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Achieving Universal Voter Registration Through the Massachusetts Health Care Model: Analysis and Sample Statutory Language

Universal voter registration would be the most direct means to establish full and accurate voter rolls, simultaneously creating new access to voting for nearly a third of eligible voters while also enabling election officials to run more efficient, effective elections. We reviewed whether state governments have the power to implement compulsory voter registration laws to achieve universal voter registration in a manner similar to the Massachusetts Act that requires all state residents to obtain health insurance policies.

BRIEF ANSWER

Our conclusion is that states likely will be able to implement compulsory voter registration in a manner similar to the 2006 Massachusetts health care reform policy so long as compulsory registration includes an opt-out provision. This provision will be one key difference between the registration and health insurance policies, as the Massachusetts health care legislation does not allow residents to opt-out of acquiring health insurance. But to institute legislation that requires voter registration and survives a first amendment challenge, the legislation would have to incorporate an opt-out provision for those who object to registration for political, religious, or other reasons. Nevertheless, compelling voter registration in a constitutional and otherwise legal fashion could be accomplished by requiring all residents to take some form of affirmative action—they would either have to register to vote or explicitly decline.

The inclusion of an opt-out provision strongly increases the validity, legality and constitutionality of compulsory registration. Without an opt-out provision, compulsory voter registration legislation likely would be found unconstitutional. In *Buckley v. American Constitutional Law Foundation*, the Supreme Court held that voter registration constitutes speech where the declination to register is a form of political expression. 525 U.S. 182, 195 (1999). Compulsory voter registration without an opt-out provision likely would be open to constitutional challenges on the grounds of free exercise, due process and privacy. Similarly, without an opt-out provision, those unwilling to register might challenge the legality of compulsory registration under Section 5 of the National Voter Registration Act (NVRA), which references a right to decline to register to vote.

BACKGROUND INFORMATION

Massachusetts Mandatory Health Insurance Act

On April 12, 2006, Massachusetts Republican Governor Mitt Romney signed into law an *Act Providing Access to Affordable, Quality, Accountable Health Care* with the goal of achieving universal health coverage. The Act received nearly unanimous bi-partisan support in the Massachusetts House and Senate. Under this law, all Massachusetts residents, including the approximately 550,000 currently uninsured,

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must obtain health coverage by July 1, 2007. The Commonwealth will provide free and/or subsidized health insurance for currently uninsured individuals who are unable to afford coverage.

For enforcement purposes, the act requires that proof of health insurance, whether obtained by the individual or his/her employer, must be attached to the individual's tax returns. A citizen who fails to obtain health coverage will be penalized by a fine, which will not exceed fifty percent of what would have been the cost of health insurance for the uninsured period. If an individual or his/her employer drops coverage, the individual may remain uninsured for no longer than sixty-three days. Massachusetts will impose a penalty for any uninsured period that extends past the sixty-three day period. Because the Act has not yet gone into effect, it is unclear how efficient its enforcement will be.

Thus far, Massachusetts is the only state to have taken such a bold initiative in reforming health care policy. Although Hawaii and Maine each have programs that seek to provide nearly universal healthcare, residents' enrollment in those programs is voluntary. However, passage of this reform in Massachusetts has recently spurred other states to propose similar, though not necessarily mandatory, plans. New York, Wisconsin, and Washington are reexamining legislation creating universal health care policies. On May 25, 2006 Vermont enacted health insurance reform modeled in part on Massachusetts' plan.

Voter Registration

Both voter turnout and voter registration percentages are unsatisfactorily low in the United States. As of 2004, only 72% of the population was registered to vote, according to experts' best estimates based on U.S. Census surveys. Although this percentage is up from the 70% of the population that was registered in 2000, it is far from the goal of 100 percent registration of eligible citizens. While there have been several efforts to raise this number, none encompass the entire population.

The NVRA, which mandates specific voter registration procedures for the states, has been upheld by federal circuit courts. *See Ass'n of Comm. Org. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791 (7th Cir. 1995); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093, (1996); *Ass'n of Cmty. Org for Reform Now v. Miller*, 129 F.3d 833 (6th Cir. 1997). Any act seeking to accomplish universal voter registration through an individual mandate would need to comply with the terms of the NVRA.

Undoubtedly, certain states will be more opposed than others to compulsory registration. For example, North Dakota is the only state that does not require any form of voter registration. Based upon prior resistance to voter registration, it does not seem likely that the North Dakota state government would be amenable to any form of universal registration. In order to vote in North Dakota, one simply must be 18, a U.S. citizen, a North Dakota resident, and a resident in the precinct for thirty days prior to the election. While not enabling North Dakota to plan for elections as well as it might nor pursue practices like sending out voter guides to all people who might vote in its elections, it at least does enable access for voters to the polls.

No state in the countries has yet to require all eligible voters to register to vote, relying on a voluntary system that the size and quality of our voter rolls and our problems running elections with high turnout show. Following the model of the Massachusetts health care reform, citizens would be required to assume the responsibility to register and would thereafter be responsible for providing proof of registration –

ideally twinned with policies making access to secure registration easier than today. Also, if mandatory voter registration were patterned after the Massachusetts health care reform, registered voters also would be responsible for keeping their registration updated, although again state policies could allow the state to assume that burden.

ANALYSIS

Article I, Section 4, Clause 1 of the United States Constitution provides that States have the power to regulate federal elections. The Supreme Court has recognized that States also have the power to regulate their own elections. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973).

When fundamental First and Fourteenth Amendment rights are severely limited by voting-related regulations, courts will apply strict scrutiny to ensure that the regulations are “narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279, 289 (1992). However, applying strict scrutiny to every challenge of a voting regulation would “tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Thus, when states’ voting regulations are nondiscriminatory and reasonable, a more relaxed standard will be used; the Court will determine whether “the State’s important regulatory interests are generally sufficient to justify” the regulation. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

Compulsory voter registration with an opt-out provision would likely demand only the lesser standard. The opt-out provision would greatly lessen the potential burden on First Amendment rights. Full and accurate voter roll maintenance, fraud prevention and voter registration are all compelling state interests that likely would justify a compulsory voter regulation if accompanied by an opt-out provision.

Constitutionality: First Amendment

With the inclusion of an opt-out provision, a Court is unlikely to find that compulsory registration places an unconstitutionally onerous burden upon residents’ First Amendment rights. Achieving and maintaining the integrity of the electoral process is a legitimate and valid state interest. *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973). Likewise, ensuring that registered voters are qualified to vote is a compelling state interest. *Mosley v. Price*, 300 F. Supp. 2d 389, 397-98 (2004).

Compelled speech is subject to First Amendment scrutiny. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297, 1308 (2006). In *Buckley*, the Court determined that declining to register to vote is speech where a person consciously does not register out of protest or for some other reason. 525 U.S. at 195. For this reason, compulsory registration without providing a choice of opting-out likely would be deemed unconstitutional.

In *Buckley*, the Court struck down a Colorado statute that required that initiative-petition circulators be registered voters. 525 U.S. at 195. The State defended its requirement by stating that voter registration expresses “commitment to the Colorado law-making process” and prevents lawbreakers from becoming petition circulators. *Id.* at 193, 196. Colorado further asserted that it is “exceptionally easy” for residents to meet the registration requirement. *Id.* at 195. The Court, however, determined that the registration condition was not sufficiently narrowly tailored and that the requirement imposed an undue burden on

political expression. *Id.* The ease of voter registration is irrelevant where the act of registration or the declination to register “implicates political thought and expression” in protest and thus as speech. *Id.*

Constitutionality: Privacy

Compulsory voter registration may invite claims of a violation of the right to privacy, which has been repeatedly recognized by the Supreme Court as a derivative of substantive due process. Compulsory voter registration could potentially violate individuals’ rights to privacy in states where voter rolls are sold to political parties, candidates, and database marketers. Presently, only twenty-two states prohibit the sale of voter information. The majority of states that sell voter information do not warn people that their information may be sold to non-governmental entities. Again, an opt-out provision for people who have privacy concerns could address any potential constitutional problems arising from this.

Where a voting regulation has been challenged as a privacy violation, the Fourth Circuit has held that the courts must first determine whether the regulation imposes a substantial burden on the right to privacy. *See Greidinger v. Davis*, 988 F.2d 1344 (4th Cir. 1993) (holding that a Virginia regulation requiring Social Security Numbers to be provided on voter registration forms was unconstitutional). Although Virginia had a compelling state interest in preventing voter fraud, the mandatory disclosure of Social Security Numbers is not sufficiently narrowly tailored to fulfill that state interest. *Id.* at 1354. Furthermore, the Court found that the plaintiff’s “fundamental right to vote is substantially burdened to the extent the statutes at issue permit the public disclosure of his SSN.” *Id.* A compulsory registration regulation with the inclusion of an opt-out provision likely would not pose a substantial burden on the right to privacy so as to declare the regulation unconstitutional.

National Voter Registration Act

In addition to constitutional challenges, compulsory registration may be open to a challenge under the NVRA. Again, however, an included opt-out provision likely would preemptively defeat any such challenge. The NVRA was enacted in order to provide citizens with enhanced opportunities for voter registration. If a compulsory universal registration system were to be challenged as in violation of the NVRA, the most likely objections would arise under either Section 2 or Section 5.

There is no indication that compulsory registration would violate anything in NVRA Section 2. Section 2 of the NVRA outlines the procedures that states must provide for voter registration. Section 2(b) exempts states that either have no voter registration (i.e., North Dakota) and states that provide same-day registration. As long as all other states continue to allow registration by mail and registration at governmental agencies as required by Section 2, this portion of the NVRA is not violated.

Under compulsory universal registration, interpretation of Section 5 is more complicated. Section 5 designates which agencies are required to provide voter registration services. Some provisions of Section 5 would no longer be necessary under mandatory registration, such as the provision that requires agencies’ forms to say, “If you decide not to check either box, you will be considered to have decided not to register to vote at this time.” Most significantly, Section 5 mentions a right to decline to register to vote (emphasis added):

§1973gg-5(a)(6)(B)(v): “The statement, ‘If you believe that someone has interfered with your right to register or *to decline to register to vote*, your right to privacy in deciding whether to register or in applying to register to vote, or your right to choose your own political party or other political preference, you may file a complaint with -----.’”

Because there has never been a mandate to register, it is unclear whether a right to decline to register to vote actually exists.

The NVRA’s purpose for requiring states to keep a record of individuals’ declination to register is twofold: (1) to prevent unnecessary paperwork where an individual is already registered and (2) to prevent registration of ineligible persons. The option to decline to register to vote is also available for persons, such as non-citizens, who do not meet voter registration requirements. Many people who apply for a driver's license are not eligible to vote due to age and/or citizenship.

The Act’s legislative history indicates that people may decline to register to vote because of privacy concerns or ineligibility due to criminal conviction or mental incompetence; the Act further stresses that such reasons for declination be kept confidential. The history specifically says that there must be an opportunity to decline to register to vote. Although it stresses that individuals need not divulge their reason for declining to register, no specific right to decline is mentioned, although an affirmative fundamental right to vote is repeatedly stressed.

CONCLUSION

States have constitutional and legal authority to implement compulsory voter registration in a manner similar to the recent Massachusetts health care reform, so long as the regulation would require people either to register or give them the opportunity to opt-out. Under such a policy, citizens that neglect to register or neglect to opt-out would be fined if they do not respond to a warning, much like Massachusetts residents who neglect to purchase health insurance. Although such a regulation may incur both constitutional and other legal challenges, we believe the inclusion of an opt-out provision would address any possible concerns. By requiring eligible potential voters to take an affirmative step of either registering or opting-out, states should come much closer to achieving 100 percent registration without infringing on citizens’ constitutional rights or guaranteed liberties.

Appendix: Draft Statutory Language

An Act Establishing Universal Voter Registration With an Opt-Out Provision (*Note: optional, state-sensitive sections are indicated in brackets and by use of italics*):

SHORT TITLE. Universal State Act for Voter Registration “USA Voter Registration”

FINDINGS. Whereas, voter registration remains stagnant in the State/Commonwealth of _____ this Act resolves to increase the percentage of registered voters. Because voter registration is directly correlated with voter turnout, this Act seeks to improve our democratic process through increased participation.

Whereas, voter fraud due to duplications and omissions in voter rolls remain a problem, this Act seeks to create accurate and complete voter rolls to ensure maximum, fair participation in the voting process.

Whereas, elections are run more efficiently when provisional ballots are kept to a minimum, when voters have information about what is their correct polling place and when election officials have more time to plan for actual levels of voter participation, this Act assists running good elections with shorter wait times.

[OPTIONAL, BASED ON LOCAL CONSIDERATIONS: Lastly, whereas minorities and low-income individuals are traditionally disenfranchised and disinclined to participate in the political process, this Act seeks to increase participation from individuals who are traditionally absent from the voting process. (INSERT LOCAL FINDINGS HERE)]

PURPOSE. The State/Commonwealth of _____ shall require all resident citizens who will be eligible to register to vote in the next general election to register to vote in accordance with existing election laws as provided herein. Any resident who by law may not register to vote or who does not wish to register to vote must affirmatively decline to register to vote as provided herein. [*To assist citizens in registering and maintaining accurate rolls, the State will take steps to make it easier for citizens to have access to registrations and to avoid duplicate registrations.*]

SECTION 1 – INITIAL REGISTRATION. All domiciliaries of the State/Commonwealth of _____ shall register to vote or affirmatively decline to register to vote on or before the first Tuesday in January of the first federal election year in which they are eligible to vote following the November 2006 elections.

[**SECTION 2 – CHANGE OF ADDRESS.** *Upon changing residency within the State/Commonwealth of _____, residents shall submit a change of address form to the Board of Elections (INSERT COUNTY OR STATE BOARD LANGUAGE HERE) or re-register to vote or affirmatively decline to register to vote on or before the first Tuesday in January of the next federal election year in which they are eligible to vote following the November 2006 elections. The State/Commonwealth shall likewise take affirmative steps toward maintaining an interoperability of databases so as to keep persons on registered voter rolls.*]

[**SECTION 3 - PENALTIES.** *Any resident who neglects to register to vote or to opt-out of registration and has received notice of the law herein requiring that they register shall be eligible for a fine not to exceed \$200.00 which will be waived upon proof of compliance with the requirements of this Act. Additionally, any resident who has neither registered nor opted out of registration is ineligible for state-sponsored benefits or employment. Any fines collected pursuant to this Act shall be used for purposes of voter registration and education activities to be administered by the chief election administrator of the state/commonwealth of _____.*]

SECTION 4 – ESTABLISHMENT OF PROCEDURES. The chief election officer of the State/Commonwealth of _____ shall promulgate such rules and procedures as necessary to carry forward the goals of this Act, including but not limited to creation of a form designed to test the eligibility of each domiciliary to register to vote under applicable local, state, and federal law. See SAMPLE A in appendix.

SECTION 5 – SEVERABILITY. Invalidity or unenforceability of one or more portions of this Act shall not affect any other portion of this Act.

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