Indiana Court Strikes Down Photo ID Requirement

On Sept. 17, 2009, in League of Women Voters of Indiana v. Rokita, an Indiana court of appeals struck down the state's voter identification requirement as unconstitutional. A three-judge panel of the court unanimously held that the law violates the state constitution's "Equal Privileges and Immunities" clause. The clause prohibits the General Assembly from granting "to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The state's voter identification law (P.L. 109–105) passed in 2005 and requires that voters present a photo ID before casting a ballot in person at a polling place. The law withstood a federal challenge in the 2008 case of Crawford v. Marion County Election Board when the U.S. Supreme Court declared it constitutional in a 6-3 decision.

After the U.S. Supreme Court upheld the law, the League of Women Voters filed suit in June 2008 seeking a judicial declaration that Indiana's Voter ID law violated the state's constitution. The state trial court dismissed the lawsuit in favor of the state of Indiana and the League appealed.

On appeal, Judge Patricia Riley, writing for the panel, cited two specific problems with the photo ID law:

- There was no comparable identification requirement for voters who cast an absentee ballot by mail; and
- Voters who live in state-licensed nursing care facilities that serve as a polling site were exempted from the identification requirement.

These omissions constituted "inconsistent and partial regulations" favoring certain classes of voters over others, the court noted. The court acknowledged that the problem with voting at nursing homes could be corrected without striking the whole law by requiring those voters to show an ID. However, the different treatment for in-person and mail-in voters could be legislatively cured in several ways, the panel said, "but it is not our task to form suggestions for legislation."

Indiana Attorney General Greg Zoeller said he would appeal the ruling to the Indiana Supreme Court. "The state's long-held view is that the voter ID law is constitutional," Zoeller said.
The death of Senator Edward Kennedy has re-ignited a debate over how vacancies in the U.S. Senate should be filled. It was a debate that came to a boil earlier this year, as then-Senator Barack Obama moved to the White House. President Obama's vacant Senate seat led to a national controversy and the impeachment of a governor when Rod Blagojevich set in motion a scandal-ridden attempt to fill the vacancy. The issue bubbled up in other states as well, as President Obama appointed several U.S. senators to cabinet positions.

Until last month, 37 states filled a vacancy in the U.S. Senate at the next regularly scheduled congressional election, with the governor empowered to make a temporary appointment to fill the vacancy until the election. In the remaining 13 states, a special election is called to fill the vacancy. In nine of those 13, the governor may make a very short-term appointment to fill the vacancy in the interim, while in the other four, the seat remains vacant until the election is held. Until very recently, Massachusetts was one of those four.

That hasn't always been the case in Massachusetts. The governor used to have the power to fill a vacancy until a special election could be held. The Democratically-controlled Legislature changed that in 2004, when Massachusetts Senator John Kerry was the Democrat's presidential candidate and Republican Mitt Romney was the governor of Massachusetts.

Last month, Massachusetts passed H.B. 656, making the state more like the rest of those 13 that fill a vacancy through special election. The new law still requires that the seat be filled through a special election held about five months after the vacancy occurred, but allows the governor to make a temporary appointment to hold the seat until the special election is held. With the death of Senator Kennedy in August, committee hearings on this bill began on September 15, a month earlier than originally scheduled. Thereafter, the state House approved the bill 95-58 and the senate subsequently passed it 24-16, which authorized the governor to make an interim appointment. On Sept. 24, Paul G. Kirk was named to fill the seat.

All together, a dozen states have taken a closer look at filling vacancies in the U.S. Senate this year. The list includes three where the presidential election or cabinet appointments created vacancies earlier this year: Colorado, Illinois and New York. Just one state, Connecticut, has passed legislation so far. S.B. 913 removed the governor's authority to make an appointment to fill a vacancy in most cases, and requires a special election be held instead. If a vacancy occurs within the last 14 months of a U.S. Senate term, the governor may make an appointment to fill out the rest of the term, subject to confirmation by the General Assembly. In 2008, the Kansas Legislature passed similar legislation (H.B. 2683), but it was vetoed by the governor.

Read how all 50 states fill U.S. Senate vacancies on NCSL's website.
Voter Registration "Modernization" Coming to a State near You?

It is clear that universal registration on a national scale is not coming. But what is going to be on the national agenda very soon is "voter registration modernization," which is essentially universal voter registration on the state level. — Rick Hasen, Election Law Blog June 23, 2009.

This is the second installment of a three-part series on a new movement toward sweeping registration reform, a movement which appears to be originating in Washington, D.C. and is targeting state capitals.

Part I of this series discussed the background behind proposals for large-scale registration reform. Part II focuses on so-called universal registration, sometimes referred to as "automatic" registration — a core component of voter registration "modernization."

Inherent to any national model of universal registration is a federal mandate to require states to assume responsibility to ensure that every eligible citizen 18 or older who meets certain residency requirements is administratively "captured" and inserted into the voter rolls. Ostensibly, state election authorities would identify these citizens from other government lists such as tax and motor vehicle databases. Under a federal mandate, states would also be required to update registration continually, that is state and local governments would be responsible for tracking the movement of voters to ensure that they are not inadvertently dropped from the rolls.¹

One thing is certain: advocates for voter registration modernization propose that Congress should dictate voter registration policy. For example, the Brennan Center for Justice in a recent policy summary stated:

To move the nation toward universal registration, federal legislation will most likely be necessary. Such a system, to achieve genuine universality will need to have several key elements. It would have as its core a national requirement that states take responsibility for registering all eligible citizens, with some flexibility for states to innovate, and the federal financial support necessary to enable states to achieve the goal of universal registration. But there will be manifest complexities...e.g., states will need to ensure that citizens with more than one residence are registered at the correct one for voting purposes.

The Brennan Center, FairVote, Common Cause, US PIRG, Demos, the League of Women Voters and the Lawyers Committee on Civil Rights are currently lobbying Senator Charles Schumer (NY), who chairs the Senate Rules and Administration Committee, to introduce voter registration "modernization" legislation that would require universal and permanent voter registration using data from existing statewide databases. This policy would be combined with "fail safe" registration on Election Day (same day registration). Addressing the 2009 NCSL Legislative Summit in Philadelphia, David Becker, project director, Elections Initiatives, at the Pew Center on the States predicted that "such a bill would probably be introduced in September." At press time, the bill has not yet been introduced.

What is the genesis of the movement toward universal registration?

The effort to establish "universal registration" is not entirely new. In 1977, newly elected President Jimmy Carter coined this term to describe his administration's bill to federally mandate election-day voter registration in all federal elections. Under his plan, proof of identity and residence, such as a driver's license, would have been required. Dubbed the Universal Voter Registration Act of 1977, the legislation failed to garner support from Republicans and from southern and urban Democrats, which persuaded congressional leaders to keep the bill off the floor in both chambers. Congressional Quarterly Almanac (1977) recorded that, "many members of Congress in both parties viewed it as an unnecessary change to an electoral system against which they had few complaints. They were elected without election day registration, and its

¹ How election officials would make checks regarding interstate relocation, citizenship, mental competency, and criminal convictions (felonies) are vexing questions.
implementation might draw a new group of voters with uncertain loyalties." The administration estimated the cost of the program at $48 million every two years. House Minority Leader John J. Rhodes (AZ) categorized it as a "dangerous step toward the federalization of the entire election process."

In 1988, Senator Alan Cranston (CA) introduced a new Universal Voter Registration Act to "eliminate both the barriers that keep our citizens from registering to vote and the discriminatory effects of our current registration procedures." Senator Cranston characterized registration essentially as "an elitist system keeping citizens from the polling place — sometimes inadvertently and often deliberately" — alluding to incidents of racial discrimination in the South. Like the Carter bill, Senator Cranston's legislation would have established election-day registration in all 50 states. In addition, it would have established national standards for registration by mail, registration in public agencies, and motor voter registration programs. This legislation failed to advance beyond the hearing stage of committee consideration in either the Senate or the House.

In 1993 Congress enacted the National Voter Registration Act (also known as "Motor Voter"). The central provision requires states to provide individuals with the opportunity to register to vote at the same time they apply for or renew a driver's license. Among other things, the act also requires states to offer voter registration at all offices that provide public assistance and permits all citizens to register to vote by using mail-in forms.

**Pros and Cons**

In his NCSL Legislative Summit remarks, David Becker articulated three advantages of voter registration modernization: accuracy, cost and efficiency. He asserted that universal registration will significantly reduce the number of records in the voter rolls that are defective or no longer valid (approximately 15 percent). He pointed to cost savings drawn from a reduction in paper, printing and postage expenses. For example, Elections Canada saved $130 million over six elections since creating its national register. "One third of current local election administration costs are devoted to list maintenance," he said. Lastly, he said that database sharing will lead to a more effective registration system than the status quo, which includes only 70 to 75 percent of the voter eligible population. The Pew Center on the States also has released a new report entitled, *Bringing Elections into the 21st Century*, that recommends a system that, "ensures states maintain control of their voter rolls, while allowing for common standards and data exchanges across state lines."²

Some advocates behind universal registration believe that the National Voter Registration Act has been a disappointment. They point to the fact that enforcement of the states' obligation to offer registration at public assistance, disability and military recruitment offices has been "woefully inadequate." Still others contend an entirely new system is necessary because election day surveys point to registration problems as the major reason why voters have been turned away at the polls. (*Please see the June issue of The Canvass*). Lastly, some progressives assert that universal voter registration is necessary to maintain their 2008 turnout advantage among 18 to 24-year olds, who have historically voted at lower rates than any other age group.

Those opposed to voter registration modernization maintain it is a pretext for the federalization of all election law. They argue that, "If registration is taken over by the federal government, what is left of state election law authority?" Critics believe that voter rolls were inflated with "deadwood" by the National Voter Registration Act, which made it more difficult to maintain accurate and current lists. Capturing names from databases may appear attractive, they say, but in practice it will be an invasion of privacy as the government will electronically track citizens as they make address changes.³ Some opponents suggest voter registration modernization will be a major unfunded mandate for states and localities, particularly since the 2002 Help America Vote Act has not been fully funded. It would also be administratively burdensome and potentially

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² The Pew Center on the States also recently released a report entitled, *Provisional Ballots: An Imperfect Solution*, which looks at variations in counting within Florida.

³ Ostensibly, this proposal could require that the Unites States Postal Service notify election officials of address changes.
expensive, they contend. Finally, opponents maintain election day registration would invite fraud from non-residents and non-citizens by permitting someone who might have already cast an absentee ballot or voted at another polling place the ability to do so again. Mark Shelden, Clerk, Champaign County, Ill., has described voter registration modernization as a "dangerous proposal" that reduces voter control and confidence and increases cynicism.

**State Legislation**

This year legislators in at least six states (California, Hawaii, Minnesota, New Jersey, New York and Texas) introduced universal registration legislation. In California, Assembly Bill 106 allows an application or filing for a new or renewed driver's license, state identification card, other motor vehicle permit, or a personal income tax return, to simultaneously operate as a voter registration form. On March 31, 2009, the Assembly Committee on Elections and Redistricting approved the bill and re-referred it to the Committee on Appropriations. The bill will have to be approved by the Assembly by January 31, 2010, in order to advance in the 2010 session. The bill's fiscal note suggests that the state share of the implementation cost would total at least $8.6 million. This amount does not include county-reimbursable general fund costs, which are projected to be in the millions. A nearly identical Texas bill, House Bill 1780, failed at the committee level. The fiscal note, however, offers a more detailed five-year impact estimate of $14.6 million. In Minnesota, House File 1053 passed both chambers, but was vetoed by the governor on May 21, 2009. Universal registration legislation remains pending or has been carried over in Hawaii, New Jersey and New York.

In Hawaii, Senator Les Ihara introduced S.B. 648 in 2009 and is planning to renew his efforts at passage in 2010. The bill would require all residents of Hawaii to register to vote. A resident who declines to register must formally "opt out." Citizens who fail to register or decline to register would be subject to a fine and be ineligible for state-sponsored benefits or employment. Senator Ihara says, "The Census Bureau ranked Hawaii last in 2008 turnout at 52 percent (tied with Utah). At the same time, we have no election day registration and voters must be registered 30 days prior to an election. These requirements appear unfriendly to new residents. We're working to change that," he said. Ω
Military and Overseas Voters

On Friday, July 24, the U.S. Senate passed S. 1415, the Military and Overseas Voter Empowerment Act as an amendment to the National Defense Authorization Act (S. 1390). The National Defense Authorization Act, as amended, is currently pending in the U.S. House of Representatives. If passed by the House, S. 1415 will take effect in November 2010.

Introduced in early July by Senator Charles Schumer (D-NY), S. 1415 attempts to simplify voter registration as well as the casting and counting of absentee ballots of U.S. military and overseas voters. Under the bill, states must: do the following:

- Permit these voters to request all voter registration and absentee ballot materials from the state by mail or electronically;
- Designate not less than one means of electronic communication for use by the voter and the state for these purposes;
- Protect the voter’s privacy; and
- Establish procedures for transmitting voting materials to uniformed and overseas voters.

The chief state election official may request a hardship waiver from the Director of the Federal Voting Assistance Program if he or she determines that the provisions of the bill cannot be met. Waiver requests must be submitted no later than 90 days before the federal election and be approved not less than 60 days before the election. S. 1415 defines “hardship” as one or more of the following:

- The state’s primary election date prohibits the state from complying with the bill;
- The state has suffered a delay in generating ballots due to a legal contest; or
- The state’s constitution prohibits the state from complying.

The remainder of the bill addresses the Federal Voting Assistance Program director’s responsibilities with respect to the collection and delivery of ballots from these voters. The bill also permits states to delegate responsibilities under S. 1415 to local jurisdictions.

Absentee Ballot Tracking

On July 30, the U.S. House of Representatives passed H.R. 2510, the Absentee Ballot Track, Receive and Confirm Act of 2009. As reported in the June issue of The Canvass, it was introduced by Representative Susan Davis (D-CA) and cosponsored by Representative Kevin McCarthy (R-CA). H.R. 2510 proposes a reimbursement program to states that voluntarily choose to track and confirm the receipt of absentee ballots in elections for federal office. Under this voluntary program, the data would be accessible to voters online, or in the absence of Internet availability, via a toll-free number. Information available would include whether the ballot cast was counted and if not, why.

A state choosing to participate in this program must submit to the U.S. Election Assistance Commission a certification that the state has established an absentee ballot tracking system and a statement of costs incurred by that state. The amount of reimbursement to a state will be equal to the costs incurred, with some limits. A state may not receive more than one payment. It is important to note that the bill does not authorize a specific reimbursement, nor are there any funds appropriated to carry out its provisions.
Election Policy on the Ballot

Among the 48 issues already qualified for 2010 ballots are two election-related measures placed on the ballot by state legislatures.

*California: Open Primaries*
This measure will appear on the June 8, 2010 Primary ballot. It would establish a "top-two" primary for California state and congressional offices, similar to the primary type currently used in Louisiana and Washington. In a top-two primary, voters can select candidates of any party, and the top two vote-getters, regardless of their party affiliations, advance to the general election.

*Oklahoma: Voter ID*
Voter identification has been a contentious issue in Oklahoma this year. Earlier in the year, the Legislature passed S.B. 4, requiring photo ID at the polls, but it was vetoed by the governor. In response, the Legislature passed S.B. 692, essentially establishing the same requirement but asking voters to approve it first. If voters approve Question 746 in November, the new law will take effect on July 1, 2011. Oklahoma would be the 26th state to require identification at the polls, and the eighth to require photo identification.

At press time, still circulating for signatures for 2010 ballot access are initiative petitions in California and Mississippi requiring voter ID, and instant run-off proposals in Florida and Massachusetts. A number of election-related initiatives have been filed in Oregon, but have not yet been approved for circulation. A proposal to create permanent absentee voting status is already circulating in Idaho, aimed for the 2012 ballot. In most states, deadlines for submitting petitions fall in the spring or summer before the election, so it will be early fall 2010 before any of these measures could be certified for the ballot.
Interview with the Elections Chair

Profile: Senator Staci Appel of Iowa, Chair, State Government Committee

Staci Appel was elected to the Iowa Senate in 2006 and now serves as assistant majority leader. Before entering public service, she worked as a financial consultant with Merrill Lynch and UBS Paine Webber for 12 years. Senator Appel represents District 37, located in Southern Iowa. Her district is approximately half rural and half urban.

TC: What would you say is your greatest legislative achievement on the State Government Committee?

In 2007, in my first term as a member of the State Government Committee, I successfully carried the Election Day Registration bill (House File 653) in the Senate.

TC: How did Election Day Registration perform in 2008?

There weren't any problems with the new registration system and 54,000 more people voted. Our prior law had required Iowans to register at least 10 days before an election. It's great to see our voter participation going up.

TC: What have been some of your recent legislative priorities?

SA: In 2008, I sponsored legislation to consolidate our elections, HF 2620, which was enacted with strong bipartisan support. As a result, all school board elections are now held on one of four dates (quarterly) in odd years. We also limited city and county elections to one of six standardized dates throughout the year. At the same time, we increased the term of school board directors from three to four years and publicized these calendar changes through increased voter education. Another key aspect of this bill was its authorization of vote centers for city and school elections, permitting voters to vote at any location within a locality.

TC: Looking back, what were some of the challenges with your consolidation bill?

SA: Winning bipartisan support can be a major challenge. Often, election reform bills can turn into caucus votes -- as happened to in 2007 with the Election Day Registration legislation (all 30 Senate Democrats voted for it and 20 Republicans voted against it). We face many critical issues in each session and election reform bills are, unfortunately, sometimes set aside as "partisan." We also noticed that legislators who had previously served in local government were initially hesitant to support election date consolidation -- out of deference to their former colleagues working in local government.

TC: How did you overcome those hurdles to pass HF 2620?

SA: Ultimately, we were successful by winning support from both sides of the aisle. Our efforts to show that a consolidated calendar would result in significant cost savings helped earn valuable support from our Republican colleagues.
2009 NCSL Legislative Summit: Recap

The July 2009 NCSL Legislative Summit in Philadelphia featured three dynamic election sessions; they were:

**Election Reform Roadmap**

Speakers included:

- Gineen Bresso Beach, Chair, U.S. Election Assistance Commission, Washington, D.C.
- Robert Pastor, Co-Director, Center for Democracy and Election Management, American University, Washington, D.C.
- Vassia Stoilov, Doctoral Fellow, Center for Democracy and Election Management, American University, Washington, D.C.

*Webcast and a Power Point are available on NCSL’s website.*

The Center for Democracy and Election Management (CDEM) released three new reports on the state of electoral reform in the fifty U.S. states. Included in the reports are election administration profiles of all fifty states.

EAC Chair Gineen Bresso Beach gave an overview of the duties of the Commission under the Help America Vote Act and discussed current levels of available HAVA funding and released a 50-state table entitled *Distribution of Requirements Payments and Matching Contributions.*

A *HAVA Requirements Payments Fact Sheet* was also distributed. She then identified two areas in which the Commission is actively involved in helping states to improve their election management functions:

- Federal voting equipment testing certification through the EAC voluntary voting system guidelines, (state officials have responsibility for testing voting systems and this provides needed support); and

- Assisting Military and Overseas Voters: The National Institute of Standards and Technology, under contract with the EAC, is performing research into the risks associated with the electronic transmission of blank ballots and voted ballot submission. The EAC and NIST are developing voluntary guidance and best practices in this area. With this data, the EAC hopes to develop a voluntary pilot certification program to assist states that intend to pursue electronic means to expedite ballot transit time for military and overseas voters who often face tight ballot deadlines.

**Voter Registration--Are Major Changes Coming?**

Speakers included:

- Virginia Senator George L. Barker
- David Becker, Project Director with the Pew Center on the States, Washington, D.C.
A Podcast and PowerPoint are available on NCSL's website.

Senator Barker outlined Virginia's recently enacted legislation S.B. 1188/H.B. 1878 to direct the State Board of Elections (SBOE) to establish standardized rules for determining a person's residence. The bill arose in part due to inconsistent treatment of Virginia college students who tried to register for last year's presidential election using their campus address. In late August, the Virginia State Board promulgated new rules, drafted by a bipartisan task force, after extensive public comment. Senator Barker discussed these developments as well as a number of registration issues. David Becker discussed Pew's initiative to support voter registration modernization and the data Pew has aggregated regarding the current voter registration system. To hear the podcast, go to the NCSL Legislative Summit page at ncsl.org.

Issue Forum: The Pre-Election Election: Early Voting in the States

Speakers included:

- Maryland Delegate Jon S. Cardin
- John Fortier, Research Fellow, American Enterprise Institute, Washington, D.C.
- Susannah Goodman, Director of Voting and Election Reform, Common Cause, Washington, D.C.

This session covered the pros and cons of various early and absentee voting models. It also examined the impact of early voting on overall turnout and campaigns.

"Were it left to me to decide whether we should have a government without newspapers or newspapers without government, I should not hesitate a moment to prefer the latter."

Thomas Jefferson, Letter, 1787
Georgia asks the Justice Department to Reconsider on Voter Verification

In August, Georgia Secretary of State Karen Handel announced that the state had asked the U.S. Department of Justice (DOJ) to reconsider its May 2009 denial of pre-clearance for two voter verification processes administered in the November 2008 general election. Georgia is one of nine states where Section 5 of the Voting Rights Act requires pre-approval by the DOJ before new voting procedures may be implemented. In seven additional states, select counties or townships are subject to Section 5 pre-approval requirements. Learn more about Section 5 pre-clearance here.

The procedure at issue in Georgia is a voter verification process that matches five criteria provided by new voter registration applicants with information in the Georgia Department of Driver Services database or the Social Security Administration database. These criteria include first name, last name, date of birth, driver's license number or last four digits of the applicant's Social Security number and citizenship. If the verification process reveals that an applicant previously reported that he or she was not a U.S. citizen, that person must provide proof of citizenship.

In October 2008, a federal three-judge panel directed the state to continue the verification process while it sought Section 5 pre-clearance. The panel also acknowledged the verification requirements imposed on the state by the 2002 Help America Vote Act.

Then, in May 2009, as reported previously in The Canvass, the U.S. Department of Justice denied Voting Rights Act Section 5 pre-clearance for the already-implemented program to screen out non-citizens within the Georgia statewide voter registration database. The decision bars the state from continuing its verification programs. The Department of Justice now has 60 days to respond to the state's request for reconsideration. Ω

ACORN Sues to Overturn Pennsylvania Voter Fraud Law

The American Civil Liberties Union of Pennsylvania and Project Vote recently filed a federal lawsuit on behalf of the Association of Community Organizations for Reform Now (ACORN) that challenges the constitutionality of a state statute barring the use of quotas in voter registration drives. The ACLU lawsuit names Allegheny County District Attorney Stephen A. Zappala, Jr. and Attorney General Tom Corbett as defendants.

In the lawsuit, ACORN challenges the constitutionality of a Pennsylvania election statute, 25 Pa. Cons. Stat. § 1713, entitled "Solicitation of Registration," which makes it a crime to “give, solicit or accept payment or financial incentive to obtain a voter registration if the payment or incentive is based upon the number of registrations or applications obtained.” District attorneys, including those in Allegheny County, are applying the law to prohibit not only payment per registration, but also any reliance on performance standards or goals that refer to the number of registrations. ACORN argues that this application essentially precludes it from hiring and paying employees to advance the organization’s goal of registering eligible voters, thereby imposing a severe burden on its First and 14th Amendment rights. ACORN seeks a declaration that the statute is unconstitutional and an injunction to block its enforcement.

In May, District Attorney Stephen A. Zappala, Jr. charged several ex-ACORN canvassers with violating the statute. Zappala said that while some of the pending charges are based on the law barring the use of quotas, most of the charges are related to fraud and obstruction statutes. Zappala said the quota charges involve misdemeanors carrying a fine of $500 to $2,500 and 30 days to one year in jail, and are the least serious he filed against the workers, most of whom also are charged with
felonies like forgery. ACORN pays canvassers because it got poor results when it tried to use volunteers, the lawsuit said.

In addition to Pennsylvania, prosecutors have filed criminal charges against ACORN in Florida and Nevada for voter registration offenses. In Florida, the indictments involve fraudulent voter registrations. In Nevada, the charges involve workers being paid under an illegal quota program. On Sept. 30, ACORN officials and a former regional supervisor for the group were ordered to stand trial; they will be arraigned on Oct. 14.

Top Two Primary to "Round II" in Federal District Court

Washington will need to defend its new Top Two primary once again. Last month, a federal judge denied the state's motion to dismiss the ongoing legal challenge to Initiative 872, the 2004 ballot initiative that established the Top Two. This latest challenge was brought by the state's major political parties. A new round of litigation is now set to begin.

The Republican Party, joined by the Democratic and Libertarian Parties, first challenged the constitutionality of the initiative in 2005, arguing that the law, on its face, forced the parties to associate with renegade candidates, including those who may oppose party values. Under Initiative 872, the parties maintained, such renegade candidates would be allowed to appear on the ballot with an official party designation. The federal district court ruled in favor of the political parties and enjoined the law from being implemented. The U.S. Court of Appeals for the Ninth Circuit affirmed that decision. In March 2008, the U.S. Supreme Court reversed and upheld the law as constitutional — in its unimplemented status, but sent the case back to the 9th Circuit, which in turn returned the case to the district court for any claims not settled by the Supreme Court.

In the "Top Two," all elections for partisan office start with a single primary in which every candidate competes. Each candidate declares his or her party preference or independent status, which is printed on the primary ballot along with the candidate's name. A candidate can choose to identify with any party he or she chooses, even if that political party would itself prefer otherwise. Voters may select any candidate listed on the ballot, regardless of party preference, and the two candidates that receive the most votes, regardless of their party designation, advance to the general election. Consequently, the general election becomes a runoff between the top-two vote getters in the primary. A quirk of the Washington system is that two candidates having the same party preference can go head-to-head in the general election after running against each other in the primary.

Last August marked the first time the Top Two primary was used to determine which candidates would face off in the general elections. One of the new named plaintiffs in the suit is Libertarian candidate Ruth Bennett, who unsuccessfully ran for the 37th Legislative District in 2008. Bennett won 11.25 percent of the vote in the two-candidate primary, but only 10.56 percent in the general election. In both races she faced incumbent Eric Pettigrew, who declares his preference as the Democratic Party. First elected in 2002, Representative Pettigrew posted 89 percent in both the primary and general elections.

In his ruling that the post-implementation challenge should proceed, Judge John Coughenour wrote, "Plaintiffs will not be able to strike down I-872 in its entirety... the best that plaintiffs can achieve is to invalidate certain portions of I-872's implementation and enjoin the state from implementing I-872 in specific ways that lead to voter confusion or other forms of forced confusion." Louisiana is the only other state that uses a runoff-type primary system, where it is referred to as the "Cajun" primary. California voters will consider a June 2010 primary ballot measure asking whether the state should implement the Top Two model as well.
New Study Shows Young Voters Find Convenience in Election Day Registration

The Center for Information and Research on Civic Learning and Engagement at Tufts University recently released a study examining the impact of state election law reforms on young voters in 2008. "Clearly voter turnout is a complicated issue that cannot be solely explained by state election laws," the report noted. The term "youth" used in the study covered American citizens between the ages of 18 and 29. The District of Columbia had the highest youth turnout at 76 percent while Hawaii had the lowest at 30.9 percent. Nationally, youth turnout was 51.1 percent.

Read the full study, or view more data on youth voting compiled by Tufts University.

Election Day Registration: The study examined youth turnout in nine states that offered election day registration in 2008. Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Rhode Island, Wisconsin and Wyoming allowed voters to register at the polls on Election Day. Rhode Island allowed election day registration only for voters seeking to vote for president and vice president and who missed the 30-day advance registration deadline, precluding them from voting in any other ballot races.

The Tufts study found that in 2008, on average, 59 percent of young Americans whose home state offered election day registration voted -- nine percentage points higher than in states that did not offer the option. This was true for virtually all demographics of young Americans, with the exception of African American youth, who maintained a high turnout rate regardless of election day registration.

No Excuse Absentee Voting: Twenty-eight states allowed mail-in absentee voting without excuse. This reform showed only a slight increase in turnout. The average youth turnout was 52 percent in the states that allowed no-excuse absentee voting and 50 percent in states that required an excuse.

Early In-Person Voting: In the 32 states that permitted early voting (no-excuse, in-person voting prior to Election Day), youth turnout was no higher than in the states without early voting. However, the study did find that 24 percent of young voters in early voting states chose to vote early. The study concluded that "early in-person voting is a convenient option for young people, though it does not seem to mobilize young voters who would not have otherwise voted."

Longer Polling Hours: The CIRCLE study found that keeping polls open longer is associated with higher voter turnout for young Americans who are not in school. While longer polling hours were not associated with higher turnout for full-time students, longer polling hours did help young Americans who worked full-time (7 percent increase), part-time (up 5 percent), and were part-time students (up 5 percent).

Time Off to Vote: Twenty-nine states require private firms to provide time off for employees to vote, and 30 states give state employees time off on Election Day. The 2008 data confirmed no significant link between time off to vote and youth turnout.
States Ranked on Military and Overseas Voting Policy

In its September research newsletter, the Overseas Vote Foundation published a Uniformed Overseas Citizen Absentee Voting Act State Policy Index that evaluates states on military and overseas voting policy. Claire Smith, the foundation's research program director, ranked the states with respect to their enactment of legislation to facilitate voting by members of the armed forces, their family members and U.S. citizens living abroad.

In the 2008 general election, the top five states were Colorado, Iowa, Kansas, New Mexico and South Carolina. The lowest ranking states were Alabama, Arkansas, Nevada, New York and Wyoming. It is important to note that Nevada just recently enacted reform legislation that dramatically expands the use of electronic resources for registration and balloting, as well as extending registration deadlines and the use of the Federal Write-In Absentee Ballot.

Researchers measured each state's policy against eight registration laws and eight balloting regulations. These 16 different requirements are at the heart of the recommendations that the U.S. Election Assistance Commission and the Federal Voting Assistance Program have made to the states since 2004. Smith included a caveat with her findings: "It is important to note that the index ... only examines legislation and is not a ranking of performance; rather the index is a tool that can be used to explain outcomes. Thus, the states at the top of the rankings have not performed better, but they have passed more laws making it easier for UOCAVA voters to participate." The report concludes, "Although much has been done on the state level to introduce voter-friendly policies, there is still a lot of work to be done." In January 2010, OVF will compute the 2009 index. Read the full research report and other featured articles in the Foundation's online newsletter. 

Developing Trend: Online Voter Registration

The following nine states allow a qualified voter to complete his/her voter registration entirely online, or are in the process of implementing such a system.

**Arizona** -- implemented in 2002; see [EZ Voter Registration](#)

**California** -- passed in 2008 (S.B. 381); to be implemented in 2010

**Colorado** -- passed in 2009 (H.B. 1160); to be implemented by April 1, 2010

**Indiana** -- passed in 2009 (H.B. 1346); to be implemented by July 1, 2010

**Kansas** -- implemented in 2009; see [Vote Kansas](#)

**Louisiana** -- passed in 2009 (H.B. 520); to be implemented by April 1, 2010

**Oregon** -- passed in 2009 (H.B. 2386); to be implemented by March 1, 2010

**Utah** -- passed in 2009 (S.B. 25); implementation date not specified in law

**Washington** -- passed in 2007 (H.B. 1528); see [Online Voter Registration](#)
"The 2008 presidential election saw a significant increase in voter turnout among young people, blacks and Hispanics. But as turnout among some other demographic groups either decreased or remained unchanged, the overall 2008 voter turnout rate was not statistically different from 2004 (at 64%)."


"My point is the law infringes upon the fundamental right to free association."

Krist Novoselic, Democratic Central Committee, Wahkiakum County, WA, and bass guitarist with the band Nirvana commenting on the state's "Top Two" primary Seattle Weekly's "Daily" blog, August 25, 2009. Ω

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FROM THE EDITORS' DESK:

Affidavits Raise Red Flag in Colorado

A recent special district election in Colorado calls into question the ability of state and local election officials to weed out and deter voting fraud effectively. On Aug. 25, 2009, in El Paso County, the Woodmen Hills Metropolitan District held a recall petition election on Ms. Janice Pizzi, the district's board president. After the canvass, the final tally was 406 for the recall and 412 against. In a post-election news release, Robert C. Balink, the El Paso County Clerk, announced that his office had identified 17 votes that were cast by ineligible voters. Eligible voters for the recall election had to be registered Colorado voters who either lived in the district or owned property in the district. The release noted an "Irregularity:"

Although the 17 ineligible votes cast exceed the margin in this race, the mere existence of these ineligible votes does not void the election returns. ... Under Colorado law, the result of any election to determine a ballot issue or ballot question may be contested [if] illegal votes were received ... in sufficient numbers to change the result of the election. ... Colorado courts have held, that absent other fraud or misconduct that corrupts the election, "the fact that illegal ballots have been cast ... does not ordinarily warrant the rejection of the entire poll."... Likewise ... the Colorado Supreme Court stated that a challenge to the election results must name the individuals, as well as the identity for whom the illegal ballots were cast. Based on Colorado statute and court opinions, the clerk will certify the election results.

However, for the future, Balink observed, "it should be noted that relying only on voters' affidavits of eligibility, as is the current Colorado law, does not adequately protect the public from illegal votes being cast." In Colorado special district elections, a person not listed on the voter rolls can vote by simply signing a self-affirming oath that he or she is registered to vote in the state and is eligible to vote based on one of four statutory grounds: residency; ownership of taxable real or personal property within the special district; tax liability on a contract to purchase real property located within the special district; or, is the spouse of an owner of taxable real or personal property located within the special district.

According to Liz Olson, county election manager, the 17 voters in question were not listed in the election day poll book. They were advised they could vote a regular ballot, but would need to complete the affidavit. After the election, in checking the statewide voter registration database, the clerk's office found none of the 17 were registered to vote anywhere in the state. At best, it could have been that the 17 signed oaths were defective due to errors by voters as to their registration status, where they lived or where their property was located. At worst, 17 of the ineligible affidavits were fraudulent, and the voters perjured themselves. Instances of both may have occurred. In either case, those illegal votes effectively cancelled out the votes of 17 people who were legitimately registered to vote in the recall election. The affidavits have since been referred to the district attorney for further review. Although this problem occurred at the local level, in a very small election, it strikes at the heart of voter confidence. Theoretically, this situation could have arisen in any state that allows non-resident property owners to vote in special districts and has similar affidavit provisions. In addition to Colorado, at least two other states, Arizona and California, authorize such procedures. Hopefully, legislators and election officials will work together to prevent these anomalies from occurring in the future.

As always, feel free to call us at (303) 364-7700 ext. 1379 or send us an e-mail with any questions.  

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