

Position paper presented at the FairVote "Claim Democracy Conference" by Congressman Jesse L. Jackson, Jr. at American University's Washington College of Law Saturday, November 22, 2003

Most Americans believe that the "legal right to vote" in our democracy is explicit (not just implicit) in our Constitution and laws. However, our Constitution only provides for **non-discrimination in voting** on the basis of race, sex, and age in the 15th, 19th and 26th Amendments respectively.

The U.S. Constitution contains no explicit affirmative individual right to vote!

Even though the "vote of the people" is perceived as supreme in our democracy - because voting rights are protective of all other rights - the Supreme Court in ***Bush v. Gore*** constantly reminded lawyers that there is no explicit or fundamental right to suffrage in the Constitution - "the individual citizen has no federal constitutional right to vote for electors for the President of the United States." (*Bush v. Gore*, 531 U.S. 98, 104 (2000))

Chief Justice William Rehnquist and Associate Justice Antonin Scalia besieged Gore's lawyer with inquiries premised on the assumption that there is no constitutional right of suffrage in the election of a president, and state legislatures have the legal power to choose presidential electors without recourse to a popular vote. "In the eyes of the [Supreme] Court, democracy is rooted not in the right of the American people to vote and govern but in a set of state-based institutional arrangements for selecting leaders." (*Overruling Democracy - The Supreme Court vs. The American People*, By Jamin B. Raskin, p. 7)

If candidate George Bush had lost in the Supreme Court in 2000, Florida's Republican-controlled legislature was prepared to ignore the six million popular votes cast in Florida. They were determined to elect, select, choose, and hand pick their own "Bush presidential electors" and send them to Congress for certification if necessary. Thus, even if all votes had been counted and Al Gore had won Florida's popular vote, and his electors had been sent to Congress, under our current Constitution the Florida legislature could have sent their slate of Bush electors to Congress and it would have been perfectly legal - and a "strict constructionist" or necessary constitutional interpretation - for Congress to have recognized the Bush electors.

Only a Voting Rights Amendment can fix these flaws in our Constitution.

The 10th Amendment to the Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the State, are reserved to the States respectively, or to the people." Since the word "vote" appears in the Constitution only with respect to **non-discrimination**, the so-called **right to vote** is a "state right." **Only** a constitutional amendment would give every American **an individual affirmative citizenship right to vote**.

Without the constitutional right to vote, Congress can pass voter legislation - and I support progressive electoral reform legislation - but it leaves the "states' rights" **system** in place. Currently, Congress mostly uses financial and other incentives to entice the states to cooperate and comply with the law. It's one reason there have been so many problems with the recently passed Help America Vote Act, and

why many states still have not fully complied with the law.

Our "states' rights" voting system is **structured** to be "**separate and unequal**." As we saw in the 2000 election, there are 50 states, 3,067 counties, tens of thousands of cities, and many different machines and methods of voting - all "separate and unequal."

There's **ONLY ONE WAY** to legally guarantee "an equal right to vote" to every individual American and that is to add a Voting Rights Amendment to the Constitution!

The lack of basic political rights for all Americans was made even clearer in **Alexander v. Mineta**, a case to gain political representation for the disenfranchised citizens in our nation's capitol, the District of Columbia. Ignoring the democratic ideal of voting, the court said, "The Equal Protection Clause does not protect the right of all citizens to vote, but rather the right of all *qualified* citizens to vote" (**Alexander v. Daley**, 90 F. Supp. 2d, 35, 66, emphasis added) "To be qualified, you must belong to a 'state' within the meaning of Article I and the Seventeenth Amendment and must be granted the right to vote by the state." (*Overruling Democracy - The Supreme Court vs. The American People*, By Jamin B. Raskin, p. 36)

I believe that voting is not only a **democratic right**, it is a **human right**. That human right is not in our Constitution! That's why I have proposed legislation to add a voting rights amendment to the U.S. Constitution based on the INDIVIDUAL RIGHT of all Americans to vote. It was introduced in the U.S. House as House Joint Resolution 28. It reads as follows:

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:

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. Each State and the District constituting the seat of Government of the United States shall

establish and abide by rules for appointing its respective number of Electors. Such rules shall provide for the appointment of Electors on the day designated by the Congress for holding an election for President and Vice President and shall ensure that each Elector votes for the candidate for President and Vice President who received a majority of the popular vote in the State or District.

SECTION 5. The Congress shall have power to enforce this article by appropriate legislation.'

With this amendment in the Constitution, ***all of the votes*** in 2000 - to the best of our human ability and using credible and standard criteria - would have had to have been counted. No unnecessary or arbitrary timeline cutoff would have been allowed with regard to counting votes. And the Florida legislature could not have even thought about ***ignoring the six million popular*** Florida votes in order to ***select*** presidential electors independent of the popular vote. Under this amendment, the popular vote could never be ignored and an independent legislative selection of electors could never happen.

In light of the presidential fiasco in Florida in 2000, and during the South Carolina Democratic presidential candidate's debate on May 3, 2003, Rev. Al Sharpton asked Florida Senator, Bob Graham, if he would support adding a voting rights amendment to the Constitution. In essence he said the following: "I haven't seen the legislation, but probably not. I believe states should remain in control of election procedures. And I'm against federalizing the election process."

Let's analyze his statement.

1. It means Senator Graham essentially supports the *status quo* when it comes to voting rights because, under current law, 2000 could happen again in Florida or elsewhere. The winner of the popular vote losing has happened three previous times in our history - 1824, 1876 and 1888. Most Americans are totally unaware that, nationally, according to a joint study by the California Institute of Technology and Massachusetts Institute of Technology, somewhere between four and six million votes were not counted in 2000 because many states had similar problems to what occurred in Florida. Other states' election systems didn't get the same exposure as Florida's because the winner in other states was not in doubt. For example, Illinois was worse than Florida - it didn't count nearly 200,000 votes with similar problems to Florida's - but because Gore won Illinois with over 300,000 votes, the winner of the state's electoral votes was not in doubt. In Illinois and other states too, most of the problems - with voting and machines - were concentrated in the poor and minority communities.

"Amazingly, the government of the United States conducts and provides no official count of the vote for president." (*Overruling Democracy - The Supreme Court vs. The American People*, by Jamin B. Raskin, p. 66) Can you imagine the United States recognizing a close and hotly contested third world "democratic" election where the citizens had no right to vote, as much as six percent of the total vote was not counted; where there was no official results provided by the government; and where that country's Supreme Court declared it's personal and ideological friend the winner, even though the declared winner did not get the most popular votes?

2. It means Senator Graham supports "states' rights" when it comes to voting rights. But I would remind Senator Graham and others, slavery was not supported directly in the Constitution. The word "slavery" never appeared in the Constitution. Slavery was supported constitutionally because states had a right - "states' rights" - to provide legal cover allowing private citizens to own other human beings. That same states' rights **system** was at work in the 2000 election with respect to voting and it continues today.

3. H. J. Res. 28 does not **federalize** voting any more than the First Amendment federalizes free speech or freedom of religion. The First Amendment's right to free speech and religion is an individual citizenship right applicable to every American - not a "federal" right - protected by the federal government and its courts. It's an individual right that can be upheld in a federal court of law. Likewise, a voting rights amendment would grant every American an **individual citizenship right to vote** that, because it would be a right for every American, would ultimately be validated by Congress, through legislation, and the Supreme Court, through interpretation.

4. In essence, then, in the South Carolina debate, Senator Graham chose "states' rights" over an "individual right."

5. Attorney General John Ashcroft sent a letter to the National Rifle Association asserting that every American has an individual constitutional **RIGHT TO A GUN**. In it he wrote: "Let me state unequivocally my view that the text and the original intent of the Second Amendment clearly protect the right of individuals to keep and bear firearms." Some agree and others disagree with that interpretation.

However, there can be no debate or disagreement about the right to vote. The Supreme Court made it absolutely clear in *Bush v. Gore* - there is NO INDIVIDUAL CITIZENSHIP RIGHT TO VOTE in the Constitution!

If Americans had a choice between the **RIGHT TO A GUN** and the **RIGHT TO VOTE**, it would be nearly unanimous. Americans would choose the right to vote! If that is the priority of the American people, then we should have the wisdom and political will to codify it in the form of a constitutional amendment.

What are the advantages of fighting for human rights and constitutional amendments? Human rights and constitutional amendments are **non-partisan** (they're neither Democratic nor Republican), they're **non-ideological** (they're not liberal, moderate, or conservative), and they're **non-programmatic** (they don't require a particular means, approach or program to realize them). We can **experiment** to find the best **means** of fulfilling such a constitutional right. Rights and constitutional amendments are also not a "special interest." They're for **all** Americans!

August 6th was the 38th anniversary of the signing of the 1965 Voting Rights Act. But the Voting Rights Act is really misnamed and, to some extent, misleading. It's not actually a voting **rights** act. In fulfillment of the 15th Amendment to the Constitution, added in 1870, the 1965 Voting Rights Act was

actually a *Non-Discrimination in Voting Act*.

To fulfill the democratic ideal, an affirmative voting rights constitutional amendment still lies in the future. Over 100 nations explicitly guarantee their citizens the right to vote and to be represented at all levels of government. The United States is not among them.

If we pass a new voting rights amendment, the next civil rights movement will emerge fighting for congressional legislation that can advance even further the central democratic idea of universal voting - only partially enabled through the 1965 Voting Rights Act, Motor Voter and the Help American Vote legislation. With a voting rights amendment, a new civil rights movement would emerge to fight to fully implement the amendment, while also using the federal courts to interpret voting rights more fully.

WHAT CAN I DO? If you would like to help me put this voting rights amendment in the Constitution, call your congressperson at 202.225.3121 (or call their local office) and urge them to become a co-sponsor of H.J. Res. 28. You can also urge your Senator to introduce a parallel bill in the U.S. Senate. If you need more information about this legislation call my office at 202.225.0773.