FAIRVOTE POLICY
PERSPECTIVE

A Constitutional Right to Vote:

The Promise of House Joint Resolution 44

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SUMMARY

Establishing an explicit constitutional right to vote would strengthen the ability of all citizens to exercise their suffrage rights and limit the ability of federal, state, or local governments to impinge upon the right to vote. FairVote supports an amendment to the U.S. Constitution establishing such an explicit right to vote, because we believe that the right to vote is a cornerstone of representative democracy that depends upon broadly defined voter eligibility, universal voter access to the polls, and election integrity. Recent Supreme Court decisions only underscore the value of this approach, as a properly worded amendment would provide a check on abuses of federal power of the time, place and manner of congressional elections, a check on abuses of state power over voter eligibility in elections, and a means to establish policies designed to prevent practices at any level of government that unnecessarily undercut participation or have a discriminatory impact.

FairVote's support of a broadly worded constitutional amendment to ensure that every U.S. citizen of voting age has a right to vote in every election held in the jurisdiction in which the citizen resides is grounded in our analysis of American history and global and state models for a right to vote. U.S. House Members Keith Ellison and Mark Pocan have shown great leadership in introducing House Joint Resolution 44 (HJ Res. 44), which would establish a right to vote in the U.S. Constitution with language that is largely consistent with our recommendation. As explained in this analysis, HJ Res. 44 would provide much needed protection for an individual right to vote in the United States.

I. The Need for a Right to Vote Amendment

It is widely believed that "the right of voting for representatives is the primary right by which other rights are protected."[1] Many are surprised to learn, then, that the right to vote is not explicitly protected in the U.S. Constitution. Amending the Constitution to include an explicit right to vote would make it clear that this right is in fact fundamental. It would ensure that voter challenges to election rules would force governments to justify practices that curtail access to the ballot.

That is not to say that the amendment would make every limitation on voting rights unconstitutional. There must be predetermined dates on which ballots can be cast, for example, in order for elections to run smoothly, and states have established voter registration laws in an effort to bring order to the electoral process. However, a right to vote amendment would ensure that voting laws would be evaluated using the standard of "strict scrutiny," meaning that governments would have to show that the restrictions were narrowly tailored to achieve a compelling state interest. When evaluated under strict scrutiny, many aspects of our current elections may not meet this standard, creating opportunities for access to the ballot for millions of Americans who are now actively or effectively disenfranchised.[2]

This is particularly important when it comes to Supreme Court evaluation of voting laws. At times, the Supreme Court has used language broadly supportive of the right to vote, stating

> "[N]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[3]

However, the Court has taken a far more limited role in striking down statutes that might infringe upon this right.[4] Even when suggesting that citizens do have a right to vote, the Court has been

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[1] Thomas Paine, *Dissertation on First Principles of Government*, The Writings of Thomas Paine, ed. Moncure D. Conway, vol. 3, p. 267. Originally published in 1795.

[2] Jonathan Soros and Mark Schmitt, *The Missing Right: A Constitutional Right to Vote*, Democracy: A Journal of Ideas, Issue #28, Spring 2013 (*available at* http://www.democracyjournal.org/28/the-missing-right-a-constitutional-right-to-vote.php?page=all).

[3] *Wesberry v Sanders*, 376 U.S. 1, 17; 84 S. Ct. 526; 11 L. Ed. 2d 481 (1964).

[4] "In recent years, the Supreme Court has backed off somewhat from its strict categorical approach to the right to vote. *Compare Reynolds v. Sims, 377 U.S. 533, 554-55, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)* (holding the right to vote is fundamental and any alleged infringement on right to vote must be "carefully and meticulously scrutinized"), *and* Illinois state Bd. Of Elections v. Socialist Workers Party, 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) (holding the right to vote is a fundamental right subject to strict scrutiny), *with* Rodriguez v. Popular , 457 U.S. 1, 9, 102 S.Ct. 2194, 72 L.Ed.2d 628 (1982) (finding the right to vote per se is not a constitutionally protected right), *and* Burdick v. Takushi, 504 U.S. 428, 432-33, 112 S.Ct. 2059, 199 L.Ed.2d 245 (1992) (holding the right to vote in any manner through the ballot is not absolute and law imposing burden on right to vote is not necessarily subject to strict scrutiny)),*and* Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 (1982) ("However, this Court has often noted that the Constitution 'does not confer the right of suffrage upon any one,' and that 'the right to vote, per se, is not a constitutionally protected right . . . .'")(citing San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 n. 78 (1973); Minor v. Happersett, 21 Wall. 162, 178

clear that the protection remains limited. The Court has said that U.S. citizens have a constitutionally protected right to vote on equal footing with other citizens in their particular jurisdiction, but that the right to vote is not absolute, with a great deal of power to restrict voting rights left to the states.[5] As a result, the protection of voting rights under this existing scheme can be limited. It took the Twenty-fourth Amendment to prohibit poll taxes, for example, demonstrating that severe infringements could continue into the modern era. The recently decided *Arizona v. Inter-Tribal Council of Arizona*[6] underscores the need for clear voting rights protection, as the Court established that Congress has power over the time, place, and manner of congressional elections, including the power to make key decisions affecting voter and candidate access to the ballot, while states have power over eligibility of voters within the boundaries established by the Constitution.

By amending the U.S. Constitution to include an explicit right to vote, courts will have the ability to ensure that this most fundamental right in our democracy is not diminished. Currently, when voting regulations are challenged under the Constitution, the "severe burden" test is applied.[7] Under this test, the courts evaluate whether the state law in question imposes a "severe burden on voters."[8] If the regulation does impose a severe burden the court reviews the regulation under strict scrutiny.[9] If the regulation does not impose a severe burden, the court applies a lower level of intermediate scrutiny, balancing the burdens imposed on voters against the state's interest in promulgating the regulation.[10]

As a result of these tests, the Supreme Court's equal protection voting rights jurisprudence allows for greater voting restrictions than would likely be available if there were an explicit right to vote in the U.S. Constitution.[11] FairVote's goal is to limit restrictions on voter access and restrictions on voter eligibility. Our goal is to have an explicit constitutional right to vote establish a floor of protections that ensure laws and practices involving voter access and voter eligibility do no impose unnecessary burdens on voter. States and cities could take additional steps to promote, protect, and expand suffrage, providing direction for potential higher minimum standards for the whole nation to follow in the future.

Amending the Constitution to establish an explicit right to vote would ensure that every citizen of voting age has the right to vote in free and fair elections regardless of who they are or where they live. It would affirm our nation's shift from understanding voting as a privilege to

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(1875))." *Winters v. Illinois State Bd. Of Elections*, 197 F. Supp. 2d 1110, 1113 (N.D. Ill. 2001), *affirmed* 535 U.S. 967 (2002).

[5] *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("This 'equal right to vote' is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways.").

[6] *Arizona v. Inter Tribal Council of Arizona, Inc.*, No. 12-71, slip op. (U.S. ___, 2013).

[7] *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)); *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983).

[8] *Burdick*, 502 U.S. at 433.

[9] *Burdick*, 502 U.S. at 434.

[10] *Id*.

[11] *See* Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559 (2004), *available at* http://archive.fairvote.org/media/rtv/Raskin.pdf.

embracing voting as a right.[12] Of the 17 constitutional amendments adopted since the bill of rights, seven amendments either directly expanded the franchise or sought to expand the power of voters in elections.[13] A right to vote would amendment is the next step in that trajectory.

II. Historical Background

While the Constitution contains no explicit right to vote, our Declaration of Independence states that "[g]overnments are instituted among men, deriving their just powers from the consent of the governed."[14] This founding principle is key to understanding the right to vote, as the means for expressing consent is by casting a ballot in an election. It is true that in 1776 and for many decades after, it was accepted that the franchise be limited to just a small proportion of the population. However, it is clear that the need to hold elections in order to choose leaders was always a cornerstone of America's democracy.

Indeed, at its inception, the Constitution mandated that all Members of the U.S. House of Representatives be directly elected,[15] precisely because participating in elections is a fundamental part of republican government. James Madison explicitly addressed the importance of the right of suffrage, but suggested that leaving it to the states would be sufficient – an assumption subsequent history proved overly optimistic.[16]

This limited suffrage protection slowly expanded over time, as the U.S. Constitution was amended to prohibit voting discrimination based on race (Fifteenth Amendment),[17] sex (Nineteenth Amendment),[18] ability to pay a poll tax (Twenty-Fourth Amendment),[19] and age (Twenty-Sixth Amendment).[20]

Despite these expansions to suffrage, the Supreme Court declared that the U.S. Constitution "does not confer the right of suffrage upon anyone, and … the right to vote, per se, is not a

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[12] Keyssar, Alexander. *Constitutional Amendments and the Right to Vote: Some Reflections on History*. Kennedy School of Government, Harvard University, November 2003. [http://www.fairvote.org/assets/Uploads/Right-to-Vote/keyssar.pdf].

[13] *See* http://www.fairvote.org/four-reasons-to-support-a-right-to-vote-amendment. Those amendments are: Twelfth Amendment to improve selection of the president; Fifteenth Amendment to ban denial of suffrage based on race, color or previous condition of servitude; Seventeenth Amendment to require direct election of senators; Nineteenth Amendment to ban denial of suffrage based on gender; Twenty-Second amendment for term limits in presidential elections; Twenty-Third amendment to provide presidential voting fights for the people of Washington, D.C.; Twenty-Fourth amendment to ban poll taxes; and the Twenty-Sixth Amendment to extend voting rights to people after they turn 18. Note that the Twenty-Seventh Amendment regarding congressional pay was first sent to Congress in the 1790s.

[14] THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

[15] U.S. CONST. art. I, § 2, cl. 1.

[16] In The Federalist paper No. 52, presumed author James Madison underscored the value of suffrage rights in his anticipation of them being enshrined in many state constitutions, writing, "It will be safe to the United States because, being fixed by the State constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their constitutions in such a manner as to abridge the rights secured to them by the federal Constitution." THE FEDERALIST NO. 52 (James Madison).

[17] U.S. Const. amend. XV.

[18] U.S. Const. amend. XIX.

[19] U.S. Const. amend. XXIV.

[20] U.S. Const. amend. XXVI.

constitutionally protected right."[21] The Court found, instead, that the right to vote is protected by the Equal Protection Clause of the Fourteenth Amendment.[22] While the Court has described "the right to vote freely for the candidate of one's choice" as "the essence of democracy" in Fourteenth Amendment cases,[23] the Court uses the Equal Protection Clause to weigh the burdens on voters against the state's interest in determining qualifications and procedures for voting.[24] Therefore, while the Fourteenth Amendment provides some protection for the right to vote, it has not provided comprehensive protection, does not require strict scrutiny, and still leaves voters vulnerable to restrictive voting laws. Fourteenth Amendment protection is important, but it is not the same as endowing all citizens with an explicit right to vote. In order for citizens' suffrage rights to truly be protected, an explicit right to vote is necessary.

III. The Right to Vote in State Constitutions and Its Application in Recent Cases

While the right to vote under the U.S. Constitution is merely implied, every state protects the right to vote in its constitution to some degree.[25] Except for Arizona, every state constitution affirmatively and explicitly grants the right to vote, albeit with different levels of specificity that can affect its enforcement and different exceptions to that protection.[26]

Typically a state constitution explicitly grants the right to vote by setting out qualifications for electors in that state. The Wisconsin Constitution, for example, states, "Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district."[27] Some states provide further qualifying information, such as the Virginia Constitution, which states that, "all men, having sufficient evidence of permanent common

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[21] *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (internal quotation marks and citations omitted) (quoting Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973)).

[22] *Bush v. Gore*, 531 U.S. 98, 105 (2000); *Reynolds v. Sims*, 377 U.S. 533, 563 (1964). Section Two of the Fourteenth amendment includes the phrase "right to vote," in the context of reducing House seats for states that limit suffrage rights absent certain conditions: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." However, this provision was never enforced, even when southern states used pretext to prevent African American residents from voting until the passage of Voting Rights Act in 1965.

[23] *Reynolds*, 377 U.S. at 555.

[24] *Baker v. Carr*, 369 U.S. 186, 208 (1962); *Harper v. Virginia State. Bd. of Elections*, 383 U.S. 663, 665 (1966).

[25] Jamin B. Raskin, *Is There a Constitutional Right to Vote and Be Represented?*,48 AM. U. L. REV. 589, 612-13 (1999).

[26] Joshua A. Douglas, *The Right to Vote Under State Constitutions*; Vanderbilt Law Review (Forthcoming 2014), March 17, 2013 (draft on file with author). An 'explicit' grant means that the state constitution includes language declaring that a citizen 'shall be qualified to vote,' 'shall be entitled to vote,' 'is a qualified elector,' or other similar language. Arizona's Constitution does not grant the right to vote to its citizens through direct language, instead stating that "No person shall be entitled to vote . . . unless" the person meets the citizenship, residency, and age requirements. This language still implicitly grants the right to vote, albeit in the reverse of all other states because it provides who may not vote (no one unless they meet the state's eligibility requirements).

[27] Wis. Const. art. III, § 1.

interest with, and attachment to, the community, have the right of suffrage."[28] Many states include language requiring elections be "free" and either "open" or "equal."[29] Interestingly, the Vermont Constitution also requires that elections be "without corruption."[30]

That is not to say that the states always provide expansive voting rights. Certain state constitutions include limitations on the right to vote as well. For example, some state constitutions deny voting rights to people with felony convictions or mentally incompetent persons.[31] Other state constitutions allow the state's legislature to enact other reasonable voting procedures in order to combat voter fraud and protect the integrity of the election process.[32] These additional requirements and explicit restrictions notwithstanding, the primary purpose of state constitutional right to vote language is to grant voting rights to the state's citizens.

One of the strongest arguments for an explicit right to vote in the U.S. Constitution is that its absence can lead to state deference to federal court decisions on voting by "lockstepping." With lockstepping, state courts interpret their state constitutions while following U.S. Supreme Court interpretation of the U.S. Constitution's definition of that particular area of law. While such a practice can make sense when involving language that is in the both the federal and state constitutions, such as rights established under the Fourth Amendment, it can weaken state court actions to uphold the right to vote when state constitutional protections are more robust than federal constitutional protections.

To see the legal impact of state constitutional right to vote provisions and how the right to vote is affected by federal constitutional provisions, it is helpful to look at recent challenges brought in state courts. Several states courts have evaluated voter identification laws in the past decade. Voter identification laws require people to provide some form of identification when voting to combat the impersonation of eligible voters. The selection of what type of identification is needed at the polls can create controversy when it involves items such as drivers' licenses, which many eligible voters do not have.

In some challenges to voter ID laws in state courts, the court first considers the state constitution to determine if it protects the right to vote, only later invoking the "federal floor" of federal court jurisprudence if the state constitution is insufficient. In other states, courts rely on lockstepping.

Despite the fact that almost every state constitution explicitly grants the right to vote to its citizens, many state courts do not give these provisions any separate significance from voting rights jurisprudence under the U.S. Constitution. In the context of voting rights, this method of interpretation can be harmful, as most state constitutions go further than the U.S. Constitution in

[28] Va. Const. art. I, § 6.

[29] These states are Arizona, Arkansas, Colorado, Delaware, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

[30] Vt. Const. art. VIII.

[31] *See, e.g.*, Ky. Const. § 145; Va. Const. art. II, § 1; Ala. Const. art. VIII, § 177(b). Note that in Kentucky and Virginia, this restriction on voting rights for people with felony convictions is permanent unless a gubernatorial action restores the right and in Alabama, citizens with felony convictions are banned only when their felony is one of "moral turpitude."

[32] Del. Const. art. V, § 1; Md. Const. art. I, § 4.

conferring voting rights. The amount of deference the state courts gave to federal constitutional interpretation is key to understanding the outcomes in Voter ID cases.

The difference in interpretive methods can be seen in the initial decisions in the Voter ID cases from Pennsylvania and Wisconsin. Despite the fact that the Pennsylvania and Wisconsin Constitutions are very similar,[33] the Pennsylvania court rejected the plaintiffs' argument that the state's voter identification requirement violated the Pennsylvania Constitution,[34] while two Wisconsin courts initially invalidated voter ID laws under the Wisconsin Constitution.[35] The reason for this difference was the interpretive method used by the court.[36]

In the Wisconsin cases, the lower courts interpreted the Wisconsin Constitution independently, determining that the protection of the right to vote in the state constitution was greater than that provided by the federal constitution.[37] In addition to defining a qualified elector,[38] the Wisconsin State Constitution defines the types of laws that may be enacted in order to implement its election law. Wis. Const. Art. III, § 2 states that "laws may be enacted:

> (1) Defining residency. (2) Providing for registration of electors. (3) Providing for absentee voting. (4) Excluding from the right of suffrage persons: (a) Convicted of a felony, unless restored to civil rights. (b) Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside. (5) Subject to ratification by the people at a general election, extending the right of suffrage to additional classes.

In *League of Women Voters v. Walker*, the Wisconsin state court found that Act 23's strict voter ID requirement was unconstitutional because the act went beyond the powers granted to the legislature in the Section 2 of the state constitution.[39] In laying out its rationale, the court stated,

> "Article III is unambiguous, and means exactly what it says. It creates both necessary and sufficient requirements for qualified voters. Every United States citizen 18 years of age or older who resides in an election district in Wisconsin is a qualified elector in

[33] The Pennsylvania Constitution provides that "Every citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections . . . ." Pa. Const. art. VII, § 1. The Wisconsin Constitution says that "Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district." Wis. Const. art. III, § 1.

[34] *Applewhite v. Commonwealth*, 2012 WL 3332376 (Pa. Comm. Ct. 2012) (unreported), vacated and remanded by 54 A.3d 1, 2012 WL 4075899 (Pa. 2012).

[35] *Milwaukee Branch of the NAACP v. Walker*, 11-CV- 5492, 17 (Wis. Cir. Ct. Mar. 6, 2012); *League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, Case No. 11-cv-4669 (Wis. Cir. Ct. Mar. 12, 2012).

[36] *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*; Vanderbilt Law Review (Forthcoming 2014), March 17, 2013 (draft on file with author).

[37] *Milwaukee Branch of the NAACP*, 2012 WL 739553; *League of Women Voters v. Walker*, 11 CV- 4669 at X (Wis. Cir. Ct. Mar. 13, 2012).

[38] *See supra* Sec. III.

[39] *League of Women Voters v. Walker*, 11 CV- 4669 at 5 (Wis. Cir. Ct. Mar. 13, 2012).

> that district, unless excluded by duly enacted laws barring certain convicted felons or adjudicated incompetents/partially incompetents. … The government may not disqualify an elector who possesses those qualifications on the grounds that the voter does not satisfy additional statutorily-created qualifications not contained in Article III, such as a photo ID. For this reason, a right to vote amendment to the Constitution should be affirmatively worded."[40]

An important implication of this holding is that it reinforced that the voter qualifications enumerated in Section 2 of the state constitution may not be overridden by the state legislature.

While the District 4 Wisconsin Court of Appeals overturned the Dane County Circuit Court's ruling in May 2013, that decision was a limited one. The court ruled that a voter ID is not an "additional qualification," but rather a means to identify state residents who had registered to vote. The Court of Appeals declined to find that the Voter ID law is unconstitutional in the absence of evidence that the requirement impairs the rights of qualified citizens to vote. Given that such evidence was not presented in this case, the court left open the possibility that plaintiffs might succeed in an as-applied challenge if they supplied evidence that the voter ID requirement imposed too heavy of a burden on voters. Thus, that decision does not resolve the constitutionality of the law.

Act 23 was also at issue in *Milwaukee Branch of the NAACP v. Walker*.[41] In that case, the court noted that the state constitutional right to vote warranted a strict scrutiny analysis of Act 23.[42] This type of scrutiny required the state to prove that Act 23 was a regulation narrowly tailored to serve a "proper and compelling government interest."[43] In practice, it means that "the court must look not only to see if the law speaks to a legitimate purpose, but must go further … to consider both the benefits and the burdens of the law."[44] While noting that the purported interest of Act 23 was to protect the integrity of the election process, the court examined evidence based on forty voters' affidavits describing their hardships in obtaining a voter ID.[45] In doing so, it found that the law unconstitutionally burdened individuals' ability to vote.[46] As a result, the court granted a temporary injunction to prevent the state from enforcing Act 23.[47]

This result was made possible precisely because the Wisconsin Constitution affirmatively protects the right to vote, and because Wisconsin courts interpret the state constitution first, rather than lockstepping their analysis to protections granted in the U.S. Constitution. Significantly, the court distinguished the Wisconsin case from a similar case brought before the

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[40] *League of Women Voters of Wisconsin v. Walker*, No. 11-CV-4669 (Dane Cnty. Cir. Ct. 2011)
[41] *Milwaukee Branch of the NAACP v. Walker*, 11-CV- 5492, 17 (Wis. Cir. Ct. Mar. 6, 2012) ("Where a statute implicates a fundamental interest, it is the obligation of a court to apply a strict or heightened level of review to the statute to determine if it remains within the range of authority permitted under the constitution.")
[42] *Id.* at 8.
[43] *Id.*
[44] *Id* at 17.
[45] *Id.* at 4.
[46] *Id.* at 9.
[47] *Id.*

U.S. Supreme Court to challenge the legitimacy of an Indiana voter ID law in *Crawford v. Marion County Election Board*. The court stated that the case in *NAACP v. Walker* was "founded upon the Wisconsin Constitution which expressly guarantees the right to vote while Crawford was based upon the U.S. Constitution which offers no such guarantee."

By contrast, in its initial analysis the Pennsylvania court used the lockstepping approach, determining that Pennsylvania's grant of voting rights was limited by federal jurisprudence.[48] Although the Pennsylvania Commonwealth court discussed Pennsylvania cases, it ultimately relied on the U.S. Supreme Court's decision in *Crawford v. Marion County Election Board*[49] for its analysis – in direct contrast to the Wisconsin court. Thus, despite the fact that Pennsylvania's constitution provides substantially more protection than the U.S. Constitution, Pennsylvania voting rights protection were kept in lockstep with the federal constitution's Equal Protection Clause.

When the case reached the Pennsylvania State Supreme Court, that Court sent the case back to the Commonwealth Court, to assess the on-the-ground affect this law would have on voters. As a result, the Commonwealth Court granted a partial preliminary injunction in the Voter ID case, leaving the law in place but delaying its implementation. As a result of this temporary injunction, voters were not required to show identification in order to vote in the 2012 elections and May 2013 primary elections.[50]

Passing a right to vote amendment would prevent the form of interpretive gap seen in the Pennsylvania Commonwealth Court's initial assessment. As it stands now, state court decisions that lockstep state constitutions with the more limited rights implied in federal constitution have the effect of diminishing the right to vote, as the right to vote that is only implied in the Equal Protection Clause. This is not to say that the goal of the right to vote amendment is to encourage lockstepping. Rather, with a federally guaranteed constitutional right to vote, residents in states where courts already interpret state constitutions using the lockstep method, like the Pennsylvania lower court and Indiana, could see their rights expanded.

The conclusion to be drawn from these examples is not that a constitutional amendment will necessarily prevent or permit voter ID laws from being implemented. Rather, the right to vote amendment would raise the federal floor of voting rights protections and require state courts to interpret the right to vote under an explicit guarantee. Concretely, this means that any voter ID law would need to be narrowly tailored to remedy demonstrable problems and to be implemented in such a way that it does not create undue barriers to voting – that is, affecting the "how" more than the "if" in states were policymakers decide to require a voter ID. Requiring this type of analysis is precisely the reason a right to vote amendment is needed in the U.S. Constitution.

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[48] *Applewhite v. Commonwealth*, 2012 WL 3332376 at 7, 16-19.

[49] *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

[50] On October 2, 2012, Judge Robert Simpson issued a partial preliminary injunction that allowed people to vote without an ID without using a provisional ballot - similar to the soft roll-out used in the primary. Voters without an acceptable ID were given information at the polls saying that they would need ID for the next election and providing information about getting free ID through PennDOT. The voter ID law was not in effect for the May 2013 primary for in-person voters. Voters were asked to show ID in that election, but were still able to vote regularly (not provisionally) without showing ID. Judge Simpson has scheduled a trial on the permanent injunction to begin Monday, July 15, 2013, in Harrisburg, PA.

IV. Procedure and Historical Context of Amendments to the U.S. Constitution

The U.S. Constitution allows for passage of amendments through a two-step process.[51] An amendment must first be proposed by either two-thirds of each house of Congress or a constitutional convention called by two-thirds of the states through state conventions. Then, the amendment must be ratified by either three-fourths of the state legislatures, or three-fourths of state conventions. It is notable that no amendment has ever been initiated by the states, and all but one successful amendment was ratified by state legislatures rather than by state conventions. (The Twenty-first Amendment, repealing Prohibition, was the only amendment ratified through state conventions.)

Since the nation's founding, amendments have been proposed over a thousand times in Congress. Yet only 17 have been adopted since the original 10 were proposed in 1789, including two that cancelled each other out (prohibition against alcohol), and the Twenty-sixth Amendment involving Congressional salary increases that initially was sent to the states in the 1790s. Congress has been the largest hurdle in amending the Constitution; only six additional amendment proposals have made it through both houses of Congress, only to fail to be ratified by a sufficient number of states.

Even for amendments that have passed, passage was often difficult, requiring legislators and advocates to overcome many obstacles in the process. The chance of final success is not the only element to consider when planning to campaign for a constitutional amendment, however – raising awareness of the problem can be a valuable endeavor in itself.

V. Right to Vote Amendment Objectives

Our current system has serious flaws. Defenders of universal suffrage in the United States can point to many examples of where we fall short of this ideal. For example:

- Nearly one out of three eligible voters is not registered to vote, and our state-based system of voter registration results in large numbers of duplicate and faulty registrations.
- The quality of state election administration can vary widely from state to state and from county to county, with few minimum national standards.
- Citizens who are not residents of states, such as the more than 600,009 Americans living in Washington, D.C. and the more than 4.7 million Americans living in territories such as Puerto Rico and Guam, face severe limits on their right to vote for president and members of Congress.
- State laws have taken away voting rights for more than five million of their citizens of voting age based on a wide range of legislative action.[52]

[51] U.S. Const. art. V.

[52] Nationally, an estimated 5.85 million Americans are denied the right to vote because of laws that prohibit voting by people with felony convictions. For more information on this issue, please see the work of The Sentencing Project at http://www.sentencingproject.org.

- The Voting Rights Act creates protections for clearly defined racial minorities, but less clear protections for other groupings of voters and racial minorities living outside of states subject to Section Five preclearance provisions.

Amending the U.S. Constitution to include an explicit right to vote to empower Congress to address these issues and lay the basis for legal challenges to the most serious infringements of the right to vote is important, and it is by no means a new venture. A right to vote amendment has been introduced in Congress continuously since the 107th Congress in 2001, and garnered more than 50 sponsors in the 112th Congress. It has been discussed at length by legal scholars and civil rights activists, including at a strategic gathering before FairVote's "Claim Democracy" conference in November 2003,[53] and it is the focus of several scholarly articles.[54] As law professor Jamin Raskin states, "Our structural democracy deficit reflects the fact that our pervasive popular beliefs about universal suffrage are still not embodied in affirmative constitutional language."[55]

Moreover, a right to vote amendment could potentially clarify the balance of power between Congress and states with regards to voting rights legislation. In *Arizona v. Inter-Tribal Council*,[56] the Supreme Court issued a ruling that could potentially lead to confusion and conflict between states and the federal government over federal election laws. This case concerned a 2004 Arizona law requiring people registering to vote in the state to provide documentary proof of citizenship in order to become registered to vote. At issue was whether Arizona must accept a federal form required by the 1993 National Voter Registration Act (known as "motor voter"), for voter registration, despite the fact the form does not require registrants to provide documentary proof of citizenship.

The Court resolved the conflict between the federal form and Arizona's additional requirement by holding that Congress has the power to require Arizona to accept and use the motor voter form in its current form under the "Elections Clause"[57] of the U.S. Constitution, which gives Congress the power to override state laws on the "times, places, and manner" of holding congressional elections. Because Congress had regulated the manner of voter registration, Arizona's law was preempted by the federal statute.

Of course, federal supremacy over voting must be balanced with states' abilities to advance voting rights. In fact, states that have typically taken the lead with innovative practices that expand and improve suffrage, like early voting and same-day registration. Congressional laws should provide baseline protections, but those definitions should be subject to strict scrutiny – and should not prevent states from practices that in fact may be better at upholding the right to vote.

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[53] *See* [http://www.fairvote.org/RTV-papers-reports-and-speeches#.URkMSx1lF4I] for academic papers, reports, and speeches presented at that conference.

[54] Constitutional Amendments and the Right to Vote: Some Reflections on History by Alexander Keyssar and A Right To Vote Amendment To The Constitution: Confronting America's Structural Democracy Deficit, by Jamin Raskin (available at http://www.fairvote.org/assets/Uploads/Right-to-Vote/Raskin.pdf).

[55] Raskin supra note 12, 3 ELECTION L.J., at 572.

[56] *Arizona v. Inter Tribal Council of Arizona, Inc.*, No. 12-71, slip op. (U.S. ___, 2013).

[57] U.S. Const. art. I, §4

Furthermore, *Arizona v. Inter-Tribal Council* established new potential problems. Writing for the majority, Justice Antonin Scalia explained that states have one clear area of authority in federal elections – the authority to determine qualifications, or who may vote, only limited by amendments to the Constitution abolishing certain kinds of discrimination. In the opinion, the Court distinguished between Congress's broad time, place, and manner power and its lack of power to set voter qualifications (such as residency requirements), determining that voter qualifications is an issue left to the states.[58] According to election law experts such as Rick Hasen, this interpretation may give states new powers to resist federal government control over elections.[59]

Ultimately, the lower courts will be left to determine how to reconcile the majority opinion in *Arizona v. IATC* and its impact on voters. It is important to note, though, that a right to vote amendment should be designed to eliminate confusion. Ideally, the right to vote amendment would be drafted and interpreted in such a way as to ensure that Congress would have the power to set federal minimums that would guarantee fair voter enfranchisement, while states would retain the autonomy to administer elections and function as the laboratories of democracy.

VI. Textual Evaluation of HJ Res. 44

The language of a right to vote amendment is critically important. In reaching out to prospective new backers of a right to vote amendment over the past year, FairVote has recommended introducing new language for the amendment that defined the right broadly.[60]

HJ Res. 44 does take the broad approach, stating:

> SECTION 1. Every citizen of the United States, who is of legal voting age, shall have the fundamental right to vote in any public election held in the jurisdiction in which the citizen resides.
>
> SECTION 2. Congress shall have the power to enforce and implement this article by appropriate legislation.

The following is a general discussion of HJ Res. 44 and our analysis of key elements within its language.

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[58] Richard L. Hasen, *The Supreme Court Gives States New Weapons in the Voting Wars*, http://www.thedailybeast.com/articles/2013/06/17/the-supreme-court-gives-states-new-weapons-in-the-voting-wars.html. On a more positive note, Professor Joshua Douglas notes that if Justice Scalia is correct that Congress has no authority to determine qualifications under the U.S. Constitution, then state courts are wrong in using the lockstep approach for their constitutional right to vote provisions. Because most state constitutions go further than the federal constitution in guaranteeing a right to vote, a shift in focus on state qualification rules might actually be a move in the right direction for voters. Josh Douglas, *A Silver Lining to the 'States Rights' Portion of Justice Scalia's Opinion*, Election Law Blog (June 18, 2013, 7:32 AM), http://electionlawblog.org/?p=51752.

[59] *Id.*

[60] H.R.J. Res. 28, 110th Cong. (2008): Proposing an amendment to the Constitution of the United States regarding the right to vote. For this language and a discussion of House Joint Resolution 28 ("HJ Res. 28"), the amendment first introduced by Congressman Jesse Jackson, Jr. in 2001 that had more specific provisions, please see Appendix 2. Note that FairVote was a resource to Congressman Jackson when his office developed the legislation. We applaud his years of laudable advocacy for the legislation.

An explicit right to vote: HJ Res. 44 makes the right to vote an explicit right, instead of one that is merely implied within the Equal Protection Clause. As it stands now, the Constitution can be interpreted to protect the right to vote by implication, although courts have not been generous when interpreting whether the right to vote exists.[61] The proposed amendment language, by contrast, ensures that the right to vote be framed as an explicit right. Granting the right to vote in the Constitution establishes that state actors must have a compelling interest when legislating in a way that impacts voting rights. The ultimate goal is to safeguard the right to vote against legislation and practices that disenfranchise citizens or make voting excessively burdensome.

A universal right to vote amendment versus more limited application: Some scholars have suggested that the right to vote amendment should ensure a right to vote only in federal elections or for President alone or some other limited application. Another suggestion would use a phased approach, with the first phase establishing a right to vote for President, and the second phase pushing for voting rights uniformity across the states. However, FairVote believes the amendment language should be a true reflection of what we want to achieve; that is, the establishment of the right to vote as a fundamental and explicit right in all governmental elections taking place in the jurisdictions where one lives. Limiting a suffrage amendment to the right to vote in presidential or federal elections would leave gaps in voting rights protection. HJ Res. 44 would establish the right to vote as explicit and fundamental.

Particulars on citizenship and age: In HJ Res. 44, the right to vote is limited to U.S. citizens and those of "legal voting age." At the Constitutional level, the right to vote in all elections should only be conferred on U.S. citizens. Doing so guarantees that all citizens have the right to vote, but does not prohibit non-citizens from voting in elections where legal resident voting is allowed.[62] With regard to age, rather than inserting a mandatory voting age of 18, this amendment proposes that the right to vote is fundamental to all U.S. Citizens "of legal voting age." This will allow for local, state and national statutes to enfranchise citizens under the age of 18 in the future, as 20 states have done by allowing certain 17-year-olds to vote in primaries and caucuses.

Broad protections without specific provisions: This proposed amendment would confer "the fundamental right to vote," without providing examples of particular changes such as Election Day registration. In keeping with Constitutional history and the structure of other amendments, broad language, rather than highly specific statutory language or a list of protections, should be used.[63] While enumerated protections are important, these are better served through statutes, such as the Help America Vote Act (HAVA) of 2002,[64] and the Voter Empowerment Act (VEA), proposed in 2013.[65]

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[61] *See supra* Section I.

[62] For example, non-citizen residents may vote in local elections in six towns in Maryland. http://www.ivotenyc.org/?page_id=473

[63] By contrast, some of HJR 28 included language that deals with specific administrative protections, such as Election Day registration and setting up federal overview of state practices. See Appendix for additional detail.

[64] Help America Vote Act of 2002, 42 U.S.C. §§15301-15545.

[65] Voter Empowerment Act of 2013, H.R. Res.12, 113th Cong. (2013).

States and Territories: As written, HJ Res. 44 does not automatically grant the right to vote in all federal elections to the U.S. territories. Some have argued that adding the right to vote to the Constitution will mean that citizens in U.S. territories would be allowed to vote for the President and potentially for Congress.[66] However, this amendment language, specifically the phrase that states that citizens "shall have the right to vote in any public election held in the jurisdiction in which the citizen resides," does not necessitate changes in this area.

This amendment could be interpreted in such a way that citizens would be granted the right to vote only in elections that are already held in their jurisdiction. It would be up to court interpretation to determine whether, for example, the amendment requires that Washington, D.C. residents have the right to vote to elect U.S. Senators.

Congressional enforcement and state election administration: Section 2 of HJ Res. 44 grants Congress "the power to enforce and implement this article by appropriate legislation." This language is used, with slight variations, in the Thirteenth, Fourteenth, Fifteenth, Eighteenth, Nineteenth, Twenty-Third, Twenty-Fourth and Twenty-Sixth Amendments.[67] The enforcement provisions contained in these amendments extend the powers of Congress originally enumerated in Article I, Section 8 of the Constitution to the areas covered by the respective amendments, and have the effect of increasing the power of Congress in those areas. Granting Congress additional power does not necessarily diminish local power, however.

Importantly, these enforcement provisions have not been found to be limitless grants of power to Congress. In *City of Boerne v. Flores*,[68] the Supreme Court took a narrow view of the Congress' enforcement power in a case involving the Fourteenth Amendment. In that case, the Court struck down a provision of the Religious Freedom Restoration Act (RFRA) that sought to forbid the states from placing burdens on religious practice in the absence of a compelling state interest. The Supreme Court decided that the RFRA exceeded Congress' authority because the statute was not sufficiently connected to the goal of remedying a constitutional violation. Establishing that all legislation enacted under the congressional enforcement powers articulated in Section 5 of the Fourteenth Amendment must be "congruent and proportional" to the unconstitutional harm it seeks to remedy, the standard articulated in *Boerne* has been followed by every post-*Boerne* decision on legislation that sought to abrogate the states' sovereign immunity.

One of the key goals with a right to vote amendment is to establish a proper balance between strengthening protection of the right to vote at a federal level with the ability of states and localities to be able to administer elections and develop innovations that can be models for other states and cities. HJ Res 44 would achieve this objective if interpreted under the *Boerne* test. No government would be permitted to infringe upon the individual right to vote, but election administration would still remain within the purview of the states. State law would only be

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[66] *See* Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559 (2004), *available at* http://archive.fairvote.org/media/rtv/Raskin.pdf.

[67] The variations in the pertinent language are as follows: the Thirteenth Amendment leaves out the word "the," the Fourteenth Amendment states "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article," and the Eighteenth Amendment states "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

[68] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

affected when Congress passed legislation designed to implement the amendment; that is, to protect the fundamental right to vote conferred in Section 1.[69]

CONCLUSION

Establishing a right to vote amendment can preserve the best of our traditions involving the right to vote and bolster state and local actions to expand suffrage. In this era of frequent disagreement over voting procedures and rules, the existence of an explicit constitutional right to vote would strengthen the claims of all citizens to be able to exercise their suffrage rights and limit the ability of federal, state, or local governments to impinge upon the right to vote. The amendment would lay the basis for a new movement not only to protect suffrage, but to encourage its exercise. It would be a statement that today, in the 21st century, we all agree to stand upon the solid foundation of the right to vote when building our representative democracy.

HJ Res 44 deserves strong support. It reflects the broadly stated right we believe most appropriate. What we as Americans do with this right will be up to us. FairVote supports an election administration structure in which the federal government would enhance voting rights through reasonable national norms and states and localities could explore innovations designed to improve voting rights.

To help confront the electoral problems Americans experience in our elections, it is time for us to come together and establish a base of authority to protect voting rights and improve elections. That authority is an amendment that clearly establishes a direct right to vote for every American citizen of voting age. For this reason, FairVote will work with Congress and civil society groups to amend the Constitution to include a broadly defined, explicit right to vote. To further that goal and achieve immediate pro-suffrage changes, we have established PromoteOurVote.com to be the catalyst for a grassroots movement for cities, states, and ultimately Congress to take action to defend voting rights, promote voter turnout, and expand suffrage.[70]

The right to vote is too important to be taken for granted. We must make it a living, breathing part of our democracy – ensuring we are protecting it legally and exercising it in our elections. We applaud those in Congress willing to meet this challenge, as well as the local governments, student leaders, and organizations ready to take immediate action to protect Americans' fundamental right to vote.

[69] Section Two of the amendment should be evaluated with this goal in mind, with one potential modification being the omission of the words "and implement."
[70] *See* http://www.PromoteOurVote.com.

Appendix I. Comparing HJ Res. 44 with language proposed by Congressman Jim Cooper

On May 1, 2013, Congressman Jim Cooper (D-TN) made a speech in which he laid out his vision for protection of voting rights through an explicit right to vote in the Constitution.[71] He explained his support with these insights:

> "Voting has increased from roughly 6% of the population during the American Revolution to roughly 60% today—the lowest of any advanced democracy—and that's during high-turnout presidential elections. Did the Freedom Riders risk their lives to empower a maximum of 60% of voters? … One explanation for America's low voter turnout is apathy, which may imply consent. That's certainly what incumbents like me want to believe, that a majority of Americans think the U.S. is on the right track so there's no need to vote. Of course, opinion polls indicate the opposite.
>
> "So why don't people vote to throw the bums out? One answer is that voting is a nuisance. There are 13,000 voting districts in America, each with its own rules, and 110,000 precincts. Instead of being as quick and easy as shopping on Amazon.com, voting requires registration months in advance and then waiting in line on exactly the right day at exactly the right location, a makeshift, pop-up DMV. Error rates in elections are high—and there are no receipts. You have to trust a system run by the most partisan people in America, local election commissions. A great deal of underground legal thought involves ways of lowering voter turnout, not raising it."

Congressman Cooper then read his proposed language: "The right of adult citizens of the United States to vote shall not be denied or abridged by the United States or any State."

We would support Congressman Cooper's language as written, but prefer the language of HJ Res. 44 relating to its definition of voting age, its specification of the right to vote being in elections held in the jurisdiction in which Americans reside, and its designation of congressional authority.

[71] Joey Garrison, *Full Transcript of Rep. Jim Cooper's '28th Amendment' Speech*, The Tennessean, May 6, 2013, http://blogs.tennessean.com/politics/2013/full-transcript-of-rep-jim-coopers-28th-amendment-speech/?repeat=w3tc; Jim Cooper, The 28th Amendment Speech at Nashville Bar Association (May 1, 2013) *available at* http://cooper.house.gov/images/Law%20Day%20PDF.pdf.

Appendix II: Comparing HJ Res. 44 and HJ Res. 28

Starting in 2001, former Congressman Jesse Jackson, Jr. introduced HJ Res 28, a proposed right to vote in the Constitution. The Congressman introduced the amendment for six consecutive congressional sessions. FairVote was a resource to the Congressman as he developed the amendment language and advocated for its passage, and we were pleased that twice the number of co-sponsors of HJ Res. 28 rose above 50 House members.

HJ Res. 28 reads as follows:

> Proposing an amendment to the Constitution of the United States regarding the right to vote.
>
> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:
>
> ARTICLE—
>
> 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.

There are several differences between HJ Res. 44 and HJ Res. 28. First, Section 1 of HJ Res. 28 §1 contains a requirement that citizens must be "eighteen years of age or older" in order to vote. As stated above, FairVote is of the opinion that the language of the constitutional amendment should secure the rights of citizens "of voting age," but not determine what that age should be.

Second, HJ Res. 28 §1 contains an exception that "the United States or any State may establish regulations narrowly tailored to produce efficient and honest elections." We prefer the simpler language of HJ Res. 44

Third, HJ Res. 28 §2 establishes federal election standards that delve into the specifics of how a right to vote would be implemented. We support this conception of the balance of power between Congress and the states, but see it as statutory in nature. By requiring in the Constitution that elections be administered in accordance with "election performance standards established by the Congress," this amendment could give rise to distracting debates over issues such as whether the Federal Elections Commission, the Election Assistance Commission or congressional committees would review and promulgate federal election rules. FairVote believes the focus instead should be on the general principle of nature of protection of the individual right to vote as the foundation of democracy.

Finally, HJ Res. 28 §3 moves the discussion of Election Day registration from the statutory level to the constitutional level. Currently, the proposed Voter Empowerment Act ("VEA") contains a section on "Access" that would allow Election Day registration. FairVote supports this provision in the VEA, but believes voter registration be governed by statute rather than the Constitution.

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FairVote is a non-partisan electoral reform organization seeking fair elections with meaningful choices. Our vision of "the way democracy will be" includes an equally protected right to vote, instant runoff voting for executive elections and proportional voting for legislative elections.

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