

National Association of Women Judges

Seattle

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Good afternoon. I am pleased to welcome you to the city I grew up in.

I've been asked to talk about the struggle to define democracy which is playing out in many state and federal court rooms, as well as state and local legislatures. This has been a struggle since our country was created. Who could be a citizen and who could vote. And how much, in a democracy, do you have a right to have your vote count.

In this presidential election year, these questions are very much in the news. I will begin with the battle over voting rights and then touch on voter re-enfranchisement and proof of citizenship requirements.

Voting Rights

While I am not representing the Civil Rights Commission today, I want to note that the Commission was created by the 1957 Civil Rights Act which also attempted to create enforcement measures to secure the promise of the 15th Amendment.

Section 1 of this Amendment provides: The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The Commission's first hearing was in Montgomery, Alabama on the pervasive efforts by white officials to disenfranchise African Americans.

Eventually the data the Commission collected helped to result in the much stronger enforcement provisions in the 1965 Voting Rights Act, including the powerful tool of Section 5 which the Supreme Court rendered toothless in 2012.

Section 5 requires certain states and counties with entrenched discrimination around voting to ask the Department of Justice or the DC federal court to clear any voting change before it can be implemented.

This is important because there is no way to make voters "whole" if they are blocked from voting. And the context of the voting rights act is the recognition that in certain regions, there is racially polarized voting. In other words, there are some counties, towns and states where a majority of white voters seldom vote for African Americans and other minorities as candidates and where there is a racial divide over policies that serve minority communities.

By the time litigation is won, the people who have been elected unfairly and who are not responsive to minority communities, will have often served much of their term and done their damage.

It proved to have a prophylactic effect. Election officials, most of who want to do the right thing, were required to prove the proposed change would not have a negative impact on minority voters. So problems were avoided because an assessment was required.

If a politician or party seeking to manipulate the outcome of an election pressed them to make changes in order to suppress minority voting, the election officials could point to Section 5.

In past efforts, Congress tried to bar specific practices but state and local politicians seeking to hold onto power by preventing minorities from voting would create a new tactic that on its face they would argue was race neutral but in practice or impact was not. Now every change would be scrutinized and allowed only if proven to be harmless.

- 1. Covered jurisdictions were required to give public notice of any proposed change and show outreach to the community. That enabled local groups to find out about planned changes and contest those that they felt would be harmful.**

Changes made through state legislation are generally well known and there is more time to organize around them. But changes made administratively like closing or moving polling places in minority communities or changing days and hours for voting or for registration, or making it harder for groups to help citizens register or vote, are much harder to detect.

- 2. Most importantly, unlike other provisions in the Act, the burden to show there is no discriminatory impact or intent is on the state or county rather than the minority community.**

The officials also had to make the data and analysis publicly available so it can be reviewed and challenged.

- 3. The states and counties covered were identified through a formula that looked at whether there were certain vote suppression tests or devices like poll taxes and level of voter registration as of 1972 [orig 1968].**

In 1975, Congress added Section 203 of the Voting Rights Act to protect limited English proficient voters and became part of the formula.

In the 2004 election, Hubert Vo became the first Vietnamese American in the Texas State House when he beat an incumbent with only 37 votes out of almost 21,000 votes cast after Houston was required to provide interpreters and translated materials to Vietnamese American voters.

In the 2014 election, litigation forced Alaska to comply with coverage for Alaska Natives and the first Alaska Native was elected to Lt. Governor.

As you all know, under the constitution, it is under a limited set of circumstances that the federal government can impose its will on the states so Congress has required periodic review and reauthorization.

Section 5 and Section 203 were reauthorized in 2006 by a unanimous vote of the Republican led Senate and by 390 to 33 in the Republican led House and signed into law by President Bush. Conservative Republican James Sensenbrenner was a staunch sponsor of the bill.

Shelby County v. Holder

Shelby County, Alabama, with an extensive history of trying to disenfranchise Black voters, quickly challenged the reauthorized provision.

In 2012, despite thousands of pages in the record documenting recent vote suppression efforts, the Supreme Court struck down the coverage formula in a 5 to 4 decision written by the Chief Justice arguing that African American voter registration and turn out had improved and that the current forms of discrimination were not as flagrant. Basically he was less concerned about the clear racial inequities that persist in most of these states and more concerned about limiting some states rights, which historically has been the rationale given for segregation and other discriminatory actions.

Justice Ruth Bader Ginsberg in her fiery dissent said, “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella because you are not getting wet.”

Unfortunately, she was prophetic. Within days and weeks of the decision, formerly covered states acted to implement laws that DOJ had rejected and pass laws that would have been rejected.

North Carolina

Before the *Shelby* decision, NC legislators were preparing a 16 page voter ID bill. After the decision, the bill grew to 57 pages and eliminated many of the gains made to make voting more accessible to every citizen.

A federal court found the drafters had targeted minority voters with surgical precision.

Staff had asked for a breakdown of the 2008 election to see whether whites and blacks differed in their preference for early voting;

for data showing whether Hispanic voters tend to vote outside their home precinct;

and an aide to the House speaker asked for a breakdown by race of registered voters that do not have a driver's license number.

The bill shortens early voting and cuts Sunday voting used more heavily by minorities, eliminates out of precinct voting and makes drivers licenses and passports among the few documents eligible to be voter IDs, eliminates same-day registration, and bars counties from extending poll hours to accommodate long lines. The bill passed with votes only from white legislators.

After 4 years of litigation and several trips to the U.S. Supreme Court, North Carolina's voter ID law was struck down, as was many of the other tactics, with a final appeal still possible.

Texas

Texas passed its extremely restrictive Voter ID law in 2011, but the Department of Justice had withheld clearance. After the *Shelby* decision, the Governor immediately moved to implement it.

Gun permits count but state university ID do not. In the last election, a voter with Department of Homeland Security employee ID was not allowed to vote.

Experts testified that an estimated 600,000 citizens lacked the eligible ID and that Hispanics and Blacks were much less likely than whites to have one. Even the state's expert found that more than 1 in 20 blacks and Latinos did not have the required ID. The Trial court held that the discrimination was intentional.

The Department of Justice had also been withholding clearance of Mississippi and Alabama's voter ID laws, and those states also moved forward after *Shelby*.

Alabama originally promising to make free IDs available at DMV offices and then closed 45 of 49 offices, most of them in counties with the highest percentage of African Americans in the still highly segregated states.

Of course, many states require some form of ID. The ones being challenged are those who selected documents that discriminate against voters by race, as well as by gender, income and student status; make the ID difficult to obtain

without cost; and provided no accommodation for those who lack the documentation or ability to meet the ID requirements.

Some voters aren't able to obtain their birth certificates, particularly those born at home in rural areas where they didn't receive them, and some find that their documents don't have matching names because of errors. Some states require car insurance to obtain a drivers' license but voters don't have cars to ensure. And many can't afford to pay to get the documents necessary or can't travel to where they can get them.

For example, North Dakota, before *Shelby*, allowed many forms of ID and the use of an affidavit. After *Shelby*, the legislature restricted IDs to 3 documents and expressly prohibited college or military IDs and added a requirement of street addresses.

North Dakota's Native Americans mainly live on reservations that are not platted for street addresses. Almost 4000 Native Americans would be blocked from voting.

North Dakota was not covered by Section 5, but the gutting of Section 5 has emboldened other states.

Study after study show almost no instances of in person voter fraud in any state. Well known conservative 7th Circuit Court Judge Richard Posner, changed his views after he had authored the opinion upholding Indiana’s voter ID law.

In the subsequent Wisconsin voter ID case, he found that the theories of fraud were “goofy if not downright paranoid” and a “mere fig leaf” for the party pushing the law to suppress the vote of “people outside of the mainstream whether because of poverty, race or problems with the English language.”

Local Examples

The vast majority of violations stopped by Section 5 were actions taken by local election officials, which are much harder to detect in time to challenge. Covered jurisdictions are required to give public notice of any proposed change.

In a post Shelby world, local groups are trying to recruit, train and deploy thousands of volunteers to attend public meetings of local election boards to monitor and challenge harmful changes.

Georgia has 159 counties and local civil rights groups have sufficient capacity to monitor less than 40 of them.

Last year in Sparta, Georgia, where 80% of the residents are black, there was an election for mayor between a white and a black candidate. The majority white city council of the small town with a tiny population, ordered a voter purge. Almost all of the voters purged were black.

Also in Georgia, one county sought to consolidate 7 precincts to 1 and another to consolidate 40 to 27, in primarily African American communities.

There are many efforts in certain states to block the youth vote. Local election officials in North Carolina tried to eliminate an early voting site on campus at Appalachian State University.

In Mississippi, a polling place was moved from a community center to a police department.

In Michigan, the state sought to eliminate straight ticket voting, an option disproportionately used by minority voters.

After two Latinos were elected to the Pasadena city council, a suburb of Houston, the white mayor moved to restructure the council districts to make it more difficult for another Latino to be elected by making two districts into at-large elections so white voters could still control the outcome.

Maricopa County, home to majority minority city Phoenix, Arizona, with 1.25 million eligible voters, cut its polling places from 200 to 60 before its presidential primary. Voters waited 5 or more hours to vote while voters in white counties did not face any significant wait. The last voter voted after midnight.

Legislation to address the concerns expressed in *Shelby* has been introduced in Congress. The Republican leadership has refused to even hold a hearing during the last four years arguing there is no need for Section 5, despite having overwhelmingly supported it's reauthorization just a few years before.

Yes, some of the courts are striking down some of these laws – but only after several elections have already been held with thousands of citizens disenfranchised and at the cost of millions of dollars invested in organizing and bringing lawsuits that would have been unnecessary with Section 5.

B. Re-enfranchisement of the Formerly Incarcerated

According to one estimate, as of 2010, almost 3 million Americans are prohibited from voting due to convictions for felony offenses, even after their sentence has been completed. The 12 states with the most punitive laws account for almost half of that total. [Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia and Wyoming]

African Americans are four times more likely to lose their right to vote. In Florida, Kentucky and Virginia, 1 in 5 black citizens are affected. Advocates have won some surprising battles only to see some reversed.

In Florida, the clemency board voted to automatically restore rights for those with nonviolent convictions but were reversed in 2011, with citizens now needing to apply.

In Iowa, another harsh state, Governor Vilsack issued an executive order to restore rights to those who had completed their sentence only to see the order rescinded by his successor, Governor Branstad.

Historically, several Southern states after the civil war tailored their laws to bar back male voters, targeting offenses believed to be committed most frequently by African Americans.

It is hard to understand why most states make it so difficult for people who have paid their debt to society to fully re-integrate back into society and be treated as full citizens.

C. Proof of Citizenship

Before I close, I want to touch on the proof of citizenship laws that passed in a fever of anti-immigration legislation on the state level in Kansas, Arizona, Georgia and Alabama. The legal battle has been over whether states can force the federal government to require more than the attestation already on the form.

As with in-person voter fraud, there are almost no cases of noncitizens voting – and most of them were by error. Yet some state officials are have convinced the public that undocumented immigrants are going to risk a felony conviction that would forever bar them from becoming legal. We can't even get all of the citizens who are of Asian and Latino descent to vote. That is the real problem.

Proof of citizenship is a problem in real terms. It becomes applied only to those who aren't white or who speak with an accent. It becomes a pretext for voter intimidation. In a fishing town in Alabama, when a Vietnamese American was running for a local office, election officials supporting his opponent challenged every single Vietnamese American voter until the Department of Justice came in.

In practice it also makes it extremely difficult for community groups to help people register to vote. How many of you carry your birth certificate or naturalization papers with you to the grocery store or to church?

Moreover, state election officials in states like Arizona, Florida and Texas are trying to make it difficult for community groups to organize voter registration drives – instituting unworkable requirements for turning in registration forms and creating fines and criminal penalties.

Conclusion

What I am most confounded by is why, in a country where turn out has been falling, there is more effort to make voting harder than there is to make it more accessible? Why are we letting the politicians choose the voters rather than ensuring that voters are choosing the elected officials?

Advocates anticipate the election to be messy. Most jurisdictions have not been sufficiently investing in their voting machines and many are breaking down. Some are so old, they require floppy discs to program them.

In budget strapped times, there has been insufficient training of election day workers on the complicated and confusing rules. And despites promises to courts, states with voter ID have not done sufficient outreach and education to the voters over the rules and other changes to polling places and systems.

As one advocate said to me, at what point does negligence become intentional voter suppression.

And there is concern about voter intimidation at the polls by anti-immigrant groups and the resurgent KKK.

DOJ announced this summer that because of the Supreme Court's decision in *Shelby*, they will not be able to have their observers inside the polling places in the formerly covered states.

Communities are building election protection efforts and I hope you help get the word out to your communities about the hotlines and wireless apps that have been created to help voters find their sites and know their rights. 1-866-OUR VOTE; in Spanish: 1-888-Vey Y Vota (1-888-839-8682); in various Asian languages: 1-888-API VOTE.

The concern is so great that international human rights bodies such as the Organization of American States and the Organization for Security and Cooperation in Europe's (OSCE) Office for Democratic Institutions and Human Rights are sending election monitors.

Please meet with your election officials and if you hear concerns, please let the Department of Justice and civil rights organizations know.

As President Lyndon Baines Johnson once stated, "The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from others."

In his 1965 speech to Congress introducing the Voting Rights Act legislation, LBJ forcefully argued:

“The first right and most vital of all our fights is the right to vote.... It is from the exercise of this right that the guarantee of all our other rights flows. Unless the right to vote be secure and undenied, all other rights are insecure and subject to denial for all our citizens.

The challenge to this right is a challenge to America itself. We must meet challenge as decisively as we would meet a challenge mounted against our land from enemies abroad.”