Protecting the Ballot for All:

How Federal Courts Have Vindicated the Constitution and Prevented Voter Suppression by the States in the Run Up To the 2016 Election

By David H. Gans

Introduction

This election season has witnessed a string of huge court victories vindicating the right to vote and invalidating restrictive voting laws—many passed in the wake of the Supreme Court's 2013 decision in *Shelby County v. Holder* striking down a core part of the Voting Rights Act.[1] In case after case, courts have carefully reviewed tough voting restrictions, and concluded that these laws make it harder for racial minorities and others to exercise their constitutional right, perpetuate past discrimination, and cannot be justified by states' purported governmental interests. Applying the Constitution, the Voting Rights Act, or both, courts are making it clear that states must respect the voting rights of all citizens, and cannot resort to tenuous justifications to burden the fundamental right to vote, a right protected by more provisions of the Constitution than any other right.

In some of these cases, courts have issued broad relief, freeing voters from discriminatory laws and ensuring that voters can go to the polls this November without barriers; in others, the courts have softened voting restrictions—creating safeguards that blunt the worst effects of discriminatory laws, but that may or may not be enough to secure the right to vote for all. Even though the scope of relief provided has varied, what we are seeing is potentially an important shift in the law: courts are refusing to rubberstamp state laws that make it harder for some citizens to vote and are holding states to the requirement of showing that election regulations help, not hurt, our democracy.

The Supreme Court, however, remains closely divided on the issues, as evidenced by the Court's recent 4-4 split over whether to stay an appellate ruling invalidating North Carolina's omnibus voter suppression law, a ruling in which the court of appeals found that the law's provisions surgically targeted African American voters.[2] Given the ideological divisions on the Supreme Court, the next Justice confirmed to the Court will effectively have the power to determine whether voter suppression laws like North Carolina's that make it harder for minorities to vote will be enforced or struck down. In the meantime, though, one thing is clear: the jurisprudence developed by the lower courts offers a solid foundation for enforcing the promise of equal political opportunity reflected in both the Constitution and the Voting Rights Act.

[1] 133 S. Ct. 2612 (2013).
[2] *North Carolina v. NC Conference of the NAACP*, 16A168 (Aug. 31, 2016).

I. Recent Voting Rights Cases

A. Important Voting Rights Victories

The trend of voting rights victories started, surprisingly enough, with a ruling by the most conservative federal appeals court in the nation, the United States Court of Appeals for the Fifth Circuit. On July 20, in *Veasey v. Abbott*, the entire Fifth Circuit, by a vote of 9-6, struck down SB 14, Texas's voter identification law—which allows use of a gun permit as an ID to vote, but not a government-issued employee or student photo identification card—as a violation of the Voting Rights Act's prohibition on discriminatory results. In an opinion written by George W. Bush nominee Judge Catherina Haynes, the court held that "SB 14 has a discriminatory effect on minorities' voting rights in violation of Section 2 of the Voting Rights Act," finding that "SB 14 creates a racial disparity by requiring the use of certain IDs to vote that minorities disproportionately lack" and that "the provisions of SB 14 fail to correspond in any meaningful way to the legitimate interests the State claims to have been advancing through SB 14."[3] The Voting Rights Act, which the court recognized enforces the Fifteenth Amendment's ban on racial discrimination in voting, prohibits "needlessly burdensome laws with impermissible racially discriminatory impacts," aiming to "prevent just such invidious, subtle forms of discrimination."[4]

The Fifth Circuit approved a narrow remedy, which left the voter identification law in place but ordered the district court to "rectify . . . the discriminatory effect on those voters who do not have SB 14 ID or are unable to reasonably obtain such identification."[5] For the 2016 election, the district court ordered that voters who lack SB 14 ID can exercise their right to vote by presenting one of a broad list of documents—including a voter registration certificate, a current utility bill, or a bank statement—and filling out a "reasonable impediment" declaration, the reasonableness of which cannot be questioned by state election officials.[6]

The *Veasey* majority wrote that a broader remedy would be appropriate based on a finding of intentional racial discrimination, and remanded to the district court for further proceedings the plaintiffs' claim that SB 14 was intentionally crafted to discriminate against racial minorities on account of race, holding that some of the evidence on which the district court had relied was improper.[7] Critically, the *en banc* majority recognized that "neutral reasons can and do mask racial intent" and that "people hide discriminatory intent behind

[3] *Veasey v. Abbott,* No 14-41127*,* slip op. at 72, 71 n.61, 68 (5th Cir. July 20, 2016) (en banc).
[4] *Id.* at 41.
[5] *Id.* at 83.
[6] *Veasey v. Abbott*, No. 13-193 (S.D. Tex. Aug. 10, 2016). The "reasonable impediment" declaration requires a voter to sign a statement that he or she could not obtain one of the photo ID required by SB 14, and list the reason for the failure, including lack of transportation, lack of birth certificate, work schedule, or other difficulty. The declaration itself provides that the reasonableness of a voter's impediment to obtaining ID cannot be questioned.
[7] *Veasey*, slip op. at 12-20. Two of the judges who joined the majority *en banc* opinion would have upheld the district court's judgment that SB 14 was enacted with discriminatory intent, concluding that the district court had properly applied the law to the facts in finding SB 14 unconstitutional. *Id.* at 172-77 (Dennis, J., concurring in part and dissenting in part); *id.* at 190-203 (Costa, J., dissenting in part).

seemingly legitimate reasons."[8] It held that the plaintiffs had presented circumstantial evidence of discriminatory intent, observing that

- "[t]he record shows that drafters and proponents of SB 14 were aware of the likely disproportionate effect of the law on minorities, and that they nonetheless passed the bill without adopting a number of proposed ameliorative measures that might have lessened this impact";
- the bill was "subjected to radical departures from normal procedures"; and
- "the cloak of ballot integrity could be hiding a more invidious purpose," particularly since "in-person voting, the only concern addressed by SB 14, yielded only two convictions for in-person voter impersonation fraud out of 20 million votes cast in the decade leading up to SB 14's passage."[9]

If the district court, once again, finds that SB 14 was motivated by discriminatory intent, it could invalidate SB 14 in its entirety, or even require Texas to preclear future voting changes under the Voting Rights Act.[10]

On the heels of the Fifth Circuit's ruling, in *North Carolina State Conference of the NAACP v. McCrory*, the United States Court of Appeals for the Fourth Circuit struck down North Carolina's omnibus voter-suppression law—enacted immediately in the wake of *Shelby County*—which imposed a restrictive photo identification requirement and eliminated a host of laws designed to foster minority political participation. [11] All three judges agreed that the North Carolina statute was enacted with discriminatory intent. Judge Diana Gribbon Motz's opinion for the court explained that, at the moment "African Americans were poised to act as a major electoral force," North Carolina enacted "the most restrictive voting legislation seen in North Carolina since the enactment of the Voting Rights Act of 1965," "target[ing] African Americans with almost surgical precision." [12] In the wake of *Shelby County*, the legislature rushed to toughen its voter identification law to "retain[] only those types of photo ID disproportionately held by whites and [to] exclude[] those disproportionately held by African Americans," while "swift[ly] eliminat[ing] . . . the tools African Americans had used to vote."[13] Never has a legislature, the Fourth Circuit observed, "done so much, so fast, to restrict access to the franchise."[14]

As in *Veasey*, the Fourth Circuit in *North Carolina State Conference of the NAACP* carefully reviewed the state's justifications for its new rules and found them wanting. North

[8] *Id.* at 22.
[9] *Id.* at 23, 25, 31, 27.
[10] Section 3 of the Voting Rights Act, 52 U.S.C. § 10302(c), gives federal courts the authority to subject governments to a duty to preclear in order to remedy "violations of the fourteenth or fifteenth amendment justifying equitable relief."
[11] *North Carolina State Conf. of the NAACP v. McCrory*, Nos. 16-1468, 1469, 1474, 1529 (4th Cir. July 29, 2016).
[12] *Id.* at 10, 41, 11.
[13] *Id.* at 43, 56.
[14] *Id.* at 44.

Carolina's package of restrictive laws, Judge Motz explained, "were not tailored to achieve its purported justifications, a number of which were in all events insubstantial. In many ways, the challenged provisions . . . constitute solutions in search of a problem. The only clear factor linking these various 'reforms' is their impact on African American voters."[15] The court struck down all five challenged restrictions, finding that "the proper remedy for a legal provision enacted with discriminatory intent is invalidation."[16] As noted above, an equally divided Supreme Court refused to stay the ruling. This means that voters in North Carolina will be able to exercise their right to vote in November free from these discriminatory measures.

Voting rights victories have spanned all parts of the nation. In *Brakebill v. Jaeger*, a federal district court in North Dakota preliminarily enjoined that state's restrictive voter identification law, which had eliminated previously existing fail-safe provisions designed to ensure the right to vote for those who could not reasonably obtain an ID.[17] Observing that "Native Americans face substantial and disproportionate burdens in obtaining each form of ID deemed acceptable under the new law," and that almost one out of every four "Native American eligible voters do not currently possess a qualifying voter ID," the court held that a "safety net is needed for those voters who cannot simply obtain a qualifying voter ID with reasonable effort" and enjoined use of the state's voter ID law "without the existence of a 'fail-safe' provision."[18] Citing the entrenched poverty that many Native Americans face, the court held that North Dakota had imposed an unreasonable burden on the right to vote in violation of the Fourteenth Amendment.

In Wisconsin, two federal courts intervened to limit state efforts to make it harder to vote. In *Frank v. Walker*, a federal district court softened the state's voter identification law, finding that "although most voters in Wisconsin either possess qualifying ID or can easily obtain one, a safety net is needed for those voters who cannot obtain qualifying ID with reasonable effort."[19] In *One Wisconsin Institute, Inc. v. Thomsen*, another federal district in Wisconsin reached a similar conclusion, while also striking down a host of new restrictive state laws, including cutbacks on early voting as well as a lengthier durational residency requirement, finding that the state's new rules imposed an undue burden on the right to vote.[20] The court held that the state's voter identification law "lacks a functioning safety net for qualified electors who cannot get a voter ID with reasonable effort."[21] According to the court, the state's current system for providing voter IDs "is a wretched failure: it has disenfranchised a number of citizens who are unquestionably qualified to vote, and these disenfranchised citizens are overwhelmingly African American and Latino. The [ID petition process] violates the constitutional rights of those who must use it."[22] The court also held that state laws that limited

[15] *Id.* at 68-69.
[16] *Id.* at 71.
[17] *Brakebill v. Jaeger,* No. 16-008 (D.N.D. Aug. 1, 2016).
[18] *Id.* at 9, 18, 22, 2.
[19] *Frank v. Walker*, No. 11-1128, slip op. at 3 (E.D. Wis. July 19, 2016).
[20] *One Wisconsin Institute, Inc. v. Thomsen*, No. 15-324 (W.D Wis. July 29, 2016).
[21] Id. at 4.
[22] *Id.* at 29.

municipalities to one early voting site per county, and cut back the days and hours available for early voting, unnecessarily burdened the right to vote, finding that the "legislature specifically targeted large municipalities—Milwaukee in particular—intending to curtail minority voting" in violation of the Fifteenth Amendment.[23] The court also struck down Wisconsin's attempt to increase its durational residency requirement from 10 to 28 days, finding that the 28-day rule "simply make[s] it harder for otherwise eligible voters to vote."[24]

The two district courts issued different remedies. To fix the constitutional flaws in the state's voter identification law, the district court in *One Wisconsin Institute* ordered the state to make it easier for citizens to obtain a free voter ID, holding that once a citizen invokes the state's ID petition process to get a free ID, "the DMV must promptly issue a credential valid for voting, unless readily available information shows that the petitioner is not a qualified elector entitled to such a credential."[25] There are some weaknesses in this remedy—DMV offices can be hard to access for many working people: they are rarely open after work or on the weekend. Furthermore, some voters who apply for a credential right before the election may not receive it in time to exercise their right to vote.[26] By contrast, the court in *Frank* issued a broader—and more effective—order, finding that "the appropriate remedy" is to allow "voters to present an affidavit in lieu of photo identification" in order "to prevent those who cannot obtain ID with reasonable effort from losing the right to vote."[27] The *Frank* order gave voters unable to obtain ID the right to vote by filling out a "reasonable impediment" affidavit—akin to that that ordered in *Veasey*—and provided that "any reason the voter deems a reasonable impediment must be accepted."[28] Unfortunately, a panel of the Seventh Circuit stayed the order in *Frank* pending appeal,[29] and the entire Seventh Circuit declined to disturb the stay on the basis of the state's representation that the credentials required by the *One Wisconsin Institute* injunction "will indeed be available to all qualified persons who seek them," once a citizen initiates the ID petition process, even if some documentation is missing.[30]

Federal courts have also enforced other federal voting rights laws as well. On September 9, in a 2-1 ruling in *League of Women Voters v. Newby*, the D.C. Circuit blocked efforts by Kansas, Alabama, and Georgia to change the "Federal Form"—which under the National Voter Registration Act must be used by all states for voter registration in federal elections—to require citizens residing in those three states to submit proof of citizenship, a

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[23] *Id.* at 45; *id.* at 55-62.
[24] *Id.* at 78.
[25] *Id.* at 117.
[26] See Zachary Roth, *New Wisconsin Voter ID Rules Expose Law's Real Aim,* nbcnews.com (Aug. 29, 2016) (available at http://www.nbcnews.com/politics/elections/analysis-new-wisconsin-voter-id-rules-expose-law-s-real-n639581); Doug Chapin, *Waiting for the Mail: Wisconsin ID Procedures Raise Concerns*, Election Academy (Aug. 31, 2016) (available at http://editions.lib.umn.edu/electionacademy/2016/08/31/waiting-for-the-mail-wisconsin-id-procedures-raise-concern/).
[27] *Frank*, slip op. at 36.
[28] *Id.* at 37.
[29] *Frank v. Walker*, Nos. 16-3003, 3052 (7th Cir. Aug. 10, 2016).
[30] *Frank v. Walker*, Nos 16-3003, 3052, *One Wisconsin Institute, Inc. v. Thomsen*, Nos. 16-3083, 16-3091, slip op. at 3-4 (7th Cir. Aug. 26, 2016) (en banc).

requirement that disproportionately harms minorities.[31] Acting unilaterally, the Executive Director of the U.S. Election Assistance Commission had approved the States' request to modify the Federal Form, but the D.C. Circuit held that plaintiffs were likely to succeed in their challenge to the Executive Director's action. Going forward, U.S. citizens residing in Kansas, Alabama, and Georgia will be able to register to vote in federal elections—including the upcoming presidential election—simply by signing a declaration, under penalty of perjury, of their U.S. citizenship.

B. The Sixth Circuit's Failure to Protect the Right to Vote for All

As of this writing, the only outlier this election season has been a pair of 2-1 rulings handed down by the United States Court of Appeal for the Sixth Circuit upholding Ohio laws that make it harder for racial minorities and other to exercise their right to vote. In both cases, there were strong dissenting opinions arguing that the court had abdicated its responsibility to protect the right to vote.

On August 23, in *Ohio Democratic Party v. Husted*, the Sixth Circuit rubberstamped an Ohio law that eliminated the state's "Golden Week," which provided opportunities for same-day registration and early voting—opportunities on which racial minorities had overwhelmingly relied to register and exercise their right to vote—without carefully reviewing the justification for the law.[32] The court's opinion, authored by Judge David McKeague, insisted that "judicial restraint is in order" lest the federal court "become entangled, as overseers and micromanagers, in the minutiae of state election processes."[33] Claiming that "it's easy to vote in Ohio"—while ignoring the trial court's findings to the contrary and the fact that Ohio had introduced early voting in the wake of long lines on Election Day that had disenfranchised voters—the court held that "the removal of Golden Week can hardly be deemed to impose a true 'burden' on any person's right to vote" and upheld it under a "deferential standard of review akin to rational basis."[34]

In a sharply worded dissent, Judge Jane Stranch insisted that "it is healthy to scrutinize the river of State voting regulations that has flowed in the wake of *Shelby County v. Holder*," observing that courts may not "shy away from the scrutiny that is essential to the protection of the fundamental right to vote."[35] Judge Stranch emphasized that the record showed that, as in *North Carolina State Conference of NAACP*, "'[r]egistration and voting tools may be a simple 'preference' for many white [voters], but for many African Americans, they are a necessity.'"[36] She would have struck down the state's elimination of Golden Week, finding that it "disparately

[31] *League of Women Voters v. Newby*, No. 16-5196 (D.C. Cir. Sep. 9, 2016).
[32] *Ohio Democratic Party v. Husted*, No. 16-3561 (6th Cir. Aug. 23, 2016).
[33] *Id.* at 3, 2.
[34] *Id.* at 10, 15.
[35] *Id.* at 28, 30 (Stranch, J., dissenting).
[36] *Id.* at 35 (Stranch, J., dissenting) (quoting *North Carolina State Conference of the NAACP*, slip op. at 55).

impacts a protected group without sufficient justification by a relevant and legitimate state interest."[37]

On September 13, in *Northeast Ohio Coalition for the Homeless v. Husted*, a panel of the Sixth Circuit upheld Ohio laws that make it harder for citizens to cast an absentee or provisional ballot, while striking down others.[38] By a 2-1 vote, the court upheld Ohio laws that gave voters less time to correct errors in absentee and provisional ballots and limited the ways in which poll-workers can assist voters, requirements that the district court found would disproportionately burden minority voters in violation of the Voting Rights Act and the Fourteenth Amendment. As in *Ohio Democratic Party*, the Sixth Circuit, in an opinion by Judge Danny Boggs, took its own view of the evidence, concluding that a "law cannot disparately impact minority voters if its impact is insignificant to begin with."[39] The court of appeals also held that the district court had improperly focused on the law's impact on homeless and illiterate voters, insisting that "[z]eroing in on the abnormal burden experienced by a small group of voters is problematic at best and prohibited at worst."[40]

In an extraordinary dissenting opinion, Senior Judge Damon Keith took the majority to task for failing to enforce the Constitution and Voting Rights Act, observing that "by denying the most vulnerable the right to vote the Majority shuts minorities out of our political process. Rather than honor the men and women whose murdered lives opened the doors of our democracy and secured our right to vote, the Majority has abandoned this Court's standard of review . . . ."[41] Judge Keith wrote that "the complete lack of sensitivity and unbridled privilege with which the Majority exercises its view of the trivial is exactly what led to the constitutional and statutory protections at issue in the case."[42]

II. Core Themes of the New Voting Rights Jurisprudence

Three core themes are central to the new, developing voting rights jurisprudence reflected in these recent voting rights victories. First, courts are giving teeth to the part of the Voting Rights Act left untouched by *Shelby County*—Section 2's nationwide prohibition on laws that result in a denial of equal political opportunity—making it a critical tool to challenge state laws that threaten to deny racial minorities access to the ballot. Section 2's results test was born out of a struggle against efforts to dilute the voting strength of minority voters; courts now are using its sweeping language to prevent states from making it harder for racial minorities to vote, enforcing the Fifteenth Amendment's command that states not abridge the right to vote on account of race.[43]

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[37] *Id.* at 37 (Stranch, J., dissenting).
[38] *Northeast Ohio Coalition for the Homeless v. Husted*, Nos 16-3603, 3691 (6th Cir. Sept. 13, 2016).
[39] *Id.* at 16.
[40] *Id.* at 20.
[41] *Id.* at 31 (Keith, J., concurring in part and dissenting in part).
[42] *Id.* at 66 (Keith, J., concurring in part and dissenting in part).
[43] *See, e,g. Veasey*, slip op. at 63 (emphasizing that, under the Fifteenth Amendment, "*abridgement* of the right to vote is prohibited along with denial").

Second, courts are carefully reviewing the lines drawn by voter identification and other state electoral laws to ensure that they respect the fundamental right to vote, taking a page from the Supreme Court's recent ruling reaffirming the right to choose abortion and demanding that state regulation "confers . . . benefits sufficient to justify the burdens upon access that [they] impose."[44] Recognizing that the devil is often in the details, courts are paying close attention to whether voter identification laws discriminate against IDs often possessed by minorities and the evidence offered to justify new laws that make it harder for citizens to exercise the right to vote.

Third, in line with the Fifteenth Amendment's purpose to prevent all forms of racial discrimination in voting, courts are taking aim at efforts to blunt the emerging political power of minority voters, recognizing that concerns about voter fraud can be a pretext for racial discrimination. Together, the careful judicial review in recent cases is, in the words of one judge, a necessary "part of a process of harmonizing [legislative] priorities with the fundamental right to vote—a topic which over a quarter of our Constitution's amendments have dealt in one way or another, and an individual right that cannot be compromised because an adverse impact falls on relatively few rather than many."[45]

III. Conclusion

Voting rights litigation is hardly over for the moment. In *Veasey*, plaintiffs have gone back to the district court to enforce the injunction entered by the district court, claiming that Texas has failed to properly educate voters about their right to cast a ballot using the "reasonable impediment" declaration, and that Texas officials in one county have threatened to investigate any voter who files a "reasonable impediment" declaration.[46] In Wisconsin, the district court judge in the *One Wisconsin* case has asked the state to spell out the steps it has taken to inform citizens that they can exercise their right to vote, even if they lack ID, by invoking the state's ID petition process.[47]

Elsewhere, appeals and other proceedings are still ongoing—North Carolina will be filing a petition in the Supreme Court asking it to review the Fourth Circuit's ruling striking down the state's omnibus voter suppression laws, as will plaintiffs in the *Ohio Democratic Party* case,[48] the two Wisconsin cases are heading to the Seventh Circuit, and the district court in *Veasey* will be considering whether Texas's strict voter ID law was enacted to discriminate against

[44] *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2230 (2016).
[45] *Veasey*, slip op. at 99 (Higginson, J., concurring).
[46] *See Veasey v. Abbott*, No. 13-193, United States Motion to Enforce Interim Remedial Order (S.D. Tex. Sept. 6, 2016) (available at http://electionlawblog.org/wp-content/uploads/veasey-us.pdf); Private Plaintiffs and Plaintiff-Intervenors' Motion for Further Relief to Enforce the Interim Remedial Order (S.D. Tex., filed Sept. 7, 2016) (available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/Veasey-PrivatePlaintiffsMotionToEnforce090716.pdf);
[47] *One Wisconsin Institute, Inc. v. Nichol*, No 15-324 (W. D. Wis. Sept. 12, 2016).
[48] The Supreme Court refused to stay the Sixth Circuit's ruling in *Ohio Democratic Party* pending the disposition of a petition for certiorari, see *Ohio Democratic Party v. Husted*, 16A223 (Sept. 13, 2016), and plaintiffs will be filing a petition for a writ of certiorari soon.

minorities on account of race—though these cases are unlikely to be resolved until after the November election. Further, litigation in Alabama,[49] Arizona,[50] Ohio,[51] Kansas,[52] Virginia,[53] and other states challenging laws that make it harder to register and cast a vote are also a crucial part of the story, although we will have to wait for resolution of those cases. But for now, it is undeniable that the federal courts have played a critical role in helping to ensure that the right to vote is equally enjoyed by all this November. Moreover, the effect of these decisions may well extend past this November: the jurisprudence developed by the courts offers a firm footing to enforce the promise of equal political opportunity reflected in both the Constitution and the Voting Rights Act.

[49] *Greater Birmingham Ministries v. Alabama*, No. 15-2193 (N.D. Ala., trial scheduled for Sept. 11, 2017).
[50] *Feldman v. Arizona Secretary of State's Office*, No. 16-1065 (D. Ariz., motion for preliminary injunction filed June 10, 2016). The parties recently settled the part of the case concerning lack of polling places in Maricopa County, agreeing to changes that will make it easier for citizens to exercise their right to vote. The other claims in the case remain.
[51] *A. Phillip Randolph Institute v. Husted*, No. 16-3746 (6th Cir., argued July 27, 2016).
[52] *Fish v. Kobach*, 16-3147 (10th Cir., argued Aug. 23, 2016).
[53] *Lee v. Virginia Board of Elections*, No. 16-1605 (4th Cir., to be argued Sept. 22, 2016).