master of one’s own mind”), an often ill-defined determination.⁹¹ Another eighteen prevent voting if there is a specific

68. See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. R. 1391, 1395 (1993).

69. *Immigrants and Disenfranchisement*, Immigrant Voting Project, <http://www.immigrantvoting.org/material/disenfranchisement.html> (last visited Feb. 28, 2008).

70. Raskin, *supra* note 68, at 1420-21.

71. *Id.* at 1395.

72. Hayduk, *supra* note 67 at 3.

73. *Id.*

74. Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271 (Summer 2000).

75. From 1880-1910, a huge wave of immigrants from Southern and Eastern Europe arrived in the United States. The stark increase of “darker Mediterranean and politically suspect immigrants” generated a nativist backlash. Along with other restrictive policies towards immigrants, states began to limit access to the franchise. By 1900, only eleven states continued to allow immigrants the right to vote and over the next twenty-six years these states also eliminated the right to vote for noncitizens. See Ron Hayduk, *DEMOCRACY FOR ALL*, 25-27 (Routledge Taylor & Francis Group 2006).

76. Several Massachusetts’ localities are seeking home rule authorization from the state legislature to permit them to adopt noncitizen voting.

77. Proposed legislation in Minnesota, a state with a long history of nonresident voting rights, seeks to amend the state constitution to restore those rights (along with voting rights for ex-offenders).

78. Two bills relating to noncitizen voting have been introduced in the New York legislature, each a number of times since 1993. The first extends the right to vote in local elections to “resident aliens” who have earned permanent legal status in this country, who have been residents of New York for at least three years, and who have filed an application for citizenship and are awaiting processing. The bill would add a new section to the Election Law and would apply to New York City (automatically) and any other locality that passed a law permitting noncitizen voting. A.B. 4122, 230th Leg., (N.Y. 2007) (sponsored by Assembly Member Perry, et al.). The second bill would grant an affirmative “right to vote” to all legal permanent residents who otherwise fulfill state residency and age requirements. It would amend multiple sections of New York’s election law to require qualified voters be either a “citizen of the United States” or “an alien lawfully admitted for permanent residence in the United States” thus expanding the franchise. A.B. 4635, 230th Leg., (N.Y. 2007) (sponsored by Assembly Member Lopez). Each time either bill has been introduced, however, it has been read once and sent to the committee on Election Law where it remained until reintroduced in the following session. New York City introduced new legislation on April 5, 2006 to allow residents who have lived in the city for six months or longer to vote in municipal elections. See Int. 245 (N.Y.C. 2006) available at http://www.nycouncil.info/html/legislation/legislation_introbyyear.cfm

79. In the 2004 general election, San Francisco included on its ballot a proposition to allow all residents to vote in school board elections. See Current Immigrant Voting Rights Practices and Movements, <http://www.immigrantvoting.org/statescurrent/stalist.html> (last visited Feb. 28, 2008).

80. See Immigrant Voting Rights in Connecticut, <http://www.immigrantvoting.org/statescurrent/connecticut.html> (last visited Feb. 28, 2008).

81. See Immigrant Voting Rights in Chicago, <http://www.immigrantvoting.org/statescurrent/Chicago.html> (last visited Feb. 28, 2008). Since 1998, Illinois has permitted noncitizen voting in school council elections in large cities. *Id.*

82. See Immigrant Voting Rights in Maine, <http://www.immigrantvoting.org/statescurrent/maine.html> (last visited Feb. 28, 2008).

83. See Immigrant Voting Rights in Maryland, <http://www.immigrantvoting.org/statescurrent/maryland.html> (last visited Feb. 28, 2008). Six counties in Maryland currently allow resident voting in local elections and further efforts are ongoing. *Id.*

84. See Immigrant Voting Rights in North Carolina, <http://www.immigrantvoting.org/statescurrent/northcarolina.html> (last visited Feb. 28, 2008).

85. See Immigrant Voting Rights in Texas, <http://www.immigrantvoting.org/statescurrent/Texas.html> (last visited Feb. 28, 2008).

86. See Immigrant Voting Rights in Washington, DC, <http://www.immigrantvoting.org/statescurrent/DC.html> (last visited Feb. 28, 2008). The city council introduced a bill in July 2004 to extend full voting rights to legal permanent residents. *Id.*

87. See Current Immigrant Voting Rights Practices and Movements, <http://www.immigrantvoting.org/statescurrent/stalist.html> (last visited Feb. 28, 2008).

88. “Strong” as measured by Freedom House. See <http://www.freedomhouse.org>, *supra* note 66.

89. *Id.*

90. See, e.g., WASH. CONST. art. VI, § 3 (amended 1988) (giving only a state court the power to declare a person mentally incompetent and therefore unable to exercise the right to vote); *Missouri Protection & Advocacy Services, Inc. v. Carnahan*, 499 F.3d 803 (8th Cir. 2007) (upholding a Missouri law that allows citizens who are under full guardianship to retain their voting rights if they demonstrate a capacity to vote).

91. See Press Release, Judge David L. Bazelon Center for Mental Health Law, Appeals Court Favors Individual Determination of Voting Rights for Disenfranchised Citizens with Mental Disabilities (Aug. 23, 2007) (on file with Advancement Project), available at http://www.bazelon.org/newsroom/2007/8thCircuit_Voting082307.htm.

determination of incompetence with respect to voting.⁹² Virtually all states prohibit disenfranchisement solely on grounds of institutionalization or mental illness or retardation.

Some advocates in the mental health community argue that if there are to be any qualifications based on mental disability, a specific finding of incapacity to vote should be required before a person is denied access to the franchise. In other words, they would argue that a finding of general mental incompetence or the appointment of a guardian is not a sufficient basis to disenfranchise. It is for this reason that the standard for assessing voting capacity as set forth in *Doe v. Rowe*,⁹³ which requires such a specific finding, has found at least some support among the medical community. As a result of *Doe*, it would not be surprising if there were more constitutional challenges to disability-based disenfranchisement in the near future, on grounds of due process, equal protection, and the Americans with Disabilities Act (ADA). However, other activists in the mental health community take more of an ardent stance, arguing that if a person is capable of forming and expressing the desire to vote, they should not be disenfranchised. They read *Doe* as the start of a dangerous precedent whereby states will create threshold tests for competency, which could serve to disenfranchise large numbers of qualified voters.

Mental competency qualifications could be one of the most complex issues to confront in any effort to enshrine an explicit right to vote. Choosing a middle ground position on constitutional language, in line with the test

created by *Doe* and the law in some states, might result in *de facto* disenfranchisement on a much greater scale. Undoubtedly, some tough decisions will have to be made, on philosophical and practical levels, on how to proceed in this area.

PERSONS WITH FELONY CONVICTIONS

At present, two states, Kentucky and Virginia,⁹⁴ permanently disenfranchise persons who have been convicted of felonies. Several states (Alabama, Arizona, Florida, Mississippi, Nevada, Tennessee, and Wyoming) allow only a limited number of persons with felony convictions to vote.⁹⁵ Activists caution that a movement to enshrine an explicit right to vote in the U.S. Constitution should not be permitted to open the door to re-argument of settled law in 40 states, where people with felony convictions already have the ability to vote. The goal of any movement should push further by expanding the franchise to persons who are incarcerated or serving sentences, as a means of investing them in their communities and thus reducing the chance that they will commit additional crimes. In fact, the Brennan Center cites a study which shows that among those previously arrested, voters are less than half as likely as nonvoters to be re-arrested, in support of the argument that “[r]e-enfranchisement reduces crime and helps people who have served prison sentences to reintegrate into society.”⁹⁶

Polling data show that more than 80% of Americans favor restoration of the vote once persons convicted of a crime have served their entire sentence and are living in the community.⁹⁷ A majority of the participants

in our focus groups also favored restoration of the vote to persons with felony convictions who have completed their sentences.

Beyond Qualifications: Minimalist or Maximalist Coverage?

Participants at our November 2005 convening at the Leadership Conference considered whether an explicit right to vote should include replacing the Electoral College with direct election of the president and voting rights for residents of the District of Columbia and/or residents of U.S. territories. Several participants supported this “maximalist” approach on the ground that a bold and aggressive proposal would inspire more passion among supporters and would bring more allies to the struggle. This “maximalist” approach needs to be given serious consideration.

DISSECTING THE ELECTORAL COLLEGE DEBATE

The Electoral College consists of 538 electors: one for each of 435 members of the House of Representatives, one for each of the 100 Senators, and three for the District of Columbia by virtue of the 23rd Amendment. The electoral system (the Constitution does not use the term “college”) was established as a compromise between election of the president by Congress and election by popular vote.

The U.S. Constitution provides that the electors, not direct popular vote, select the president.⁹⁸ A majority of 270 electoral votes is required to elect the president and vice president. No constitutional provision or

92. Pam Belluck, *States Face Touchy Decisions on Who is Mentally Fit to Vote*, N.Y. Times, June 19, 2007, at A1, available at http://www.nytimes.com/2007/06/19/us/19vote.html?pagewanted=1&_r=1&th&emc=th. For example, in November 2007, the New Jersey electorate approved an amendment to their state constitution replacing the provision that denied the right to vote to an “idiot or insane person” with language that “no person adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting shall enjoy the right of suffrage.” See Official 2007 General Election Results, Public Question Number Four, [http://www.nj.gov/oag/elections/2007results/07-general-election/07-official-general-election-tallies-\(pub-ques\)-12.3.07.pdf](http://www.nj.gov/oag/elections/2007results/07-general-election/07-official-general-election-tallies-(pub-ques)-12.3.07.pdf) (last visited March 6, 2008); see also N.J. CONST. art. II, § 1 (6).

93. 156 F.Supp.2d 35 (D. Me. 2001).

94. See State Legislative and Policy Reform to Advance the Voting Rights of Formerly Incarcerated Persons, *supra* note 33.

95. *Id.*

96. Memorandum from Catherine Weiss and Jennifer Weiser of The Brennan Center for Justice at N.Y.U. School of Law to Commission on Presidential Nomination Timing and Scheduling (May 11, 2005), available at http://www.brennancenter.org/dynamic/subpages/download_file_9493.pdf.

97. Jeff Manza, Clem Brooks, & Christopher Uggen, *Public Attitudes Toward Felony Disenfranchisement in the United States*, 68 PUBLIC OPINION QUARTERLY 275 (2004).

98. U.S. CONST. art. II, § 1, amended by U.S. CONST. amend. XII and XXIII.

federal law requires electors to vote in accordance with the popular vote in the state where they were appointed. In the event that no candidate receives a majority of electoral votes, the 12th Amendment to the Constitution provides for the presidential election to be decided by the House of Representatives.⁹⁹

Neither the Constitution nor federal law prescribe the manner in which each state appoints its electors, other than directing that they be appointed on the Tuesday after the first Monday in November. In most states, the electors are appointed by statewide popular election. However, state laws vary. For example, in Maine and Nebraska, two electors are chosen at-large by statewide popular vote and the rest are selected by the popular vote in each congressional district. As a result, the electoral procedure in these states allows a split slate of electors to be chosen.

ARGUMENTS FOR ELECTORAL COLLEGE REFORM

There have been more than 700 attempts to change the Electoral College since its inception. According to FairVote, “[m]ore constitutional amendments have been proposed to reform the Electoral College than any other issue, and polls regularly show that some two-thirds of Americans are ready to establish a direct nationwide vote for the president.”¹⁰⁰

The Electoral College is rooted in racism. Historians frequently describe the founders’ motives in creating the Electoral College as protecting small state interests and giving the final decision to educated and connected citizens in a nation beset by illiteracy and

isolation.¹⁰¹ However, recent scholarship reveals that the “real demon” leading to the Electoral College was slavery. At the Constitutional Convention, James Madison opposed direct election of the president because “in a direct election system, the North would outnumber the South, whose many slaves, (more than half a million in all) of course, could not vote.”¹⁰² The “three-fifths compromise” in the Constitution meant that slaves counted as three-fifths of a person. So, “the electoral college – a prototype of which Madison proposed in this same speech – instead let each southern state apportion three residents for every five slaves, in computing its share of the overall Electoral College.”¹⁰³ In other words, every five slaves were counted as three residents to grant white Southern elites additional political power.

The current impact of the Electoral College is still racially unbalanced. While more than 30 percent of the nation’s white population lives in states that have been generally viewed as “competitive” in recent elections (Colorado, Florida, Iowa, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Ohio, Oregon, Pennsylvania and Wisconsin), just 21 percent of African Americans, 18 percent of Latinos, 21 percent of Native Americans, and 14 percent of Asian Americans live in these states. In other words, three out of ten White Americans live in a battleground state, but less than two of every ten people of color share this opportunity.¹⁰⁴

Reformers also point out that there is no constitutional provision or federal law requiring electors to vote in accordance with the popular vote in their States. In the 1976 election, a Washington elector pledged to

President Gerald Ford voted for Ronald Reagan. In the 1988 election, a West Virginia elector voted for Senator Lloyd Bentsen as president and for Governor Michael Dukakis as vice president. In *Bush v. Gore*, the United States Supreme Court declared that “[t]he individual citizen has no federal constitutional right to vote for electors for the president of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College.”¹⁰⁵ Some state laws require electors to cast their votes according to the popular vote and provide that so-called “faithless electors” may be subject to fines or may be disqualified for casting an invalid vote and be replaced by a substitute elector.

According to FairVote, the Electoral College system will, if not reformed, relegate two-thirds of Americans to the sidelines during presidential elections for years to come. In their publication titled, “The Electoral College in the 21st Century,” FairVote further asserts:

Today, record-setting campaign resources are targeted at just a handful of states. Voter mobilization money, advertising dollars, campaign energy, candidate visits and almost certainly policy decisions are all spent to sway voters in roughly a dozen states. That number of competitive states is far smaller – and more consistent election to election – than it was just two decades ago. The result is rapidly growing inequality in voter turnout, especially among young people. Racial fairness is undermined because these states are disproportionately white.¹⁰⁶

99. The vote would be taken by State, with each State delegation having one vote. U.S. CONST. amend. XII.

100. FairVote.org, The Case for Reform, <http://www.fairvote.org/?page=976> (last visited March 6, 2008).

101. Chuck Raasch, *Electoral College Debate Intensifies*, USA TODAY, Sept. 24, 2004, available at http://www.usatoday.com/news/politics/elections/nation/president/2004-09-24-electoral-college_x.htm.

102. Akhil Reed Amar & Vikram David Amar, *History, Slavery, Sexism, the South, and the Electoral College* (pt. 1), FINDLAW, Nov. 30, 2001, <http://writ.news.findlaw.com/amar/20011130.html>.

103. *Id.*

104. FairVote, Presidential Election Inequality: The Electoral College In The 21st Century 23-24 (2006), available at <http://www.fairvote.org/media/perp/presidentialinequality.pdf>.

105. 531 U.S. 98, 104 (2000) (per curiam).

106. FairVote, *supra* note 104, at 23.



Polling data show that public opinion has supported nationwide popular election of the president for more than six decades. For example, the Gallup poll in 1944 showed 65 percent of the public approved of the proposal to discontinue the electoral vote system in the U.S., 23 percent disapproved of the proposal, and 13 percent had no opinion on the matter. And, in 1980, the percentage remained high at 67 percent of Americans approving of the measure.¹⁰⁷ This significant popular support may well be a reason to include reforms to the Electoral College in a movement to enshrine an explicit right to vote in the Constitution or federal law.

VOTING RIGHTS IN THE DISTRICT OF COLUMBIA

With regard to federal elections, D.C. residents now have only the right to vote in presidential elections and to elect a member of the House of Representatives who lacks full voting rights.¹⁰⁸

As Professor Jamin Raskin points out:

More than 570,000 taxpaying U.S. citizens live in the District of Columbia and lack any voting representation in Congress. They pay more federal taxes per capita than the residents of every state but Connecticut and are fighting in Iraq right now. . . .

This is a double injustice since Congress acts not only as the national legislative sovereign for District residents on issues of war and peace, the federal budget, confirmation of federal judges, and ultimately as their local legislature too.¹⁰⁹

According to a January 2005 poll by DC Vote, 82 percent of respondents support equal voting rights for D.C. citizens in the Senate and the House, with support crossing all demographic groups, including political parties.¹¹⁰ This represents a 10 percent increase since 1999. Polls also show that more than 80 percent of American adults are not aware that District citizens do not have equal Constitutional rights, including voting rights in Congress. Among the most

107. John r. Koza et al., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 275 (Nat'l Popular Vote Press 2006) (citing Gallup Poll, Americans Have Historically Favored Changing Way Presidents Are Elected (Nov. 10, 2000)). This book may be downloaded from <http://www.every-vote-equal.com> (last accessed Feb. 19, 2008).

108. On January 24, 2007, the House of Representatives restored delegate voting rights to D.C.'s Representative. See Norton Gets Committee of the Whole Vote Returned But Wants Full House Vote Brought to the Floor (Jan. 24, 1007), available at http://www.norton.house.gov/index.php?option=com_content&task=view&id=486.

109. Raskin, *supra* note 4.

110. See DC VOTE, Survey: U.S. Public Opinion on DC Voting Rights (2005), available at <http://www.dcvote.org/pdfs/polls/polljan2005.pdf>.

important reasons for supporting equal D.C. voting rights are: “Democracy is an American birthright” (86 percent) and “citizens should be able to teach their children that everyone counts in American democracy” (83 percent).¹¹¹

In 2007, Congress considered a bill that would have extended to D.C. residents the right to elect a voting representative to Congress. The proposed bill would have added two voting representatives to the U.S. House of Representatives, including one from Washington, D.C.¹¹² The House of Representatives passed the bill but the Senate did not.¹¹³ Thus, at the present time, residents of the District of Columbia do not have a voting representative in Congress.

Including D.C. voting rights in a right to vote proposal would likely face opposition. However, the D.C. activists we spoke with who have been involved, on the grassroots level, feel that this issue must be included in any discussion of an explicit right to vote.

VOTING RIGHTS IN PUERTO RICO AND OTHER U.S. TERRITORIES

The U.S. Supreme Court recently declined to review the First Circuit’s ruling that either a federal constitutional amendment or Puerto Rican statehood would be necessary for Puerto Ricans to have the right to vote in presidential elections.¹¹⁴ An affirmative right to vote bestowed upon U.S. citizens might accomplish this goal. It would be difficult for courts to maintain that U.S. citizens in U.S. Territories should be treated differently from citizens in the 50 states when an explicit right does not distinguish between the two.

Professor Raskin paints a grim picture of this area of disenfranchisement of U.S. citizens living in the Territories:

As a political matter, the suffrage question has been submerged in the long-running impasse over commonwealth, statehood, and independence. Without a right to vote for all citizens, the constitutional structure inevitably

reduces people living in the territories to colonial status.¹¹⁵

Professor Raskin notes that including citizens of U.S. Territories is more complex and less popular than voting rights for D.C. residents. He suggests that “one middle ground position would be to follow the path of the 23rd Amendment – granting District of Columbia residents the right to choose electors for president and vice president – and build language into a right to vote amendment granting all the nation’s territorial residents the right to vote for president, specifically presidential electors equal to the number of electors to which they would be entitled if they were all part of a single state.”¹¹⁶

111. DC VOTE, New Poll Shows Strong Nationwide Support for DC Voting Rights (2005), available at <http://www.dcvote.org/media/release.cfm?releaseID=155>.

112. See District of Columbia House Voting Rights Act of 2007, H.R. 1905, S. 1257, 110th Cong. (2007), available at <http://thomas.loc.gov/>.

113. *Id.*

114. See *Igartua de la Rosa v. United States*, 229 F.3d 80 (1st Cir. 2000), cert. denied, 547 U.S. 1035 (2006).

115. Raskin, *supra* note 4.

116. Jamin Raskin, *A Right to Vote Amendment for the U.S. Constitution: Confronting America’s Structural Democracy Deficit*, 3 Election L.J. 559, 566 (2004).

STRATEGIES FOR ACHIEVING AN AFFIRMATIVE RIGHT TO VOTE

Constitutional Amendment or Federal Statute?

Amending the Constitution is an extremely difficult undertaking. An amendment must first be proposed by two-thirds of each House of Congress or must arise out of a Constitutional Convention called for by two-thirds of the state legislatures. Such a proposed amendment must then be ratified by three-fourths of the states' legislatures or three-fourths of the states' ratifying conventions.¹¹⁷ Only 27 amendments to the U.S. Constitution have been adopted since the Constitution was ratified in 1788 and 10 of those were the Bill of Rights added in 1791. All of the 27 successful amendments were proposed by Congress; a Constitutional Convention has never been used.

On the other hand, federal statutes often can be drafted and enacted in one term of Congress (i.e., one or two years, or less in some cases). A statute becomes federal law when it passes both houses of Congress by a majority vote and is signed by the President.¹¹⁸ Congress can also override a regular presidential veto by two-thirds vote of the House and the Senate.¹¹⁹ Although passing a federal statute may be a simpler process, statutes are also vulnerable to being overturned each time a new term of Congress is convened.

Despite the very difficult challenge of amending the Constitution, the leading proponents of an explicit federal right to vote tend to favor a constitutional amendment.

They point out that although only 17 amendments have been added to our Constitution since the Bill of Rights, more than one-third of those (seven) have been directly related to voting and increasing democratic participation. They view the right to vote as the natural progression of amendments, including the 15th Amendment granting the vote to former slaves, the 19th Amendment granting the vote to women, the 24th Amendment abolishing the poll tax, and the 26th Amendment lowering the voting age to 18. Proponents such as Rep. Jackson also point out that a constitutional amendment is more difficult to undo and makes a stronger moral statement than a federal law.

Some constitutional experts raise the concern that Congress might not have the power to enact a federal statute enshrining the right to vote. They predict that the Supreme Court might quickly invalidate any such statute. To address this question, Advancement Project asked a leading voting rights scholar, Stanford Law Professor Pamela Karlan, for her views. Karlan produced a detailed legal memorandum concluding that Congress clearly has the power to regulate all the details of voting in federal elections.¹²⁰ As a matter of practice, Congress has deferred to the states to set most rules for federal elections, but this is a congressional choice, not a requirement. Karlan also cites authority for the proposition that Congress has the power to legislate a right to vote that includes state and local elections. However, Karlan notes

that congressional power to regulate voting in state and local elections is not as certain as Congress' authority over federal elections.

Inspire a Movement

Enacting a Constitutional Amendment or a right to vote statute would require more than an initiative or a project undertaken by a few organizations. It would require a grassroots movement. Recent elections generated tremendous grassroots energy that has the potential of becoming a powerful, multiracial movement. Harvard Law Professor Lani Guinier describes the possibility revealed by the 2000 election:

Such mobilization would seek to recapture the passion in evidence immediately after the election as union leaders, civil rights activists, black elected officials, ministers, rabbis, and the president of the Haitian women's organization came together at a black church in Miami.... "It felt like Birmingham last night," Maria Castellanos, a Latina activist in Miami, wrote in an e-mail describing the mammoth rally....

The sanctuary was standing room only. So were the overflow rooms and the school hall, where congregants connected via large TV screens.... The people sang and prayed and listened. Story after story was told of voters being turned away at the polls, of ballots being allegedly destroyed, of NAACP election

117. U.S. CONST. art. V.

118. U.S. CONST. art. I, §7, cl. 2. A statute can also become law when Congress is in session and the President does not sign or veto the bill in ten days. *Id.*

119. *Id.* Congress cannot, however, override a pocket veto, which occurs when the President does not sign a bill and Congress is not in session. *Id.*

120. Karlan, *supra* note 34.

literature being allegedly discarded at the main post office, of Spanish-speaking poll workers being sent to Creole precincts and vice-versa.¹²¹

An organized effort to promote a right to vote amendment or federal statute could serve as the mechanism for organizing and channeling this passion into a movement. College student Niko Bowie sees an explicit right to vote as “a virtually unassailable moral claim.” He points out the strategic importance of grounding the right to vote in morality:

It would be tough for any elected official to stand on a podium and publicly denounce the Constitutional Right to Vote. The political backlash awaiting such a speaker would be as predictable as the irony of the situation. The right to vote is such a moral imperative that the campaign could easily convert many ideological supporters simply by educating Americans of its absence.¹²²

Marshall Ganz, a professor at Harvard University’s Kennedy School of Government, studies organizing and social movements. He has found that social movements require moral claims.

This “moral” or transformational dimension of social movements distinguishes them from transactional “insider” interest group politics. At the same time, in a democratic polity, no matter how constricted, numbers do count so those seeking change must learn to express the compelling nature of the changes they seek in a broadly accessible moral framework or public narrative. Social movements not only assert values,

but they enact them. Motivating a person to act in a new way is more challenging than persuading a person to change their opinion. And mobilizing from the “outside” – without the authority, legitimacy, or resources of the “inside” – can impose very high personal costs.... “[S]elf-interest” alone is rarely enough to motivate the kind of courage or commitment demanded of organizers and participants, especially at the beginning. And the sources of our courage and commitment reside in our understanding of who we are, what we are called to do, and why, in relation to others – our moral identities.¹²³

Movements can appear to “erupt” and spread like wildfire. But seemingly spontaneous eruptions usually result from years of patient preparation, much of which is unseen by the general population. In the discussion below, we suggest activities that can lay a strong foundation for a right to vote movement. These activities include building an effective coalition; refining and finalizing the language of the amendment or statute; implementing a strategic communications effort; mobilizing the academic community; identifying high level allies who can motivate politicians; and conducting continuous outreach focused on key targets such as students and faith-based networks.

Claim the Moral Highground

A right to vote movement would give voting rights advocates a way to reclaim the moral high ground.

By treating voting as a privilege or luxury, current federal law gives states the power to withhold the franchise from those it deems

unworthy (e.g., persons with felony convictions) or from those who cannot overcome arbitrary obstacles. In contrast, true democracy requires that all members have a voice in decision-making.

Professor Lani Guinier suggests that “access to voting is like access to water – a necessity for the survival of our democracy.”

Would you deny even a person convicted of a crime the right to breathe or to drink water or wouldn’t we say that is cruel and unusual punishment? Why should we allow states to deny people the fundamental right of a democracy in ways that are cruel and unusual punishment not just for the individual but for the very legitimacy of our democracy?¹²⁴

Build a Strong, Diverse, and Effective Coalition

The right to vote movement will need an infrastructure that provides leadership, a process for decision making, and mechanisms for sharing information and coordinating activities.

The experience of Equal Rights Amendment (ERA) supporters is instructive. Pro-ERA efforts led to the blossoming of the women’s movement in the 1960s. In this modern phase, the National Organization for Women (NOW) and ERAmerica, a coalition of approximately 80 organizations, led pro-ERA efforts.¹²⁵ They developed and implemented coordinated strategies, shared information, and generally reached major decisions by consensus.¹²⁶

121. Lani Guinier, *What We Must Overcome*, THE AMERICAN PROSPECT, Mar. 21, 2001, at 26, available at http://www.prospect.org/cs/articles?article=what_we_must_overcome.

122. Niko Bowie, Email to Penda Hair (April 11, 2008).

123. Marshall Ganz, “Left Behind: Social Movements, Parties and the Politics of Reform,” (Unpublished Paper Presented at Annual Meeting of American Sociological Association, Montreal, PQ, August, 2006).

124. Email from Lani Guinier, Professor, Harvard Law School, to Penda Hair, (July 26, 2006) (on file with Advancement Project).

125. *Id.*

126. For additional information on the ERA campaign, see <http://eracampaignweb.kis-hosting.com/contactus.php>; <http://www.now.org/issues/economic/cea/who.html>; <http://www.lvw.org//AM/Template.cfm?Section=Home>; <http://www.alicepaul.org>; and <http://4era.org>.



The right to vote coalition will probably start relatively small and grow quickly. The small group of founders must be committed from the outset to sharing power on an equal footing with those who join later. The coalition should strive to include organizations at every level of political activity, including local grassroots activists, state and regional organizations, and national organizations.

To be successful and effective, the coalition will need to reach a consensus on the process for governing and making decisions. That process should be flexible enough to change as the coalition grows and its needs evolve. The coalition could consider employing democratic leadership models in its own governance, such as rotating leadership, sharing power, and structuring meetings to encourage deliberation.¹²⁷

Finalize Content and Language

Right to vote proponents will have to make a number of major decisions, some of which have been discussed above. We have outlined the pros and cons of various options but believe it is too early to reach conclusions on these key issues. We recommend that the coalition make these decisions after additional outreach, research, and consensus building has occurred.

The ERA experience provides powerful reasons for not committing to the final language of the proposal too early. Opponents used specific language in the ERA to bolster their arguments against the initiative. Specifically, they highlighted that the term “sex,” rather than “gender” or “women,” is used in the ERA. Thus, they argued that the ERA would be interpreted

to require same sex toilets and other consequences that the public strongly opposed. Use of a single word, “sex” rather than “gender,” allowed people to focus on the most irrelevant but most controversial and mythical implications of the ERA.¹²⁸

After the right to vote coalition has decided upon the content and scope of the proposal, we believe it would be wise to develop several alternative versions of the language. The alternatives could be vetted for a number of months or even years during which time scholars, including constitutional law experts, could write articles on the meaning and implications of each version. Also during this time, public opinion research could be conducted to determine which language resonates best with key audiences.

127. See Lani Guinier & Gerald Torres, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 156-57 (Harvard University Press 2002). Professors Lani Guinier and Gerald Torres advocate a “power with” rather than a “power over” model of decision making and suggest that this model offers important insights and creative ideas for governing efforts to resist and reform inequitable systems. *Id.* at 131-67.

128. See, e.g., Kathryn Jean Lopez, *Equality for Whom?*, *Sacramento Bee*, Feb. 3, 2006, available at <http://dwb.sacbee.com/content/opinion/v-print/story/14143574p-14971931c.html>.

SHARING THE VISION

Engaging in Intense Public Education

The ERA and the D.C. Voting Rights Act Amendment were defeated even though large majorities of the public supported them. A major factor in these defeats was the ability of opponents to seize control of the debate, putting supporters on the defensive. The right to vote coalition should use communications strategies that will allow it to control the terms of the debate and stay on the offense. During the planning period, Advancement Project retained several communications experts to start the process of designing an effective communications strategy.

Gauging Support for a Constitutional Right to Vote

To gain understanding of the public's perceptions, opinions, beliefs, and attitudes regarding the right to vote and related issues, Advancement Project retained RIVA Market Research to conduct a series of focus groups at geographically diverse locations across the country, with racially and ethnically diverse participants.

The focus groups were split into two stages to allow the first set of groups to inform our research and strategic brainstorming and impact the content of the second set of focus groups. Two of the focus groups were conducted in Spanish.

In October 2005, five two-hour focus groups were held in Atlanta, Cleveland, and New York City.



In January 2006, another five two-hour focus groups were conducted in San Francisco, Phoenix, and New York City.

The focus group findings are encouraging. Virtually all participants were surprised to learn that the U.S. Constitution does not already provide an explicit right to vote. And, importantly, participants of all races overwhelmingly favor including an explicit right to vote in the Constitution. As one participant put it, the right to vote should be in the Constitution “so no one can take it away, ever.”

Participants were also asked whether particular consequences that a constitutional right to vote might produce would sway

them to support or oppose such an amendment. In the second set of groups, for example, overwhelming majorities of more than 90 percent reported that the following four factors would move them in favor of the amendment:

- 1) All citizens over the age of 18 can vote easily or conveniently.
- 2) The voting rules are the same all over the country so it is no harder to vote in state A than it is in state B.
- 3) Persons with felony convictions, but who have served their time, can vote.
- 4) Modern, accurate, verifiable voting machines are used all over the country so that everyone knows his vote will be counted accurately.

The extremely strong support for uniform voting rules all over the country suggests that the “states’ rights” opposition argument may not resonate with the public. The strong support for restoration of voting rights for persons with felony convictions is consistent with polling data.

More than 70 percent of the participants in the second set of focus groups also stated that the following consequences would sway them in favor of a constitutional right to vote:

- No one has to stand in line more than 15 minutes to vote.
- The Federal government, states, and counties would make a one-time investment of millions of dollars to bring the voting system to “state of the art” nationwide.

The only potential impact that did not garner majority support of the participants in the second set of groups was allowing persons to vote without a photo ID. This drew only 43 percent of these participants. This finding is troubling given that onerous and discriminatory ID requirements are a growing trend in the states.

The second set of focus groups also tested potential “opposition” messages to see whether these claims would undermine support for the right to vote. It is heartening that not a single “opposition” message garnered substantial support.

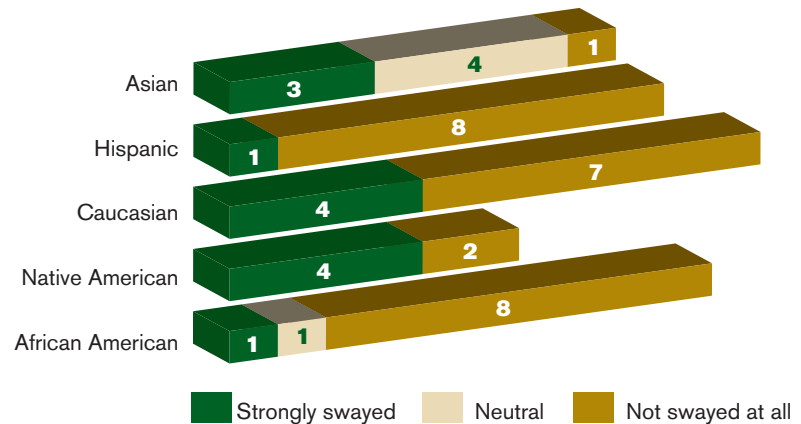
Developing Messages that Work

Advancement Project retained Douglas Gould & Associates, a progressive strategic communications firm, to use the focus group research to recommend messages for communicating about the right to vote.

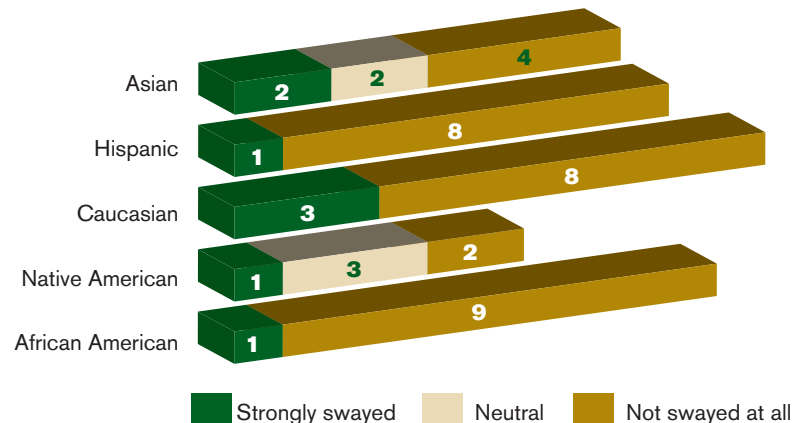
The message platform that resulted from the joint work of Douglas Gould and Advancement Project’s in-house Communications Department focuses on ways to frame the right to vote. Frames guide journalists in

deciding which details of a story to select or leave out and which to emphasize or de-emphasize. The two frames are each positive ways of communicating about the right to vote. Each can be used effectively, and the most effective frame will generally depend on the audience and context. These frames reflect messages in support of a Constitutional Amendment and they assume that D.C. voting rights would be included within such an amendment. The messages could be tweaked to apply to a proposed federal statute.

MESSAGE 1 “IF WE CREATE THIS UNIVERSAL RIGHT TO VOTE, PEOPLE IN MENTAL INSTITUTIONS WILL BE PERMITTED TO VOTE.”



MESSAGE 2 “VOTING IS A PRIVILEGE. IF WE CREATE THIS UNIVERSAL RIGHT, THEN WE WILL BE REWARDING PEOPLE WHO ARE NOT GOOD CITIZENS.”



UNIFORMITY FRAME

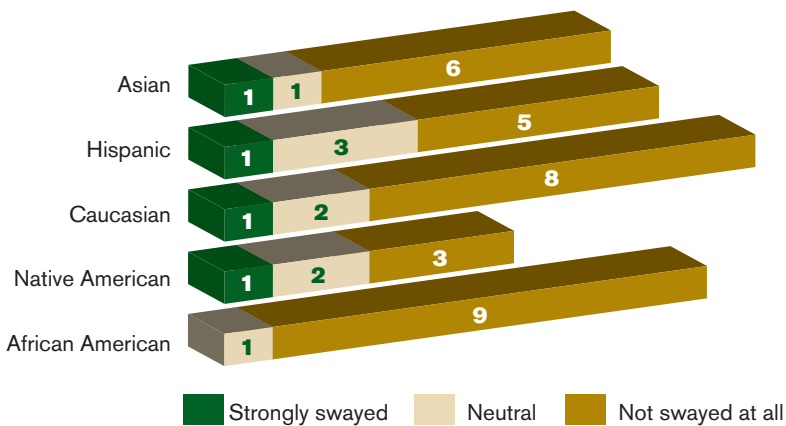
Problem: Most Americans believe that the legal right to vote is explicitly written into our Constitution and laws, but surprisingly it is not. The Constitution explicitly prohibits discrimination in voting, but it does not guarantee the vote itself. Thus, the states and localities have adopted vastly different qualifications and systems for voting even in federal elections, such as the election of president and vice president. A constitutional amendment would create uniform rules and voting procedures across the nation and give every American an individual, affirmative right to vote.

SUPPORTING POINTS: The US Constitution prohibits discrimination in voting on the basis of race, sex and age in the 15th, 19th, and 26th Amendments, respectively.

- Currently, voting in the United States is based on state and local law, and therefore voting qualifications and conditions vary from place to place.
- This means that state and local governments can – and do – disenfranchise individuals and groups of citizens. Many ways of denying voting rights are entirely legal under the existing, limited federal laws that touch on voting.
- This current voting system is separate, unequal and confusing. There are approximately 13,000 separately administered voting jurisdictions in the country.
- For example, in some states, voters can register to vote on Election Day, while in others they must register as much as 30 days in advance. States and localities have not only failed to provide equal access to the ballot box for all citizens, but have actually erected barriers to voting.
- A Constitutional amendment will guarantee the right to vote for all Americans.

MESSAGE 3

“IS THIS JUST A WAY TO GET FELONS THE RIGHT TO VOTE?”



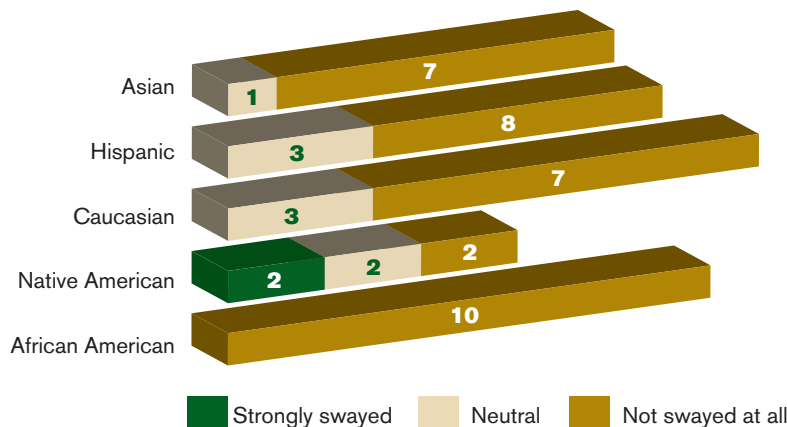
SOLUTION: How do we change the current system and prevent another “Florida” from happening? How can we achieve equal opportunity to vote in 13,000 separate and unequally administered voting jurisdictions? The answer: only by adding an affirmative right to vote amendment to the Constitution. Such an amendment would give Congress the power to establish a unitary voting system, ensure that every vote is counted, and grant equal protection under the law for all voters.

INDIVIDUAL RIGHTS FRAME

Problem: This is no hypothetical argument. Without an explicit right to vote, Americans repeatedly are disenfranchised or otherwise deprived of their political voice, and they have no basis for retrieving it.

MESSAGE 4

“THIS IS NOTHING BUT A BLATANT POLITICAL MOVE TO GET MORE PEOPLE OF COLOR VOTING, BECAUSE THEY WILL VOTE FOR LIBERALS.”



SOLUTION: To realize the promise of one person, one vote, it is the responsibility of all Americans to advance a constitutional amendment that will transform a right to vote from myth to reality. It should not matter in which state you live, where you move, or attend school; you are an equal American in obligation and should be treated equally, politically.

SUPPORTING POINTS:

- Despite the relentless urging to exercise our “right to vote” during an election year, that “right” is a myth. What we have is a privilege, granted or withheld at the discretion of our state and local governments.
- Americans often have no legal recourse when they’re disenfranchised. The solution is both simple and daunting – we must establish a constitutional right to vote.
- While we lack an explicit right to vote, millions of Americans are disenfranchised permanently for past felonies, even after they have served their sentences. Incredibly, offenses such as marijuana possession that are considered misdemeanors in some states are used to deny voting privileges for life in others. Such inequity results from our ability to vote being left to the whims of 50 states and thousands of separate and unequal local governments. It is a mockery of the Constitution’s “equal protection” promise.
- Washington, D.C., residents, who lack any voting representation in Congress, would benefit from a constitutional right to vote. District residents outnumber those of Wyoming, pay federal taxes, make up a disproportionately large share of our military casualties, and are treated like state residents in hundreds of statutes. Yet politically, they are more like subjects than citizens.
- The qualifications to become a registered voter vary from state to state because our Constitution “does not protect the right of all citizens to vote, but rather the right of all *qualified* citizens to vote.” And it is left to states to decide who is qualified. In some states, not having photo identification deems you unqualified to vote.
- The U.S. Supreme Court ruled in *Bush v. Gore* (2000) that “the individual citizen has no federal constitutional right to vote for electors for the President of the United States.” In other words, Florida’s state right to oversee the election took precedence over counting every individual vote.

Specific Communication Tactics

To ensure that the public understands the need for, and the true meaning of, an affirmative right to vote, multiple tactics are essential. Of course, the specific tactics would have to be finalized in the overall context of a strategic communications plan developed by the coalition. The following list suggests types of tactics that are likely to be effective.

- Airing television and radio Public Service Announcements
- Developing and disseminating radio and print ads
- Attending news media editorial board meetings
- Monitoring and disseminating all media on the issue and updating the field daily
- Facilitating events that draw attention to the issue
- Creating and distributing fact sheets
- Forming a speakers bureau
- Writing opinion editorials
- Identifying high-profile opinion leaders and former public officials

- as spokespersons
- Conducting outreach to progressive radio stations
- Arranging satellite media and radio tours
- Building a right to vote website
- Establishing a toll-free number for callers who seek more information
- Facilitating reporter meetings
- Recruiting celebrities
- Providing weekly talking points to allies/stakeholders
- Organizing a national right to vote conference
- Speaking at annual conferences (e.g., NAACP; National League of Cities, etc.)
- Drafting a right to vote press kit
- Holding quarterly press briefings (state and national)
- Conducting media training
- Maintaining a story bank
- Organizing marches and rallies
- Facilitating panel discussions
- Sponsoring debates on voting rights
- Organizing town meetings in various cities
- Filing lawsuits

- Sending letters to the editor
- Publishing a right to vote newsletter

Mobilizing Activist Scholars

The right to vote movement will have initial and continuing needs for high quality research. Mobilizing academics is a perfect way to obtain needed research and support. Scholars from many fields can document existing problems produce examples to be used for educating the public, and provide authoritative legal analysis. Scholars also often can be powerful spokespeople because they have tremendous credibility with the media.

Thinking Creatively About Outreach

History teaches that youth and faith-based institutions often have provided critical energy, resources, and leadership for progressive social movements. We have already seen examples of student enthusiasm for the right to vote during this planning process. Niko Bowie, a Yale college freshman, heard

about the initiative from his mother, advisor Lani Guinier, and immediately wrote and published a strong piece in the Yale Daily News.¹²⁹ Members of Harvard's Black Law Students Association volunteered to spend hundreds of hours researching state constitutions to ascertain whether they included explicit right to vote provisions. Bringing students and faith institutions into active coalition membership should be an early goal. The coalition should quickly produce a map of other key allies, keeping in mind that unlikely allies can boost the power of the coalition.

In addition to educating the public through the media, the coalition should consider grassroots and informal channels of communication. Communication during the Civil Rights Movement occurred in barbershops and beauty salons as well as on TV and in newspapers. We need to find the modern equivalents of the older informal networks to boost communication potential. Students and others may find power in using modern technology to spread right to vote information. Teach-ins may be another valuable technique to use on campuses as well as in other communities. The coalition should also consider using the

popular education strategy pioneered by Brazilian educator and activist Paulo Freire.¹³⁰ In the U.S., the Highlander Center has a tremendous track record of facilitating popular education and might be a wonderful site for the coalition's founders to hold an initial meeting.

Next Steps:

Concrete steps that can be taken immediately to build an affirmative right-to-vote movement, include:

- Create a diverse steering committee of individuals including civil rights advocates, religious leaders, law professors, social scientists, demographers, and media and communications professionals who are committed to creating a right to vote plan.
- Convene the steering committee to decide preliminarily whether to advocate for a statute or constitutional amendment, develop a preliminary plan by consensus and create concrete goals for the steering committee. The committee should hire a full-time director to coordinate the efforts.
- Formulate a comprehensive strategy for outreach to other national and local organizations that have similar goals.

- Develop a public education plan, including following up on the above focus group information with more specific message development.
- Conduct community education and raise awareness of the issue through talk radio shows, editorials, presentations at progressive conferences.
- Further evaluate the legal and constitutional landscape, including researching state laws, recent litigation and analyzing the congressional debate on the Voting Rights Act reauthorization.
- Research and analyze the implementation of right to vote provisions in state constitutions and the constitutions of other countries.
- Research past successful constitutional amendment campaigns in the United States.
- Hold a kick-off conference, bringing together the steering committee, experts, and other potential coalition members.
- Use the 2008 election cycle as an opportunity for public education, highlighting that an affirmative right to vote creates a universal remedy to numerous barriers to participation.

129. Niko Bowie, *Americans lack right to vote*, YALE DAILY NEWS, Nov. 16, 2005, available at <http://www.yaledailynews.com/articles/view/15726>.

130. Paulo Freire viewed education, when delivered appropriately, as an avenue for the oppressed to become empowered and find freedom.

CONCLUSION

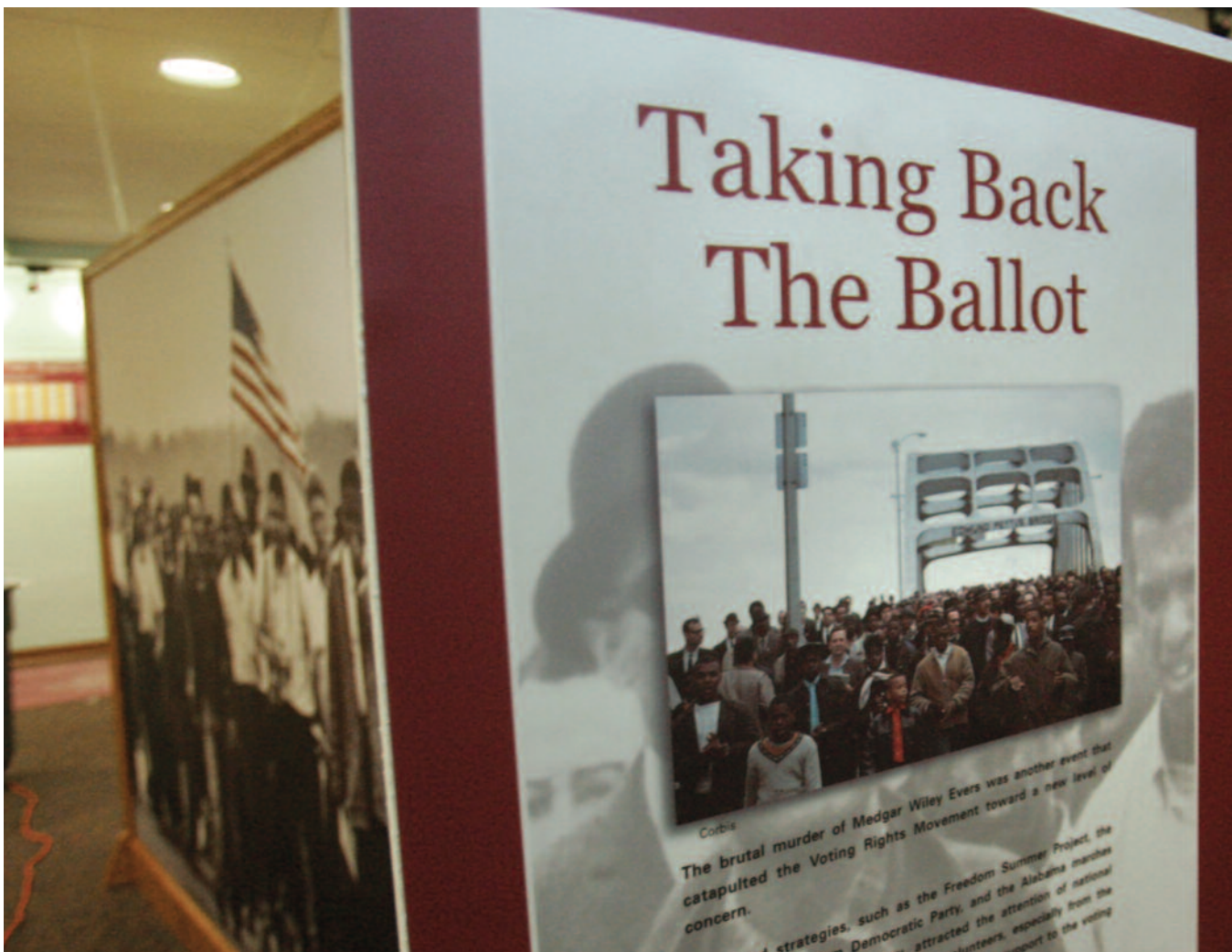
The right to vote, although not well-protected, is the very foundation of our democracy. The vote enables Americans to influence everything from spending on public education and health care to preserving our environment and protecting equal opportunity in employment. In short, voting is power. No wonder the struggle to attain it has caused men and women to risk their lives – here and around the world. In 2008, an energized electorate is once again expected to turn out in large numbers in November. But we must be clear about the

implications of living in a nation where federal law doesn't guarantee the right to vote to anyone. This year, millions of eligible voters who cast votes may not get their vote counted because of the unnecessary rules in states throughout the country that impede the voting process.

In the wake of two consecutive tainted presidential elections, it is clear that the cornerstone of our democracy, the electoral process, is in need of urgent repair. It is time for local, state, and national coalitions,

groups, and organizations to move forward with an affirmative agenda for electoral reform. It is time to rectify this patchwork of bizarre and erratic state customs.

We need to protect the rights of voters and establish full voting rights so all Americans can help decide all laws that govern them. The right to vote must become a right guaranteed to all American citizens and not a privilege controlled by a few.



ACKNOWLEDGEMENTS

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RIVA Market Research conducted focus groups to begin testing public perception. Douglas Gould & Associates helped begin shaping an effective messaging strategy.

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Congressman Jesse Jackson, Jr. (D-IL) deserves special mention for his tireless advocacy on behalf of establishing a Constitutional right to vote for all Americans. His leadership on this issue inspires us all.

Finally, the tireless efforts of the Right to Vote team at Advancement Project – Penda Hair, Judith Browne-Dianis, Edward Hailes, Sabrina Williams, Keith Rushing, Jennifer Maranzano, Alexi Nunn and Ari Matusiak – brought this initiative to fruition.

Advancement Project, a policy, communications and legal action group committed to racial justice, was founded by a team of veteran civil rights lawyers in 1998. Our mission is:

“To develop, encourage, and widely disseminate innovative ideas, and pioneer models that inspire and mobilize a broad national racial justice movement to achieve universal opportunity and a just democracy!”



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