New England Journal of Political Science

Volume 6 | Number 2 Article 2

9-1-2012

Voting Politics in the American States

Alec C. Ewald
University of Vermont

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The University of Vermont

The right to vote, said the U.S. Supreme Court in *Bush v. Gore* (2000), encompasses not just the formal "allocation of the franchise," but also "the manner of its exercise." More than a decade after that ruling, Americans are even more exercised about our electoral behavior, and our manners are not very good. Politicians and partisans legislate and litigate, disagreeing bitterly about drawing electoral districts, voter registration rules, when and how we vote, and, most of all, whether we should be required to prove our identity with photo identification at the polls. Brawls over ballots have been a recurrent feature of American political life, going back at least to the Jacksonian reformers and their assault on the property test, and it's emphatically clear that we are neck-deep in another episode.

A booming literature tackles these ongoing "voting wars" (Hasen 2012). Simply keeping up is not easy—organizations such as the National Conference of State Legislatures and Electionline.org provide indispensable guides to legislation proposed, passed, and challenged in court, while numerous advocacy groups have compiled reports analyzing competing claims and filed amicus briefs criticizing or supporting new restrictions on registration and voting.

This collection of five essays uses the case-study method to fill important gaps in this literature. Each explores recent election-law changes in a particular state in detail—focusing mostly on politically liberal states, where the passage of laws making voting harder comes as something of a surprise. Indeed, partisanship is a critical theme of the collection. Together, these essays leave no doubt that this has been a partisan movement, with Republicans driving almost all state laws tightening voting rules. (An ID law passed in heavily-Democratic Rhode Island,

meanwhile, due to a fascinating set of idiosyncratic conditions.) For Republicans, purely partisan motives (making it harder for our opponents' supporters to vote will help us win elections) align perfectly with principled views (fraud truly harms the civic body, and asking voters to do a little more work is just an ounce of prevention). Democrats, of course, see things the other way, believing it should be as easy as possible for any eligible person to vote—a view that coincides nicely with their perceived electoral interests as well, given that higher levels of turnout has historically tended to help Democratic candidates.

A second major theme is political culture, which political scientists have long employed to help understand variation in state laws. We see here, though, that while political culture is real, it is also complex and malleable, and scholars must treat it with great care. That is particularly true with the "moralistic" political culture found in the northeast and upper Midwest. As these essays demonstrate, that culture may offer fertile ground for egalitarian policy-making, but its esteem for participation can also be turned to exclusionary uses. And while certainly reformers work to harness the language and values a political culture contains, it remains unclear how much explanatory power this static variable can have when policies change.

Both of these themes figure in Bilal Dabir Sekou's analysis of Connecticut—a state where recent electoral reform has gone in the other direction, towards making voting easier. In 2012, Connecticut lawmakers enacted a measure allowing Election Day Registration (EDR), a change Democrats in the state legislature had been putting forward for years. Professor Sekou concludes that several factors led to Connecticut's enactment of EDR. The state's underlying political culture values and promotes political participation, and Democrats were able to harness that ideology and emphasize voting-rights rhetoric when they took undivided control of state government for the first time in decades. Reformers executed an "inside and outside" strategy,

with a broad coalition of advocacy groups supporting the efforts of leading politicians to put an EDR law in place. Finally, passage of EDR was facilitated by the fact that Connecticut has been making voter registration progressively easier in recent years, so the move to EDR could be seen as a continuation of that trend, rather than a dramatic shift.

Florida has followed a very different path. Though the 2000 election prompted election-administration changes across the country, nowhere was the pressure for immediate reform stronger than Florida. As Professor Susan MacManus shows, initially this was a fully bipartisan push, with an emphasis on standardization, consistency, and uniformity. Bipartisanship in Florida election reform is now a distant memory. Partisan hostility has been front and center, with Republicans speaking of the need to "protect" voting rights by passing legislation making registration, early voting, and voting after changing one's address more difficult, and Democrats decrying new restrictions as an assault on voting rights—and the lowest form of partisan manipulation. Professor MacManus offers a comprehensive, concise analysis of the many different elements of Florida's 2011 omnibus election-reform bill, together with explanation of how each change has fared in the court of public opinion—and courts of law. Some pieces of the bill, such as changes to early voting, have been subject to constant legal challenges, particularly in those areas of Florida that remain subject to Voting Rights Act preclearance requirements. (While Florida already requires photo ID, its law is relatively permissive, allowing voters to offer any of a variety of forms of identification. Perhaps for that reason, while Floridians feud over many other proposed restrictions, voter ID there has drawn less critical attention.)

Other changes, such as Florida Governor Rick Scott's 2011 reversal of the previous governor's policies facilitating restoration of voting rights to people with criminal convictions, and the 2012 push for Florida counties to purge their voter rolls in an aggressive search for non-

citizens, have come about via executive-branch action rather than statute. As with almost every contested election reform, these measures have also been the focus of constant litigation. Professor MacManus also emphasizes another critical common feature of our election-law moment: Local variation endures amidst these moves for uniformity, with county officials in Florida still able to determine early-voting hours, consolidate precincts, implement voter-list "purges," and train poll workers. The result is that a close election in 2012 could all too easily provide a straight-up 2000 *déjà vu* in the Sunshine State.

At the far northern end of the Eastern seaboard, a very different election-reform tale has unfolded over the last two years. In Maine, as Amy Fried and Emily Shaw explain, Republicans swept to statewide power in 2010 and promptly eliminated election-day registration—but the change never took effect, since a 2011 referendum overturned the 2010 change and restored Maine's longstanding practice of permitting EDR. Blending qualitative and quantitative analysis, Professors Fried and Shaw demonstrate that EDR's proponents won a sweeping victory because they harnessed those elements of Maine's political culture that fit their cause and employed rhetoric attuned to Maine's political sensibilities. Pro-EDR groups emphasized continuity, pride in Maine's civic tradition, and pragmatism, arguing that same-day registration "has worked for more than thirty years," for example. Meanwhile, they appeared to carefully avoid the rhetorical frames that have dominated debate in other states. Perhaps with an eye to Maine's powerful political independents, they chose not to emphasize partisanship at all, and eschewed the "voter disenfranchisement" and "voter suppression" frames as well.

EDR's Maine opponents, meanwhile, misplayed a strong hand. As Professors Fried and Shaw explain, the "fraud frame" often works well beyond a partisan base, particularly in states with moralistic political cultures, because it is naturally linked to the need to save the civic body

from corruption. But by badly overstating the electoral troubles that existed in Maine (and, in some cases, inventing fraud examples out of whole cloth) EDR opponents simultaneously made themselves look foolish and insulted those who were proud of the way Maine's elections were conducted.

In analyzing recent election-law controversies in Minnesota and Wisconsin, Davida Alperin and Neil Kraus leave no doubt that the "bundle of values" associated with moralistic political culture is capacious and plastic, capable of changing over time and providing weapons both sides can use in a fight. After repeatedly trying to enact ID requirements in previous years, Wisconsin Republicans took advantage of their post-2010 majorities in both houses of the state legislature, and Republican Governor Scott Walker signed into law a bill requiring photo ID, restricting the practice of one voter "vouching" for another, and tightening residency laws. Disputes over these laws immediately jumped not only to the courts but also to the various state and local bureaucracies which would have to administer the new requirements—an important reminder of the importance of our localized electoral system.

Minnesota Republicans, meanwhile, also won control of both houses in 2010. But with their ID efforts thwarted by Democratic Governor Mark Dayton, they turned to the constitutional-amendment path, and placed a proposed restriction on the 2012 ballot. In both states, Alperin and Kraus show, the "fraud" frame has dominated, with proponents of voter restrictions warning that honest voters may have their votes "stolen" by duplicate and ineligible voting. Race appears to play a latent but potent role in this rhetoric, with politicians' repeated invocation of "Chicago-style fraud" activating white voters' concerns about the changing racial demographics of both states. Both Minnesota and Wisconsin have long traditions of progressive

politics, Alperin and Kraus note, but the events of the last two years strongly suggest a real erosion in the power of the states' moralistic political culture.

Rhode Island is often held out as proof that the voter-ID push is actually a bipartisan phenomenon, and indeed the state did enact ID while Democrats were fully in control. But as Maureen Moakley shows, in this area (as in many others) Rhode Island is *sui generis*. First, Rhode Island's law seems to offer an example of an ID requirement that does not actually function in a restrictive way. The requirement will be phased in only slowly; many forms of ID are accepted; there are robust protections for provisional voting, allowing those without ID to easily cast votes that count; and, perhaps most important, the state is already engaged in aggressive outreach, with the Secretary of State's office sending a van around the state to senior centers, homeless shelters, and special events, providing not only free ID but also help registering. Thus the ID requirement may become a tool to enable and encourage *more* people to vote.

Race appears to have played a quite different role in Rhode Island than in other states, with Latino voters embracing the new requirement as a way to demonstrate their legitimacy, and a few prominent African American legislators supporting the law. But perhaps the most important factor making Rhode Island unique has been the state's grim fiscal crisis. With Democrats on the defensive over the state's economic troubles and public-employee union retiree benefits the focus of critical public attention, the two groups most organized to oppose voting-laws restrictions elsewhere were in no position to do so here. In Maine, supporters of election-day registration had been able to harness *positive* feelings toward the status quo, but in Rhode Island everyone in political life knew voters were disgusted with the way things were, and eagerly supported a proposal they could call "reform."

Taken together, these papers illustrate the degree to which the contemporary American dispute over voting practices is a study in *problem definition*, writ large. By this I mean four things.

First, voter ID requirements in particular clearly represent a solution in search of a problem. In-person impersonation fraud is vanishingly rare in the U.S., as repeated studies have shown (Levitt 2012; Minnite 2010). Even voters' *perceptions* of fraud are not changed by restrictive laws: political scientists Stephen Ansolabehere and Nate Persily have found that the presence of ID requirements has no effect on voters' perceptions of fraud. Moreover, while substantial numbers of Americans do worry that fraud is occurring, there is no relationship between one's fear of fraud and one's likelihood of turning out to vote (Ansolabehere and Persily 2008).

Implicit here is a second definitional problem: what critical terms like "fraud" and "integrity" mean, in the context of American elections. ID requirements are built to address only one particular type of deception—they do nothing to address voter-registration chicanery, absentee-ballot fraud, corruption by state or local elections officials, or errors caused by inadequate databases or faulty machinery, for example. Yet those arguing for photo ID will often point promiscuously to any and all electoral problems as reasons to mistrust in-person voters. As for "integrity," while the word connotes wholeness and cleanliness, given the fractured, locally-varying ways Americans have always voted, it is not at all clear that any given reform can claim the term (Ewald 2009).

But a third element of the problem-definition picture is that at least in court, the other side of the dispute does not have an easy road, either. As one insightful essay puts it, these cases can seem to come down to "invisible voter v. imaginary fraud" (Persily 2012). Those challenging

ID requirements are sometimes forced to point to something like an "invisible voter" because even restrictive photo-ID laws *do* allow people to get some kind of state-issued ID at no cash cost, provided they can supply a birth certificate—obligating litigants to locate elderly people whose birth certificates were lost through no fault of their own and who live some distance from the nearest ID-issuing office, for example. More generally, while millions of Americans don't have photo ID, we simply don't know how many will be deterred from voting altogether because of the ID burden, as opposed to those who would not have voted anyway, or who will simply vote absentee without a photo ID.

Finally, and most fundamentally, the last decade has laid bare the depth of Americans' continuing ambivalence (not to say confusion) over what our essential electoral language means. If the "right to vote" is a marker of national citizenship, long protected by federal statutes and constitutional protections, why do state laws and local practices still vary so much? Does the elimination of EDR, for example, diminish the "right to vote," or is it merely a technical change in *when* we vote? What about imposition of a photo ID requirement—again, is this a restriction of "the right to vote," or does it simply clarify how one demonstrates eligibility? Is the passage of such a rule properly called "disenfranchisement?"

The high priests of the federal courts have been no more immune to this confusion than the humblest state lawmaker. For example, in a 2006 decision, the U.S. Supreme Court referred approvingly to ID requirements, worrying that voters "who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised" (*Purcell v. Gonzales*, 2006: 7). Notice *fear* and *feel* here: the Court appeared willing to justify a restriction that might *literally* disenfranchise voters without ID because of the fears and feelings of those who actually *did* vote,

and the Justices award the *latter* group the immensely valuable rhetorical mantle of "disenfranchised." Such confusing linguistic terrain offers boundless opportunities to partisans.

There is no single path out of this thicket, particularly given that American elections have always featured such uncertainties. But a little help might come from wider use of a metaphor political scholars have been familiar with for more than half a century: the *price* of voting. In 1957, Anthony Downs famously stipulated that if the cost of voting (tallied in time to research the issues, register, and vote) exceeded its benefits (measured in the gains to come from one's preferred candidate winning, times the likelihood of one's casting the deciding vote), a rational person would almost always abstain (Downs 1957). Its predictive validity has proven poor: Millions of Americans continue to vote, despite the fact that by Downs' logic they are utter fools to do so, given the infinitesimal chance that their vote will decide the outcome. And it seems to drain all the dignity and communal character out of voting to speak of it this way.

Certainly no politician wants to use this metaphor: one side would much rather refer to the sanctity of "electoral integrity," the other to the exalted "right to vote." These ideas must and will continue to feature prominently in Americans' battles over ballots. But it might be refreshing and helpful if, at least occasionally, one set of advocates would say, "my colleagues and I want to raise the price of voting," while their opponents responded, "frankly, we think voting should be as cheap as possible." Particularly at the intersection of voting rights and election administration—where the controversies detailed in this collection reside, and where close American elections will likely be decided in the months and years ahead—the language of cost is useful.

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