

Asking Better Questions about Voter Identification Laws

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Twists and turns in Texas litigation

In 2011, the Texas legislature passed one of the strictest voter identification laws in the nation. The new law was challenged almost immediately by voting rights advocates, and it is still being litigated in a long and convoluted case that seems unlikely to end anytime soon. A federal district court in Corpus Christi has already twice struck down the law as racially discriminatory, and the 5th Circuit Court of Appeals previously agreed, at least in part. The second round of arguments on appeal just concluded [last week](#), and whatever the 5th Circuit eventually decides, the case seems likely to be appealed again to the Supreme Court. (See [this page](#) by the Brennan Center for full details of the case.)

The Texas law as initially passed in 2011 required anyone voting at the polls to show certain limited types of government-issued photo ID, such as a driver's license or passport. However, in response to the 5th Circuit's initial decision, the Texas legislature amended the law in May 2017, allowing an exception for those with a "reasonable impediment" to obtaining the required photo ID. The new law allows voters to provide alternate (non-photo) documentation of identity if they swear—under penalty of felony perjury—that they do not possess the required photo ID and are unable to obtain it for one of the predetermined reasons specified by statute (such as lack of transportation or inability to obtain supporting documents).

Confusing eligibility with identity?

It is important first to note that photo ID laws like Texas' are not meant to ensure that a prospective voter is *eligible*. Eligibility is determined at the time of registration, and only those who have properly registered prior to the election are eligible to vote, at least in Texas. The photo ID requirement is meant only for *proving identity*—to ensure that someone who appears at the polls claiming to be a certain registered voter is in fact that person.

We might then ask, why did Texas agree to grant an exception allowing alternate forms of identification documents *only* for those who lack the required photo ID and have a "reasonable impediment" to obtaining it? If the ID requirement is really about proving identity, then why not allow others—say someone who simply forgot their driver's license at home—to show an alternate form of identification? If the procedures allowed for those who do not have and cannot ("reasonably") obtain the required ID are sufficient to prove identity for these individuals, why are these same procedures not sufficient for others as well?

A way forward through better questions

In reality, the two sides in Texas do not seem that far from a potential agreement. In amending its law, the Texas legislature essentially admitted the need to allow exceptions to the photo ID requirement; the only remaining dispute is over the scope of those exceptions. The case would probably settle immediately if Texas agreed to expand the exception to any prospective voter who declares it *overly burdensome*—for whatever reason—to provide one of the preferred forms of photo ID, but who is still willing and able to provide alternate proof of identity.

Everyone agrees that voters must be identified before casting a ballot. The debate is over the particulars of the identification procedure. Specifically, we might ask: How much of the burden of this administrative process may a state place on any *individual citizen* seeking to exercise the right to vote?

However, the questions more commonly being asked and answered in current debates over voter identification laws, both in the public sphere and in the courts, are generally quite different. These questions have centered mostly on empirical issues, such as: What is the [measurable effect](#) of these laws on [voter turnout](#), in [general](#) and [for minorities](#) in particular? How many prospective voters [actually lack](#) the types of photo ID required by the [Texas law](#)? And of course, how probable is it that strict voter identification laws might affect [the outcome](#) in [major elections](#)?

Similarly, in legal challenges to identification requirements, courts have typically looked to the magnitude of the administrative burden, and specifically whether these laws “[unduly burden](#)” the right to vote. Notably, courts seem to have interpreted this as weighing the overall impact across groups of potential voters, and they have focused mostly on the question of whether these laws are discriminatory—the main question in the Texas case.

Such questions are no doubt important, but given the state of current debates, these might not be the best questions to be asking in the interests of protecting voting rights and expanding participation. What, then, may be better questions at this time? Election law scholar Richard Hasen has [asserted repeatedly](#) that questions about administrative burdens like strict voter identification laws should focus not so much on turnout effects, nor exclusively on questions of [discrimination](#), but rather on “[the dignity of voters](#),” and whether a state like Texas has any good reason for making voting procedures more burdensome than they actually need to be.

We could take this a step further and assert that the right questions have to do with the *value of voting at the individual level*. How valuable is any one citizen’s vote? How much responsibility should a state have to prevent the disenfranchisement of just one individual? To what lengths must a state go in helping even just [one voter](#) to participate?

Only by answering these types of questions—which involve problems of participatory democratic theory more than empirical issues—can we rightly assess the weight of administrative burdens. For in order to determine whether a state has a good enough reason for its voter identification law, or whether it unduly burdens the right to vote, we must first determine how much weight to give to the individual interest in participation.

Beyond voter identification

Focusing on the value of voting at the individual level supports arguments to limit other administrative burdens on participation. For example, the conventional practice of Texas and other states requiring voters to register in advance of an election is arguably an undue burden on the right to vote. With today's technology, every state should be able to implement procedures for same-day registration, as currently [allowed](#) in several states.

Additionally, we might ask whether current procedures for provisional balloting, which are closely tied to identification laws, impose an undue burden when they require voters to follow up in person with further documentation in order to have their votes counted. Perhaps instead the state should have at least the initial burden of following up on provisional ballots to determine whether or not they should be counted?

More fundamentally, arguments about administrative burdens raise deeper questions about the value of voting in a democracy. One might hope it would be obvious that the democratic ideal is for as many citizens as possible to participate in elections, and therefore voting should be as easy as possible. However, [many](#) people continue to [believe](#) that voting should [not](#) be [too easy](#). Such beliefs are commonly based on assertions that most citizens are extremely [ignorant](#)—or at least highly [uninformed](#)—about politics. Voting rights advocates must be prepared to respond to these arguments and to explain clearly why voting really should be as easy as possible.

These deeper debates about the value of participation are beyond the current scope, but these are arguments we can and should win; the history of democracy itself is on our side. Nevertheless, we may lose if we continue quibbling over the magnitude and significance of turnout effects, or the overall impact of administrative burdens across groups of potential voters. If instead we can shift discussion to the value of voting for each and every individual citizen, and to the ensuing responsibilities of states to ensure equal and easy access to the polls, then we may prevail not only in voter identification debates, but in the voting wars more broadly.

“No eligible citizen denied”

We might start with a simple participatory principle: States should ensure that *no voting-eligible citizen is ever denied at the polls*. In terms of identification requirements, this means that administrative procedures for those who are already registered to vote should focus on reasonable ways of proving identity. But it also means that advance registration should not be required, and procedures at the polls for those who are not registered should focus on determining eligibility. And finally, this principle implies that provisional balloting procedures should generally put a greater burden on the state and not require individuals to follow up with further documentation unless absolutely necessary.

In principle, none of this should be that difficult. Everyone agrees on the need to keep elections secure from fraud or mistake, but we can and should find ways of ensuring electoral integrity without obstructing the individual right to vote.

In the end, we need courts to more closely scrutinize voter identification laws—along with all voting procedures—to ensure they are based on real administrative needs, not on partisanship. Unfortunately, this stricter scrutiny does not seem likely to emerge from the Texas litigation. We have much work to do, but if we begin by asking better questions, we might eventually start getting better answers.