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Court Victories Don't Mean Voters Are in the Clear



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As the country prepares itself for the presidential election in November, a flurry of recent court rulings have blocked or blunted the efforts of three state legislatures to impose barriers to the ballot box. Litigation activity over strict photo ID laws or other voting restrictions in Texas, North Carolina and North Dakota has quieted, leaving voters, principally minority voters, in these states in a better position than they were a few months ago but worse off than in the last presidential election. Let us explain.

Photo ID Laws

In 2012, the country had only four states with very strict photo ID laws in effect, requiring the kind of IDs that high numbers of otherwise eligible voters do not have. In 2016 the number of states with such restrictive ID laws has doubled (and the number would be even higher were it not for the courts). The sharp increase appears to be significantly influenced by two factors. First, strict photo ID laws have been the most common legislative technique used by those attempting to deflate voting — rationalized by the goal of eliminating alleged impersonation at the polls. A wave of restrictive voting laws swept the country after the 2010 state legislative elections and took numerous forms, but strict photo ID laws were the most prevalent.

The second factor, of course, was the evisceration of the pre-clearance provision of the Voting Rights Act, known as Section 5—which required the Department of Justice or a three-judge court in DC to approve electoral changes in certain states and counties with a history of discrimination. In 2013, the U.S. Supreme Court, in [Shelby County v. Holder](#), 133 S.Ct. 2612 (2013), gutted this decades-old tool on the ground that the formula that determined which jurisdictions were covered by Section 5 was outdated. Thus, *Shelby County* removed the most effective means to combat restrictive legislation harmful to minority voters.

Indeed, within only hours after the Shelby County decision, Texas announced it would implement what is considered to be the nation’s strictest voter ID law, a law that had been blocked under the now-dormant Section 5 provision of the Voting Rights Act.¹ The North Carolina Legislature, likewise free from the worry of a Section 5 challenge, immediately packed a bill with a variety of voting restrictions.² As General Assemblyman Tom Apodaca said at the time, as quoted in *The New York Times*, “Now we can go with the full bill.” With the “legal headache” of Section 5 out of the way a more extensive “omnibus” bill could be implemented.³

We have also seen strict photo ID laws arise in places that could not be subjected to a legal challenge under Section 5 even before the Shelby County decision. North Dakota and Wisconsin are two examples.

The Texas and North Carolina cases have very lengthy and complicated procedural histories, but matters seem to be temporarily resolving—at least for the November election. On July 20 of this year, the full Fifth Circuit Court of Appeals issued a decision finding the Texas photo ID law had a discriminatory effect in violation of Section 2 of the Voting Rights Act, a provision that was untouched by the Shelby County decision. [Veasey v. Abbott](#), 830 F.3d 216 (5th Cir. 2016). (Co-author Myrna Pérez was one of the litigators for the plaintiffs.)

The appellate court sent the case back to the district court to craft a solution to address the discriminatory effect in time for the 2016 election. On Aug. 10, the district court judge approved a plan proposed by the parties that allows voters who do not have an otherwise required ID—and who face a reasonable impediment or difficulty in getting one—to vote a regular ballot if they: (a) sign a declaration explaining their difficulty getting the accepted ID and (b) present one of a number of documents—including a utility bill, paycheck, or other

¹ To see the text of the law as passed by the Legislature and initially implemented, consult Tex. Elec. Code Ann. §63.0101.

² To see the law as passed by the Legislature, consult H.B. 589, 2013 Leg., Reg. Sess. (N.C. 2013).

³ William Wan, “Inside the Republican Creation of the North Carolina Voting Bill Dubbed the ‘Monster’ Law,” *N.Y. Times*, (Sept. 2, 2016), https://www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html.

government document. Texas voters previously disenfranchised by the prohibitive voter ID law are now able to vote in November's election under the interim remedy.

Likewise, a panel of federal appeals court judges struck down North Carolina's omnibus law, including its photo ID law, in July of this year, finding its restrictions discriminatorily motivated. *North Carolina State Conference of the NAACP v. McCrory*, No. 16-1468, WL 4053033, at *9 (4th Cir. July 29, 2016). The court found that the law's provisions "target African Americans with almost surgical precision" in an attempt to limit African-American turnout at the polls. The judges pointed out that Republican leaders crafted the law only after receiving data indicating that African-American voters would be most significantly impacted by it. "We cannot ignore the record evidence that, because of race, the legislature enacted one of the largest restrictions of the franchise in modern North Carolina history," the panel wrote. North Carolina's Republican governor petitioned the Supreme Court to set aside the appellate court's decision for this November's election, but the court rejected the request.

In contrast, North Dakota's photo ID law has thus far had a shorter journey through the courts. Prior to 2013, North Dakota allowed voters to cast a ballot without being asked for ID unless the election official didn't recognize him or her. In 2013, all voters were required to present one of five types of IDs. In 2015, the law became even stricter—eliminating college IDs and military IDs as appropriate forms of voter ID as well. Additionally, all ID cards had to show current residential addresses. On Aug. 1, a district court preliminarily blocked North Dakota's photo ID law, finding that it discriminatorily impacted Native Americans. *Brakebill v. Jaeger*, No. 1:16-cv-008 (N.D. Aug. 1, 2016).

In somewhat of a departure from the other cases, Wisconsin's restrictive photo ID law remains largely in place. But there is a bright side — the litigation resulted in a theoretically easier path than the photo ID law originally contemplated for obtaining the kind of identification required to vote. While the most recent court decision declined to enjoin the law, the decision suggests that the court was persuaded by a representation by the state that it would mail a free ID that can be used for voting to anyone who came to a DMV office to request one. *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016). This was not the state's position when the litigation started. Unfortunately, news reports suggest that this representation is not actually happening in practice.⁴

⁴ See e.g. Patrick Marley, "DMV Workers at 7 More Stations Give Wrong Voter ID Info," *Journal Sentinel*, (Oct. 3, 2016, 11:23 PM), <http://www.jsonline.com/story/news/politics/elections/2016/10/03/dmv-workers-6-more-stations-give-wrong-voter-id-info/91461338/>.

Obstacles in November

Though these victories will make it somewhat easier for voters to cast ballots in November, there remain at least three forms of obstacles facing voters in these states (and others) this November: confusion, partisan machinations, and self-designated “policing” at the polls.

Legal changes, even when they improve access for voters, can cause confusion over the state of the law. For example, after Pennsylvania’s photo ID law was struck down in 2012, there were still reports of voters being asked for photo ID. In a more recent example, Texas officials enforced the strict photo ID law in multiple elections (notwithstanding several courts ruling it invalid). Given the strong need in a circumstance like this for robust education, the private plaintiffs and the Department of Justice were compelled to return to court multiple times to ask for its assistance in improving the accuracy and adequacy of the state education effort.

Even when there is a court ruling, there still could be partisan machinations to try and evade the outcome of the court ruling. North Carolina is a recent example of this. Although the photo ID provision of the omnibus North Carolina law received the most attention, the law also included cutbacks to early voting. As noted above, the U.S. Court of Appeals for the Fourth Circuit struck down the omnibus law, including the early voting cutbacks, but in the case of early voting, election boards at the state and county level retained jurisdiction to implement the court’s ruling. The members of these boards of elections are appointed—the State Board by the governor, and the county boards by the State Board. The North Carolina Republican Party Executive Director Dallas Woodhouse emailed members of county election boards who were Republican appointees and advised, “Republicans can and should make party line changes to early voting.”⁵ Thus, the efforts to cut back early voting that were struck down by the court, resurfaced in another setting.

Finally, there is a concern over the possibility that certain voters will face intimidation or discrimination at the polls due to private persons taking it upon themselves to “police” polling places to prevent alleged wrongdoing by voters. These policing efforts have sometimes had the effect of suppressing the vote in various states. Indeed, this kind of conduct led, in the 1980s, to a consent decree regulating such practices which remains in effect. Poll site monitoring of this kind also causes confusion and congestion, further suppressing the vote.

All told, the changing laws coupled with diverse court rulings in a highly partisan atmosphere may jeopardize a smooth and efficient Election Day. Election officials and advocates must be

⁵ Colin Campbell, “NC Republican Party Seeks ‘Party Line Changes’ to Limit Early Voting Hours,” (Aug. 17, 2016 1:55 PM), <http://www.jsonline.com/story/news/politics/elections/2016/10/03/dmv-workers-6-more-stations-give-wrong-voter-id-info/91461338/>.

vigilant in assisting voters to be able to cast ballots, and voters must take the extra steps required to educate themselves as to the rules in their states.

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