Voter Identification in the Courts

By Justin Levitt

Every state has a system for asking voters to show that they are who they say they are. The most restrictive of such laws have drawn court challenge. This litigation is as varied as the voter ID regimes: cases have proceeded on different facts in different contexts, under different legal theories.

In a polarized environment, changes to election procedures with a perceived partisan skew are often highly controversial. Few recent changes have been more prominent in this respect than those regarding voter identification regulations. And predictably, as voter identification regimes have changed, litigation has followed.

A voter identification system is really just a set of procedures to ensure that voters are who they say they are. Most of the recent changes in state law concern the identification of voters who show up in person at the polls. Despite widespread recognition that absentee voting has posed more of a problem historically, few states have changed the process for absentee voters.

Federal Law

Federal law sets a baseline for voter identification. Under the Help America Vote Act of 2002, any new voter who registers to vote by mail must have her identity confirmed in one of two ways.[1] First, election officials may be able to match driver's license numbers or Social Security digits on the registration form to other data systems to confirm that the individual on the form is who she says she is. If the numbers cannot be matched, then before the citizen's ballot can be counted, the voter must provide documentation: a photo ID card, utility bill, bank statement, government check, paycheck, or government document with the voter's name and address. Perhaps because this regime allows voters to confirm their identity in several different ways, it has never been challenged in court.

State Laws

Beyond the federal baseline, every state has some means to ensure that voters are who they say they are. Some states compare signatures from the registration form to a voter's entry in the poll book. Some ask for a document from a fairly extensive list. Some ask for a government-issued photo ID from those who have one, and require a special affidavit from those who do not. In some states, similarly, voters without a qualifying ID card will be asked to vote a provisional ballot, which is counted if the voter's signature on a sworn attestation of identity matches the signature on his or her registration form.

And a few states effectively require all voters beyond a few discrete carve-outs—for example, those with a religious objection or those who are legally indigent—to present a current government-issued photo ID. A citizen without such a card will not be able to cast a valid ballot. Even within this category, there is variety: some accept some student IDs, for example, and some do not.

These more restrictive laws are at the heart of the current controversy.[2] Though most citizens have the ID required by each state, many in the more restrictive regimes do not—and these citizens without are at the center of the legal and policy battle. Indiana and Georgia passed photo-ID-only laws in 2005; Missouri followed in 2006; Kansas, Tennessee, Texas and Wisconsin in 2011; Mississippi and Pennsylvania in 2012; and Arkansas, North Carolina and Virginia in 2013.[3]

In the Courts

Court challenges have followed in each state above, other than Mississippi and Virginia. Laws have been invalidated in Arkansas, Missouri and Pennsylvania; sustained against particular attacks in Indiana and Tennessee (though others have followed); and blocked (at least temporarily, but perhaps only temporarily) in Georgia, Texas and Wisconsin. Several cases are pending.

But that simple recounting of successful, unsuccessful and partially successful challenges masks substantial diversity in the litigation. Different courts are not, by and large, evaluating the same facts under the same cause of action to arrive at different results.

Instead, the impact of voter ID laws differs from state to state; the available legal claims differ from state to state; and even the quality of lawyering and litigation strategy differs from state to state. Differing outcomes sometimes reflect disagreement

among judges—but they also reflect litigation under different conditions and with different legal theories. Moreover, the success or failure of particular allegations often depends as much on the particular evidence presented to a court as on the abstract merit of the claims themselves. The U.S. Supreme Court has rejected one claim that one state's voter ID law violated one constitutional doctrine—but that is not the same as deciding that voter ID laws are constitutional.

Claims Based on Implementation

One set of claims has aimed not at the ultimate validity of ID laws, but at their rollout: too fast, too sloppy, too little information. Courts in Georgia and Pennsylvania pressed pause, giving states time to ensure that education and implementation were uniform; a North Carolina federal court declined to do so. In Pennsylvania, the court ultimately determined that the state would be unable to adequately implement the law as written at any point.[4]

Claims Based on Legislative Power

Other claims concern the legislature's authority to enact rules like ID requirements. Most states' constitutions expressly authorize the legislature to regulate the election process—and some specify the election-related topics that a legislature may regulate. Litigation has proceeded on the premise that these authorization clauses are exclusive: if the state constitution does not expressly authorize legislative regulation of ID, the legislature may not regulate ID. State supreme courts in Georgia, Indiana and Tennessee have dismissed such claims, though the Arkansas Supreme Court struck down the state's ID law on this basis.[5]

Claims Based on Partisan Motive

Still another type of claim attacks the alleged partisan motivation of the legislature in enacting the new laws. These allegations have flavored existing cases, but have not yet been the centerpiece of any lawsuit.[6] The Supreme Court has strongly resisted legal challenges along these lines in other electoral arenas as long as a plausible alternative purpose exists. And related, but distinct, claims of undue partisan effect have found even less hospitable legal homes.

Claims Based on Racial Discrimination

Another set of claims attacks the newer ID laws as abridging the right to vote on account of race or ethnicity. ID laws are not inherently racist; neither are literacy tests, poll taxes, registration purges or district lines. But any tool can be abused. Even without intent to disenfranchise based on race, an ID law that interacts with the legacy of racial discrimination in other arenas to create a disparate racial impact may, in certain circumstances, create liability under the federal Voting Rights Act.

The racial and ethnic impact of the more restrictive ID laws is not uniform: the communities most affected in Kansas are different from those in Tennessee. Nor is the political or historical environment the same from state to state with respect to the enactment of a new regulation of the franchise. Both the Constitution and the Voting Rights Act are profoundly sensitive to local context; liability in one area need not imply liability in a different area, even for a law that looks very similar in the statute books. In areas where new laws have a more dramatically skewed demographic impact, or where there exists a more profound history of discrimination or present evidence of misconduct, these claims are more likely to resonate.

Claims of intentional racial discrimination under the Constitution are quite difficult to prove; claims under the Voting Rights Act are subject to a standard that is still a work in progress for ID laws. Most early cases under the Voting Rights Act were based on direct, and directly discriminatory, outright denials of the vote; later cases built a jurisprudence concerning redistricting. Neither line of cases fits the current ID controversies particularly well, which means that courts are just now working through the applicable standards.

The race-based claims that have succeeded are quite recent and are now proceeding through an appellate process. A federal judge struck down Texas' ID law as the product of intentional race discrimination and as a Violation of the Voting Rights Act; that decision is now on appeal.[7] In Wisconsin, a federal judge found a violation of the Voting Rights Act due to disparate impact that was in part the legacy of discrimination in other arenas; an appeals panel rejected the claim, with a significantly narrower conception of the Voting Rights Act.[8]

Claims Based on Unequal Treatment

Still another set of claims is premised on the assertion that the newer ID laws treat similarly situated voters differently, in an unconstitutional fashion. Some of these challenges concern the differential treatment of absentee voters and voters at the polls; others concern the differential treatment of students.[9] To date, none has succeeded, though various claims are pending.

Claims Based on Impermissible Cost

A further set of claims attacks the newer ID laws as imposing an impermissible cost or other property requirement, either under state constitutions or under federal statutory and constitutional prohibitions of a poll tax. Even when government-issued ID cards are available without charge, there may be travel time and effort to procure them, or a monetary cost to procure the underlying documents necessary to apply for the cards. This sort of claim was rejected in Tennessee and is pending in North Carolina. A federal court has struck Texas' ID law on this basis, but the case is on appeal.[10]

Claims Based on Undue Burden

A final set of claims is both the most common and the most varied. The federal Constitution and many state constitutions require that electoral regulations' burdens be justified. The greater the burden, the more justification is necessary.

Proof of burden sufficient to satisfy a court has been difficult to come by. Most challenges to more restrictive ID laws have attempted to stop the laws before they take effect. It is tricky to find people who have already been blocked from voting by a law that is still in the future, and in Georgia, Indiana and Tennessee, these challenges have failed; in Wisconsin, a challenge that succeeded at the trial court was rejected on appeal.[11] The Indiana case—one of the first challenges to restrictive ID laws in the country—was thin on empirical support and became the claim that the Supreme Court ultimately rejected. The Wisconsin case had substantially more factual development.

Other cases have turned to proxy estimates of harm, like local statistics attempting to assess the number of citizens without valid ID, and testimony speaking to the difficulties facing those without ID as they try to get an ID. In Missouri and Pennsylvania, for example, state courts found that ID laws created a burden insufficiently justified by the ostensible interest in preventing voters from impersonating others at the polls. A federal court similarly struck down Texas' new ID law, but the case is now on appeal.[12]

Cases Modifying Voter ID Statutes

The cases above resulted in injunctions against the implementation of restrictive ID laws, rejections of claims for injunctions, or temporary injunctions that were later dissolved. But a review of voter ID in the courts would not be complete without an acknowledgment of litigation that reshaped ID requirements rather than providing a thumbs-up or thumbs-down.

South Carolina passed a new voter ID law in 2011, when it was still subject to a preclearance regime requiring federal approval before implementing any electoral change. In the course of litigation, South Carolina officials explained that voters with a government-issued photo ID would be required to show it, but any voter with a "reasonable impediment" to obtaining photo ID could cast a valid ballot after completing an affidavit; virtually any reason will suffice.[13] And in Wisconsin, litigation in state court concerning the cost of ID forced the state Department of Transportation to issue a photo ID to citizens without any underlying documentation of their identity, if procuring that documentation otherwise would require paying a fee.[14]

Notes

[1] 52 U.S.C. § 21083(b).

[2] There have been fewer court challenges to identification laws permitting citizens to vote a valid ballot at the polls even if they do not possess (and cannot readily obtain) a particular government-issued photo ID card, or to aspects of ID laws that apply only to certain subpopulations seeking to vote at the polls. Challenges to a Michigan requirement that voters either show photo ID or complete an affidavit were rejected by the state Supreme Court, In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444 (Mich. 2007); challenges to an Arizona requirement that voters either show photo ID or two non-photo pieces of identification were rejected by the 9th Circuit Court of Appeals, *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012); and challenges to a Colorado requirement that voters show identification mirroring the Help America Vote Act were rejected by a state trial court, *Colo. Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485 (Colo. Dist. Ct. 2004). Challenges to an Ohio law requiring various forms of voter identification were resolved by consent decree. Consent Decree, *Northeast Ohio Coalition for the Homeless v. Blackwell*, No. 2:06-cv-00896 (S.D. Ohio Nov. 1, 2006); Consent Decree, *Northeast Ohio Coalition for the Homeless v. Brunner*, No. 2:06-cv-00896 (S.D. Ohio April 19, 2010). And a challenge to Oklahoma's law (requiring a government-issued photo ID card, registration card, or match of voter information) is still pending. *Gentges v. Oklahoma State Election Board*, 319 P.3d 674 (Okla. 2014).

With respect to subpopulations, for example, a federal court in Ohio struck down a state requirement that naturalized citizens, but not others, show proof of their citizenship. *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio 2006). A federal court in Minnesota similarly struck down limits on tribal ID cards not applicable to other forms of ID cards. *ACLU of Minn. v. Kiffmeyer*, No. 04-CV-4653, 2004 WL 2428690 (D. Minn. 2004).

[3] Some municipalities have passed their own voter ID

regulations as well, for municipal elections only. For example, Albuquerque, New Mexico, requires voters at the polls to show a photo ID card, but allows for several private ID cards (like a student ID, debit card, insurance card, union card, or professional association card) in addition to government-issued ID cards. In 2008, the law was upheld against a challenge on several grounds. *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008).

[4] *Common Cause/Georgia v. Billups*, 406 F.Supp.2d 1326 (N.D. Ga. 2005); *Common Cause/Georgia v. Billups*, 439 F.Supp.2d 1294 (N.D. Ga. 2006); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2012 WL 4497211 (Pa. Comm. Ct. 2012); *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Comm. Ct. 2014).

[5] *Democratic Party of Georgia, Inc. v. Perdue*, 707 S.E.2d 67 (Ga. 2011); *League of Women Voters of Indiana, Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010); *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013); *Martin v. Kohls*, 444 S.W.3d 844 (Ark. 2014).

[6] Memorandum Opinion and Order, *Green Party of Tenn. v. Hargett*, No. 2:13-cv-224 (E.D. Tenn. Feb. 20, 2014).

[7] Opinion, *Veasey v. Perry*, No. 13-cv-00193, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014).

[8] *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), *reversing* 17 F. Supp. 3d 837 (E.D. Wis. 2014).

[9] *League of Women Voters of Indiana, Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010); *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013).

[10] Order on Parties' Motions for Judgment on the Pleadings, *Currie v. North Carolina*, No. 13-CVS-1419 (N.C. Super. Ct. Feb. 24, 2015); *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013); Opinion, *Veasey v. Perry*, No. 13-cv-00193, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014).

[11] *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009); *Democratic Party of Georgia, Inc. v. Perdue*, 707 S.E.2d 67 (Ga. 2011); *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); *League of Women Voters of Indiana, Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010); *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013); *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), *reversing* 17 F. Supp. 3d 837 (E.D. Wis. 2014).

[12] *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006) (en banc); *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Comm. Ct. 2014); Opinion, *Veasey v. Perry*, No. 13-cv-00193, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014).

[13] *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012) (three-judge court).

[14] *Milwaukee Branch of the NAACP v. Walker*, 851 N.W.2d 262 (Wis. 2014).

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