



Time to provide a right to vote: Opinion

Star-Ledger Guest Columnist By Star-Ledger Guest Columnist

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The Supreme Court reminded us that Americans did not even have a constitutional right to vote for president.

By Frank Askin

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So, American citizen, you think you have a

right to vote for your federal

representatives? Think again. U.S. Supreme Court Justice Antonin Scalia just disabused you of that notion — although in a backhanded sort of way.

In his majority opinion earlier this month striking down the Arizona law requiring voters to produce documentary evidence of citizenship in order to cast a ballot, Scalia stated in no uncertain terms that the Constitution allows Congress to “regulate how federal elections are held, but not who may vote in them.” Notably, not one of the liberal members of the court challenged his assertion.

The actual language of the Constitution gives Congress the power to override state laws governing the “time, place and manner” of conducting federal elections. Many scholars believed that the term “manner” was broad enough to encompass the qualifications of voters.

But the Scalia opinion took pains to disavow the one Supreme Court opinion which seemed to suggest just that. In 1970, in the case of *Oregon vs. Mitchell*, the court upheld a congressional enactment requiring states to allow 18-year-olds to vote in federal elections.

But Scalia pointed out that only one of the justices in the *Mitchell* majority based the decision on the Elections Clause of Article I of the Constitution, the clause Scalia now says deals only with the how and not the who. The other four members of the majority relied on the Equal Protection Clause of the Fourteenth Amendment. But in more recent years, the new conservative majority of the court has greatly limited Congress’ authority to legislate under that provision.

As a consequence, it is at least arguable that Congress no longer has the power to pass laws concerning the qualifications to vote in federal elections. The ruling in *Arizona vs. Inter-Tribal Council* would appear to make vulnerable, for example, existing federal laws that require states to allow people who recently moved out of the state to vote by absentee ballot in presidential elections. It would presumably also preclude Congress from enacting new legislation providing for ex-felons on parole and probation to vote in federal

elections in states that disenfranchise them.

Less clear is the impact of the decision on other restrictive voting provisions that somehow fall between how and who. For example, a number of Republican-controlled state legislatures have been enacting laws requiring photo IDs in order to vote. Is that a qualification beyond Congress' power to forbid, or does it have to do with the "manner" of voting? The Arizona opinion held that the registration process belonged within the latter category, but it will be up to future courts to make that determination in each particular case.

While there is no federal constitutional provision or law that actually provides a right to vote, just about every state constitution has such a provision. For example, the New Jersey Constitution guarantees that every citizen at least 18 who has been a resident of the state for 30 days "shall be entitled to vote for all officers that now or hereafter may be elected by the people, and upon all questions which may be submitted to a vote of the people."

So while legislation restricting the right to vote in New Jersey may not be subject to challenge under federal law, it is subject to challenge in state courts under state law. At the moment, there is a lawsuit pending in the New Jersey courts challenging 21-day advance voter registration as an undue and unnecessary burden on the state right to vote in light of modern technology. And there is a long tradition of New Jersey courts being extremely protective of the right to vote.

But that is not true in many states. And that is why the time has come to amend the federal constitution to provide a right to vote — at least in federal elections.

In the 2000 case of *Bush vs. Gore*, the U.S. Supreme Court reminded us that Americans did not even have a constitutional right to vote for their president. That right is subject to the will of state legislatures, which, under the Constitution, could themselves appoint presidential electors. The only protections the Constitution presently provides for voting are those forbidding discrimination on the basis of race (15th Amendment), sex (19th) and age (26th).

There are bills pending in Congress to amend the Constitution to explicitly provide a right to vote for every citizen of voting age. The Arizona decision reminds us that it is time to seriously consider such an enactment.

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