

2009

I Lost My Home, Don't Take My Voice: Ensuring the Voting Rights of the Homeless through Negotiated Rulemaking

Sarah Devlin

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Sarah Devlin, *I Lost My Home, Don't Take My Voice: Ensuring the Voting Rights of the Homeless through Negotiated Rulemaking*, 2009 J. Disp. Resol. (2009)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2009/iss1/7>

This Comment is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

COMMENTS

“I lost my home, don’t take my voice!” Ensuring the Voting Rights of the Homeless Through Negotiated Rulemaking

“Who are the electors...? Not the rich more than the poor, not the learned, more than the ignorant, not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.”¹

I. INTRODUCTION

“The right to vote, as the citizen’s link to his laws as government, is protective of all fundamental rights as privileges.”² This right is often unexercised or taken for granted; but for hundreds of thousands of homeless citizens, voting is a right which is beyond reach. The U.S. Department of Housing and Urban Development estimated that on any given night in 2005, more than 754,000 Americans were without a traditional residence—living in emergency shelters, transitional housing, or on the streets.³ While many of those people are only temporarily homeless,⁴ many others are being disenfranchised by an electoral system that requires a traditional residence or a particular form of identification, unavailable to the homeless population. Legislatures and courts alike have wavered between giving homeless Americans the right to vote and taking that right away. It is time to adopt a unified rule, which can only be fairly achieved through negotiated rulemaking, a bringing-together of representatives from various interest groups in order to reach consensus on the text of a proposed rule.⁵

1. The Federalist No. 57, at 348-49 (James Madison) (Clinton Rossiter ed., 1961).

2. *Evans v. Comman*, 398 U.S. 419, 422 (1970) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

3. OFFICE OF CMTY. PLANNING AND DEV., U.S. DEPT. OF HOUS. AND URBAN DEV. ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 24 (Feb. 2007), available at <http://www.huduser.org/Publications/pdf/ahar.pdf> (last visited Apr. 12, 2009).

4. U.S. CONF. OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA’S CITIES: A 23-CITY SURVEY 21 (2007), available at <http://usmayors.org/publications/> (last visited Apr. 12, 2009).

5. See generally ENVTL. PROT. AGENCY, NEGOTIATED RULEMAKING FACT SHEET, available at <http://www.epa.gov/adrfactsheetregneg.pdf> (last visited Apr. 12, 2009).

II. STATE CONCERNS

States have a legitimate goal and compelling interest in combating election fraud and protecting the integrity of the electoral process.⁶ In recent years, this has meant regulating the proof of identification used by voters and verifying that those who vote are legitimate members of the political community.

A. Voter Identification

During the last decade, voter identification laws have become increasingly contentious and partisan, with Republicans and Democrats sparring on different sides of the issue.⁷ In fact, few electoral procedure laws that passed in any of the states since the 2000 and 2004 presidential election “arouse more potent partisan feelings than voter identification laws.”⁸ Such laws, while attempting to combat claims of voter fraud, necessarily evoke fundamental fears of disenfranchisement.⁹ Many states have felt an urgency to prevent voter fraud—often instigated more by partisan politics than by actual evidence of such fraud—resulting in hastily written legislation that pushes the bounds of the flexible federal identification requirements outlined in the Help America Vote Act (“HAVA”).¹⁰ HAVA, passed in 2002, provided funds to states to modernize voting systems, established the Election Assistance Commission, and set minimum election administration standards, including a voter identification standard which states that an individual who votes in person must present either a “current and valid photo identification or . . . a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.”¹¹ With more states adopting stricter identification regulations than those contemplated by HAVA, and some even requiring state-issued, non-expired photographic identification, otherwise eligible voters are being disenfranchised; most notable among them are the poor, the disabled, and the homeless.¹² It is these groups who may not already possess a state-issued, non-expired photographic identification and may not have the funds or resources available to obtain either the identification itself or the documents required to obtain one.¹³

6. See *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973).

7. *Developments in the Law: Voting and Democracy*, 119 HARV. L. REV. 1144, 1144 (2006).

8. *Id.*

9. *Id.* at 1145-47.

10. *Id.* at 1150, 1152. “Often where the battle over identification is most heated, real evidence of voter fraud proves scarce . . . Furthermore, the appearance of deceased persons and felons on the voter rolls is suggestive far more of administrative mismanagement than of any widespread electoral wrongdoing.” *Id.* at 1153 (citations omitted).

11. 42 U.S.C. § 15483 (2000).

12. *Developments in the Law*, *supra* note 7, at 1144. As of 2006, twenty-two states required some form of identification for all voters at the polls in every election, seven states request photographic identification, and two states accept only photographic identification. *Id.* at 1148-49.

13. See *Weinschenk v. State*, 203 S.W.3d 201, 212-13 (Mo. 2006). When Missouri passed a law that would require a non-expired state-issued photographic identification in order to vote, it was estimated that between 169,215 and 240,000 people lacked the appropriate identification. *Id.* at 213. Missouri law required that a person provide a birth certificate or other identifying documentation to be eligible to obtain the state-issued photographic identification. *Id.* at 204. The identification cards were to be provided by the state, but applicants had to pay to obtain certified copies of their birth certificates. *Id.*

B. Political Community

In addition to verifying voter identity, states also have an interest in confirming that voters are members of the political community. A political community, in its most basic sense, is a group of citizens with distinct geographic and demographic characteristics.¹⁴ Some would also define a political community as a group of people with common “principles of justice to govern their relationships in society.”¹⁵ However it is defined, the essence of a “political community” is at the base of all representative democracy—the members of a political community elect a representative to speak for the interests of that community.¹⁶

Bona fide residency requirements have long been upheld as a way to guarantee that the electors are members of the political community in which they are seeking to vote¹⁷—“that those participating have a vested interest in the election.”¹⁸ Yet, many of the systems in place to determine bona fide residency directly result in the disenfranchisement of homeless voters.

Voting is the one “fundamental right essential to the preservation of all other rights.”¹⁹ Despite any residency requirements imposed by states, voting is not a property right.²⁰ Any system of government “whose philosophical underpinning...uses property rights as a prerequisite to exercising other rights, will have the unintentional but unavoidable consequence of excluding the homeless.”²¹ With tens of thousands of Americans now losing their homes in the current foreclosure crisis,²² the separation of voting rights from property rights is of increasing importance. As Missouri’s state election authority stated, “These folks are hurting. The lives they built have been turned upside down because they can no longer provide a home for their families. . . . This is the most crucial time to vote, and the possibility of losing that right should be the last thing they worry about.”²³

The Supreme Court of Missouri held the photographic identification requirement unconstitutional under the Missouri Constitution. *Id.* at 219 (citing MO. CONST. art. 1, § 2).

14. Nicholas Aroney, *Democracy, Community, and Federalism in Electoral Apportionment Cases: the United States, Canada, and Australia in Comparative Perspective*, 58 U. TORONTO L.J. 421, 436 (2008).

15. W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 408 (2004).

16. Aroney, *supra* note 14, at 443.

17. Jennifer E. Watson, *When No Place is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501, 522 (2003) (citing *Dunn v. Blumstein*, 404 U.S. 330, 343-44 (1972)).

18. David Zetlin-Jones, Note, *Right to Remain Silent?: What the Voting Rights Act Can and Should Say About Felony Disenfranchisement*, 47 B.C. L. REV. 411, 419 n.58 (2006) (citing *Evans v. Cornman*, 398 U.S. 419, 422 (1970)).

19. David L. Rosendorf, Comment, *Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights*, 45 U. MIAMI L. REV. 701, 719 (1990/1991).

20. *Id.*

21. *Id.* at 719-20.

22. See generally Catherine Clifford, *85,000 Homes Lost in October: As Government and Industry Scramble to Reverse the Tide of Foreclosures, Filings Jumped 25% in October*, CNNMoney.com, Nov. 13, 2008, available at http://money.cnn.com/2008/11/13/real_estate/foreclosures_october/index.htm?postversion=2008111303 (last visited Apr. 12, 2009).

23. *Sec. of State Robin Carnahan Defends Rights of Voters Losing Homes*, THE ST. LOUIS AMERICAN, October 6, 2008, http://www.stlamerican.com/articles/2008/10/06/news/local_news/localnews000000001.prt (last visited Apr. 12, 2009).

The right to vote is a civil right which should stand alone, separate from property ownership. "Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights."²⁴ Yet the voting eligibility of a particular citizen as a bona fide resident is usually determined by domicile in a home.²⁵ Conventionally, in order to even register to vote, a person must list the address of a traditional home within the election precinct.²⁶ Election boards across the country have determined that the requirement that voters have a traditional residence is "necessary to ensure that voters have a verifiable nexus to the community,"²⁷ Thus bona fide residency requirements are used to blur any distinction between voting rights and property rights, inseparably linking the two.²⁸ But even if it is determined that the homeless have electoral rights, regardless of their lack of a traditional residence, other procedures must be developed to recognize and protect the state's interest in limiting the right to vote only to those bona fide residents of the district.²⁹ Procedures that would not discriminate against the homeless per se have a discriminatory effect because drivers' licenses, utility bills, or other identification are not readily available to the homeless population.³⁰ Herein lies the conflict between the state's concern for identification and its residency requirements.

III. THE PROBLEM IS YET TO BE SOLVED

This is not to say that courts and legislators have never attempted to solve the disenfranchisement problems of homeless Americans; still, no attempt has been completely thorough, uniform, or successful.

A. Congressional Failures

As previously mentioned, combating voter fraud is a highly partisan issue.³¹ On one hand, legislators see that prior to the 2004 election, 180,000 deceased persons were still on the voter list in six swing states, and they know that even a small number of fraudulent votes can change an election at both the federal and local levels.³² On the other side are people who emphasize the rarity of voter fraud, especially in-person voter fraud (that which happens at the polling place), and focus on opening the polls to encourage broad participation, which they be-

24. Kevin Bundy, Note, "Officer, Where's my Stuff?" *The Constitutional Implications of a De Facto Property Disability for Homeless People*, 1 HASTINGS RACE & POVERTY L.J. 57, 57 (2003).

25. Rosendorf, *supra* note 19, at 717.

26. *Id.*

27. *Id.* at 718, 720.

28. *Id.* at 719.

29. *Id.* at 720-21.

30. *Developments in the Law, supra* note 7, at 1146. Even relaxed identification requirements burden homeless voters who do not receive regular leases, utility bills, or pay checks, may have a difficult time obtaining birth certificates or other state documentation, and may not be personally known by election authorities. *Id.*

31. *Id.* at 1144.

32. *Id.* at 1145-46. In 2004, John Kerry won the presidential race in Wisconsin with an 11,000-vote margin, but it was later revealed that although 277,000 votes had been cast in Milwaukee, less than 273,000 Milwaukee voters had participated in the election. *Id.* While in Washington State, the governor's race was decided by a 130-vote margin, when up to 1,600 illegal votes had been cast. *Id.*

lieve is fundamental to a functioning democracy.³³ Thus Democratic and Republican policy makers, in their continued battle over antifraud provisions, have inadvertently left it to the courts to “balance the concerns regarding effective election administration against the potential burdens on disadvantaged voters.”³⁴

Still, it is not only partisan politics that hinders finding a solution to the disenfranchisement of homeless voters; the homeless population, due to its societal position, has a limited ability to participate in the political process.³⁵ Because the homeless often cannot vote or otherwise participate in the political process, they are often not considered constituents with valid concerns warranting attention by elected representatives. The homeless are largely a population that has no access to politicians or even the media, and they are often seen as second-class citizens with “little influence over the enactment of punitive and discriminatory policies.”³⁶ Instead, constituents with traditional homes, as well as suburban shoppers and tourists who may not even live in the district, lobby the district’s legislators to “clean up” the district by eradicating all filth, addiction, begging, public sleeping, panhandling, and other stereotypes largely borne by the homeless population.³⁷ These traditionally domiciled constituents carry all of the legislative influence because a legislator’s re-election depends on the vote of those with traditional residences.

B. Judicial Confusion

Courts have recognized the political powerlessness of the homeless and that, as a population, they may need extra protections.³⁸ However, some courts have continued to uphold strict voter identification laws and bona fide residency requirements that preclude homeless citizens from voter rolls, while other courts have overturned them.³⁹ The judiciary’s mixed messages have left the homeless confused about their own electoral rights.

In *Crawford v. Marion County Election Board*, the United States Supreme Court held that requiring a non-expired, state-issued photographic identification to vote did not unjustly burden the voters of Indiana.⁴⁰ However, in so holding, the Court noted that the plaintiffs—a group comprised of a political party, a party committee, and a number of elected officials and non-profit organizations—failed to provide the Court with an adequate number of registered voters who did not

33. *Id.* at 1146. Ironically, in states where there is the largest push for photographic identification in order to combat voter fraud, true evidence of voter fraud is scarce or non-existent. In Georgia, a state which requires photographic identification at the polls, the Secretary of State states to have “never encountered a single instance of voter impersonation at the polls.” *Id.*

34. *Id.* at 1144.

35. Bundy, *supra* note 24, at 107.

36. *Id.* at 108.

37. *Id.* at 107-08.

38. Watson, *supra* note 17, at 521-22.

39. Compare *Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610 (2008) (upholding photographic identification requirements), with *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006) (overturning photographic identification requirements), *Dunn v. Blumstein*, 405 U.S. 330 (1972) (discussing residency requirements), and *Pitts v. Black*, 608 F. Supp. 696, 697 (S.D.N.Y. 1984) (same).

40. *Crawford*, 128 S.Ct. at 1623.

already own photographic identification cards.⁴¹ In addition, the Court remarked that the plaintiffs neglected to even address the number of would-be first time voters who would be prevented from registering because they did not own proper identification.⁴² The plaintiffs further failed to detail the difficulty that such strict identification requirements would create for indigent voters; when they presented to the Court the affidavit of only one homeless person who was denied a photo identification card because she did not have an address, it was insufficient evidence to show how widespread the disenfranchisement might be.⁴³ This decision leaves one to wonder if the outcome would have differed if the plaintiffs had presented their case with more thorough evidence.

Yet, before the Supreme Court ruled in *Crawford*, the Missouri Supreme Court came to a very different conclusion in a case adjudicating the validity of a similar photographic voter identification requirement. In Missouri, the plaintiffs, a group of disenfranchised registered voters, provided the court with detailed facts to show how many registered Missouri voters lacked the photographic identification that would be required and specified exactly how indigent voters would be affected.⁴⁴ In that case, the photographic identification requirements were overturned as a violation of a specific provision of the Missouri State Constitution that “enshrines the right to vote among certain enumerated constitutional rights of its citizens.”⁴⁵ The Missouri ruling again raises the question of whether the U.S. Supreme Court would have ruled differently in *Crawford* if the Court was presented with the kinds of extensive facts offered in Missouri.

Court rulings on residential requirements have been just as varied as those on photographic identification requirements. In *Dunn v. Blumstein*, the U.S. Supreme Court ruled on a Tennessee law that placed a durational residency requirement on voting.⁴⁶ In order to register to vote, which must be completed thirty days before any election, Tennessee law required that a citizen reside in the state for one year and in the county for three years prior to being added to the poll books.⁴⁷ The durational residency requirement was challenged under the Equal Protection Clause as creating a class of citizens—new Tennessee residents—who were denied the right to vote.⁴⁸ In determining whether the residential prerequisite was violative of the Equal Protection Clause, the Court looked to three issues: the character of the classification in question, the individual interests affected, and the state’s interests in upholding the classification.⁴⁹ Because both the right to vote and the right to interstate travel are constitutional rights, the Court required the state to show that it was exercising a substantial and compelling state interest in

41. *Id.* at 1622-23.

42. *Id.* at 1622.

43. *Id.* at 1622-23.

44. *Weinschenk v. State*, 203 S.W.3d 201, 206 (Mo. 2006).

45. *Id.* at 221 (citing MO. CONST. art. 1, § 25 which states “That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage”).

46. 405 U.S. 330 (1972).

47. *Id.* at 331-32. See also *id.* at 333 n.1 (citing relevant provisions of the Tennessee Constitution and Tennessee Code).

48. *Id.* at 334-35.

49. *Id.* at 335.

enforcing the durational residency requirement.⁵⁰ The Court recognized a legitimate state concern that voters be members and bona fide residents of the political community in which they are voting.⁵¹ However, the Court further stated that a one-year residency requirement could hardly be necessary to achieve that purpose; therefore, the Court overturned the durational requirements.⁵² The Court then listed other objective and less intrusive ways to determine bona fide residency that would not disenfranchise recently established Tennesseans, such as “dwelling, occupation, car registration, driver’s license, [and] property owned.”⁵³

While the homeless population may be more transient than traditionally domiciled citizens, and thus would benefit from overturning durational residency voting requirements, the Court’s suggestions on how to show bona fide residency do not aide the homeless in any way. Few, if any, homeless citizens have proof of dwelling, occupation, car registration, driver’s license, or owned property.

Still, the judicial system is not consistently ignorant of the plight of homeless voters. In *Pitts v. Black*, the U.S. District Court for the Southern District of New York faced a homeless plaintiff class that sought to permanently prevent the New York City Board of Elections from interpreting and applying the New York State Election Law in a way that would disenfranchise the entire plaintiff class, in violation of the Equal Protection Clause.⁵⁴ New York voter registration required citizenship, age, thirty-day duration within the state, county, and city, as well as “residence.”⁵⁵ The definition of “residence” was at the heart of the dispute.⁵⁶ The term “residence” was defined in the election law as “that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return.”⁵⁷ Plaintiffs argued that, rather than defining “residence” in this way, which would deny the vote to all homeless people, “residence” should be defined as “the act of being in one geographical locale, where one performs the usual functions of sleeping, eating and living in accordance with one’s life style, and a place to which one, ‘wherever temporarily located’ always intends to return.”⁵⁸

The New York City Board of Elections claimed that their interpretation of the law was required to meet the board’s compelling interests of ensuring that voters are members of the political community, protecting the integrity of the ballot against fraud, and maintaining administrative feasibility.⁵⁹ The court, however, disagreed that a fixed premises is the only way to ascertain that a would-be voter is a bona fide resident of the district and participant in the political community.⁶⁰ It found that listing a park bench as a residence accomplishes the same objective, and it cited other jurisdictions that had allowed homeless voters to list the place

50. *Id.*

51. *Id.* at 343-44.

52. *Id.* at 347-48.

53. *Id.* at 348.

54. 608 F. Supp. 696, 697 (S.D.N.Y. 1984).

55. *Id.* at 698 n.2.

56. *Id.*

57. *Id.* at 698.

58. *Id.*

59. *Id.* at 699.

60. *Id.* at 708. See also the court’s discussion of ways other states have provided for the homeless to establish a residence for voter registration purposes. *Id.* at 699-701.

where they sleep, or a shelter, as their residence.⁶¹ The court further found that the homeless are no more likely to commit election fraud than those voters with traditional homes.⁶² The court felt that the safeguards already in place against voter fraud—including criminal prosecution of election fraud, address verification, signature verification, and a rarely used physical search—were sufficient to allow the homeless the right to vote.⁶³ The court also found the defendants' claims of administrative infeasibility unfounded because not only had homeless voting been accomplished in other cities, but detailed maps showed the location of various parks and other locations where homeless congregated in relation to voting districts.⁶⁴ In fact, with the exception of two parks, every park and other such location in New York City was encompassed entirely in one precinct.⁶⁵ Therefore, the location of homeless citizens' residential park benches did not affect their representative district.⁶⁶ Finally, the court held that the right to vote is a "fundamental right, which is preservative of all other rights in a democracy, and deserves the strictest constitutional protection,"⁶⁷ and is a right which should be held equally by all members of a political community.⁶⁸ In addition, the Board of Election failed to prove that there was no other way to meet their interests other than denying the right to vote.⁶⁹ Because of these reasons, the district court overturned the New York City Board of Election's interpretation of the New York election law.⁷⁰

Thus, in light of the varied judicial responses on the issue, both the homeless population and election authorities across the country are faced with contradictory answers to the questions of how to verify a citizen's identity and ensure bona fide residency without disenfranchising the poorest of the country's population. The U.S. Supreme Court instructs that citizens can show bona fide residency through owning a home or having some right to a physical property, but a lower court qualifies this requirement by ruling that owning a home or otherwise having property rights cannot be required if such a requirement disenfranchises homeless voters. The question of how to best guarantee the rights of the homeless while

61. *Id.* at 707-08. Washington D.C. allows homeless voters to list the place he sleeps as his voting address, "whether it is a park bench or any other non-traditional accommodation," with the location of the bench or other sleeping place being the designator of the appropriate voting precinct. *Id.* at 701. Philadelphia permits homeless voters to list a shelter as their address, whether or not the homeless voter sleeps at the shelter. *Id.* Thus in Philadelphia, the homeless shelter would designate a homeless voter's voting precinct. *Id.*

62. *Id.* at 707. See also the court's discussion of voter fraud. *Id.* at 703.

63. *Id.* at 706-07.

64. *Id.* at 702-03.

65. *Id.* at 703.

66. *Id.* Central Park and Riverside Park, though not contained in a single district, had easily determinable lines along streets. *Id.* "For example, Central Park above the 96th Street crosstown is the 81st [Election District] of the 68th [Assembly District]; between the 96th Street crosstown and the 86th Street crosstown it is the 87th [Election District] of the 69th [Assembly District]. Therefore, the homeless person would need only know between which two crosstown streets he lived." *Id.*

67. *Id.* at 708 (citing *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

68. *Id.* at 708-709 (citing *Dunn v. Blumenstein*, 405 U.S. 330, 336 (1972) (citations omitted)).

69. *Id.* at 709 (citing *Blumenstein*, 405 U.S. at 345; *Auerbach v. Kinley*, 499 F. Supp. 1329, 1337, 1342 (N.D. N.Y. 1980); *Evans v. Corman*, 398 U.S. 419, 422 (1970); *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 631 (1969); *In re Applications for Voter Registration of Willie R. Jenkins*, Decision at 3 (D.C. Board of Elections and Ethics June 7, 1984)).

70. *Id.* at 710.

protecting against voter fraud remains unanswered, but negotiated rulemaking may provide a solution.

IV. WHAT IS NEGOTIATED RULEMAKING AND WHY WILL IT WORK?

Negotiated rulemaking became popular in the late 1980s as an alternative to the traditional notice and comment procedure of agency rulemaking outlined in the Administrative Procedure Act (“APA”).⁷¹ Under traditional notice and comment rulemaking, the agency would make the initial policy determinations, and using their own expertise and staff, develop a proposed rule.⁷² Conversely, negotiated rulemaking, also known as regulatory negotiation or “reg-neg,” is a voluntary process for devising agency regulations which brings together the parties who would be affected by a rule, including the government, and allows them to participate directly in the decision making procedure.⁷³ Negotiation brings a new legitimacy to the rulemaking process by having the support and consensus of the various interests affected.⁷⁴ This legitimacy is lacking in the traditional notice and comment process because of the adversarial nature in which the agency makes the decision and then defends its position against the opinions of the interested parties.⁷⁵

The basic principle behind negotiated rulemaking is that when an agency considers the adoption of a new regulation, it will assess whether the issue could be appropriately negotiated, possibly with the assistance of a convener—a neutral third party charged with assembling the negotiating committee.⁷⁶ If the matter is deemed appropriate for negotiation, the convener will then be charged with determining the appropriate parties for the negotiation so that all affected interests will be represented.⁷⁷ The formation of such negotiation committee will be published in the Federal Register so that persons or groups who feel that their interests are underrepresented may petition the convener for inclusion in the negotiation.⁷⁸ Thereafter, negotiations are held, usually with the oversight of a neutral mediator, who may or may not have also served as convener.⁷⁹ Once the parties reach consensus, usually defined as unanimity, the agency publishes the consensus rule as a proposed rule and receives comment on the proposition.⁸⁰ The negotiating committee may, but does not always, review the comments and discuss whether changes should be made to the proposed rule.⁸¹ After receiving comment and

71. Danielle Holley-Walker, *The Importance of Negotiated Rulemaking to the No Child Left Behind Act*, 85 NEB. L. REV. 1015, 1017 (2007).

72. *Id.* at 1036 (citing Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 9 (1982) for the proposition that the APA “was clearly built on the notion of agency expertise”).

73. U.S. Dept. of Labor, *Overview of Negotiated Rulemaking*, available at <http://www.dol.gov/asp/programs/negreg/negbrief.htm> (last visited Apr. 12, 2009).

74. Holley-Walker, *supra* note 71, at 1038-39.

75. *Id.*

76. William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351 n. 2. (1997) (citing Administrative Conference of the U.S. Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.82-4 (1993)).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

addressing proposed changes, the agency will adopt the rule as final and develop a preamble to the rule, responding to comments and explaining the agency's rationale.⁸²

In practice, negotiated rulemaking is rather more like a mediation than a negotiation, with a third party neutral serving as an objective organizer. This kind of dispute resolution, where a neutral third party oversees the interaction, is appropriate where the parties have "reached or anticipate a negotiation impasse based on, among other factors, personality conflicts, poor communication, multiple parties, or inflexible negotiation postures."⁸³ Modifying election laws produces just this kind of dispute because, not only are the issues for discussion highly partisan, but election law has varying effects on, and must be implemented by, many different levels of government, from national regulatory bodies to the local election authority that governs just a portion of a county. Overall, political and public opinion has become entrenched in the area of voter residency and identification requirements. In such cases, a party-driven process that focuses on individual interests, like mediation or negotiated rulemaking, may be more empowering for the parties than a more adversarial process, such as notice and comment rulemaking.⁸⁴ This mix of parties and interests could easily create an impasse if not for a regulatory negotiation hosted by a skilled mediator.

The first real description of the negotiated rulemaking process, as opposed to the traditional notice and comment rulemaking process, was published in 1982, at a time when both courts and agencies were beginning to turn to alternative dispute resolution methods rather than litigation and adjudication.⁸⁵ The Negotiated Rulemaking Act of 1990 ("the Act") legislatively legitimized the practice.⁸⁶ Because the Act dictated that "there should be no judicial review of an agency's establishment of, assistance to, or termination of a negotiated rulemaking committee," it left the decision of an agency to opt for negotiated rulemaking as opposed to a traditional notice-and-comment procedure completely undeniable.⁸⁷ Yet, so as not to make the rules adopted by this procedure impervious, the Act specified that a court may not give deference to a negotiated rule over rules otherwise established.⁸⁸

Since its inception, regulatory negotiation has faced various criticisms. A claim usually voiced by courts and judges is that negotiated rulemaking undermines the entire American administrative process by replacing an impartial rule-making process designed to address true public interest with a negotiation be-

82. *Id.*

83. *Alternative Dispute Resolution Techniques and Procedures*, in *Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts* (U.S. Department of Justice August 1992) included in PHILLIP J. HARTER AND JOHN P. MCCRORY, *PUBLIC POLICY DISPUTE RESOLUTION: SELECTED READINGS* 23 (2002).

84. Elaine Smith, *Danger—Inequality of Resources Present: Can the Environmental Mediation Process Provide an Effective Answer?* 1996 J. DISP. RESOL. 379, 380 (1996).

85. Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, *supra* note 76, at 1351-52. Agencies began using ADR principles not only in the rulemaking process, but to settle rulemaking disputes. Rather than defending lawsuits against challengers, agencies looked to settle disputes outside of the judicial process.

86. *Id.* at 1357-58.

87. *Id.* at 1357.

88. *Id.*

tween privately bargained interests.⁸⁹ Negotiated rulemaking diminishes the law to simply a restriction on the range of what may be bargained away by the parties exercising their individual concerns.⁹⁰ Using “nonlegal values” to decide important industry-wide or even cross-industry regulation—while allowing those whom the law seeks to regulate define the context of such regulations—is a fundamental alteration of the process of law.⁹¹ According to these critics, the agencies’ legitimacy, conferred upon them by their ability to act in the public interest, is stripped and transferred to private parties in consensus.⁹² Further, courts have voiced criticism of negotiated rulemaking because, unlike traditional notice and comment rulemaking, negotiated rulemaking does not produce a comprehensive administrative record of the issues. Proponents of negotiated rulemaking defend the lack of administrative record by arguing that maintaining a complete transcription would discourage participants from participating honestly and openly, without fear that the public may judge them on their statements or concessions.⁹³ However, in practice, agencies keep detailed administrative records of the negotiation process and of how a rule will be implemented after its passage.⁹⁴

According to proponents of negotiated rulemaking, one of the major advantages of this process is that if the negotiating committee is well formed and truly reaches a consensus, the new rule will be more thorough and efficient, resulting in less litigation over rules and rule changes.⁹⁵ Negotiation allows parties to concentrate and prioritize their actual interests in order to effectively compromise with the other players.⁹⁶ Adversarial notice and comment rulemaking, on the contrary, encourages parties to assume extreme positions, including seeking to overturn regulations in their entirety rather than merely modifying the offensive provisions.⁹⁷ By taking a cooperative approach between the agency and the affected parties, while striving to find an outcome that is beneficial for all involved, the resulting rules are “objectively superior to those produced by more competitive tactics.”⁹⁸

To achieve these superior rules, the parties to a negotiation must be able to shed their assumptions that their interests are in direct conflict with those of the other participants.⁹⁹ This attitude, “the mythical fixed-pie bias,” fosters a belief that “what is good for the other side must be bad for us.”¹⁰⁰ However, negotiating parties have different priorities in integrative negotiations, involving more than

89. *Id.* at 1356.

90. William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiations and the Public Interest – EPA’s Woodstove Standards*, 18 ENV’T L. L. 55, 67 (1987).

91. *Id.* at 95 (quoting Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676 (1986)).

92. Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, *supra* note 76, at 1386.

93. *Id.* at 1364.

94. *Id.* at 1364-65.

95. *Id.* at 1369.

96. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 29 (1982).

97. *Id.*

98. LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE* 165 (Princeton U. Press 2003).

99. *Id.* at 166.

100. *Id.*

one issue or problem.¹⁰¹ Thus, participants are able to “trade things they value less for other things that matter to them more.”¹⁰² This type of negotiation allows for “growing-the-pie” results, or results which benefit all the players involved.¹⁰³ The negotiation over homeless election rights would necessarily be integrative, involving the multiple complicated problems of allowing those without traditional residences to vote while maintaining that only bona fide residents of the district are able to vote, and combating voter fraud while providing that identification requirements do not exclude homeless citizens.

However, even in integrated negotiation, the success of various alternative dispute resolution tactics depends on the parties’ mutual desire to develop procedures to settle disputes which meet all of their individualized needs and interests.¹⁰⁴ If there is no consensus to the process, it lacks legitimacy, and it is unlikely that the parties will be able to reach consensus.¹⁰⁵ If there is no true consensus, litigation may ensue as it would have under a notice and comment system.¹⁰⁶ Therefore, to avoid litigation, parties must mutually support a system of alternative dispute resolution, such as negotiated rulemaking.

While this process may not be appropriate in all circumstances, negotiated rulemaking should be considered if:

[1] parties desire a consensus effort and are willing to commit the time and resources necessary to participate;

[2] the decision-making body is willing to allow consensus decisions to guide a policy or regulatory decision;

[3] the regulatory agency desires an outcome supported by all affected interests;

[4] The parties desire to have the regulatory agency as a party to negotiations so they have some assurance as to the nature of the regulation or policy that will be issued;

[5] an agency seeks a policy or regulatory outcome that is more easily implemented (i.e. reduced administrative and legal challenges);

[6] An agency needs to address competing points of view early in the regulatory process or

101. *Id.*

102. *Id.*

103. *Id.*

104. CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES OF THE NATIONAL ACADEMY OF ARBITRATORS AMERICAN ARBITRATION ASSOCIATE FEDERAL MEDIATION AND CONCILIATION SERVICE 3 (1974).

105. *Id.*

106. Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, *supra* note 76, at 1369-70.

[7] an agency perceives that there are sufficient incentives, the timing is right, and resources are available for such a process to succeed.¹⁰⁷

In the dispute over homeless voting rights and homeless disenfranchisement, it is clear that many of these factors are present. As a bipartisan agency, the Elections Assistance Commission (“EAC”), a four-person commission, established by HAVA and appointed by the President with the consent of the Senate, represents the concerns of both political parties—ensuring the integrity of the vote and preventing disenfranchisement. Thus the agency has an inherent desire to reach consensus and prevent further partisan split, which has, thus far, prevented the agency from establishing many meaningful decisions. Further, the EAC, State Attorneys General, State Secretaries of State, and all of the agencies in charge of conducting, overseeing, and enforcing elections and election law would welcome a rule that is more easily implemented. Moreover, differing opinions about what can and cannot be required of voters in terms of identification, residency, and registration have produced competing arguments that are clogging courts and legislatures. The time is right for a negotiated rule because, while elections have become increasingly close and the public’s fear of voter fraud has intensified, the home-foreclosure crisis has begun creating a larger population of homeless citizens who have a right to speak their minds through elections. The parties are willing to negotiate because it has become evident that there is no other satisfactory alternative: by combating fears of fraud, voters are being disenfranchised, resulting in costly litigation and muddled court rulings.

In addition to preventing adversarial litigation, negotiated rulemaking generally will open the door to consensus-building between the homeless and election authorities, between partisan political groups, and between any other groups and interests affected. Such consensus-building may be necessary and repeated at multiple stages during the negotiated rulemaking process.¹⁰⁸

V. WHO SHOULD SOLVE THE PROBLEM?

Negotiated rulemaking is a process in which interested parties come together to share their concerns and jointly craft a policy that would address the interests and aspirations of all involved.¹⁰⁹ It is important that all relevant parties be heard; however, the balance between including all those who might somehow be affected and preserving the manageability of the negotiation is delicate.

Selecting and including the relevant parties is instrumental in a successful negotiated rulemaking, as evidenced by the first negotiated rulemaking to implement the No Child Left Behind Act of 2001 (“NCLB”).¹¹⁰ Examining a real world example such as this can be instructive in moving forward on negotiated rulemaking in the context of homeless voting rights. Like negotiating homeless disenfran-

107. *A Primer on Consensus Building – Implementing the Clean Air Act of 1990*, in PHILLIP J. HARTER & JOHN P. MCCRORY, *PUBLIC POLICY DISPUTE RESOLUTION: SELECTED READINGS* 30 (2002).

108. *Id.*

109. Brett A. Williams, *Consensual Approaches to Resolving Public Policy Disputes*, 2000 J. DISP. RESOL. 135, 149 (2000).

110. Holley-Walker, *supra* note 71, at 1044-57.

chisement, negotiating education standards involves various complicated issues and affects populations which are often underrepresented: the homeless and students (particularly racial minority and disabled students).¹¹¹ NCLB, somewhat uniquely, requires negotiated rulemaking for every regulation, whether it is appropriate (as discussed earlier) or not, which perhaps can be interpreted as congressional acknowledgement that NCLB involves complicated matters and affects a variety of interest groups.¹¹² The first negotiated rulemaking of NCLB focused on academic standards, student assessments, and accountability.¹¹³ Despite being specifically instructed by Congress to achieve a balance between program beneficiaries (students and parents) and program providers (educators and education officials), the Department of Education (“DOE”), acting without a neutral convenor, invited to the negotiation table a conspicuously low number of students and parents who were not also school employees.¹¹⁴ In order to more easily reach a consensus favorable to the DOE’s predetermined policy preferences, it intentionally created an unbalanced rulemaking committee.¹¹⁵ By having a committee with strongly disparate views, consensus can be elusive and difficult to accomplish, and the DOE stacked the deck so as to avoid this difficulty and quiet any adversity.¹¹⁶ Perhaps expectedly, this obvious exclusion of divergent interests resulted in litigation—one of the consequences of traditional notice and comment rulemaking that negotiated rulemaking is designed to avoid.¹¹⁷ However, because there is no evidence that any other interest group has challenged the composition of a rulemaking committee through litigation, the DOE’s exclusion of necessary parties from the negotiation table may be an anomaly.¹¹⁸

Nonetheless, the NCLB negotiation provides an important lesson for negotiated rulemaking in the context of homeless disenfranchisement. To avoid litigation and reach the true consensus which negotiated rulemaking was designed to achieve, the committee must include a variety of interest groups, especially in situations involving largely underrepresented populations. Because the homeless population is largely ignored in politics, it is important to bring organizations that support, affect, and interact with homeless citizens to the bargaining table to speak on their behalf. In this section, I will briefly discuss a number of political and social justice organizations which should necessarily be represented at the negotiation.

A. *The United States Election Assistance Committee (“EAC”)*

The Help America Vote Act of 2002 (“HAVA”) established the EAC as a bipartisan commission tasked with providing guidance to election authorities on how to meet HAVA requirements, adopt voluntary voting system guidelines, collect and research information on American elections for Congress, election offi-

111. *Id.*

112. *Id.* at 1031, 1044.

113. *Id.* at 1031-32.

114. *Id.* at 1046.

115. *Id.* at 1046-47.

116. *Id.* at 1048.

117. *Id.* at 1047-48.

118. *Id.* at 1052.

cials, and the public, and how to accredit testing laboratories, certify voting systems, and audit the distribution of federal funds to states under HAVA.¹¹⁹ The EAC must be represented in this negotiated rulemaking because it is one of the main resources states have in verifying that their elections adhere to recent federal standards. In order to guarantee state adherence and federal enforcement, any decisions coming out of this negotiated rulemaking would need the support of the EAC. Also, a large source of the partisan conflict over voter identification requirements stems from HAVA regulations, such as the photo identification requirements discussed earlier. The EAC, as the authority vested with overseeing state implementation of HAVA, is the appropriate authority to determine which regulations regarding homeless voting would or would not coincide with existing federal requirements.

Though other negotiation participants may object to allowing two representatives from the EAC to participate when they only have one, it is important that both major political parties have representation in the negotiation. Therefore, one of the EAC representatives should be a Democrat, and the other, a Republican. The EAC is a bipartisan organization. As such, the members of the parties would be able to provide support for or opposition to any proposed regulations. While hosting a commissioner of each party guarantees that the committee will hear politically diverse opinions, once a rule is established, it will receive unified support from the EAC—both symbolically and literally, through EAC enforcement.

B. The United States Department of Veterans Affairs (“VA”)

The VA works to provide care and benefits, such as disability compensation, pensions, educational assistance, vocational training, home loans, and life insurance to America’s veterans.¹²⁰ While veterans make up little more than twelve percent of the United States population, they comprise nearly one-fifth of the American homeless population.¹²¹ The VA has offered aide to homeless veterans through outreach and assistance programs since 1987.¹²² In fact, the VA is the “only federal agency that provides substantial hands-on assistance directly to homeless persons.”¹²³ Because the VA not only directly represents a significant portion of the homeless, but also acutely understands the interaction between the homeless and federal and state agencies and assistance programs, it is important that a representative of the VA be present in any negotiated rulemaking about homeless voting.

119. United States Election Assistance Commission, *About the EAC*, available at <http://www.eac.gov/about> (last visited Apr. 12, 2009).

120. United States Department of Veterans Affairs, *About VA Home*, available at http://www.va.gov/about_va/ (last visited Apr. 12, 2009). United States Department of Veterans Affairs, *Benefits*, available at <http://www.vba.va.gov/VBA/> (last visited Apr. 12, 2009).

121. U.S. DEPT. OF HOUS. AND URBAN DEV. ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS, *supra* note 3, at 31.

122. United States Department of Veterans Affairs, *Homeless Veterans*, available at <http://www.va.gov/homeless/> (last visited Apr. 12, 2009).

123. United States Department of Veterans Affairs, *Frequently Asked Questions: Homeless Veterans*, available at http://iris.va.gov/scripts/iris.cfg/php.exe/enduser/std_adp.php?p_faqid=1333 (last visited Apr. 12, 2009).

C. The League of Women Voters

There are many organizations that represent women in the electorate, most notably the nonpartisan organizations of the League of Women Voters and Women's Voices. Women's Vote. ("WVWV").¹²⁴ Of these two groups, the more appropriate participant is the League of Women Voters because the League is long established as an organization focused on furthering the cause of women in voting, international relations, and environmental concerns, among others.¹²⁵ WVWV is a relatively young organization as it has been in existence since 2003, and it has a more limited scope of interest.¹²⁶ Further, the League is established nationwide while WVWV has not yet reached all states.¹²⁷ As the more established organization, the League of Women Voters deserves a seat at this table representing the interests of women. There may be some objection among the rulemaking panel that women voters are specifically represented while male voters are not. This is an especially relevant complaint considering that the majority of the homeless population is male.¹²⁸ However, there is a lack of credible male-oriented voting organizations. Further, the explicit interests of the male homeless population could be well represented by the VA since homeless veterans are almost exclusively male.¹²⁹

D. The Indiana, North Dakota, and Missouri Attorneys General

Thanks to *Crawford*, Indiana has some of the most stringent voter identification requirements in the country, requiring a non-expired, state-issued photo identification in order to be allowed in the polls. On the opposite end of the spectrum is North Dakota, a state that feels any requirements more burdensome than a personal oath of identification would limit otherwise eligible voters and therefore be unacceptable. Thus, the Indiana and North Dakota Attorneys General, the elected officials charged with upholding the laws of these two states respectively, should be present. The Missouri Attorney General should also participate. Missouri has not only faced stringent voter identification laws, but has overturned them, due in part to diligent research that quantified the exact number of Missourians who would be disenfranchised by a requirement similar to Indiana's identification requirements. Further, Missouri currently takes a more "middle of the road" approach to voter identification, requiring either identification issued by Missouri, a Missouri agency, or a Missouri local election authority, identification issued by the U.S. government or its agency, identification issued by a Missouri institute of higher education, a copy of a current utility bill, bank statement, paycheck, gov-

124. See League of Women Voters, *About the League*, http://www.lwv.org/AM/Template.cfm?Section=About_Us (last visited Apr. 12, 2009); Women's Voices. Women's Votes, <http://www.wvww.org/> (last visited Apr. 12, 2009).

125. League of Women Voters, *About the League*, *supra* note 124.

126. See Women's Voices. Women's Votes, *supra* note 124.

127. There are Leagues in all fifty states and has hundreds of local Leagues nationwide. See League of Women Voters, *About the League*, *supra* note 124; Women's Voices. Women's Votes, *supra* note 124.

128. U.S. DEPT. OF HOUS. AND URBAN DEV. ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS, *supra* note 3, at 34.

129. *Id.* at 33.

ernment check, or other government document with the name and address of the voter, a driver's license or state identification from another state, or an attestation by two supervising election judges.¹³⁰

E. The National Association of Secretaries of State ("NASS")

The NASS is comprised of every state's and territory's highest election official. It is the aim of the NASS, which is the oldest national association of public officials, to be a forum of information, suggestions, and proposals to help these election officials continue to develop and improve their offices and elections within their respective states.¹³¹ This organization must be represented because of its expertise in the administrative difficulty of directing elections, its understanding of the effect that election laws have on the electorate both directly and indirectly, and because it can provide a nonpartisan approach to election requirements and will be essential to the implementation of any negotiated resolution.

F. The American Association of People with Disabilities ("AAPD")

The AAPD represents the political, social, and economic interests of those across the widest spectrum of disability, including both physical and mental disabilities.¹³² Twenty-five percent of the American homeless population lives with a disability, so it is only logical that there be a voice to represent the specific and specialized interests of this group.

G. New York City Board of Elections

The Board of Elections in the City of New York is a ten-member bipartisan commission that oversees all elections in New York City.¹³³ As the local election authority of one of the largest cities in the United States, the Board would be thoroughly aware of the difficulties of election administration at the local level in a jurisdiction with a substantial homeless population. Further, because of *Pitt*, the Board understands precisely how election law interpretation can effectively disenfranchise voters.

H. The American Civil Liberties Union ("ACLU")

In 1965, the ACLU established the Voting Rights Project, which has worked to increase political participation and protect minority communities from vote

130. Vote Missouri, The Missouri Voting Rights Center, *How to Vote*, available at <http://www.sos.mo.gov/elections/govotemissouri/howtovote.aspx#Forms> (last visited Apr. 12, 2009).

131. National Association of Secretaries of State, *Constitution/Bylaws*, available at http://nass.org/index.php?option=com_content&task=blogcategory&id=24&Itemid=216 (last visited Apr. 12, 2009).

132. American Association of People with Disabilities, *About AAPD*, available at <http://aapd.com/AAPDRedesign/index/staff.html> (last visited Apr. 12, 2009).

133. Board of Elections in the City of New York, *About the Board of Elections*, available at <http://www.vote.nyc.ny.us/abouttheboard.html> (last visited Apr. 12, 2009).

dilution and disenfranchisement.¹³⁴ The ACLU has been a principal or amicus party in nearly all major election litigation since the passage of the Voting Rights Act over thirty years ago and has strongly supported lobbying efforts to make the right to vote more accessible to racial minorities, women, the disabled, criminals, and the underprivileged.¹³⁵ As such, the ACLU's insight into the effect of various election legislation and its possibly disenfranchising effects is crucial to this negotiation.

I. Brennan Center for Justice

The Brennan Center for Justice serves largely as an EAC watchdog.¹³⁶ Because the EAC deals with issues that are highly partisan, contentious, and fundamental to democracy, the Brennan Center verifies that EAC practices and studies are competent, transparent, accountable, and promote fundamental democratic values.¹³⁷ Since the EAC is represented in this negotiation, it is also imperative, for the purposes of transparency and authenticity, that the EAC watchdog also participate. However, the Brennan Center would be present merely to ensure the integrity of the decision, not to participate in the voting activities of the negotiating parties.

J. The United States Conference of Mayors ("USCM")

The USCM is a nonpartisan organization of the mayors of all American cities with populations equal to or greater than 30,000.¹³⁸ There are currently 1,200 members.¹³⁹ The goals of this organization include developing effective national urban/suburban policy, re-enforcing the relationship between cities and the federal government, and ensuring that the federal government creates policies that meet the needs of urban areas.¹⁴⁰ The USCM has recognized and researched the plight of the homeless in urban areas.¹⁴¹ Thus, they could speak for the traditionally-domiciled residents in the cities that house most of the nation's homeless population, while also serving as a source of local knowledge about homeless life. As such, a representative of USCM should be present.

134. American Civil Liberties Union, *Voting Rights*, available at <http://www.aclu.org/votingrights/index.html> (last visited Apr. 12, 2009).

135. American Civil Liberties Union, *Voting Rights: Legal Documents*, available at http://www.aclu.org/votingrights/relatedinformation_legal_documents.html (last visited Apr. 12, 2009).

136. Brennan Center for Justice, *EAC Oversight*, available at http://www.brennancenter.org/content/section/category/eac_oversight (last visited Apr. 12, 2009).

137. *Id.*

138. U.S. Conference of Mayors, *About USCM*, available at <http://www.usmayors.org/about/overview.asp> (last visited Apr. 12, 2009).

139. *Id.*

140. *Id.*

141. U.S. Conference of Mayors, *Online Publications*, available at <http://www.usmayors.org/publications/> (last visited Apr. 12, 2009).

K. America Votes

America Votes is a state-based coalition of over forty organizations, all of which are focused on increasing participation, voter impact, and education in elections through grassroots voter mobilization.¹⁴² The partners in this group represent a wide spectrum of social and economic interests,¹⁴³ including a clear interest in getting homeless voters to the polls so that their voices may be heard.

America Votes also particularly speaks to the interests of its members—and arguably on behalf of organizations with the same or similar interests as America Votes members—regarding individual demographics of the homeless population, or other populations that may be substantially affected by changes in election laws. Members with such specific interests include: The National Association for the Advancement of Colored People, the American Association of Retired Persons, and the League of Young Voters. The concerns of these or similar groups need not be individually voiced. Unlike the groups supporting veterans, the disabled, and female voters, other members of America Votes only have a general aspiration to ensure free and fair elections, rather than specialized information or aspirations regarding homeless Americans. The aspirations of these other member organizations for open elections is being represented not only by America Votes, but also by many of the other parties.

L. The United States Department of Housing and Urban Development (“HUD”)

Part of HUD’s mission is “to increase homeownership, support community development and increase access to affordable housing free from discrimination.”¹⁴⁴ HUD oversees and supports a “Continuum of Care”—local agencies that provide shelter, food, counseling, job skills programs, and other services to the homeless.¹⁴⁵ Because many of the possible solutions to the homeless voter crisis

142. America Votes, *About*, available at <http://www.americavotes.org/site/content/about/> (last visited Apr. 12, 2009).

143. America Votes, *Partners*, available at http://www.americavotes.org/site/partner_summaries/ (last visited Apr. 12, 2009). Partners include 21st Century Democrats, ACORN, AFL-CIO, AFSCME, Alliance for Retired Americans, American Association of Justice, American Federation of Teachers, American Hunters and Shooters Association, Americans United for Change, Ballot Initiative Strategy Center, Brady Campaign to Prevent Gun Violence, Campaign for America’s Future, Campaign for Community Change, Change to Win, Clean Water Action, Communities for Quality Education, Defenders of Wildlife, Democracia Ahora, Democracy for America, EMILY’s List, Hip Hop Caucus, Human Rights Campaign, INDN’s List, International Brotherhood of Teamsters, League of Conservation Voters, League of United Latin American Citizens, League of Young Voters, Moveon.org, My Rural America, NAACP Voter Fund, NARAL Pro-Choice America, National Association of Social Workers, National Democratic Network, National Education Association, National Jewish Democratic Council, National Stonewall Democrats, People for the American Way, Planned Parenthood Action Fund, Progressive Future, Progressive Majority, ProgressNow Action, SEIU, Sierra Club, USAction, Vote Vets, Women’s Campaign Forum, Women’s Voices Women Vote, Working America, and Young Democrats of America.

144. Homes & Communities, *HUD’s Mission*, available at <http://www.hud.gov/library/bookshelf12/hudmission.cfm> (last visited Apr. 12, 2009).

145. Homes & Communities, *Homeless*, available at <http://www.hud.gov/homeless/index.cfm> (last visited Apr. 12, 2009).

would include the participation of local agencies, organizations, and shelters, HUD provides a negotiating voice for those Continuum of Care organizations.

M. *The National Coalition for the Homeless (“NCH”)*

NCH is a network of advocates, service providers, formerly homeless, and homeless people who are committed to ending homelessness and providing for the immediate needs of the homeless and of those who are threatened with homelessness.¹⁴⁶ As an organization, NCH has people who are or have been homeless involved at all levels of their work.¹⁴⁷ As such, this organization provides the ideal representation of the actual needs and difficulties of homeless citizens. A representative of this organization would be able to speak to what kinds of processes or programs would be practical for homeless people, what kind of identification they would be able and willing to acquire, and what kind of transiency restrictions would be practical. Further, NCH helped to sponsor an effort to get homeless citizens in Washington, D.C. to vote this year, so the organization would have a firsthand account of the successes and weakness of such a program.¹⁴⁸

VI. CONCLUSION

A number of variables—such as where a negotiation takes place, the issues at stake, as well as the roles, status, and relationships of the parties—influence both the success and the outcome of a negotiation.¹⁴⁹ Because of all the possible variables, it would be presumptuous to hypothesize the exact proposal this negotiation would reach. Possible solutions that address voter identification requirements might include allowing a person to vote by affirming his identity by affidavit, by providing a social security number even if the homeless person does not possess his social security card, or by issuing the person a specific voter identification card. One possibility for resolving the issue of residency includes allowing homeless voters to claim a park bench or alley as their home for purposes of districting, and providing them with a post office box or other mailing address where they could receive their card and other election-related information. Another option would be to allow a homeless voter to list a homeless shelter in his area as a residence, even if he does not live there, making the voter a constituent of the district where the shelter is located. This solution would require shelters to allow non-resident homeless people to receive mail at the shelter. More creative options include creating a “homeless district” comprised not by geography, but by a citizen’s status of not having a traditional residence. Because of the inherently complex balance between protecting the rights of the people to express their rights and the interest of the state in protecting the integrity of the government, there have

146. National Coalition for the Homeless, *Who We Are*, available at <http://www.nationalhomeless.org/index.html> (last visited Apr. 12, 2009).

147. *Id.*

148. Kathryn Lindsay Dobies, *Homeless, Not Voteless*, MEDILL WASHINGTON REPORTS (Nov. 4, 2008), available at <http://news.medill.northwestern.edu/washington/news.aspx?id=103553> (last visited Apr. 12, 2009).

149. BABCOCK & LASCHEVER, *supra* note 98, at 148.

been calls for creative solutions in other areas of election law.¹⁵⁰ This would be no different.

Negotiated rulemaking will provide a forum for the parties to fully explore the many options available to prevent homeless disenfranchisement. This negotiated rulemaking varies from many of the typical regulation negotiations in that there is no immediate threat of arbitration or litigation. This rulemaking is completely voluntary. As such, it may leave open a greater possibility that participants walk away from the table if they feel their interests are not being addressed. It may encourage participants to work together to find the best possible solution, rather than becoming adversarial and threatening to end the discussion because they feel adjudication would grant them a more favorable outcome. Further, though many, if not all, states conform to the guidelines issued by the EAC, these guidelines are voluntary; without the congressional authority to issue mandatory rules, there is no guarantee that every state would conform to any guidelines issued by the EAC as a result of this negotiation. However, even if EAC guidelines are not mandatory or the negotiation does not reach consensus at all, this process will have brought the plight of homeless disenfranchisement to the forefront of public awareness. The use of negotiated rulemaking will give the homeless a de facto legislative voice—the constituents and legislators will speak for them, even if the homeless cannot speak for themselves through their vote.

SARAH DEVLIN

150. For an example, see Ben Hovland, Comment, *Championed by Progressives and William U'ren: Can Oregon Give the Ballot Initiative to the People Again?*, 85 OR. L. REV. 275 (2006) (discussing political reforms for the ballot initiative process).

