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State Legislatures Adjourning, But Voting Rights Still Center Stage



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Voting rights advocates have been carefully watching state legislatures since 2010—when restrictive voting laws were widely introduced across the country. The 2015 legislative session has been interesting for both what has happened and what has not. At least 113 bills that would restrict access to registration and voting have been introduced or carried over in 33 states.¹ Nearly half the bills are aimed at establishing voter ID requirements or tightening pre-existing ones, but only one has passed thus far.² On the other hand, in the same period, at least 464 bills that would enhance access to voting were introduced or carried over in 48 states plus the District of Columbia.³ While fewer bills restricting access to the ballot box have passed this year than in prior legislative sessions, voting rights are, appropriately, still garnering significant public attention because of high-profile decisions by the U.S. Supreme Court and lower federal courts.

¹ Voting Laws Roundup, BRENNAN CTR. FOR JUSTICE (June 3, 2015), <http://www.brennancenter.org/analysis/voting-laws-roundup-2015>.

² Id.

³ Id.

Decisions and Ongoing Cases

This term the Supreme Court issued several major decisions concerning voting rights. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,⁴ the court upheld an independent redistricting commission created by Arizona voters. In doing so, the court held that the U.S. Constitution's Elections Clause should be read expansively. This constitutional provision states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature* thereof..."⁵

The court held that "Legislature" should be read to include the entirety of a state's legislative process, including initiatives directly passed by its voters.⁶ This decision will leave in place independent commissions and citizen-initiated election laws in 25 states that could have been threatened by a different outcome.⁷

The Supreme Court also decided to hear a redistricting case that could radically change the way states draw district boundaries each decade. In *Evenwel v. Abbott*,⁸ slated to be heard in the fall of 2015, the issue before the court will be whether a state should use its voting-eligible population, rather than its total population, when drawing new legislative district lines. Today, all but two states use total population when drawing legislative districts.⁹ Using only the voting-eligible population could have a significant impact on representation in districts with large numbers of non-citizens or minors.¹⁰

In another significant voting rights case this term, the Supreme Court weighed in on Kansas' and Arizona's laws that require a voter to present documentary proof of citizenship when first registering.¹¹ In *Kobach v. U.S. Election Assistance Commission*,¹² those states petitioned for

⁴ *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

⁵ U.S. CONST. art. I, §4, cl. 1 (emphasis added).

⁶ The initiative process, whereby citizens circulate petitions to place a matter on the ballot to be voted upon, is generally referred to as "direct democracy." See Initiative, Referendum and Recall, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx> (last visited July 24, 2015).

⁷ See Adam Liptak, "Supreme Court Rebuffs Lawmakers Over Independent Redistricting Panel," N.Y. TIMES, June 30, 2015, at A13, available at <http://www.nytimes.com/2015/06/30/us/supreme-court-upholds-creation-of-arizona-redistricting-commission.html>; "Could the Supreme Court Make Dozens of State Election Laws Unconstitutional?" BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/supreme-court-could-make-dozens-election-laws-unconstitutional> (last visited July 24, 2015).

⁸ *Evenwel v. Perry*, No. A-14-CV-335-LY-CH, 2014 WL 5780507 (W.D. Tex. 2014), cert. granted sub nom. *Evenwel v. Abbott*, 135 S. Ct. 2349 (2015).

⁹ Kansas and Hawaii do not use total population when drawing legislative districts; they each exclude non-resident military personnel and non-resident students. See KAN. CONST., art. X, §1; *Kostick v. Nago*, 960 F.Supp.2d 1074 (D. Haw. 2013) aff'd, 134 S. Ct. 1001 (2014).

¹⁰ See Zachary Roth, "SCOTUS to Hear Case That Could Set Back Latino Voting Power," MSNBC (May 27, 2015, 9:24 AM), <http://www.msnbc.com/msnbc/scotus-hear-case-could-set-back-latino-voting-power>.

¹¹ See Jerry H. Goldfeder and Myrna Pérez, "Voting Restrictions: From Statehouses to Courts," NYLJ (Oct. 24, 2014), available at <http://www.stroock.com/siteFiles/Pub1552.pdf>.

certiorari to review a Tenth Circuit decision upholding the U.S. Election Assistance Commission's decision not to modify the federal voter registration form to include the states' documentary proof of citizenship requirements. The high court declined to grant cert, letting stand the holding that Kansas and Arizona had failed to prove that citizenship requirements were necessary to ensure registered voters met all of the eligibility requirements.¹³

Other cases are working their way through the courts. In Texas, the U.S. Court of Appeals for the Fifth Circuit is reviewing a strict photo ID law that the U.S. District Court¹⁴ held was enacted with the intent to discriminate, and, accordingly, violated Section 2 of the Voting Rights Act, placed an unconstitutional burden on the right to vote, and constituted an unconstitutional poll tax.¹⁵

Another major voting challenge is being litigated in North Carolina. In 2013, Gov. Pat McCrory signed a bill into law that enacted a strict photo identification requirement for 2016 and eliminated seven days of early voting, same-day voter registration, and pre-registration for 16- and 17-year-olds, along with other restrictive changes, for 2014.¹⁶ Opponents of the law sought a preliminary injunction before the 2014 election, and although the U.S. Court of Appeals for the Fourth Circuit granted a partial injunction, the Supreme Court stayed that order and the law was in full effect for the 2014 election.

Before a trial on the merits was set to take place this summer, North Carolina lawmakers changed the photo ID portion of the law, allowing voters without ID to cast a provisional ballot that will be counted—as long as the voter shows a reasonable impediment that prevented them from acquiring a photo ID and provides identifying information otherwise necessary to register to vote.¹⁷ The trial began in July.¹⁸

Registration System

On March 5, the State of Oregon, almost immediately upon Kate Brown becoming governor after her predecessor resigned in disgrace,¹⁹ passed groundbreaking voter registration legislation that will streamline voter registration in the state by putting more responsibility on

¹² *Kobach v. U.S. Election Assistance Comm'n*, 722 F.3d 1183 (10th Cir. 2014), cert. denied, No. 14-1164, 2015 WL 1307634 (U.S. 2015).

¹³ See Lyle Denniston, "Opinion Analysis: A Cure for Partisan Gerrymandering?" SCOTUSBLOG (June 29, 2015, 3:21 PM), <http://www.scotusblog.com/2015/06/opinion-analysis-a-cure-for-partisan-gerrymandering/>.

¹⁴ *Veasey v. Perry*, 71 F.Supp.3d 627 (S.D. Tex. 2014).

¹⁵ See Jerry H. Goldfeder and Myrna Pérez, "Proving Who You Are: The Legal Battle Over Voter ID Laws," 251 NYLJ (June 4, 2014), available at <http://www.stroock.com/SiteFiles/Pub1495.pdf>.

¹⁶ H.B. 589, Gen. Assemb. (N.C. 2013).

¹⁷ H.B. 836, Gen. Assemb. (N.C. 2015).

¹⁸ Sharon McCloskey, "Voting Rights Trial Opens on Monday, NC POLICY WATCH (July 9, 2015), <http://www.ncpolicywatch.com/2015/07/09/voting-rights-trial-opens-on-monday/>.

¹⁹ See Kirk Johnson, "New Governor Seeks Public's Trust in Oregon," N.Y. TIMES, Feb. 19, 2015, at A12, available at http://www.nytimes.com/2015/02/19/us/kate-brown-replacing-john-kitzhaber-as-oregon-governor.html?_r=0.

the government to register eligible citizens to vote.²⁰ The law will automatically register those eligible citizens who obtain or renew DMV identification. People will have the opportunity to decline to register, and there are practices and protocols to ensure ineligible persons are not accidentally registered. Shortly after Oregon passed its law, 17 other states introduced bills seeking to make their voter registration electronic and automatic.²¹ New York is one of them.²²

Following Oregon's lead, on June 4, former Secretary of State and presidential candidate Hillary Rodham Clinton announced her support for automatic, universal registration of all citizens when they turn 18.²³ On June 29, the New Jersey Legislature also passed automatic voter registration, along with other reforms like online registration and early voting.²⁴ Governor Chris Christie has indicated he may veto the bill,²⁵ but voting rights advocates in New Jersey have vowed their efforts would continue.²⁶

All told, the cross-currents on voting rights are undergoing a seismic shift. It remains to be seen whether the state houses or the courthouses are going to be more significant, and what the final landscape will look like.

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²⁰ H.B. 2177, 78th Legis. Assemb., Reg. Sess. (Or. 2015).

²¹ Automatic Voter Registration, BRENNAN CTR. FOR JUSTICE (July 6, 2015), <https://www.brennancenter.org/analysis/automatic-voter-registration>.

²² A.B. 6610, Assemb., 2015-2016 Reg. Sess. (N.Y. 2015).

²³ See Anne Gearan and Niraj Chokshi, "Hillary Clinton Calls for Sweeping Expansion of Voter Access," WASH. POST (July 4, 2015), http://www.washingtonpost.com/politics/hillary-clinton-calls-for-sweeping-expansion-of-voter-registration/2015/06/04/691f210c-0adb-11e5-9e39-0db921c47b93_story.html.

²⁴ Democracy Act, A.B. 4613, 216th Leg. (N.J. 2015).

²⁵ See Clause Brodesser-Akner, "Christie Attacks N.J.'s 'Democracy Act' as DNC Attempt to Up Voter Fraud," NJ.COM (June 29, 2015, 4:47 AM), http://www.nj.com/politics/index.ssf/2015/06/christie_attacks_njs_democracy_act_as_dnc_attempt.html.

²⁶ See Samantha Lachman, "Chris Christie Looks Likely to Veto New Jersey Voting Reforms," HUFFINGTON POST (July 9, 2015, 12:00 PM), http://www.huffingtonpost.com/2015/07/09/chris-christie-new-jersey_n_7761708.html.