

Government and Election Law

Voting Restrictions: From Statehouses to Courts

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Thousands of eligible voters are at risk of having a more difficult time casting their ballots this November than in past years. Since the 2010 legislative elections, new voting restrictions have been passed by legislators in no fewer than 22 states.¹ And voters have fewer protections against discrimination at the ballot box than in prior years.

In the summer of 2013, the Supreme Court ruled in *Shelby County v. Holder*, a decision that struck down an important provision of the Voting Rights Act that had protected certain voters against discrimination at the ballot box.² Only hours after the opinion was released, the attorney general of Texas announced that his state's strict photo ID law, which had been blocked under the now inoperative "preclearance" provision of the Voting Rights Act, would go into effect³—despite estimates that over 600,000 registered voters⁴ (as many as half of whom are Latino⁵) would not have the identification now required by Texas to vote.

With similar alacrity after the ruling in *Shelby County*, North Carolina imposed what has been called the most draconian voting law in the nation. It includes a strict photo ID requirement, a significant cut-back on early voting, and an end to same-day registration.⁶ Lawmakers there, as in Texas, waited until after the preclearance requirement had been eliminated to move forward with the legislation; a state Senate committee chair admitted to the press after the *Shelby County* decision, "now we can go with the full bill" rather than a less restrictive version.⁷

With statehouse battles largely over—for now—the action has shifted to the courts. Advocates have challenged photo ID laws in Arkansas,⁸ Texas⁹ and Wisconsin;¹⁰ in North Carolina¹¹ and Ohio,¹² cutbacks to early voting are at issue; and proof-of-citizenship requirements are being challenged in Arizona¹³ and Kansas.¹⁴

It would be difficult to dispute that the laws being challenged in these cases, along with all of the other restrictive measures that have recently been enacted, represent a reversal of the general trend throughout most of our history to expand voting rights and make the process of voting more convenient and accessible.¹⁵ Indeed, there is ample evidence that these restrictive laws have a disproportionate impact on minorities. Nationwide, the Brennan Center has found that of the 11 states with the highest African-American turnout in 2008, seven passed laws making it harder to vote. Of the 12 states with the largest Hispanic population growth in the 2010 census, nine have new restrictions in place. And of 15 states that had been subject to Section 5 preclearance because of a history of racial discrimination in elections, nine passed new restrictions.¹⁶

Since 2011, eight states that had seen increases in minority early voting have sharply cut back on early voting hours and days—often slashing the days and hours mostly used by minorities and hourly workers, such as Sundays and evenings.¹⁷

Challenges in the Courts

Challenges to these laws are making their way through the courts. In Wisconsin, a federal trial court enjoined that state's photo ID law, and the U.S. Court of Appeals for the Seventh Circuit stayed that injunction (and upheld the photo ID law on the merits¹⁸). However, on Oct. 9, the Supreme Court vacated the stay of the district court's injunction—so the photo ID law will not be in effect for this November's elections, but may be so in future elections.¹⁹

In Ohio, a state never subject to the now-infirm section of the Voting Right Act, state officials eliminated the state's period of same-day registration popularly known as "Golden Week" and reduced early voting. The trial court enjoined these provisions, and that injunction was upheld on appeal.²⁰ Ohio filed an emergency application to the Supreme Court, and on Sept. 29 the high court stayed the district court's preliminary injunction.²¹ So, in this year's elections, Golden Week is gone.

A federal district court in Texas struck down its strict photo ID law and imposed an injunction, finding after a two-week trial that the law had been enacted with a discriminatory purpose, created an unconstitutional burden on the right to vote, had an impermissible discriminatory effect against Latinos and African Americans, and constituted a long-outlawed poll tax.²² This same law had been blocked by the now-inoperative preclearance provision of the Voting Rights Act, and would still be blocked had the Shelby County decision not come down.

Texas appealed to the U.S. Court of Appeals for the Fifth Circuit, and on Oct. 14 that court, without questioning the trial court's finding of intentional discrimination, nevertheless stayed the district court's injunction.²³ Plaintiffs filed an emergency appeal to the U.S. Supreme Court, which was summarily rejected on the morning of Saturday, Oct. 18. Justice Ruth Bader

Ginsburg, joined by Justices Sonia Sotomayor and Elena Kagan, wrote a scathing dissent, but Texas' strict photo ID law will be in place for November's voting. (Co-author Myrna Perez is one of the litigators in *Texas NAACP v. Steen*, one of the consolidated cases challenging the Texas photo ID law.)

A challenge to Kansas and Arizona's laws requiring presentation of documentary proof-of-citizenship as a precondition to voting is sub judice in the U.S. Court of Appeals for the Tenth Circuit.²⁴

Amid these judicial setbacks, voters have had one recent, significant victory: On Oct. 15, the Arkansas Supreme Court unanimously held that that state's photo ID law violated the state constitution by imposing an additional "qualification" to voting that would make it more difficult for citizens to cast a ballot.²⁵

Conclusion

Ongoing litigation challenging restrictive voting laws has generated confusion and ambiguity as the elections approach. Election officials, community leaders and voting advocates, not to mention many candidates for office, must now affirmatively educate the public as to what the voting requirements are in their states.

Clarity might be hard to come by, perhaps prompting widespread recount litigation in close elections. Congress should, therefore, revise the weakened Voting Rights Act to ensure that elections are free, fair and accessible to all. Until then, however, restrictive voting laws such as these will, undoubtedly, continue to be challenged in the courts.

Endnotes:

1. Wendy Weiser & Erik Opsal, "The State of Voting in 2014" (2014), available at www.brennancenter.org/sites/default/files/analysis/State_of_Voting_2014.pdf.
2. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).
3. See Tomas Lopez, "*Shelby County: One Year Later*," (2014), available at <http://www.brennancenter.org/analysis/shelby-county-one-year-later>.
4. Plaintiffs' and Plaintiff-Intervenors' Findings of Fact & Conclusions of Law at 21, *Veasey v. Perry*, No. 13-cv-00193 (S.D. Tex. Sept. 18, 2014).
5. Letter from Thomas E. Perez, Assistant Att'y Gen., to Keith Ingraham, Director of Elections, Office of the Texas Secretary of State (March 12, 2012), available at http://www.justice.gov/crt/records/vot/obj_letters/letters/TX/1_120312.pdf.
6. Lopez, "*Shelby County: One Year Later*," supra note 3.

7. Laura Leslie, “NC Voter ID Bill Moving Ahead With Supreme Court Ruling,” WRAL.com (June 25, 2013), <http://www.wral.com/nc-senator-voter-id-bill-moving-ahead-with-ruling/12591669/>.
8. *Kohls v. Martin*, No. CV-14-462 (Ark. Sup. Ct.).
9. *Veasey v. Perry*, No. 13-CV-193 (S.D. Tex.).
10. *Frank v. Walker*, No. 14-2058 (7th Cir.).
11. *League of Women Voters of N.C. v. McCrory*, No. 13-cv-660 (M.D.N.C.); *N.C. State Conference of the NAACP v. McCrory*, No. 13-cv-658 (M.D.N.C.); *United States v. N.C.*, No. 13-cv-861 (M.D.N.C.).
12. *Ohio State Conference of the NAACP v. Husted*, No. 14-3877 (6th Cir.).
13. *Kobach v. Election Assistance Commission (EAC)*, No. 13-cv-4095 (D. Kan.); No. 14-3062 (10th Cir.).
14. *Id.*
15. See Wendy Weiser, “In 22 States, a Wave of New Voting Restrictions Threatens to Shift Outcomes in Tight Races,” *The American Prospect* (Fall 2014), available at <http://prospect.org/article/22-states-wave-new-voting-restrictions-threatens-shift-outcomes-tight-races>.
16. See Weiser, “Wave of New Voting Restrictions,” *supra* note 10 (citing Weiser & Opsal, “The State of Voting in 2014,” *supra* note 1).
17. *Id.*
18. *Frank v. Walker*, No. 14-2058, 2014 WL 4966557 (7th Cir. Oct. 7, 2014).
19. The photo ID law was also challenged in state court. In July 2014, the Wisconsin Supreme Court upheld the law against a state constitutional challenge by interpreting it so that voters cannot be forced to pay for underlying documents needed to get a free ID, such as a birth certificate. In so doing, the state’s highest court reversed two separate trial court judges’ rulings that the law was inconsistent with state constitutional protections. *Major Voting Litigation That Could Impact 2014*, available at <http://www.brennancenter.org/major-voting-litigation-could-impact-2014>.
20. *Ohio State Conference of the NAACP v. Husted*, No. 14-3877, 2014 WL 4724703 (6th Cir. Sept. 24, 2014).
21. *Husted v. Ohio State Conference of the NAACP*, No. 14A336, 2014 WL 4809069 (Sept. 29, 2014).

22. *Veasey v. Perry*, No. 13–CV–00193, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014).

23. *Veasey v. Perry*, No. 14-41127, slip op., (5th Cir. Oct. 14, 2014).

24. *Kobach v. Election Assistance Commission* (EAC), No. 14-3062 (10th Cir.).

25. *Kohls v. Martin*, No. CV-14-462 (Ark. Sup. Ct. Oct. 15, 2014).

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