

# Expanding Voter Participation in New Jersey

by Frank Askin

The United States Supreme Court has described the right to vote as “fundamental”<sup>1</sup> and “the essence of a democratic society.”<sup>2</sup> Indeed, it may be the most important civil right of all because it is “preservative of all rights.”<sup>3</sup> Despite the rhetoric, however, the fact is that the United States Constitution does not provide for an explicit individual right to vote.<sup>4</sup> While the Constitution mentions voting rights seven times, none of those provisions grant a right to vote to U.S. citizens. They merely prohibit discrimination in voting on account of race, gender, ability to pay a poll tax or age. It delegates to the states the determination of voting qualifications.

As a consequence, federal voting rights jurisprudence is, at best, muddled, relying in large part on the equal protection clause of the 14th Amendment to prohibit states from treating one group of voters different from others. The current test seems to rely heavily on the 1992 case of *Burdick v. Takushi*,<sup>5</sup> asking whether a particular voting qualification imposes a “severe” burden on voters. If it does, then the court applies strict scrutiny review. If not, a lower level of scrutiny is applicable, in which the burden is balanced against the state’s valid interest. As might be expected, the severity of the burden is often in the eye of the beholder.

## Looking to the New Jersey Constitution

Unlike the federal Constitution, the New Jersey Constitution has an entire chapter, titled “Elections and Suffrage,” devoted to the right to vote. It provides:

Every citizen of the United States, of the age of 18 years, who shall have been a resident of this state and of the county in which he claims his vote 30 days, next before the election, shall be entitled to vote for all officers that are now or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people[.]<sup>6</sup>

The New Jersey Supreme Court has a long history of applying strict scrutiny in voting rights cases. While often citing

U.S. Supreme Court cases in support of that proposition, the Court has emphasized reliance on the state constitution. It has never even cited *Burdick*, let alone relied upon it.

In one landmark case upholding the right of college students to elect to vote from their college dorms rather than their parents’ homes, the Court found the local requirement infringed the right to vote under both the state and federal constitutions.

The Court commented: “[W]e adopt the compelling state interest test in its broadest aspects, not only for compliance with the Federal Constitution but also for purposes of our own State Constitution...”<sup>7</sup>

In adopting the strict scrutiny standard, the *Worden* Court held that infringements on the right to vote are unconstitutional unless the state can demonstrate that such laws are “necessary to promote a compelling governmental interest,” citing the U.S. Supreme Court ruling in *Dunn v. Blumstein*.<sup>8</sup>

Since *Worden*, New Jersey courts have consistently applied strict scrutiny review to rules and regulations burdening voting rights.<sup>9</sup> New Jersey’s unwavering protection for the right to vote was summed up by the late and highly respected presiding judge of the Appellate Division, Sylvia Pressler, with these words in *Afran v. Cnty. of Somerset*: “[T]he right to vote is the bedrock upon which the entire structure of our system of government rests.”<sup>10</sup>

## Proposals to Increase Voting in New Jersey

According to the most reliable available figures, there were 5,882,574 citizens eligible to vote in New Jersey during the 2012 presidential election, 62.6 percent of whom actually cast ballots.<sup>11</sup> (The turnout rate for the rest of the country varied from 44.5 percent in Hawaii to 76.1 percent in Minnesota.) The figures indicate there were some 2.2 million eligible New Jersey citizens who failed to vote in the 2012 election.

Obviously, apathy and/or disillusionment with politics accounts for some percentage of the abstainers. But it cannot explain the 14-point difference between New Jersey and Minnesota.

## Election Day Registration

One significant difference between New Jersey and Minnesota is that Minnesota grants eligible voters Election Day registration (EDR), while New Jersey requires voters to register 21 days in advance. Seven other states and the District of Columbia also allow EDR: Idaho, Iowa, Maine, Montana, New Hampshire, Wisconsin and Wyoming. North Carolina has what it calls same day registration, which allows voters to register and vote three days before an election.<sup>12</sup> All of these states, except Idaho and Wyoming, had higher voter turnout rates than New Jersey in 2012. The average turnout rate for EDR states was some five points higher than New Jersey's.

Pre-registration was introduced in the U.S. as early as 1800, but did not become commonplace until the beginning of the 20th century. The experience of states with EDR appears rather conclusive—that pre-registration suppresses voter participation. There are many reasons for this, including the high mobility of Americans. Every time an eligible voter moves to a new state or a new county, he or she must register or re-register. Polling data shows many people fail to take an interest in elections until the last-minute avalanche of political advertising, by which time it is too late to register.

Experience in New Jersey shows this is an especially onerous burden for young people, particularly college students. They begin an academic year around Labor Day and have many things on their minds other than voting. Suddenly, they discover an election is pending, by which time the registration deadline has passed. If they do happen to sign up during a campus registration drive, they may arrive at the polls on Election Day to discover their registration has not been processed as a result of human error, or—especially during a presidential election year—because election officials were over-

whelmed by the rush of new registrations. These students will be offered a provisional ballot, which will be rejected if their name is not later located in the system.

The experience of students at the Rutgers campus in New Brunswick has led them to take the lead in a pending lawsuit challenging advance registration under the New Jersey Constitution as an undue and no longer necessary burden on the constitutional right to vote.<sup>13</sup> Six of the individually named plaintiffs have certified they had registered to vote prior to Election Day but their names were not in the poll books when they arrived to vote.

Opponents of EDR raise the specter of voter fraud as the reason to keep the current system. But they cite few instances of in-person fraud in states where EDR exists. Where there has been voter fraud, it has almost invariably been through absentee balloting or ballot stuffing by election officials, neither of which would be implicated by Election Day registration.<sup>14</sup>

In fact, in most of the EDR states Election Day registrants are allowed to vote directly on the machines, rather than by provisional ballot; officials in those states use the threat of criminal prosecution as the sole protection against fraudulent registration on Election Day. They have found few individuals are willing to risk a prison sentence in order to cast a false ballot.

These conclusions are confirmed in the findings of the New Jersey Federal District Court and the Court of Appeals for the Third Circuit in recent rulings in a case involving a longstanding injunction against the Republican National Committee prohibiting intimidation of voters on Election Day. The Republicans sued to lift the injunction, arguing the continuing injunction prevented them from guarding against fraud on election days. The appeals court responded that “only a fraction of...alleged fraudulent

activity was related to in-person voter fraud,” and the “evidence...showed that the ‘majority accused of wrongdoing were elected officials and political operatives.’”<sup>15</sup>

District Judge Dickinson Debevoise had also noted the stakes are sufficiently high to deter in-person voter fraud:

It simply is not worth it for individuals acting alone to commit in-person voter impersonation, which is relatively ineffectual for the foolish few who commit it. If an imposter gets caught, he is subject to severe criminal penalties. And even if he succeeds, the imposter gains nothing more than one additional vote for his candidate.<sup>16</sup>

In another recent case, the Pennsylvania's attorney general's office stipulated it “was not aware of any incidents of in-person voter fraud in Pennsylvania and does not have direct personal knowledge of in-person voter fraud elsewhere.”<sup>17</sup>

If advance registration was ever needed to prevent voter fraud, the author believes modern technology has made it an anachronism. While old cases suggested the Legislature could condition the right to vote on advance registration in order to guard against ineligible voting,<sup>18</sup> they all predate the computer age. Today, all registered voters are listed in New Jersey's Statewide Voter Registration System (SVRS) administered jointly by the Division of Elections and the county boards of election. The eligibility of a voter who registers can now be vetted instantaneously, and duplicate and ineligible registrations flagged. In fact, the states of California and Connecticut delayed implementation of EDR pending the completion of their own SVRS programs.

## Expanding Voter Choice

When challenged for their apathy, many non-voters will respond, “My vote doesn't matter.” To which the declarant may be reminded of the sig-

nificant number of contests decided by a single vote. But, as the author views it, the truth is that much more often than not, in the winner-take-all, first-past-the-post electoral system, voting really doesn't matter.

Because of gerrymandering, there are few competitive legislative races in New Jersey. And despite the current popularity of Governor Chris Christie, statewide races usually favor the Democrats by wide margins, discouraging many voters from participation.

Some states have dealt with the gerrymandering problem by creating truly independent, non-partisan bodies to draw up state legislative and congressional districts to encourage truly competitive contests.

And while liberal ballot access rules make it relatively easy for third-party candidates to run in New Jersey, it has proven to almost always be a wasted vote. Many local jurisdictions, including large cities like San Francisco, have dealt with this problem and encouraged voting by enacting instant runoff voting (IRV). This allows voters to pick their second choice, to whom their vote will be transferred once their favored candidate has been eliminated. This encourages backers of nontraditional candidates to go to the polls, while also expanding the tallies of third-party candidates without their supporters fearing casting a wasted vote.

### **Crime, Punishment and the Right to Vote**

In New Jersey, individuals convicted of felonies are denied the right to vote not only while incarcerated but also while free on parole or probation. Assuming it is a reasonable part of their punishment to disfranchise such inmates, there seems to be no real justification for continuing the penalty while they are back in the community and presumably being rehabilitated, according to the American Bar Association.<sup>19</sup>

This means in any given year, there are 60,000 to 70,000 otherwise eligible voters living in the community after release from prison who are denied the right to vote. Some 70 percent of them are racial minorities.

The legislative disfranchisement of parolees and probationers in New Jersey was upheld by the Appellate Division in *NAACP v. Peter Harvey, Attorney General*, and review was denied by the Supreme Court without explanation.<sup>20</sup> In rejecting the plaintiffs' disparate treatment argument under the equal protection provision of the New Jersey Constitution, the Appellate Division relied solely on federal law that required proof of intentional discrimination. In so doing, the Court ignored substantial authority that New Jersey does not follow federal equal protection doctrine. For example, in *Planned Parenthood v. Farmer*, Chief Justice Deborah Poritz wrote that New Jersey courts "have not hesitated, in an appropriate case, to read the broad language of [New Jersey's equal protection law] to provide greater rights than its federal counterpart."<sup>21</sup>

It is worth noting that a petition challenging the *Harvey* decision as violative of the Organization of American States (OAS) Declaration of the Rights and Duties of Man has been pending before the Inter-American Commission on Human Rights (IACHR) for half a dozen years. After ignoring the petition for three years, the IACHR ordered the United States Department of State to file a response in Aug. 2009. For the following year, the State Department and petitioners filed dueling briefs on whether or not the petitioners had exhausted all domestic remedies. The U.S. has not yet attempted to justify the provision on its merits. The IACHR has remained silent for the past two years.<sup>22</sup>

Even aside from the rights of parolees and probationers, there are probably several thousand temporary inmates of New Jersey's jails who are eligible to vote but have practically no ability to

exercise their right; these are individuals being held pending trial and those convicted of petty offenses.

Students at Rutgers-Newark School of Law, acting through the law school's Constitutional Litigation Clinic, have volunteered in recent years to assist inmates at the Essex County Jail to register and file absentee ballots where necessary. While the project has assisted many inmates, there are innumerable barriers to reaching more than a small segment of the eligible population. Among those barriers is a provision of New Jersey's absentee ballot law that restricts delivery of absentee ballot applications to registered voters in the county and limits to 10 the number of applications each can deliver.<sup>23</sup>

A remedy for this problem would be to place voting machines in New Jersey's jails and prisons. This would immediately assist three categories of incarcerated eligible voters: 1) those who are already registered in the county of confinement, and who would thus be eligible to cast an absentee ballot; 2) those not yet registered who are anticipating being incarcerated through Election Day, and would be eligible to vote on the machine at the jail; and 3) those who register while incarcerated but will be released before Election Day, and would thus be eligible to vote by provisional ballot at the polling place for their new residence within the county.

A provision in New Jersey's ballot law already authorizes county boards of election to "select a polling place other than a schoolhouse or public building for an election district when the location of the election district...with the municipality in which the election district is located is such that inconvenience would be caused the voters of such election district."<sup>24</sup>

### **Conclusion**

For public officials interested in assisting eligible voters to participate in

the democratic process, the author believes these are proposals worthy of serious consideration. ◊

## Endnotes

1. *Harper v. State Board of Elections*, 383 U.S. 663 (1966).
2. *Reynolds v. Sims*, 377 U.S. 553, 555 (1964).
3. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).
4. "The Constitution does not confer the right of suffrage upon any one, and...the right to vote, *per se*, is not a constitutionally protected right." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 ((1982) (quoting *Minor v. Happersett*, 88 U. S. 162, 178 (1874). See also *Bush v. Gore*, 531 U.S. 98, 104 (2000).
5. 502 U. S. 434.
6. N. J. Const. Art. II, §1, ¶3.
7. *Worden v. Mercer County Board of Elections*, 61 N.J. 325, 346 (1972).
8. 405 U. S. 330, 342 (1972).
9. *Smith v. Penta*, 81 N. J. 65, 77 ((1979); *In Re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hospital*, 331 N.J. Super. 31. 36 (App. Div., 2000); *McCann v. Clerk, City of Jersey City*, 338 N.J. Super. 509, 526 (App. Div. 2001), *aff'd* 168 N.J. 285) (2001). See also *Gangemi v. Rosengard*, 44 N.J. 166, 170 (1965); *Asbury Park Press v. Woodley*, 33 N.J. 1, 11 (1960).
10. 244 N.J. Super. 229, 232 (App. Div. 1990). The voter eligible population (VEP) is determined by the over-18 population, minus non-citizens and persons in prison and on parole and probation for felony offenses.
11. Figures are compiled by the United States Election Project at George Mason University, and are available at [http://elections.gmu.edu/Turnout\\_2012G.html](http://elections.gmu.edu/Turnout_2012G.html).
12. Connecticut was set to institute EDR in 2013 and California in 2015.
13. *Rutgers University Student Assembly, et. Al. v. Middlesex County Bd. of Elections*, Superior Court of New Jersey, Middlesex County, Docket No. C-85-11.
14. Lorraine C. Minnite, *The Myth of Voter Fraud*, Cornell University Press (2010).
15. *Democratic National Committee v. Republican National Committee*, 673 F. 3d 192 (3d Cir. 20120, *affirming* 671 F. Supp. 2d 575 (D. N.J. 2009), *cert. den.* 133 S. Ct. 931 (2013).
16. 671 F. Supp. 2d, 575, 609 (quoting *Crawford v. Marion City Election Bd.*, 533 U. S. 181, 227-28 (Souter, J., dissenting)).
17. *Stipulation of Parties, Applewhite v. Commonwealth*, 330 MD 12 (July 12, 2012).
18. *In Re Freeholders of Hudson County*, 195 N.J.L. 57, 60 (1928); *In re Faith's Application*, 22 N.J. Misc. 412, 413, Essex County Court, (1944). See also *Gangemi v. Rosengard*, 44 N.J. 166, 172-73 (1965). The issue was raised during the debates at the 1947 Constitutional Convention whether the Legislature had the authority to enact advance registration as a restriction on the constitutional right to vote. In a monograph titled *The Desirability of Constitutional Provision for Registration of Voters, New Jersey Constitutional Convention Records, Vol. 2*, a noted New Jersey scholar, Morris Schnitzer, wrote "it is possible to that registration illegally restricts the right to vote, unless expressly sanctioned by the Constitution." He concluded that some form of voter registration was permitted solely to deter fraud.
19. ABA Standards for Criminal Justice, Third Edition, Collateral Sanctions and Discriminatory Disqualification of Convicted Persons, Standard 19:2.6, Prohibited Collateral Sanctions: Jurisdictions should not impose the following collateral sanctions:
  - (a) Deprivation of the right to vote, except during actual confinement.
20. 381 N.J. Super. 155 (2005), *certif. den.* (2006).
21. 165 N.J. 609, 632. See also *Peper v. Princeton University Board of Trustees*, 77 N.J. 55, 82 (1978).
22. *In Re Michael Mackason, et. al.*, No. P-990-06. The IACHR, which has no rules governing deadlines for action, is known to have a huge backlog of petitions from the U.S.
23. N.J.S.A. 19:63-4.
24. N.J.S.A. 19:18-3.

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