STATE JUDGES AND THE RIGHT TO VOTE

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INTRODUCTION

State courts are paramount in defining the constitutional right to vote. This is in part because the right to vote is a state-based right protected under state constitutions.[1] In addition, election administration is largely state-driven, with states regulating most of the rules for casting and counting ballots.[2] State law thus guarantees – and state courts interpret – the voting rights that we cherish so much as a society. State courts that issue rulings broadly defining the constitutional right to vote best protect the most fundamental right in our democracy, while state decisions that constrain voting to a narrower scope do harm to that ideal.

Even though state courts are the primary actors in shaping the right to vote, however, most people pay less attention to state judges than to their federal counterparts. The media, for example, spend relatively little time covering state voting rights decisions.[3] Most election law scholars focus primarily on decisions from the U.S. Supreme Court.[4] This is inherently

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[1] *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 68 VAND. L. REV. 89 (2014) (noting that forty-nine of fifty states explicitly confer the right to vote to the state's citizens, and the only exception, Arizona, still requires elections to be "free and equal," which courts have interpreted as granting the right to vote).

[2] *See* Jocelyn F. Benson, *Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 354-55 (2008) (noting that state legislatures are the primary source of laws regulating election administration).

[3] *See infra* Part I.B. The media also spend very little time covering state judicial elections. *See* Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 553, 567 (2014) (citing Martin Kaplan, Ken Goldstein & Matthew Hale, *Local News Coverage of the 2004 Campaign: An Analysis of Nightly Broadcasts in 11 Markets*, Local News Archive 9-12, 28-29 (Feb. 15, 2005), http://www.localnewsarchive.org/pdf/LCLNAFinal2004.pdf)).

[4] *See infra* Part I.C.

backward given how active state courts are in regulating the voting process.[5] From voter ID, to felon disenfranchisement, to the mechanics of Election Day, state courts are intimately involved in setting out the rules for an election and giving scope to the constitutional right to vote. For example, federal courts have issued far fewer opinions on voter ID laws than state courts in the past decade,[6] and yet the federal court opinions have received most of the attention from scholars, the media, and the public.[7]

Why do federal court decisions regarding the right to vote seem more prominent than state cases? For one, U.S. Supreme Court opinions apply nationwide, resulting in immense and justifiable scrutiny when the Court renders decisions on issues of high salience, such as voting rights. With respect to lower courts, federal judges have a larger geographic reach than their state counterparts.[8] Further, federal constitutional rulings are based on the U.S. Constitution, which obviously has more prominence than (and supremacy over) state constitutions.[9]

But as this article shows – through a detailed, comparative examination of state court cases involving the voting process – state judges are often the main actors in defining the constitutional right to vote. Yet the decisions deviate markedly across states on the protection afforded to voting, with some judges issuing broad pronouncements on the primacy of the right to vote and other judges more narrowly construing the constitutional safeguard. If we want to preserve the right to vote as the most fundamental and foundational right in our democracy, then we need to recognize this divergence so that we can devise strategies to encourage broader rulings.

We should favor a broad analysis of the constitutional right to vote

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[5] As a general matter state courts issue thousands more decisions than federal courts every year, affecting millions more people. *See* Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 456-57 (2010).

[6] *See infra* Part II.A.

[7] *See infra* Part I.B.

[8] Federal appellate courts, for example, cover multiple states, and federal trial districts are larger than state trial districts. *Compare, e.g.,* Geographic Boundaries of United States Court of Appeals and United States District Courts, http://www.uscourts.gov/uscourts/images/CircuitMap.pdf (last visited Jul. 13, 2014) *with* Kentucky Court of Justice Judicial Circuits, http://courts.ky.gov/resources/publicationsresources/Publications/P107KYJudicialCircuitsMap85x11_211web.pdf (last visited Jul. 13, 2014) (showing the significantly larger geographical reach of federal courts in comparison to state trial districts).

[9] *Cf.* Tom Ginsberg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1605 (2010) (citing a study which found that forty-eight percent of respondents were unaware their state had a constitution).

because voting is the most important, fundamental right that underlies our entire democracy.[10] Voting should be as easy as practically possible for all eligible citizens; the foundation of our democracy begins with individuals going to the polls to select leaders to govern them.[11] Achieving this robust protection requires a comprehensive understanding of how state judges rule in these cases, accompanied with a call for state judges to construe their state constitution's grant of voting rights to the fullest extent possible. In addition, the analysis of state judicial decisions on the right to vote can help us discern how ideology and judicial selection may influence whether a judge is likely to interpret the right to vote broadly or narrowly, thereby adding to the debate over the kinds of state judges we want on the bench.

Analyzing state court cases on the right to vote in a detailed manner will have a significant effect nationwide. Many state court opinions rely on decisions from other states, especially when considering similar issues. When a state court faces an important election law case, such as one over voter ID, it is going to consider the views of its sister states.[12] Federal courts also look to state jurisprudence. Thus, state court decisions do not happen in a vacuum but are often interrelated. Increased scrutiny on how state courts have decided these issues can illuminate why state judges should rule broadly on voting rights, which can have a multiplying effect in other states.

Part I shows how our outsized focus on federal courts, at the expense of state courts, is misplaced. It first examines the importance of state courts in deciding constitutional law issues. It then compares media and scholarly attention to federal and state right-to-vote decisions, demonstrating how our discussion over voting rights cases is disproportionately skewed toward federal courts even though state judges do more of the work in this realm. Part II dives into the state cases in three specific areas as representative

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[10] *See* Joshua A. Douglas, *The Foundational Importance of Voting: A Response to Professor Flanders*, 66 OKLA. L. REV. 81, 99 (2013).

[11] *Id.* This article begins with the premise that voting is the most important right in our democracy and that therefore we should favor judicial decisions and judges who will protect that right broadly. For a further discussion on why courts should robustly construe the constitutional right to vote, *see id.* at 81 ("Voting is the foundational concept for our entire democratic structure. We think of voting as a fundamental – the most fundamental – right in our democracy. When a group of citizens collectively elects its representatives, it affirms the notion that we govern ourselves by free choice. An individual's right to vote ties that person to our social order, even if that person chooses not to exercise that right. Voting represents the beginning; everything else in our democracy follows the right to vote. Participation is more than just a value. It is a foundational virtue of our democracy.").

[12] Indeed, many of the state court cases discussed in Part II have done just that, with state courts looking to their sister state courts as part of the analysis. *See infra* Part II.

samples: voter ID, felon disenfranchisement, and the voting process; this final category includes decisions on electronic voting machines, extending polling hours, and counting absentee ballots. By examining over thirty state court cases issued in the last decade, this Part demonstrates just how involved state courts have been in shaping the meaning of the constitutional right to vote, as well as how state judges differ on whether they construe the constitutional right to vote broadly or narrowly. Part III then looks at whether a judge's ideology or the judicial selection method may correlate with the scope of a right-to-vote decision. Although further quantitative empirical studies are needed, as a preliminary finding the evidence in Part III shows that liberal-leaning judges are more likely to construe the right to vote broadly as compared to conservative jurists, especially for partisan-laden issues such as voter ID. In addition, appointed judges seem more likely than elected judges to define the right to vote robustly, at least for certain topics such as felon disenfranchisement. This analysis can contribute to the existing debate over who we want as judges as well as offer insights on the preferable method of judicial selection.

Ultimately, providing the most robust protection for the constitutional right to vote requires us, as scholars and advocates, to understand both how state courts construe these rights and how ideology and judicial selection may influence the state judges who issue these opinions. This article begins that process.

I. STATE JUDGES AND ELECTION LITIGATION

State judges decide thousands of constitutional law cases every year and numerous cases involving the right to vote. Yet both the media and scholars have largely ignored state courts and their effect on voting rights. Instead, the focus is primarily on federal courts, especially the U.S. Supreme Court. To understand the true meaning of the constitutional right to vote, however, we need to look more closely at state judges and how they rule in these cases.

A. State Courts and Constitutional Law

State supreme courts decide around 2,000 constitutional law cases every year, while the U.S. Supreme Court issues only about thirty.[13] Yet both scholars and the media assiduously cover the U.S. Supreme Court and give correspondingly little attention to state supreme courts,[14] unless a state court

[13] *See* Devins & Mansker, *supra* note 5, at 456-57.
[14] *See infra* Parts I.B. and I.C.

issues a decision of high public salience such as one involving same-sex marriage.[15] That is, most constitutional law is promulgated in state judiciaries, and yet as a society we pay relatively little attention to that phenomenon.[16]

Constitutional law cases arguably involve the most important issues a court decides because of their impact on the structure of democratic governance, yet "[t]he public generally 'lacks sufficient information to have clear, considered, and internally consistent judgments about exactly what the judicial role under the Constitution either is or ought to be.'"[17] But the public *should* care about the ways in which state courts decide these cases. Indeed, "[b]ecause state courts are closer to the people, their operations may be critical to 'popular constitutionalism's objective of reasserting democratic control over [constitutional] meaning.'"[18]

The lack of attention to state courts means that citizens – who vote to elect or retain judges in 39 states[19] – have woefully little information to assist them in making their choices.[20] As one scholar notes, "the voter ignorance problem is particularly acute in judicial elections because of the

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[15] *See, e.g.*, Associated Press, *N.J. Supreme Court to Hear Same-Sex Marriage Case*, CBS NEWS (Oct 11, 2013), http://www.cbsnews.com/news/nj-supreme-court-to-hear-same-sex-marriage-case/.

[16] *See* Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1635 (2010) ("Over the past thirty years, state courts have eclipsed the U.S. Supreme Court in shaping the meaning of constitutional values, both in their home states and throughout the nation.").

[17] Bam, *supra* note 3, at 567 (quoting Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1825 (2005)).

[18] David E. Pozen, *Judicial Elections As Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2067 (2010) (quoting Helen Norton, *Reshaping Federal Jurisdiction: Congress's Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003, 1023 (2006)).

[19] *See* Benjamin R. Hardy, Note, *Judicial Selection Question: Why is it Time for Preemptive Reform of Kentucky's Judicial Selection Method?*, 52 U. LOUISVILLE L. REV. 379, 386 (2014) (discussing the various methods by which judges are selected throughout the states).

[20] *See* Jordan M. Singer, *Knowing Is Half the Battle: A Proposal for Prospective Performance Evaluations in Judicial Elections*, 29 U. ARK. LITTLE ROCK L. REV. 725, 726 (2007) (noting that "all too frequently voters are confronted at the polls with an 'information problem': they face a slate of judicial candidates about which they know nothing particularly relevant, or even nothing at all"). As another study showed, "[m]any people, including those that had previously voted in a judicial election, do not even know that judges in their state are elected. While at least some people can name a Supreme Court Justice or two, most voters are unable to name a single state court judge, at any level of the state judiciary." Bam, *supra* note 3, at 568.

nature of the judicial office, the opaqueness of judicial performance, and the lack of useful cues and heuristics that allow voters to compensate for their lack of relevant knowledge."[21] Voters therefore use proxies such as the candidate's name, sex, ethnicity, or party affiliation to guide their decisions.[22]

This is problematic because all of these characteristics – except the candidate's party affiliation – are generally irrelevant to how the judge will perform in analyzing significant issues such as the constitutional right to vote. A renewed focus on state courts and how they interpret important constitutional principles will help those who select our state judges – voters, Governors, or independent commissions – base their choices on more relevant factors, such as the judges' likely ability to analyze these constitutional issues in a way that best comports with the ideals of popular democracy. An evaluation of state right-to-vote cases might also tell us whether elected versus appointed judges are better at broadly construing the state-conferred constitutional right to vote.[23] If the right to vote is the most fundamental right to our democracy,[24] then we should favor judges who will issue rulings that robustly protect that right for all voters.

B. State Courts, Election Law, and (Lack of) Media Coverage

Studies show that there is woefully little media coverage of state court decisions.[25] This is in spite of the fact that every year state courts shape the meaning of the constitutional right to vote, one of the most cherished rights in our democracy. Although the media pay greater attention to the U.S. Supreme Court's decisions involving voting rights, state courts issue more opinions than federal courts that define the scope of our participatory democracy.[26] Moreover, many state court election law cases are more

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[21] Bam, *supra* note 3, at 565-66.

[22] *See* Singer, *supra* note 20, at 727-28. Professor Singer notes that "a significant number of voters apparently cast a vote without any rationale whatsoever," highlighting one study in which "38% of those surveyed who had just cast a vote could not articulate a reason why they had voted the way they did." *Id.* *See also* ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS BETTER (Stanford Univ. Press 2013) (concluding that Americans are generally too ignorant about politics and civic affairs to govern themselves on a national scale).

[23] *See infra* Part III.B.

[24] *See* Douglas, *supra* note 10, at 81.

[25] *See* Richard L. Vining, Jr. & Teena Wilhelm, *Explaining High-Profile Coverage of State Supreme Court Decisions*, 91 SOC. SCI. Q. 704, 720-21 (2010) (noting that "[w]hen the premier print media outlets in the U.S. states cover courts of last resort, it is primarily due to either the characteristics of decisions or bench politics").

[26] *See* Richard L. Hasen, *Judges as Political Regulators*, RACE, REFORM, AND

significant than their federal counterparts because they often define voting itself, which is ultimately a state-based right under state constitutions.[27] As a society, we must not ignore these important institutions.

The media's attention, however, is skewed dramatically toward the U.S. Supreme Court's voting rights decisions. For instance, in 2012 – a presidential election year – the U.S. Supreme Court decided only two cases that arguably impacted the constitutional right to vote: *Perry v. Perez*[28] and *Tennant v. Jefferson County Commission*,[29] both about redistricting.[30] These decisions received outsized attention in the media. The *Perry v. Perez* opinion, reversing the lower court's decision on Texas's redistricting, was reported in national newspapers,[31] and was the subject of editorials in both the New York Times[32] and the Wall Street Journal.[33] The *Tennant* case, about West Virginia's redistricting, did not garner as much editorial commentary, but it still made national news in publications such as the New York Times,[34] as well as the Associated Press[35] and Reuters[36] news services.

By contrast, that same year, state supreme courts issued numerous cases that affected the upcoming election, but these decisions generally received scant media attention. For instance, shortly before the candidate filing deadline, the Missouri Supreme Court issued a decision calling into question the state's redistricting for congressional districts, yet the case

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REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 101, 103 (Charles, et al., eds. 2011) (noting that "state court cases have made up a majority of election challenge cases heard in the courts in every year but one in the last twelve years").

[27] *See* Douglas, *supra* note 1, at 95-105.

[28] Perry v. Perez, 132 S. Ct. 934 (2012).

[29] Tennant v. Jefferson County Commission, 133 S. Ct. 3 (2012).

[30] The Court also issued an important decision on campaign finance, American Tradition Partnership, Inc. v. Bullock, 132 S.Ct. 2490 (2012), that required state courts to apply the holding of Citizens United v. FEC, 558 U.S. 310 (2010), to state law. It further affirmed, without comment, a lower court decision on campaign finance in Bluman v. FEC, 132 S. Ct. 1087 (Mem) (2012).

[31] *See* Robert Barnes, *Justices Toss Texas's Minority-backed Electoral Maps*, WASH. POST, Jan. 21, 2012.

[32] Editorial, *Redistricting in Texas*, N.Y. TIMES, Jan. 21, 2012.

[33] Editorial, *Holder's Texas Defeat*, WALL STREET JOURNAL, Jan. 21, 2012.

[34] *See* Adam Liptak, *Justices Uphold Map for West Virginia Voting*, N.Y. TIMES, Sept. 26, 2012.

[35] *See* Associated Press, *Justices Back New Districts in W. Va., Population Concerns Rejected*, BOSTON GLOBE, Sept., 26, 2012.

[36] *See US Top Court Upholds West Virginia Redistricting*, REUTERS, Sept. 25, 2012.

made barely a ripple beyond Missouri's borders.[37] Few national publications picked up the story, and when they did they simply ran the Associated Press's short summary as part of their regional coverage.[38] Similarly, there were very few stories[39] about the Minnesota Supreme Court's August 2012 decision rejecting a challenge to a ballot proposition that, if the voters had passed it, would have added a voter ID requirement to Minnesota's Constitution.[40] The Rhode Island Supreme Court issued a contentious 3-2 decision, with a vigorous dissent, denying a manual recount in a primary for a state house seat,[41] and yet the only significant news coverage was from a local paper.[42] These are just a few examples of important state court election law cases that failed to garner any national attention.[43]

To be sure, the media sometimes provide greater coverage of a state case involving a hot-button issue, such as a ruling on the constitutionality of a voter ID law. For instance, national media reported a Pennsylvania trial court decision[44] upholding that state's voter ID requirement.[45] Then again, beyond a short story in the Associated Press (reprinted in various publications, including the New York Times),[46] the national media were

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[37] Pearson v. Koster, 359 S.W.3d 35 (Mo. 2012).

[38] *See* Associated Press, *Missouri: Court Rejects State Redistricting Map*, N.Y. TIMES, Jan. 18, 2012.

[39] A search of news stories for "Minnesota" and "voter ID" within a week of the decision produced very few relevant hits beyond an Associated Press alert. *See* Martiga Lohn & Patrick Condon, *Minnesota Court Rejects Challenge to Photo ID*, ASSOCIATED PRESS, Aug. 27, 2012.

[40] League of Women Voters Minnesota v. Ritchie, 819 N.W.2d 636 (Minn. 2012).

[41] Tobon v. R.I. Bd. of Elections, No. 2012–289–M.P., 62 A.3d 1126 (Mem) (R.I. 2012).

[42] *See* Katherine Gregg, *High Court Denies Hand Recount in R.I. House Race*, PROVIDENCE JOURNAL BULLETIN, Oct. 6, 2012.

[43] By contrast, in 2014 the national media did cover a Florida trial court's decision invalidating that state's Congressional districting plan, perhaps because it was one of the first decisions to throw out a redistricting scheme for unconstitutional partisan gerrymandering. *See* Robert Barnes, *Florida Judge Takes on Gerrymandering; Sets Stage for Supreme Court Cases in Fall*, WASH. POST (Aug. 3, 2014).

[44] *See* Applewhite v. Commonwealth, No. 330 M.D.2012, 2012 WL 3332376 (Pa. Commw. Ct. Aug. 15, 2012).

[45] *See, e.g.*, Ethan Bronner, *Pennsylvania Judge Keeps Voter ID Law Intact on Its Way to Higher Court*, N.Y. TIMES, Aug. 16, 2012. The national media also gave widespread coverage to the Pennsylvania Supreme Court's subsequent decision in the case. *See* Applewhite v. Commonwealth, 54 A.3d 1 (Pa. 2012); *see, e.g.*, Robert Barnes, *Pennsylvania High Court Orders More Hearings on Voter-ID Law*, WASH. POST, Sept. 19, 2012.

[46] Associated Press, *Tennessee: Court Upholds Voter Identification Law*, N.Y. TIMES, Oct. 26, 2012.

largely silent when, just a week before Election Day, a Tennessee appellate court upheld that state's voter ID law while ruling that Memphis voters could show their City of Memphis library card to prove their identity at the polls.[47] Perhaps the fact that Pennsylvania is considered a "swing" state while Tennessee is not led the national media to report the Pennsylvania decision and not the Tennessee case, even though both played a significant role in the conduct of the upcoming elections in the respective states.

Similarly, the national media paid a lot more attention to a federal district court decision striking down Wisconsin's voter ID law than it did to similar decisions just two years earlier by Wisconsin state trial judges. The federal court decision[48] was the subject of a New York Times Op-Ed.[49] By contrast, the New York Times mentioned the Wisconsin state court decisions only briefly as part of a broader discussion over voter ID, coupling it with an analysis of the Department of Justice's decision to block Texas's voter ID law that same week.[50] Similarly, major newspapers around the country printed an Associated Press article about the 2014 federal trial court ruling, but these same publications included little mention of the similar 2012 state trial court decisions.[51]

This is not to say, of course, that the media should not cover U.S. Supreme Court decisions on voting rights. As the nation's highest court, Supreme Court decisions are inherently newsworthy, and the Texas redistricting case in particular played into the prevailing partisan storyline over the clash between Southern states and the Department of Justice.[52] Moreover, the U.S. Supreme Court's decisions apply nationwide, while individual state court decisions directly affect only voters in those states. Nevertheless, it is curious that state court judgments, which arguably have a larger impact on the electoral process and can have effects across borders as other state and federal courts rely on them, receive comparatively scant attention from the media and the public. Further, the lack of attention to state courts diminishes the public's awareness of how these institutions

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[47] City of Memphis v. Hargett, M2012-02141-COA-R3CV, 2012 WL 5265006 (Tenn. Ct. App. Oct. 25, 2012), *aff'd*, 414 S.W.3d 88 (Tenn. 2013).

[48] Frank v. Walker, No. 11-CV-1128 (E.D. Wisc. Apr. 29, 2014).

[49] *See* Editorial, *Voter ID is the Real Fraud*, N.Y. TIMES, Apr. 30, 2014.

[50] *See, e.g.*, Editorial, *A Rejection of Discrimination*, N.Y. TIMES, Mar. 13, 2012 (devoting only one paragraph out of seven to the Wisconsin trial court decision).

[51] *See, e.g.*, Dinesh Ramde, *U.S. Judge Nixes Wisconsin Voter ID law*, HOUSTON CHRONICLE, Apr. 30, 2014; Dinesh Ramde, *Federal Judge Rules Wisc. Voter ID Law is Unconstitutional*, BOSTON GLOBE, Apr. 30, 2014.

[52] *See* Adam Liptak, *Justices' Texas Redistricting Ruling Likely to Help G.O.P.*, N.Y. TIMES (Jan. 20, 2012).

shape fundamental rights, such as the right to vote.[53] The news media need not stop covering the federal courts, but they should also give greater attention to state courts.

C. Scholarly Attention to State Courts and the Right to Vote

The media are not the only culprit in focusing too heavily on the U.S. Supreme Court's election law cases at the expense of state court jurisprudence. Scholars, too, have spent most of their energy dissecting only the key U.S. Supreme Court precedent in this area. In comparison, there has been little scholarship on the role of state courts in shaping the constitutional right to vote. As Professor Adam Winkler has written,

> Election law scholars have paid insufficient attention to state court adjudication of laws regulating electoral politics. The focus has been on federal law and U.S. Supreme Court decisions, even though each of the fifty states has its own set of detailed election regulations. Not only is state law a diverse, plentiful, and untapped lode for study, but state courts have historically exercised the responsibility to decide the constitutionality of state-level electoral reforms prior to the federal courts. It is to the state courts, therefore, that one must often look to discover the doctrinal foundations of election law, laid by state judges when first confronted with challenges to reforms.[54]

Yet virtually all recent scholarship on the right to vote has focused either on Supreme Court cases or has isolated a single state's jurisprudence.[55] There have been very few articles looking at state courts holistically or comparatively to discern how they affect voting rights.[56] For

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[53] *See* Vining & Wilhelm, *supra* note 25, at 721.

[54] Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886-1915*, 100 COLUM. L. REV. 873, 875 (2000) (considering early state court decisions involving the regulation of political parties).

[55] Although a few prior articles have focused on specific states, there is little scholarly commentary – besides my own previous work – providing a broad-based and holistic look at the role of state courts in shaping the constitutional right to vote. *See* Douglas, *supra* note 1, at 89; *see also* Matthew C. Jones, *Fraud and the Franchise: The Pennsylvania Constitution's "Free and Equal Election" Clause as an Independent Basis for State and Local Election Challenges*, 68 TEMP. L. REV. 1473 (1995); Hannah Tokerud, Comment, *The Right of Suffrage in Montana: Voting Protections Under the State Constitution*, 74 MONT. L. REV. 417 (2013); Robert Stockstill, Comment, *Voting and Election Law in the Louisiana Constitution*, 46 LA. L. REV. 1253 (1986).

[56] One recent exception is a not-yet-published article comparing four state Voting Rights Acts. *See* Paige A. Epstein, *Addressing Minority Vote Dilution Through State*

example, just a week after the 2012 presidential election, the *George Washington Law Review* hosted a symposium on political law, and the law review itself published articles from that event.[57] All of the articles in that issue considering voting rights and the judiciary focused on the U.S. Supreme Court and lower federal courts.[58] There was virtually no discussion of state courts.

A key U.S. Supreme Court case will often garner vigorous scholarly attention. For instance, the Supreme Court's decision in *Shelby County v. Holder*, which in essence gutted the Voting Rights Act's preclearance mechanism by which certain states had to seek federal preapproval for any voting change, has already been the subject of numerous articles.[59] Similarly, the Supreme Court's decision to uphold Indiana's voter ID law has been the focus of much scholarly commentary.[60] None of this scholarship is unwarranted or unnecessary, and it is all vital to exploring and understanding the Supreme Court's role in elections. But when a state, or even a series of states, has dealt with the same issues – such as voter ID – academics have generally failed to analyze these decisions holsticially and comparatively in a way that highlights the importance of state judges in shaping the right to vote.[61]

Voting Rights Acts U. CHI. PUB. L. Working Paper No. 474, *available at* http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2422915.

[57] *See generally* Spencer Overton, *Political Law*, 81 GEO. WASH. L. REV. 1783 (2013).

[58] *See, e.g.*, Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836 (2013) (considering the Supreme Court's *Anderson-Burdick* balancing test for election law cases); Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of* Bush v. Gore, 81 GEO. WASH. L. REV. 1865 (2013) (looking at how federal judges thwarted Republican-led attempts to change election rules); Gilda R. Daniels, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century*, 81 GEO. WASH. L. REV. 1928 (2013) (analyzing the impact of the Supreme Court's decision invalidating Section 4 of the Voting Rights Act in Shelby County v. Holder); Joshua A. Douglas, *Election Law Pleading*, 81 GEO. WASH. L. REV. 1966 (2013) (considering the impact of new procedural rules set out in recent Supreme Court cases on election litigation).

[59] *See, e.g.*, Richard L. Hasen, Shelby County *and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713 (2014); Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013); Daniel P. Tokaji, *Responding to* Shelby County*: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71 (2014).

[60] *See, e.g.*, Edward B. Foley, Crawford v. Marion County Election Board*: Voter Id, 5-4? If So, So What?*, 7 ELECTION L.J. 63 (2008); Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97 (2012); Michael J. Pitts & Matthew D. Neumann, *Documenting Disfranchisement: Voter Identification During Indiana's 2008 General Election*, 25 J.L. & POL. 329 (2009).

[61] One notable exception is Professor James Gardner's work considering state constitutions and partisan gerrymandering. *See* James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*,

Again, much as there is for the media, there is an obvious reason for election law scholars to focus their energy on U.S. Supreme Court precedent, and it is both understandable and justified. Supreme Court cases apply nationwide, and scholars are well suited to dissect and analyze this jurisprudence. U.S. Supreme Court opinions are part of our national conversation, and election law scholars are vital in shaping that debate – especially when the Court may have gone astray. But state courts are perhaps a more important source of voting rights law because their rulings are based on the explicit conferral of the right to vote in state constitutions. Sometimes state judges will rule broadly toward voting, but other times state judicial decisions are narrow. Understanding these theoretical differences is vital to achieving robust protection for the constitutional right to vote.

II. STATE COURT CASES INVOLVING THE RIGHT TO VOTE

The right to vote enjoys protection in both the U.S. Constitution and all fifty state constitutions, yet the scope of that safeguard is broader in state constitutions than in the federal document.[62] The U.S. Constitution protects the right only implicitly through the Equal Protection Clause of the Fourteenth Amendment; there is no direct conferral of voting rights.[63] The U.S. Supreme Court has acknowledged that there is no federal right to vote and that once a state grants the right to vote, it simply must do so on equal terms.[64] By contrast, virtually every state explicitly confers the right to vote to all state citizens in its state constitution.[65] State protection for the right to vote is therefore more robust than what is provided under federal law.

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145 U. PA. L. REV. 893, 893 (1997). In addition, Professors Michael Kang and Joanna Shepherd have explored extensively the impact of campaign contributions on state judicial rulings, finding that political parties play a major role in funding judicial campaigns and that judges often rule in ways that help the parties who funded them. *See* Michael S. Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239, 1243 (2013) ("Contributions from the Democratic coalition are associated with judges voting in a liberal direction across their judicial decisionmaking, while contributions from the Republican coalition are associated with judges voting more in a conservative direction."). Professor Shepherd has also found that campaign contributions from business interests affect judicial outcomes. *See* Joanna Shepherd, *Justice at Stake: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, AMER. CONSTIT. SOC'Y L. POL'Y (June 2013), http://www.acslaw.org/ACS%20Justice%20at%20Risk%20(FINAL)%206_10_13.pdf.

[62] *See* Douglas, *supra* note 1, at 95-105.

[63] U.S. CONST. amend. XIV, § 2.

[64] *See* Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

[65] *See* Douglas, *supra* note 1, at 101.

Stemming from these state sources of voting rights, state courts decide numerous cases that shape the meaning of the constitutional right to vote and dictate the rules for an election. This Part discusses some of the most common voting rights controversies state courts have adjudicated since 2000, when the U.S. Supreme Court's decision in *Bush v. Gore*[66] created a burgeoning field of litigation involving election administration,[67] or what one might call "the law of voting."[68] Although there are certainly other election-related issues state courts hear, this Part focuses on three prevalent categories which demonstrate the dichotomy between broad and narrow rulings on the constitutional right to vote: voter ID, felon disenfranchisement, and the voting process.[69]

The goal of this Part is to engage in the inquiry that Part I revealed is missing from current election law scholarship: a detailed look at state court adjudication of voting rights issues. The analysis is intended to show both that state courts are playing a vital role in election law disputes and that judges across states often come out differently on how they define the constitutional right to vote. State judges either broadly construe state constitutions as going beyond the federal constitution or instead narrowly analyze the state protection to be merely co-extensive with the U.S. Supreme Court's rulings under federal law. As the discussion reveals, the broader interpretation is the better mode of analysis for protecting voting as a fundamental right that is foundational to our concept of democracy.

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[66] Bush v. Gore, 531 U.S. 98 (2000).

[67] As Professor Rick Hasen has recounted, *Bush v. Gore* demonstrated to scholars that the nuts-and-bolts aspects of election administration were worthy of greater attention. *See* Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 377-78 (2002).

[68] *See* EDWARD B. FOLEY, MICHAEL J. PITTS, AND JOSHUA A. DOUGLAS, ELECTION LAW AND LITIGATION: THE JUDICIAL REGULATION OF POLITICS 573 (Aspen 2014).

[69] Importantly, I am not attempting to catalog *every* case state courts have decided impacting the right to vote. That kind of inquiry would necessarily be both imprecise (because not all state court cases are reported and because there would be considerable debate on what kinds of cases impact the right to vote) and less useful than a sustained focus on a few areas in which state courts have been particularly active. Thus, the goal is not to locate all state voting rights cases but instead to explain, through a representative sample, how state court analysis diverges on constitutional interpretation of the right to vote.

That said, I have attempted to uncover all reported state court cases since 2000 involving voter ID, felon disenfranchisement, and the voting process, so long as the court's decision included constitutional analysis on the right to vote. This methodology is necessarily underinclusive, as it contains only cases reported on Westlaw, but it represents enough cases – over thirty – to engage in a holistic discussion of how state courts define and shape the conferral of voting rights within state constitutions.

A. Voter ID

The controversy over voter identification laws has been the most salient, hot-button issue surrounding the right to vote over the past decade.[70] Many states have enacted new regulations requiring voters to show some form of identification at the polls before voting.[71] These laws have been subject to intense litigation, with some state courts upholding their state's voter ID law and others striking it down. Underlying most decisions upholding a voter ID law is a constricted interpretation of the state-based constitutional right to vote that simply follows narrow federal jurisprudence, while courts that have invalidated strict voter ID requirements often give independent, broader force to the state constitution's explicit conferral of the right to vote.

One reason state courts have been so active in this area is that the U.S. Supreme Court already spoke on the issue in its 2008 decision in *Crawford v. Marion County Election Board*.[72] In that case, the Court rejected a federal constitutional challenge to Indiana's voter ID law, holding that the law, on its face, did not violate the Equal Protection Clause of the Fourteenth Amendment.[73] The three-member plurality opinion narrowly construed the federal constitutional protection for voting rights, ruling that the plaintiffs could not show that Indiana's voter ID law amounted to a "substantial" or "severe" burden on the right to vote.[74] Because the law did not impose a "severe" burden, the Court did not apply strict scrutiny review but instead employed a lower-level balancing test, which is more deferential to a state's role in regulating elections.[75] The Court compared the state's interests with the alleged infringement on the right to vote and found that the state interest was high and the burden on voters low.[76] In essence, the Court closed the door to a federal challenge to voter ID laws unless the

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[70] *See generally* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007).

[71] *See* Niraj Chokshi, *Eight states have photo voter ID laws similar to the one struck down in Wisconsin*, WASH. POST (Apr. 29, 2014) (noting that thirty-one states had some form of a voter ID law).

[72] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

[73] *Id.* at 202-04.

[74] *See id.* at 198, 202–03.

[75] *Crawford*, 553 U.S. at 191 (applying Burdick v. Takushi, 504 U.S. 428, 434 (1992) and Anderson v. Celebrezze, 460 U.S. 780, 793 (1983)). For a criticism of this deferential mode of analysis, see Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. (forthcoming 2015).

[76] *Crawford*, 553 U.S. at 202.

voter-plaintiffs have very strong evidence of how the law, as applied, severely impedes particular people from voting.

After *Crawford*, states, likely emboldened by the Supreme Court's decision, began enacting stricter voter ID laws, especially in states with conservative-led legislatures.[77] Voting rights advocates then turned their attention to state courts and state sources of the right to vote, challenging these voter ID laws around the country under state constitutions.[78] The results have been decidedly mixed. Of the nine state judiciaries to consider the issue since 2004, six have upheld voter ID laws and three have ruled them unconstitutional. Of course, not all voter ID laws are the same, as they differ regarding the kinds of identification a voter must show and how long after an election a voter may bring an ID to the local election officials to ensure that the final count includes the voter's provisional ballot.[79] But the jurisprudence typically has not turned on the difference between ID requirements among the states, instead focusing on the construction of the state's constitution and an assessment of the severity of the burden the laws impose on voters. Put differently, when state courts followed *Crawford*'s narrower interpretation of the right to vote, the courts usually upheld the laws, but when courts independently construed the broader grant of voting rights in state constitutions, they were more likely to strike down these voting restrictions so long as the plaintiffs presented sufficient evidence of the burdens the voter ID law imposed on actual voters. Notably, the *Crawford* decision was pursuant to the U.S. Constitution's Equal Protection Clause, not any state sources of the right to vote. It should not be applicable to a challenge under a state constitution. Nevertheless, many state courts followed *Crawford* even when interpreting their state constitutions, thereby unduly narrowing the scope of the constitutional right to vote.

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[77] *See Voter Identification Requirements/Voter ID Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx (last visited Aug. 12, 2014).

[78] Six of the nine state court decisions involving the constitutionality of a voter ID law came after the U.S. Supreme Court's decision in *Crawford*. The three that pre-date *Crawford* are from Colorado, Missouri, and Michigan. *See* In re Request for Advisory Opinion Concerning Constitutionality of 2005 PA 71, 740 N.W.2d 444, (Mich. 2007); Weinschenk v. Missouri, 203 S.W.3d 201 (Mo. 2006); Colorado Common Cause v. Davidson, No. 04-CV-7709, 2004 WL 2360485 (Colo. Dist. Ct. Oct. 18, 2004). Even so, the majority of the state court activity has occurred after *Crawford*.

[79] *See* Justin Levitt, *Voter ID Update: The Diversity in the Details*, NAT'L CONSTITUTION CTR. (Oct 30, 2013), http://blog.constitutioncenter.org/2013/10/voter-id-update-the-diversity-in-the-details/ (explaining that voter ID laws vary and using the example that "some accept student IDs . . . and some do not").

1. State courts upholding voter ID laws

Six state judiciaries (in Colorado, Michigan, Indiana, Georgia, Tennessee, and Wisconsin) have upheld voter ID laws in the past decade.

The first reported state court decision approving a voter ID law was from a Colorado trial court in 2004.[80] The judge rejected a challenge to the state's voter ID law in part because it was consistent with the new federal requirement, from the Help America Vote Act of 2002, that individuals who mail in their voter registration forms must show an ID the first time they vote.[81] The court also found that the state had a sufficient justification for its attempt to root out voter fraud, concluding that "all of us must show identification for the most mundane of reasons, and I do not believe it likely that Plaintiffs will be able to demonstrate that Colorado's identification requirement is a sufficiently 'severe' intrusion on the right to vote to trigger strict scrutiny."[82] Further, the court explained that the law was not "really an identification requirement at all" because the state accepted many forms of non-photographic ID, and voters without an ID could cast provisional ballots that would count so long as the voter's name appeared on one of the lists the state used to test provisional ballots.[83]

Five state supreme courts have also upheld voter ID laws in recent years, most often following federal jurisprudence on the right to vote even though the state constitutions go further in explicitly conferring voting rights to all state citizens.

The Michigan Supreme Court, ruling 5-2, issued an advisory opinion to the legislature saying that the proposed voter ID law was constitutional.[84] The court invoked both the U.S. Constitution and the state constitution to find that the law was a "reasonable, nondiscriminatory restriction designed to preserve the purity of elections and to prevent abuses of the electoral franchise."[85] The two dissenters vigorously disputed this notion, contending that although "preventing voter fraud is an important interest in the abstract, . . . the relevant inquiry is whether, and to what degree, in-person voter fraud would be addressed by the photo identification

[80] Colorado Common Cause v. Davidson, No. 04-CV-7709, 2004 WL 2360485 (Colo. Dist. Ct. Oct. 18, 2004).

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] In re Request for Advisory Opinion Concerning Constitutionality of 2005 PA 71, 740 N.W.2d 444 (Mich. 2007).

[85] *Id.* at 448.

requirement."[86] The dissenters found that the law would not root out any existing fraud in Michigan elections, while at the same time it would infringe the fundamental right to vote.[87]

The Indiana Supreme Court approved its voter ID law by a 4-1 vote under the state constitution, holding that the meaning of the direct conferral of voting rights under Indiana's Constitution is the same, or in lockstep with, the U.S. Constitution.[88] The court therefore followed the U.S. Supreme Court's lead from its *Crawford* decision in upholding the law under Indiana's Constitution instead of giving its state constitution the independent and broader force that the explicit grant of the right to vote should warrant.[89]

The Georgia Supreme Court, by contrast, purported to give independent meaning to its state constitution's provision on voting rights, but it still upheld the voter ID law by a 6-1 vote.[90] The court held that the state constitution authorized the legislature to enact the law as a "reasonable procedure for verifying that the individual appearing to vote in person is actually the same person who registered to vote."[91] The dissent lamented the fact that the Georgia voter ID law "has further constricted a citizen's ability to cast a regular ballot at his or her polling precinct."[92]

The Tennessee Supreme Court was unanimous in its voter ID ruling, rejecting a state constitutional challenge to the law.[93] The court followed a "number of courts, including the United States Supreme Court, [which] have rejected the notion that a state must present evidence that it has been afflicted by voter fraud in order to enact laws pursuant to its authority to protect the integrity of the election process."[94] Although the court applied strict scrutiny review, and thus did not just simply follow *Crawford* and the U.S. Supreme Court's interpretative method for the right to vote, it found that the law was narrowly tailored to achieve the state's goals of securing election integrity.[95] This legal analysis at least leaves the door open to broader rulings on the state constitutional right to vote; litigants simply need

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[86] *Id.* at 474 (Cavanagh, J., dissenting).
[87] *Id.*; *see also id.* at 487 (Kelly, J., dissenting).
[88] *See League of Women Voters of Indiana,* 929 N.E.2d 758, 767 (Ind. 2010).
[89] *Id.*
[90] Democratic Party of Georgia, Inc. v. Perdue, 707 S.E.2d 67, 72 (Ga. 2011).
[91] *Id.* (citing GA. CONST. art. II, § I, Par. I).
[92] *Id.* at 76 (Benham, J., dissenting).
[93] City of Memphis v. Hargett, 414 S.W.3d 88 (Tenn. 2013).
[94] *Id.* at 104.
[95] *Id.* at 104-05.

better evidence on the kinds of burdens voting restrictions impose on voters.

Finally, the Wisconsin Supreme Court issued two opinions, one 5-2 and the other 4-3, upholding the state's voter ID law, following both the U.S. Supreme Court and these prior state court decisions in its analysis.[96] Initially two Wisconsin trial courts construed the state's constitution as exceeding the federal counterpart in conferring the right to vote, holding that the state's voter ID law imposed an impermissible qualification for voting under the Wisconsin Constitution.[97] One court explicitly distinguished *Crawford* by noting, "this case is founded upon the Wisconsin Constitution which expressly guarantees the right to vote while *Crawford* was based upon the U.S. Constitution which offers no such guarantee."[98] The Wisconsin Supreme Court eventually reversed these courts and upheld the state's voter ID requirement, following federal jurisprudence for the state constitutional question to conclude that the law did not add an additional qualification to vote and did not impose an undue burden on voting.[99] Although the state litigation has concluded, the question of whether the state's voter ID law complies with the federal Voting Rights Act is still pending before a federal appellate court.[100]

2. State courts invalidating voter ID laws

Within the past few years, courts in three states (Missouri, Pennsylvania, and Arkansas) have invalidated voter ID laws under state constitutions, recognizing that the state constitutional protection for the right to vote goes beyond the federal constitution. These courts have therefore broadly construed the state constitutions' explicit conferral of voting rights.

The Missouri Supreme Court, in 2006, was the first state court to strike

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[96] Milwaukee Branch of the NAACP v. Walker, No. 2012AP1652 (Wisc. July 31, 2014); League of Women Voters of Wisconsin Education Network v. Walker, No. 2012AP584 (Wisc. July 31, 2014).

[97] League of Women Voters of Wisc. Educ. Network, Inc. v. Walker, No. 11 CV 4669, 2012 WL 763586 (Wis. Cir. Ct. Mar. 12); Milwaukee Branch of the NAACP v. Walker, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Ct. Mar. 6, 2012).

[98] *Milwaukee NAACP*, 2012 WL 739553, at pt. X.

[99] Milwaukee Branch of the NAACP v. Walker, No. 2012AP1652 (Wisc. July 31, 2014); League of Women Voters of Wisc. Education Network v. Walker, No. 2012AP584 (Wisc. July 31, 2014).

[100] A trial court ruled that the law is invalid under both Section 2 of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment. *See* Frank v. Walker, 11-CV-01128, 2014 WL 1775432 (E.D. Wis. Apr. 29, 2014).

down a voter ID law.[101] The court held that the law violated the Missouri Constitution's equal protection clause and right-to-vote provision and did not satisfy strict scrutiny.[102] More specifically, the court found that although combating voter fraud is a compelling state interest, the voter ID law was not narrowly tailored to achieve that purpose.[103] In conducting its analysis, the court took pains to explain that the Missouri Constitution gives broad protection to voting as a fundamental right, thus focusing on the state source of the right to vote as independent from the federal constitution.[104]

The fate of the voter ID requirement in Pennsylvania took a circuitous route – with a state trial judge initially upholding the law,[105] the Pennsylvania Supreme Court vacating that decision,[106] and then the trial court putting the law on hold for the upcoming election[107] – before a different trial judge finally invalidated the law under the state constitution.[108] Underlying the Pennsylvania trial court's final decision invalidating the law was the notion that

> As a constitutional prerequisite, any voter ID law must contain a mechanism for ensuring liberal access to compliant photo IDs so that the requirement of photo ID does not disenfranchise valid voters. In other words, a state cannot require (A) proof of identification, (photo ID), without also mandating (B), the government provide the new proof of identification.[109]

The court thus found that the voter ID law violated the state constitution's

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[101] Weinschenk v. Missouri, 203 S.W.3d 201 (Mo. 2006). In 1999 a Virginia trial court issued an injunction against the state from moving forward with a "pilot program" in which it would require voters to show identification in ten jurisdictions. Democratic Party of Va. v. State Bd. of Elections, No. HK-1788, 1999 WL 1318834, at *1 (Va. Cir. Ct. Oct. 19, 1999). Although the court noted that the pilot program raised significant issues regarding the constitutional right to vote, it did not actually rule on the constitutionality of the voter ID law.

[102] *Weinschenk*, 203 S.W.3d. at 204.

[103] *Id.* at 204-05.

[104] *See id.* at 212 ("The express constitutional protection of the right to vote differentiates the Missouri constitution from its federal counterpart.").

[105] Applewhite v. Commw., 330 M.D. 2012, 2012 WL 3332376 (Pa. Commw. Ct. Aug. 15, 2012) vacated, 617 Pa. 563, 54 A.3d 1 (2012).

[106] Applewhite v. Commw., 54 A.3d 1, 6 (Pa. 2012) (Todd, J, dissenting); *id.* (McCaffery, J., dissenting).

[107] Applewhite v. Commw., 330 M.D. 2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012).

[108] Applewhite v. Commw., 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014).

[109] *Id.*

conferral of the "fundamental right to vote."[110] It gave primacy to the notion that all voters should have easy access to the ballot without significant hindrance from state-imposed voter restrictions. The Governor announced that he would not appeal this decision, meaning that the opponents of voter ID ultimately prevailed, through state courts and under the state constitution, in eliminating Pennsylvania's strict voter ID requirement.[111]

Finally, an Arkansas trial court construed its state constitution as going beyond the federal constitution, ruling that the state's voter ID law imposed an additional "qualification" to vote beyond what the Arkansas Constitution permits.[112] This again exemplifies a broader interpretation of the constitutional right to vote under the state constitution. The Arkansas Supreme Court is likely to hear an appeal. If it recognizes the primacy and independence of the state constitution's conferral of voting rights as going beyond the U.S. Constitution, then it should uphold this result.

In sum, since 2004, state courts in nine states have rendered important decisions regarding voter ID. Courts that have interpreted their state constitutions to be in "lockstep," or co-extensive, with the federal constitution, or who otherwise followed the U.S. Supreme Court's *Crawford* decision, upheld the laws. This analysis presents an unduly narrow view of the explicit conferral of voting rights in state constitutions. By contrast, courts that properly understood the state constitutional right to vote broadly as going beyond federal protection invalidated the voting restrictions.[113]

B. Felon Disenfranchisement

State courts have also been intimately involved in the debate over felon disenfranchisement, with some courts broadly construing the right to vote for felons and thereby limiting the reach of laws that disenfranchise them,

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[110] *Id.*

[111] *See* Dave Warner, *Pennsylvania Governor Drops Court Fight for Voter ID Law*, REUTERS (May 8, 2014), http://www.reuters.com/article/2014/05/09/us-usa-voterid-pennsylvania-idUSBREA4800N20140509.

[112] *See* Andrew DeMillo, *Group Asks Judge to Halt Arkansas Voter ID Law*, ASSOCIATED PRESS (June 24, 2014), http://www.sfgate.com/news/article/Group-asks-judge-to-halt-Arkansas-voter-ID-law-5575961.php. The judge had issued a prior decision invalidating the law, but the state supreme court reversed that decision on procedural grounds. *See* Ark. State Bd. of Election Comm'rs v. Pulaski Cnty. Election Comm'n, No. 2014 Ark. 236 (Ark. 2014).

[113] *See* Douglas, *supra* note 1, at 101-05.

and other courts ruling more narrowly in upholding the restrictions. The U.S. Supreme Court last considered the topic in 1985,[114] but several federal appellate courts have recently issued rulings on felon disenfranchisement, rejecting challenges to state laws under the federal Voting Rights Act or the U.S. Constitution's Equal Protection Clause.[115] But plaintiffs have prevailed in some state courts, particularly in limiting the reach of felon disenfranchisement laws when state courts construe the right to vote broadly. This is another example of how robust state court analysis of the right to vote can overcome undue voting restrictions, thereby including more people in the electorate.

For instance, a California appellate court ruled that the California Constitution's delegation to the legislature to "provide for the disqualification of electors while . . . imprisoned or on parole for the conviction of a felony"[116] did not apply to those prisoners "incarcerated in a local detention facility for the conviction of a felony, including persons serving that term as a condition of probation."[117] As part of its ruling, the court applied a canon of construction in favor of broader voting rights, stating,

> in the absence of any clear intent by the Legislature or the voters, we apply the principle that "[t]he exercise of the franchise is one of the most important functions of good citizenship, and no construction of an election law should be indulged that would disenfranchise any voter if the law is reasonably susceptible of any other meaning."[118]

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[114] Hunter v. Underwood, 471 U.S. 222 (1985) (invalidating Alabama felon disenfranchisement law because it was passed with racial animus); *see also* Richardson v. Ramirez, 418 U.S. 24 (1974) (upholding California felon disenfranchisement law under the Reduction in Representation Clause of the Fourteenth Amendment).

[115] *See* Johnson v. Governor of State of Florida, 405 F.3d 1214 (11th Cir. 2005) (en banc) (Voting Rights Act); Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009) (Voting Rights Act); Hayden v. Pataki, 449 F.3d 305 (2d. Cir. 2006) (en banc) (Voting Rights Act); Farrakhan v. Washington, 623 F.3d 990 (9th Cir. 2010) (en banc) (Voting Rights Act); Young v. Hosemann, 598 F.3d 184 (5th Cir. 2010) (holding that a provision of the Mississippi Constitution that prohibits felons from voting did not violate the Equal Protection Clause of the U.S. Constitution); Hayden v. Paterson, 594 F.3d 150 (2d Cir. 2010) (rejecting challenge to New York felon disenfranchisement law under the Fourteenth and Fifteenth Amendments). Notably, many of these cases were close en banc decisions with vigorous dissents, suggesting that, although plaintiffs have not prevailed in federal court, the proper resolution of the issue is far from clear. *See, e.g.*, Hayden v. Pataki, 449 F. 3d at 343 (Parker, J., dissenting); *id.* at 367 (Sotomayor, J., dissenting).

[116] CAL. CONST. art. II, § 4.

[117] League of Women Voters of Cal. v. McPherson, 145 Cal. App. 4th 1469 (Cal. App. 2006).

[118] *Id.* at 1482 (internal citation omitted).

Other courts also have limited the reach of a state's felon disenfranchisement law by invoking a broader analysis of state voting rights. The Tennessee Supreme Court, for example, invalidated the state's decision to disenfranchise an individual who was convicted of homicide when the state did not list homicide as an "infamous crime" at the time he committed the offense.[119] The court explained that "[o]ur Constitution guarantees its citizenry the right to vote pursuant to article I, section 5, protecting all except those convicted of infamous crimes. That the entitlement is preserved in the Constitution rather than by legislative enactment underscores its importance to the people."[120] Essential to the court's analysis was the principle that the right to vote is fundamental and robust, even for felons, and therefore the legislature may take that right away only pursuant to constitutional authority. Disenfranchising the defendant based on a conviction for a crime that was not "infamous" constituted a narrow view of voting rights and an impermissible "restraint on liberty."[121]

The Iowa Supreme Court also limited the reach of its felon disenfranchisement law by finding that an aggravated misdemeanor offense of "operating while intoxicated" was not an "infamous crime" under the state constitution.[122] The plurality opinion held that a crime is "infamous" only if it is one "that reveals that voters who commit the crime would tend to undermine the process of democratic governance through elections."[123] The court thereby narrowed the state's disenfranchisement provision and, in the process, emphasized the fundamental nature of the right to vote.[124]

But plaintiffs challenging felon disenfranchisement laws have not seen universal success in state courts, especially when the courts fail to construe voting rights broadly. The Indiana Supreme Court, for example, held that the state was justified in disenfranchising an individual convicted of misdemeanor battery during the time of his incarceration pursuant to the legislature's general police power to deprive convicted prisoners of the right to vote while they are in jail.[125] Similarly, the Washington Supreme Court

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[119] May v. Carlton, 245 S.W.3d 340, 345 (Tenn. 2008).

[120] *Id.* at 346.

[121] *Id.* at 345.

[122] Chiodo v. Section 43.24 Panel, 846 N.W.2d 845, 847 (Iowa 2014). The court was fractured, with three justices in the plurality, two concurring justices, and one dissent.

[123] *Id.* at 856.

[124] *Id.* at 848, 856.

[125] Snyder v. King, 958 N.E.2d 764, 782 (Ind. 2011). The court found that the state could not disenfranchise an individual solely based on his misdemeanor battery conviction,

ruled that to re-gain voting rights, a felon who had served his or her full prison sentence still must repay the entire amount of his or her "legal financial obligations."[126] The court employed a lockstep[127] analysis – in which it simply followed the U.S. Constitution and federal jurisprudence on the issue – to conclude that the Washington Constitution "does not provide greater protection of voting rights for felons than does the equal protection clause of the federal constitution."[128] Ultimately, the majority held that the right to vote is *not* a fundamental right for felons.[129]

Given that many state constitutions have sanctioned felon disenfranchisement for many years,[130] there is often no plausible state-based legal argument against the laws. Nevertheless, a narrower view of the constitutional right to vote gives states a stronger argument to justify and even expand their felon disenfranchisement provisions. A broader interpretation of the right to vote under state constitutions, by contrast, has resulted in state courts restricting the reach of the laws.

C. Voting process

State judges routinely regulate the rules of the voting process, rendering decisions on a wide range of issues such as the kinds of machines voters use and the procedures for accepting absentee ballots. When things go awry on Election Day, state judges decide whether to extend polling hours. Through these opinions, which all involve Election Day or post-election mechanics, state courts play a vital role in dictating the meaning and scope of the

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as that offense did not constitute an "infamous crime" under the Indiana Constitution's Infamous Crimes Clause. *Id.* at 785. But the holding still sanctioned the state's broader felon disenfranchisement rule for anyone in jail.

[126] Madison v. Washington, 163 P.3d 757 (Wash. 2007).

[127] *See* Douglas, *supra* note 1, at 106 (explaining the lockstep approach).

[128] *Madison*, 163 P.3d at 766.

[129] *Id.* at 768. In a subsequent decision, the Washington Supreme Court held that the state could continue to disenfranchise a person who was convicted of being a sexual predator during the period of his civil confinement, giving primacy to the legislature's constitutional authority to impose felon disenfranchisement over the constitution's explicit conferral of the right to vote. *See* State v. Donaghe, 256 P.3d 1171 (Wash. 2011).

[130] *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN AMERICA 50 (2000) (explaining that "[s]tates began to incorporate criminal disfranchisement provisions into their constitutions during the early years of the republic"); *see also* William Walton Liles, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615, 617 (2007) (noting that "by the eve of the Civil War some two dozen states had statutes barring felons from voting or had felon disenfranchisement provisions in their state constitutions") (internal quotation marks and citation omitted).

constitutional right to vote. Sometimes the decisions broadly construe the right to vote and open up the process to more people, while other times the opinions are narrow and ultimately make voting harder.

1. Voting machines

In recent years state courts around the country have issued opinions on the constitutionality of new electronic voting machines. Although most state judges have rejected these challenges and elevated the role of states in regulating the election process, at least one state court emphasized the importance of the constitutional right to vote and suggested that the problems inherent with using the new machines could potentially infringe that right.

After the 2000 presidential election debacle in Florida, Congress enacted the Help America Vote Act (HAVA), which provided funds to states and localities to replace outdated voting equipment.[131] Many states purchased new Direct Recording Electronic (DRE), or touch-screen, voting machines. Some voters then challenged the use of these machines as infringing on their rights, alleging that the machines prevented some people from casting an effective vote or having their ballot count. Plaintiffs initially challenged the DRE machines in federal court, arguing that they violated equal protection by treating voters who use them differently from voters who use paper ballots.[132] But after the federal courts rejected these claims, plaintiffs turned to state courts.

The Georgia Supreme Court, in rejecting a challenge to Georgia's DRE machines, narrowly construed the Georgia Constitution's right-to-vote provision to go only as far as federal jurisprudence.[133] The plaintiffs argued that the state's use of electronic voting machines, instead of paper ballots, violated their fundamental right to vote because the state was not protecting the DRE machines from fraudulent manipulation through the use of an independent audit trail or county and state tabulators.[134] The court, following the U.S. Supreme Court's interpretation of the right to vote, found that the DRE machines did not burden voters and therefore did not

[131] 42 U.S.C. §§ 15301 to 15545 (2002).

[132] *See* Tex. Democratic Party v. Williams, 285 F. App'x 194, 195 (5th Cir. 2008) (per curiam); Wexler v. Anderson, 452 F.3d 1226 (11th Cir. 2006); Weber v. Shelley, 347 F.3d 1101, 1106–07 (9th Cir. 2003).

[133] Favorito v. Handel, 684 S.E.2d 257, 260 (Ga. 2009).

[134] *Id.*

require strict scrutiny review, the highest form of judicial inquiry.[135] By employing a lower level of scrutiny, the court deferred to the state's assertion of an "important regulatory interest" in implementing the law.[136] Implicit in this analysis is a narrower construction of the state-based constitutional right to vote in favor of state regulation of the voting process.

The Texas Supreme Court, aligning with the Georgia case and federal court opinions, also rejected a challenge to DRE machines.[137] The plaintiffs alleged that the use of the DRE machines violated the state constitution's grant of the right to vote.[138] Specifically, they argued that paper ballots are less subject to fraud or manipulation than electronic machines, and that voters who use the electronic machines are denied the right to a hand recount of votes if a recount is necessary, thereby devaluing the votes of those who use the DRE technology.[139] The court rejected these arguments, holding that the DRE machines did not "impose severe restrictions on voters, particularly in light of the significant benefits such machines offer."[140] Part of that analysis included a limiting construction of the state constitution's conferral of voting rights to all citizens.

But an Arizona appellate court took a different tact, elevating the importance of the constitutional right to vote in analyzing this question.[141] Various plaintiffs with disabilities challenged Arizona's new DRE machines, alleging that they were inaccurate, inaccessible for voters with disabilities, and subject to vote manipulation.[142] An appellate court reversed a trial court decision that had dismissed the lawsuit, stating that the plaintiffs had presented sufficient evidence that the machines might violate both the state constitution and state statutes to allow the suit to move forward.[143] The court concluded that "Arizona's constitutional right to a 'free and equal' election is implicated when votes are not properly counted," and that there was a risk that the new DRE machines might not correctly record and tabulate the votes.[144]

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[135] *Id.* at 261-62.
[136] *Id.* at 262.
[137] Andrade v. NAACP of Austin, 345 S.W.3d 1 (Tex. 2011).
[138] *Id.* at 11.
[139] *Id.*
[140] *Id.* at 14.
[141] Chavez v. Brewer, 214 P.3d 397, 401 (Ariz. Ct. App. 2009).
[142] *Id.*
[143] *Id.* at 311.
[144] *Id.* at 320. The plaintiff did not pursue the litigation on remand because key witnesses either disappeared or could not testify on the specific points at issue. *See* Email from Clair Wendt, Sec'y for Paul F. Eckstein, Perkins Coie, to Patrick Barsotti, Research

In sum, most state courts have rejected challenges to DRE machines and narrowly construed their state constitution in the process, but the Arizona court is an exception. That court's analysis demonstrates how questions involving the efficacy of the vote casting and counting process can implicate the broader grant of the right to vote within state constitutions.

2. Extending polling hours on Election Day

On Election Day itself, state courts are often involved in decisions regarding whether to extend the polling hours because of some issue or malfunction. Lengthening the polling time in the event of a problem obviously makes it easier for some people to vote; strictly following the closing deadline might, in some circumstances, unduly shut people out from the democratic process, thereby infringing on their constitutional right to vote. Further, appellate courts that reverse a trial court decision to extend polling hours inherently interfere with the trial judge's broader, on-the-ground determination of how best to effectuate the constitutional right to vote for all citizens.

During the 2000 presidential election dispute, the decisions of the Florida Supreme Court and the U.S. Supreme Court in *Bush v. Gore* grabbed all of the headlines, but a ruling from a Missouri appellate court was also significant. The Gore campaign had successfully obtained an order from a Missouri trial judge to extend the polling hours in St. Louis until 10:00 p.m., three hours after the statutory closing time, due to extremely long lines throughout the day that were preventing some people from voting.[145] The Bush campaign convinced an appellate court to reverse that ruling.[146] As part of its written order issued a month later, the court of appeals explained the dilemma facing state trial judges on Election Day:

> We recognize that in the heat of a closely-contested election campaign, trial judges may be called upon to make difficult decisions with little time for deliberation. Where fundamental rights are at stake, such pressures are magnified. But commendable zeal to protect voting rights must be tempered by the corresponding duty to protect the integrity of the voting process. Courts should

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Assistant for Joshua A. Douglas, Univ. Ky. Coll. L. (Jul. 1, 2014, 20:17 EST) (explaining the status of the litigation of *Chavez v. Brewer* following the appellate court decision).

[145] State *ex rel*. Bush-Cheney 2000, Inc. v. Baker, 34 S.W.3d 410, 411 (Mo. Ct. App. 2000).

[146] *Id.* at 412.

> not hesitate to vigorously enforce the election laws so that every properly registered voter has the opportunity to vote. But equal vigilance is required to ensure that only those entitled to vote are allowed to cast a ballot. Otherwise, the rights of those lawfully entitled to vote are inevitably diluted.[147]

A similar issue arose during the 2002 election in Arkansas, with the Democratic Party obtaining an emergency order from a trial court judge to extend the polling hours from 7:30 p.m. to 9:00 p.m. in one Arkansas county, only later to have the Arkansas Supreme Court reverse that decision.[148] The judge issued the order extending polling hours because the county did not have sufficient voting booths, voting rolls, or other supplies and equipment, with ballots depleted during the day at three precincts.[149] These deficiencies had the tangible effect of taking away the right to vote for some people. But the Arkansas Supreme Court reversed the order later that evening, ruling that the Arkansas election law requiring polls to close at 7:30 p.m. was clear and mandatory.[150] The decision was initially 6-0 with one justice not participating, but two days later the court issued a 4-3 per curiam decision with one concurrence and three dissenting opinions.[151] The dissenters argued that the court did not have proper appellate jurisdiction over the case and therefore that the court should not have interfered with the trial court's decision.[152]

Indeed, judges throughout the country regularly extend polling hours in extreme circumstances without facing reversal from appellate courts. During the 1990 election, a North Carolina judge lengthened the voting time by one hour due to long lines throughout the day.[153] In 2010, a New Hampshire judge extended the polling time by one hour because there had

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[147] *Id.* at 412-13.

[148] Republican Party of Arkansas v. Kilgore, 98 S.W.3d 798 (Ark. 2002).

[149] *Id.* at 798-99.

[150] *Id.* at 800 (citing Ark. Code Ann. § 7–5–304 (Repl. 2000)).

[151] *Id.* at 799; *id.* at 801 (Hannah, J., concurring).

[152] *Id.* at 802 (Glaze, J., dissenting); *id.* at 804 (Corbin, J., dissenting); *id.* at 805 (Clinton Imber, J., dissenting). The dissenters lamented that "[n]ever in this court's history since 1836 has this court heard and decided an appeal or petition for a writ without the parties having filed a notice of appeal, record, and briefs so the court could deliberate properly to consider both the merits of the lower court's decision and its authority to have decided the case in controversy." *Id.* at 549 (Glaze, J., dissenting). Another justice who initially voted to reverse but then dissented from the written opinion wrote that on Election Day he had "acted improvidently in this matter" and was "truly embarrassed." *Id.* at 550 (Corbin, J., dissenting).

[153] *See* Democratic Party of Guilford Cnty. v. Guilford Cnty. Bd. of Elections, 467 S.E.2d 681, 682-83 (N.C. 1996).

been a shooting in the town, which had resulted in a lockdown of a local school that the town was using as a polling place.[154] Similarly, a Maryland judge extended the polling hours in 2006 in Montgomery County due to a glitch in the county's electronic voting machines.[155] Two years later a Maryland judge extended the polling times by ninety minutes due to a severe ice storm.[156] These are just a few examples; in every election cycle there are news reports of state judges lengthening polling hours to respond to some problem with the voting process.[157] These last-minute decisions to extend voting hours do not always result in published written opinions or national media coverage.[158] Moreover, broadly construing voting rights does not mean that judges should always extend polling hours; plaintiffs have the burden of demonstrating that there is a significant problem that will actually impede some people from voting without the additional time. As these examples demonstrate, state trial judges, when faced with an Election Day problem, often broadly interpret the right to vote so as to ensure that everyone has a reasonable chance of exercising that right on Election Day.[159]

3. Complying with rules for casting a ballot

The rules for accepting absentee ballots are also fodder for state court involvement in the voting process, especially in an election contest when the determination of who won may come down to those votes.[160] Once

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[154] *Town of Pittsburg Polling Places to Stay Open to 8:00 p.m.*, U.S. STATE NEWS, Nov. 2, 2010.

[155] Debbi Wilgoren, *Montgomery to Extend Voting Hours After Election Glitches*, WASH. POST, Sept. 12, 2006.

[156] Eric M. Weiss & Joshua Zumbrun, *Icy Rain Ties Up Traffic, Causes Dangerous Ride to the Polls*, WASH. POST, Feb. 12, 2008.

[157] *See, e.g.*, Christine Hauser & John Holusha, *Problems Lead 8 States to Extend Some Voting Hours*, N.Y. TIMES, Nov. 7, 2006.

[158] Federal courts, too, have issued rulings extending polling hours on Election Day. *See, e.g.*, Obama for America v. Cuyahoga County of Board of Elections, No. 08-cv-562 (N.D. Ohio Mar. 4, 2008). Nevertheless, a search of judicial opinions and news reports reveals much more state court than federal court activity on this issue. *See generally* Robert C. O'Brien, Amy Borlund & John Kay, *Election Day Challenges to Polling Hours and the Judiciary's Cautious Response*, 27 BUFF. PUB. INT. L.J. 1 (2009) (citing mostly state court cases and news articles involving state judges extending polling hours).

[159] Indeed, a state court decision to extend polling hours was the subject of an academic simulation of a hypothetical election contest between John McCain and Barack Obama to test the mechanisms for resolving a post-election dispute over the presidency. *See* Edward B. Foley, *The* McCain v. Obama *Simulation: A Fair Tribunal for Disputed Presidential Elections*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 471 (2010).

[160] For an overview of the procedures for resolving post-election disputes in all fifty states, see Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1

again, a state judge's construction of the constitutional right to vote as either broad or narrow often determines whether many individuals are able to participate in our democracy.

In perhaps the most well-known example, the Minnesota Supreme Court resolved the 2008 U.S. Senate election over seven months after Election Day by ruling that absentee voters must "strictly" comply with the statutory requirements for voting via absentee ballot, refusing to adopt a more lenient "substantial compliance" standard instead.[161] The ruling certified Democrat Al Franken as the winner, but the decision was narrow with respect to voting rights because it meant that some voters did not have their votes count if they had not complied with the precise rules for casting absentee ballots.[162]

In a similar holding that commanded strict compliance with voting rules, the Pennsylvania Supreme Court found that the requirement that non-disabled absentee voters hand deliver their ballots themselves was "mandatory."[163] This was in spite of the fact that the Allegheny County Board of Elections had issued a declaration before the election sanctioning the long-standing practice of allowing third parties to deliver others' absentee ballots.[164] The court held that "so-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed – particularly where, as here, they are designed to reduce fraud."[165] This narrow ruling on the constitutional right to vote meant that fifty-six voters who had complied with the election officials' stated rules for casting absentee ballots were disenfranchised, potentially affecting the outcome of at least one race.[166]

The Alabama Supreme Court also required voters to comply strictly

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(2013).

[161] Sheehan v. Franken, 767 N.W.2d 453, 462 (Minn. 2009) (per curiam).

[162] *Id.* For a discussion of the Minnesota recount and court rulings, see Edward B. Foley, *The Lake Wobegone Recount: Minnesota's Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 129 (2011). Professor Justin Levitt has noted that, even though the Minnesota Supreme Court rested on a "strict compliance" standard for absentee voters, the application of that standard was actually more lenient. *See* Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 WM. & MARY L. REV. 83, 127-28 (2012). Nevertheless, the court's ruling itself was narrow with respect to the counting of ballots because the court explicitly adopted the "strict compliance" standard.

[163] *In re* Canvass of Absentee Ballots of November 4, 2003 Gen. Election, 843 A.2d 1223, 1234 (Pa. 2004).

[164] *Id.*

[165] *Id.*

[166] *Id.* at 1225.

with the rules for absentee balloting, refusing to allow voters to cure the defects after Election Day in an election contest.[167] The court held that "to count the votes of voters who fail to comply with the essential requirement of submitting proper identification with their absentee ballots would have the effect of disenfranchising qualified electors who choose not to vote rather than to make the effort to comply with the absentee-voting requirements."[168] These cases demonstrate the manner by which state courts have issued opinions narrowly construing the right to vote and constricting who is able to participate in the election.

By contrast, a Tennessee appellate court broadly interpreted a Tennessee statute regulating how much time a voter may spend in the voting booth so as to effectuate an individual's constitutional right to vote.[169] The statute at issue limited a voter to five minutes in the voting booth if other voters were waiting and otherwise to a maximum of ten minutes.[170] The evidence showed that, because of a lengthy ballot and some precincts using new machines, there were long lines on Election Day.[171] Almost half of all voters took longer than five minutes to vote, while five percent took longer than ten minutes.[172] The court rejected the losing candidate's argument that this evidence demonstrated that illegal votes tainted the election, noting that the voters' failure to comply with the time limit was not a "serious" violation of the statute.[173] Quoting the Tennessee Supreme Court, the court explained, "[T]echnical non-conformity with election statutes will not necessarily void an election, as 'such strictness would lead to defeat rather than uphold, popular election, and can not be maintained.'"[174] The court also rejected the losing candidate's second argument that the election officials' failure to follow precisely a Tennessee election statute requiring voters to show "other evidence of identification" made these votes "illegal."[175] The parties stipulated that everyone who had voted was properly registered to do so, meaning that the failure to ask for "other evidence of identification" did not have any practical effect, even though it

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[167] Townson v. Stonicher, 933 So. 2d 1062, 1065-66 (Ala. 2005).

[168] *Id.*

[169] Stuart v. Anderson County Election Comm'n, 300 S.W.3d 683 (Tenn. Ct. App. 2009).

[170] *Id.* at 689 (citing Tenn. Code Ann. § 2–7–118).

[171] *Id.*

[172] *Id.*

[173] *Id.* at 690.

[174] *Id.* at 689-90 (quoting Forbes v. Bell, 816 S.W.2d 716 (Tenn. 1991)) (alteration in original).

[175] *Id.* at 690.

was technically a violation of the statute.[176] Thus, the decision placed paramount importance on the constitutional right to vote rather than requiring strict compliance with the election statutes. But it contrasts with the opinions discussed above that required strict compliance with election rules, even if that meant the disenfranchisement of some voters.

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This Part has discussed over thirty state court cases, issued within the last decade, that have impacted elections and the constitutional right to vote. But it focused on only three issues: voter ID, felon disenfranchisement, and rules over the voting process. This analysis barely scratches the surface of election-related decisions state courts render every year. State judges issue opinions on a wide range of election law topics, such as voter registration,[177] redistricting,[178] ballot access,[179] and campaign finance,[180] to name just a few examples. Just as with cases involving the right to vote, the analysis often differs between states, with some courts issuing broad opinions and other courts more narrowly construing the rules for participating in our democracy.

Most of these cases receive little media attention or public scrutiny, even when the states' highest courts issue the opinions, and yet they play a significant role in how elections operate. On a theoretical level the cases are inherently important because they define the scope of the right to vote, which ultimately comes from state constitutions. Practically, the decisions quite literally alter the electorate, and therefore, the election.

Understanding how different judges define the meaning of democratic

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[176] *Id.*

[177] *See* Guare v. New Hampshire, No. 219-2014-cv-458 (N.H. Sup. Ct. July 24, 2014) (invalidating new language on voter registration form that conflated domicile and residency).

[178] *See*, *e.g.*, *In re* 2012 Legislative Districting, 80 A.3d 1073 (Md. 2013) (holding that the new redistricting plan did not violate the state constitution, federal constitution, or Voting Rights Act); Maestas v. Hall, 274 P.3d 66 (N.M. 2012) (holding that lower court erred in adopting the particular redistricting plan for the state legislature).

[179] *See, e.g.*, Walsh v. Katz, 953 N.E.2d 753 (N.Y. 2011) (strictly construing ballot access rules and thereby denying ballot access to candidate); Nadar for President 2004 v. Maryland State Bd. of Elections, 926 A.2d 199 (Md. 2007) (broadly construing state ballot access rules under the state constitution to allow ballot access).

[180] *See, e.g.*, State v. Green Mountain Future, 86 A.3d 981 (Vt. 2013) (upholding disclosure requirements for political action committees); Colo. Ethics Watch v. Senate Majority Fund, 269 P.3d 1248 (Colo. 2012) (en banc) (interpreting campaign finance provision of Colorado Constitution).

participation, either broadly or narrowly, will give us better tools for protecting the right to vote as robustly as possible. Litigants can use the comparative analysis to influence courts by showing how some judges have properly given independent meaning to their state constitutions and thereby broadly construed the individual right to vote, while other judges have gone astray in following a narrower federal interpretation. That is, a comparative analysis of the overall approach to the constitutional right to vote can assist litigants in arguing for broader protection under a state's constitution.

The scholarly and advocacy community can also go a step further. We should include, as part of the ongoing conversation regarding the *kinds* of judges we want deciding these cases, evidence of how state judges impact the constitutional right to vote. Do we want judges who will narrowly construe voting rights while elevating the role of states in regulating elections? Or do we want judges who will apply a legal canon that is broader and more inclusive in how it evaluates the constitutional right to vote? The next Part contributes to that conversation by examining some features of judicial ideology and judicial selection that might correlate with these approaches.

III. JUDICIAL IDEOLOGY, JUDICIAL SELECTION, AND THE RIGHT TO VOTE

As the previous Part highlighted, in every election cycle state courts are increasingly involved in construing the scope and meaning of the constitutional right to vote. Our attention to these cases, as well as the selection process for the judges who decide these issues, should be correspondingly robust.

Beyond simply understanding the cases themselves, we can use them to contribute to the already-robust debate over *who* we choose to be our state judges and *how* we select them.[181] This Part first offers some initial thoughts on how judicial ideology might affect a judge's rulings on election law issues. It then provides some preliminary analysis on how the method of judicial selection correlates, at least for certain issues, with a judge's views on the constitutional right to vote. None of the findings are

[181] There are scores of law review articles considering the merits of electing versus appointing state judges. For a small sample of that debate, see, e.g., Monroe H. Freedman, *The Unconstitutionality of Electing State Judges*, 26 GEO. J. LEGAL ETHICS 217 (2013); Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077 (2007); F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205 (1999).

definitive, as they are based on simple observations and not quantitative empirical analysis. But they still provide preliminary, anecdotal data that can supplement the existing scholarly debate on these issues.

A. Judicial Ideology and the Right to Vote

Liberal judges tend to view individual rights broadly, granting fuller protection to plaintiffs asserting these rights against state regulation, while conservative judges analyze them more narrowly. Of course, ideology is not the only driver of judicial decision making, as legal analysis is based on law, precedent, and the facts of a particular case.[182] That said, ideology often correlates with the outcome in a case, especially on highly-partisan issues such as voting rights. It should come as no surprise, then, that a judge's analysis of the constitutional right to vote often correlates with his or her ideology.[183]

The link between ideology and interpretation of the constitutional right to vote is most poignant in decisions on voter ID laws.[184] Most, although not all, of the state judges ruling on voter ID laws in the past decade have followed their ideological predilections. Liberal judges construe the constitutional right to vote broadly and therefore view voter ID laws skeptically, while conservative judges do the opposite.[185]

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[182] *See, e.g.*, Kyle C. Kopko, *Partisanship Suppressed: Judicial Decision-Making in Ralph Nader's 2004 Ballot Access Litigation*, 7 ELECTION L.J. 301, 302 (2008) (finding that "partisanship did not have a systematic effect on judicial behavior in Nader's 2004 ballot access litigation").

[183] Prior empirical studies have shown that liberal and conservative judges rule differently on various election law issues. For example, Professors Adam Cox and Thomas Miles have found that ideology, based on the partisanship of the appointing President, correlates strongly with how a federal judge rules in a Voting Rights Act case. *See* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 19–25 (2008). Similarly, Professors Michael Kang and Joanna Shepherd have found that state judges' rulings are often consistent with the views of the political parties that funded their election campaigns. *See* Kang & Shepherd, *supra* note 61, at 1243-44.

[184] *See* Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for A Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 647 (2008) (considering both federal and state voter ID decisions and finding that, as of 2008, "there have been fourteen votes by Democratic judges against the constitutionality of photo-ID requirements, and only three votes indicating that the requirement at issue is permissible. For Republican judges, the respective numbers are three (against constitutionality) and fifteen (for constitutionality).").

[185] *See* Hasen, *supra* note 26, at 106. An important caveat is required here: I am not attempting a quantitative empirical analysis, and the sample size is relatively small, so the conclusions are necessarily tentative. Also, the direction of influence is unclear: does ideology affect the decision, or is the decision simply evidence of the judge's ideology?

The Missouri Supreme Court justices[186] in the 6-1 majority who invalidated the state's voter ID law all had liberal backgrounds.[187] Democratic Governors appointed all but one of these Justices; the only Republican-appointed Justice publicly supported certain issues traditionally

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But the analysis at least provides a first step in showing that the political identity of the judges may matter when deciding a voting rights controversy.

[186] Technically, Missouri judges are non-partisan, appointed under the "Missouri Plan" under which a non-partisan commission generates a list of three names and the Governor appoints someone from that list. MO. CONST. art. V, § 25(a). Thereafter the judges face non-partisan retention elections. *Id.* § 25(c)(1). Nevertheless, because the Governor is a political actor, the selection of Missouri's Supreme Court Justices is not as non-partisan as it might seem. *See, e.g.*, *Review and Outlook, Show Me the Judges*, WALL ST. J., Aug. 30, 2007, at A10 ("An ostensibly non-partisan seven-member commission chooses a slate of three nominees and the Governor chooses among them. The idea was to produce candidates based on merit while diluting political influence over courts. But that was then. Anybody with the power to choose judicial candidates was also destined to become a political actor. And that's exactly what happened."); *see also* Hans A. Linde, *Selecting Oregon's Judges*, 33 SEATTLE U. L. REV. 671, 678 (2010) (suggesting that the current operation of the Missouri Plan "leaves governors to find back channels to get one name or another on the commission's list").

[187] Chief Justice Michael Wolff (now the Dean of St. Louis University School of Law), a member of the per curiam majority, ran for Attorney General as a Democrat and served as a special counsel to Democratic Governor Mel Carnahan. *See* Jake Wagman, *Missouri Supreme Court Judge Michael A. Wolff to Step Down*, ST. LOUIS POST-DISPATCH, Oct. 21, 2010, http://www.stltoday.com/news/local/govt-and-politics/missouri-supreme-court-judge-michael-a-wolff-to-step-down/article_9588c1c2-0d3d-5b69-9057-9566b75a85f5.html. Democratic Governors appointed three other members of the majority: Justices Laura Denvir Stith, Richard Tiedemann, and Ronnie White. *See* Associated Press, *Missouri Court Overturns Inmate's Death Row Status*, SOUTHEASTERN MISSOURIAN (Apr. 30, 2003), http://www.semissourian.com/story/107876.html (listing affiliation of the Governor who appointed these Justices). Justice Charles Blackmar, also a member of the majority, was a senior Justice who was appointed by Republican Governor Kit Bond and was eulogized after he died as a Republican, yet he spent his retired years promoting stem-cell research and advocating for the abolishment of the death penalty – both typically more liberal views. *See Charles B. Blackmar: Professor, Judge, Chief Justice ... and Charlie — Eulogy by Chief Justice Michael Wolff*, YOUR MISSOURI COURTS (Jan. 26, 2007), http://www.courts.mo.gov/page.jsp?id=4814; *Charles Blakely Blackmar, '42*, PRINCETON ALUMNI WEEKLY (Apr. 18. 2007), http://paw.princeton.edu/memorials/4/7/index.xml. The final member of the majority decision, Judge Nancy Steffen Rahmeyer, was a court of appeals judge sitting by designation on the Missouri Supreme Court; Democratic Governor Bob Holden appointed her to the bench. *See* Judge Nancy Steffen Rehmeyer, Missouri Court of Appeals, Southern District, http://www.courts.mo.gov/page.jsp?id=1949 (last visited June 2, 2014); Virginia Young, *Judges Hear Advice on Redistricting*, ST. LOUIS POST-DISPATCH, Oct. 14, 2011, http://www.stltoday.com/news/local/govt-and-politics/judges-hear-advice-on-missouri-redistricting/article_9562fba3-729e-5eda-bca7-f13b611776ff.html.

associated with liberal views, such as abolishing the death penalty.[188] The one dissenting Justice disagreed with the majority's conclusion that the state lacked sufficient evidence regarding the existence of voter fraud, thereby deferring to the state's voting process and narrowly construing the Missouri Constitution's express conferral of the right to vote.[189] That Justice is a noted conservative who publicly affiliates with the Federalist Society (a conservative legal organization).[190] It is of course impossible to know whether any of these judge's ideological affiliations influenced their views on the voter ID law. But regardless of the role ideology actually played in the decision, the fact is that the liberal Justices all analyzed the individual constitutional right to vote more broadly than the conservative jurist in dissent.

The same trend appeared in Wisconsin.[191] Initially, two different Wisconsin trial courts invalidated the state's voter ID law under the state constitution, concluding that the Wisconsin Constitution's conferral of the right to vote goes beyond narrower federal jurisprudence.[192] Democrat Jim Doyle appointed one of those trial court judges, Richard Niess.[193] Republican Governor Tommy Thompson appointed the other judge, but after this voter ID decision, Wisconsin Republicans cried foul, claiming that

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[188] *See Charles B. Blackmar: Professor, Judge, Chief Justice ... and Charlie — Eulogy by Chief Justice Michael Wolff*, YOUR MISSOURI COURTS (Jan. 26, 2007), http://www.courts.mo.gov/page.jsp?id=4814.

[189] *Weinschenk*, 203 S.W.3d at 222, 228-29 (Limbaugh, J., dissenting).

[190] *See* Judge Stephen N. Limbaugh, Jr., http://www.courts.mo.gov/page.jsp?id=200 (last visited June 2, 2014) (listing "Member, Federalist Society"). Justice Limbaugh is now Judge Limbaugh of the United States District Court for the Eastern District of Missouri, receiving his appointment to the federal bench from Republican President George W. Bush. *See* Biographical Directory of Federal Judges, Limbaugh, Stephen Nathaniel Jr., http://www.fjc.gov/servlet/nGetInfo?jid=3177&cid=999&ctype=na&instate=na (last visited June 2, 2014) (noting nomination by President George W. Bush). Judge Limbaugh is a cousin of conservative talk radio personality Rush Limbaugh. *See* Chad Garrison, *Rush Limbaugh's Inexperienced Cousin Named Cape Girardeau Prosecutor*, RIVERFRONT TIMES, Dec. 26, 2012, http://blogs.riverfronttimes.com/dailyrft/2012/12/christopher_limbaugh_jay_nixon.php.

[191] The Wisconsin Governor appoints many judges to fill vacant seats, although they must then run for election, so using the partisanship of the appointing Governor sheds some light on the ideology of the judge. *See Judicial Selection in the States*, American Judicature Society, http://www.judicialselection.us/ (last visited June 24, 2014) (listing the various judicial selection methods in all fifty states).

[192] League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker, No. 11 CV 4669, 2012 WL 763586 (Wis. Cir. Ct. Mar. 12); Milwaukee Branch of the NAACP v. Walker, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Ct. Mar. 6).

[193] *See Richard Niess*, JUDGEPEDIA, http://judgepedia.org/Richard_Niess (last visited June 3, 2014).

the judge was politically biased because he had previously signed the recall petition against Republican Governor Scott Walker.[194] The three-judge appellate court that reversed Judge Niess contained two liberals and one conservative, although the one conservative jurist actually authored the opinion.[195] The Wisconsin Supreme Court then upheld the voter ID law in two opinions, one on a 4-3[196] vote that followed the justices' ideological predilections[197] and the other along a 5-2 vote,[198] again mostly along ideological lines.[199]

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[194] *See* Daniel Bice, *Judge in Voter ID Case Signed Walker Recall Petition*, MILWAUKEE JOURNAL-SENTINEL, Mar. 6, 2012; Editorial, *Complaints Against Judge Flanagan Are Absurd*, THE CAP TIMES (Mar. 8, 2012), http://host.madison.com/news/opinion/editorial/complaints-against-judge-flanagan-are-absurd/article_fdf70e74-6927-11e1-a31c-0019bb2963f4.html.

[195] League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker, 834 N.W.2d 393, 396 (Wis. Ct. App. 2013).

Judge Lundsten, who wrote the opinion, is "widely regarded as a conservative," and Republican Governor Tommy Thompson appointed Judge Lundsten before he won election to his seat. *See* Steve Jagler, *Voters Will Decide Fate of Walker's Bill*, ONMILWAUKEE.COM, http://onmilwaukee.com/living/articles/jagler032311.html (last visited June 29, 2014); Melissa McCord, *Appointee Looks to Retain Spot on Court*, MILWAUKEE JOURNAL-SENTINEL, Mar. 28, 2001, at 3B. Judge Higginbotham is the Wisconsin Court of Appeals' first African-American jurist and received his judgeship from Democratic Governor Jim Doyle. *See Historic Court Appointment*, JET MAGAZINE, Nov. 10, 2003, at 32. He also applied for an appointment to the federal bench during Democratic President Barack Obama's first term, suggesting that he has a liberal lean. *See* Associated Press, *Judges, Lawyers Seek Federal Appeals Court Job*, NBC15.com, Sept. 29, 2009, http://www.nbc15.com/news/state/headlines/62591442.html. Judge Blanchard likely leans Democratic as well. *See* Dee J. Hall, *Appeals Court Rejects Most of 'John Doe' Targets' Motions*, WISCONSIN STATE JOURNAL (Jan 31, 2014), http://host.madison.com/news/local/govt-and-politics/appeals-court-rejects-most-of-john-doe-targets-motions/article_3eeb32b1-2823-5f78-a0fe-46b74051ef73.html. He was elected to the court in 2010 and had the support of both Democrats and Republicans, but his campaign manager was a longtime Democratic consultant. *See* Bill Lueders, *Blanchard or Leineweber? You Be the Judge*, THE DAILY PAGE (Mar. 18, 2010), http://www.thedailypage.com/isthmus/article.php?article=28511; Editorial, *For Court of Appeals: Brian Blanchard*, THE CAPITAL TIMES (Mar. 31, 2010), http://host.madison.com/news/opinion/editorial/for-court-of-appeals-brian-blanchard/article_5ca9a3c4-2052-5ab2-b6b4-addd0d21196f.html.

[196] Milwaukee Branch of the NAACP v. Walker, No. 2012AP1652 (Wisc. July 31, 2014).

[197] *See* Jack Craver, *Wisconsin Supreme Court Hears Act 10 Case Involving Their Biggest Financial Backers*, THE CAPITAL TIMES (Nov. 11, 2013), http://host.madison.com/news/local/writers/jack_craver/wisconsin-supreme-court-hears-act-case-involving-their-biggest-financial/article_fd967a28-4b16-11e3-8023-001a4bcf887a.html.

[198] League of Women Voters of Wisconsin Education Network v. Walker, No. 2012AP584 (Wisc. July 31, 2014).

[199] Justice Crooks, who dissented in *NAACP v. Walker*, instead wrote a concurring

The Supreme Court of Georgia upheld its state's voter ID law in 2011 by a 6-1 vote.[200] There is not a lot of information available about the ideology of the justices on this court, as they are officially non-partisan and the justice's backgrounds do not suggest much regarding their politics, but it is interesting to note that the only dissenting Justice was a Democratic appointee who is the court's first African-American member.[201] In his dissenting opinion the Justice specifically invoked the country's history of disenfranchising various groups such as African-Americans before noting that Georgia's voter ID requirement placed similar unnecessary restrictions on the right to vote.[202]

The connection between ideology and a justice's vote in a voter ID case is perhaps strongest in states in which the justices are elected in partisan races. In these states the voters themselves know the judges' partisan affiliations, meaning that the justices' decisions must hew more closely to the party line if they want to avoid electoral backlash.

This rang true in Michigan.[203] The Michigan Supreme Court split 5-2 along partisan lines in ruling that the state's voter ID was valid under Michigan's Constitution, even though that source of law goes beyond the U.S. Constitution in conferring the right to vote.[204] The trend mostly held in Pennsylvania as well.[205] In total, eight judges ruled on Pennsylvania's voter ID law: two different trial court judges and six supreme court

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opinion in *League of Women Voters v. Walker*, concluding that he felt compelled to join the majority in that case based on the standard of review for the facial challenge that the case presented. *See League of Women Voters*, No. 2012AP584, at 60.

[200] Democratic Party of Georgia, v. Perdue, 707 S.E.2d 67 (Ga. 2011).

[201] *See* Tom Crawford, *State Supreme Court Upholds Voter ID Law*, GEORGIA REPORT, Mar. 7, 2011, http://gareport.com/story/2011/03/07/state-supreme-court-upholds-voter-id-law/; *Justice Robert Benham*, Supreme Court of Georgia, http://www.gasupreme.us/biographies/benham.php (last visited June 29, 2014) (noting that Benhem was appointed by Governor Joe Frank Harris, who was a Democrat).

[202] *Democratic Party of Georgia*, 707 S.E.2d at 730-31 (Benham, J., dissenting) ("This country has a long history of denying the franchise to certain groups of citizens – non-property owners, members of certain religions, African–Americans, women, Native Americans, young adults aged 18 to 21, etc. It is unfortunate that over the course of the last 13 years, this State has placed ever increasing restrictions on its citizens' ability to cast regular, non-provisional ballots at their local polling precincts.").

[203] *See* American Judicature Society, *supra* note 191.

[204] In re Request for Advisory Opinion Concerning Constitutionality of 2005 PA 71, 740 N.W.2d 444, (Mich. 2007); *see* Hasen, *supra* note 26, at 106.

[205] Pennsylvania judges are elected in partisan races. *See* American Judicature Society, *supra* note 191.

justices.[206] All but one of the judges followed their ideological predilections, with Republican-leaning judges narrowly interpreting the state constitution and approving the voter ID law, and Democratic-leaning judges ruling that it was invalid under the state constitution's broader right-to-vote provision.[207]

Although ideology can be a predictor of how a court will rule in a voter ID case, it of course does not always track each judge's vote. The Tennessee Supreme Court, which has at least three Democratic-leaning members, ruled unanimously to uphold Tennessee's voter ID law.[208] Similarly, the Supreme Court of Indiana was split 3-2 between Democratic-leaning and Republican-leaning judges in 2010[209] when it upheld, by a 4-1

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[206] Applewhite v. Commw., 54 A.3d 1 (Pa. 2012); Applewhite v. Commw., 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014); Applewhite v. Commw., 330 M.D. 2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012).

[207] Judge Simpson, who initially sided with the state before later putting the law on hold after the Pennsylvania Supreme Court reversed him, is a Republican. *See* Francis Wilkinson, *Pennsylvania Voter ID Judge Rescues Republicans*, BLOOMBERG, Oct. 4, 2012, http://www.bloomberg.com/news/2012-10-04/pennyslvania-voter-id-judge-rescues-republicans.html (suggesting that Judge Simpson's ruling was good for Republicans because, if the ID law were in place during the election, Republicans would look bad when elderly and minority voters were turned away from the polls in a state that Democrat Barack Obama was going to win anyway). The Pennsylvania Supreme Court at the time of its ruling contained three Republicans and three Democrats. *See* Joe Palazzolo, *Pa. Supreme Court Bounces Voter ID Case Back to Trial Judge*, WALL STREET JOURNAL LAW BLOG (Sept. 18, 2012), http://blogs.wsj.com/law/2012/09/18/pennsylvania-supreme-court-bounces-voter-id-case-back-to-trial-judge/. The court ruled 4-2 to send the case back to the trial court for a further inquiry regarding whether the state could implement the law in time for the election. Of the four justices in the majority, three are Republicans. *See* Applewhite v. Commw., 54 A.3d 1 (Pa. 2012); Pennsylvania Supreme Court, Judgepedia, http://judgepedia.org/Pennsylvania_Supreme_Court (last visited June 3, 2014). The two dissenting Justices who would have invalidated the voter ID law without remanding the case are both Democrats. *Id.* Judge Bernard McGinley, who on remand ultimately struck down the law with sweeping language about the fundamental right to vote under the state constitution, is also a Democrat. *See* Associated Press, *Judge Spikes Photo ID Requirement for Pa. Voters*, USA TODAY, Jan. 17, 2014, http://www.usatoday.com/story/news/politics/2014/01/17/pennsylvania-voters-photo-id/4576139/.

[208] *See* City of Memphis v. Hargett, 414 S.W.3d 88 (Tenn. 2013); Andrea Zelinksi, *Q&A: Ron Ramsey on his Controversial Push Against Supreme Court*, NASHVILLE SCENE (May 9, 2014), http://www.nashvillescene.com/pitw/archives/2014/05/09/qanda-ron-ramsey-on-his-controversial-push-against-supreme-court (noting that conservative Lieutenant Governor Ron Ramsey was leading a push against the retention of the three "Democratic Supreme Court justices" on the court).

[209] *See* Brent Dickson, JUDGEPEDIA, http://judgepedia.org/Brent_Dickson (last visited June 8, 2014) (suggesting that Justice Dickson is a conservative); Gerald L. Bepko, *A Tribute to Justice Theodore Boehm*, 44 IND. L. REV. 341, 343 (2011) (noting that Justice

vote, Indiana's voter ID law under the state constitution.[210] Notably, however, the dissenting justice was very involved in Democratic politics before he was a judge.[211] Moreover, the Supreme Court of Indiana decided this case in the shadow of the U.S. Supreme Court's decision upholding the exact same law in *Crawford*, albeit under the federal constitution, likely making it harder to issue an opinion that went the opposite way unless the court properly interpreted the state constitution as going further than the federal Equal Protection Clause.[212] That is, a decision hewing to federal protection was easy in light of a recent U.S. Supreme Court case on the same law, even though the correct analysis would show that Indiana's Constitution provides more robust protection to the right to vote than the U.S. Constitution.

These examples show that not *every* Democratic or liberal judge is going to invalidate a voter ID law, and not *every* Republican or conservative judge is going to uphold a voter ID requirement, but there is still a discernable trend, particularly regarding the scope of protection afforded to the constitutional right to vote under state constitutions. It may not be possible to categorize all judges along an ideological spectrum, and a judge's constitutional analysis on this issue may have nothing to do with his or her personal ideological predilections.[213] Moreover, voter ID laws come in different shapes and sizes, and some laws – such as the ones in Rhode Island or Colorado[214] – are more lenient and do not necessarily infringe the

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Boehm was involved in Democratic politics); Resume of Randall T. Sheppard, *available at* http://www.ai.org/judiciary/press/docs/pr120711-shepard-resume.pdf (listing several activities with the Republican Party); Associated Press, *Justice Frank Sullivan Jr. Says He's Retiring from Indiana Supreme Court*, EVANSVILLE COURIER-PRESS (Apr. 2, 2012), http://www.courierpress.com/news/2012/apr/02/justice-frank-sullivan-jr-says-hes-retiring-indian/ (noting that Justice Sullivan served as the state budget director under a Democratic Governor before the Governor appointed him to the bench); Chris Sikich, *Ind. High Court: Democrats Must Pay Fines in Walkout*, USA TODAY, June 18, 2013, http://www.usatoday.com/story/news/politics/2013/06/18/indiana-lawmaker-fines-state-supreme-court-ruling/2435003/ (noting that a Democratic Governor appointed Justice Rucker).

[210] *See League of Women Voters of Indiana,* 929 N.E.2d 758 (Ind. 2010).

[211] *Id.* at 773 (Boehm, J., dissenting); *see supra* note 209.

[212] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

[213] As just one example, Justice Frank Sullivan of the Supreme Court of Indiana has explained, in some detail, how he consciously tries to avoid any ideological bias in his approach to judicial decision making. *See* Frank Sullivan, *Three Views From the Bench*, WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE 328-33 (Charles Gardner Geyh, ed.). Justice Sullivan likely leans Democratic but voted to uphold Indiana's voter ID law. *See supra* note 210.

[214] *See* Justin Levitt, *Rhode Island Voter ID Follow-up*, ELECTION LAW BLOG (May 23, 2012), http://electionlawblog.org/?p=34694; Colorado Common Cause v. Davidson,

fundamental right to vote because there is really no added burden on voters. Regardless, the analysis shows that *who* is deciding these cases can matter a great deal because liberal-leaning judges seem to understand more clearly that state constitutions provide broad protection to the individual right to vote that goes beyond federal jurisprudence.

Unlike the correlation between ideology and a judge's views on voter ID, however, there does not appear to be as much of a link between a judge's partisan background and his or her analysis on felon disenfranchisement laws. A Republican Governor appointed all three judges in California who broadened the right to vote for felons by limiting the scope of the state's felon disenfranchisement law.[215] The Washington Supreme Court split in its decision regarding whether a convicted criminal must pay the full amount of restitution before regaining his or her voting rights, with Democratic-leaning justices in both the majority and dissent.[216] Similarly, the Tennessee Supreme Court split 3-2 in ruling that the state could not disenfranchise a felon whose crime was not classified as "infamous"; Democratic Governor Phil Bredesen appointed both the majority and dissenting authors, and both jurist were the target of conservative groups during their retention election campaigns.[217] In sum,

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No. 04-CV-7709, 2004 WL 2360485 (Colo. Dist. Ct. Oct. 18, 2004).

[215] *See* William D. Stein, California Courts, http://www.courts.ca.gov/7710.htm (last visited June 16, 2014) (noting that Judge Stein was appointed by Governor George Deukmejian in 1988); James J. Marchiano, California Courts, http://www.courts.ca.gov/7643.htm (last visited June 16, 2014) (noting that Judge Marchiano was appointed in 1998, when Republican Pete Wilson was Governor); Douglas E. Swager, First Appellate District, http://vote98.sos.ca.gov/Judges98/Douglas%20Swager.html (last visited June 16, 2014) (noting that Judge Swager was appointed in 1995, when Republican Pete Wilson was Governor).

[216] Justice Fairhurst, who authored the majority opinion, lists several Democratic organizations, and no Republican groups, as endorsing her re-election. *See* Endorsements and Ratings, Mary Fairhurst for Supreme Court, http://justicemaryfairhurst.com/endorsements/ (last visited June 16, 2014). The main dissenter in that case likely also leans toward a more liberal ideology; although little information is available on Chief Justice Gerry Alexander's politics, he did face a conservative opponent backed by a wealthy conservative organization in his 2006 re-election campaign, which suggests that he has a more liberal outlook than that candidate. *See* Conversations at KCTS 9/Gerry Alexander, KCTS, http://kcts9.org/conversations-kcts-9/gerry-alexander (last visited June 16, 2014).

[217] *See* Gary R. Wade, Supreme Court, http://www.tsc.state.tn.us/courts/supreme-court/judges/gary-r-wade (last visited June 16, 2014); *Cornelia Clark*, JUDGEPEDIA, http://judgepedia.org/Cornelia_Clark (last visited June 16, 2014); *see also Conservatives Targeting 3 Tennessee Supreme Court Judges*, INSURANCE JOURNAL (May 15, 2014), http://www.insurancejournal.com/news/southeast/2014/05/15/329092.htm (last visited June 4, 2014); Dahlia Lithwick, *How to Take Out a Supreme Court Justice*, SLATE (June 13,

judges from all ideological perspectives have ruled both broadly and narrowly on the issue of felons and the right to vote.

The lack of a link between ideology and felon disenfranchisement rulings might be in part due to the long history of felon disenfranchisement in the United States, making it less of an issue of first impression and not as ideological as voter ID requirements.[218] Policy views on felon disenfranchisement may fall along partisan lines,[219] but that does not mean that judges will necessarily follow suit, especially given that many state constitutions – and, according to the U.S. Supreme Court, the U.S. Constitution – explicitly endorse the practice.[220] That is, there is judicial imprimatur within state constitutions to uphold felon disenfranchisement laws and reject challenges to limit their scope, which might trump a judge's ideology.

Much like with the rulings on felon disenfranchisement laws, the evidence is mixed regarding a connection between the ideology of the judges and their analysis of rules involving the voting process. On the one hand, there appears to be little correlation in some cases. Both Republican-appointed and Democratic-appointed judges rejected the argument that DRE voting machines violate the constitutional right to vote for some individuals.[221] A Republican-appointed judge wrote the Missouri appellate

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2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/06/tennessee_supreme_court_justices_gary_wade_cornelia_clark_and_sharon_lee.html.

[218] *See* Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 408-10 (2012) (noting the history of felon disenfranchisement as dating to ancient Greece).

[219] *See* Jason Belmont Conn, *Felon Disenfranchisement Laws: Partisan Politics in the Legislatures*, 10 MICH. J. RACE & L. 495, 510-16 (2005) (suggesting that the debate over felon disenfranchisement falls along partisan lines, with Democrats supporting repeal of disenfranchisement laws and Republicans favoring the laws).

[220] *See* Scott M. Bennett, *Giving Ex-felons the Right to Vote*, 6 CAL. CRIM. L. REV. 1, 1 (2004) (noting that all but two states limit felons' right to vote and many of them do so via their state constitutions); Richardson v. Ramirez, 418 U.S. 24 (1974) (holding that the Fourteenth Amendment's Reduction in Representation Clause explicitly contemplates felon disenfranchisement).

[221] Justice George H. Carley wrote the opinion in Favorito v. Handel, 684 S.E.2d 257, 260 (Ga. 2009) for the Georgia Supreme Court; Governor Zell Miller, then a Democrat, appointed Judge Carley to the court in 1993. *See George Carley*, JUDGEPEDIA, http://judgepedia.org/George_Carley (last visited June 23, 2014). Chief Justice Wallace Jefferson, a Republican, wrote the opinion in Andrade v. NAACP of Austin, 345 S.W.3d 1 (Tex. 2011). *See* Andrew Cohen, *'A Broken System': Texas's Former Chief Justice Condemns Judicial Elections*, THE ATLANTIC (Oct. 18, 2013), http://www.theatlantic.com/national/archive/2013/10/a-broken-system-texass-former-chief-

decision criticizing the trial court judge's broader ruling that extended the polling hours during the 2000 presidential election, but the court was unanimous.[222]

Then again, the ultimate outcome of the election itself could affect the scope of a ruling on voting rights.[223] The Minnesota Supreme Court, in the 2008 Norm Coleman-Al Franken U.S. Senate dispute, initially ruled 3-2 along ideological lines in a preliminary ruling,[224] but it ultimately was unanimous in adopting a narrow "strict compliance" standard for absentee voting that limited the constitutional right to vote by refusing to count some ballots.[225] The fact that the court set out a narrow rule on voting rights (normally a more conservative position), with an application that resulted in the Democratic candidate winning the election, perhaps helped the court reach unanimity, as each side "won" something in the case. The same might be true in a Tennessee case, albeit going the opposite way: a Republican-appointed judge wrote a Tennessee ruling adopting a lenient standard for complying with the voting process, which is typically a more liberal stance, yet the decision affirmed the election of a conservative-leaning judge.[226]

To the extent that there are ideological trends in these cases, those who favor broader voting rights can use this data to influence Governors, appointing commissions, and voters to select certain individuals over others to serve on our state judiciaries. More specifically, although not every case

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justice-condemns-judicial-elections/280654/ (last visited June 23, 2014).

[222] *See* State *ex rel*. Bush-Cheney 2000, Inc. v. Baker, 34 S.W.3d 410, 411 (Mo. Ct. App. 2000) (Judge Larry Crahan); *see also Lawrence G. "Larry" Crahan*, ST. LOUIS POST-DISPATCH, Aug. 31, 2005 (noting that Judge Crahan was appointed in 1992, when Republican John Ashcroft was Governor).

[223] Many people view *Bush v. Gore* as the prime example of this phenomenon. *See* Bush v. Gore, 531 U.S. 98 (2000); Mark Tushnet, *Renormalizing* Bush v. Gore*, an Anticipatory Intellectual History*, 90 GEO. L.J. 113, 113 (2001) (noting that one immediate reaction to *Bush v. Gore* was that politics had prevailed over law).

[224] *See* Foley, *supra* note 162, at 144 (explaining that "the 3-2 split [in the preliminary ruling] appeared to fall along ideological, if not exactly partisan lines, in a way that arguably appeared that each of the five Justices was adopting a position favorable to the candidate the Justice was most predisposed to support in this post-election dispute").

[225] *See* Sheehan v. Franken, 767 N.W.2d 453, 462 (Minn. 2009) (per curiam).

[226] Republican Governor Don Sundquis appointed Judge Michael Swiney, who wrote the opinion. *See* Stuart v. Anderson County Election Comm'n, 300 S.W.3d 683 (Tenn. Ct. App. 2009); *see also* D. Michael Swiney, JUDGEPEDIA, http://judgepedia.org/D._Michael_Swiney (last visited June 23, 2014). The opinion rejected an election contest for the Anderson County General Sessions Court Judge, won by Republican-leaning Don Layton. *See* Don Layton, JUDGEPEDIA, http://judgepedia.org/Don_Layton (last visited June 29, 2014).

follows this trend, liberal-leaning judges seem to interpret the constitutional right to vote more broadly than conservative judges, particularly for highly salient and partisan issues like voter ID. Although conservative judges tend to favor states' rights and state sources of law over federal power as a general matter, the right-to-vote cases reverse this truism, as liberal judges seem better suited at protecting the broader grant of the fundamental right within state constitutions.

B. Judicial Selection and Decision Making on the Right to Vote

The voting rights cases discussed above generally involved challenges to a state law that had the effect of making it harder for typically disfavored groups to vote, such as poor people, minorities, felons, or the disabled. Perhaps judges are more likely to rule broadly in construing voting rights for these individuals if the judges are more isolated from the political process by being appointed instead of elected, or if they face merely a retention election instead of a campaign against an opponent. Prior studies show that elected judges tend to pay more attention to public opinion than appointed judges or judges who must win only a "yes" or "no" retention vote to stay on the bench.[227] Retention elections for appointed judges are usually boring affairs with little political drama,[228] but elected judges must actively campaign because they must beat an opponent who also wants the seat.[229] The theory, then, is that elected judges may be less likely to rule in favor of a political minority than an appointed judge who will not worry as much about the potential backlash from a vigorous campaign.[230] The initial evidence suggests that for issues that are not already highly ideological, appointed judges or those who will face only retention elections are better at broadly construing the right to vote and including political minorities in the

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[227] *See* Damon M. Cann & Teena Wilhelm, *Case Visibility and the Electoral Connection in State Supreme Courts*, 39 AM. POL. RES. 557, 570 (2011).

[228] There are, of course, exceptions to the idea that retention elections are usually apolitical, with the 2010 Iowa Supreme Court's heated retention election in the wake of the court's ruling on same-sex marriage the most notable recent example. *See* John Eligon, *Iowa Justice Who Ruled for Gay Marriage Faces Test That Three Peers Failed*, N.Y. TIMES (Oct. 22, 2012), at A14.

[229] *See* Andrea McArdle, *The Increasingly Fractious Politics of Nonpartisan Judicial Selection: Accountability Challenges to Merit-based Reform*, 75 ALB. L. REV. 1799, 1805-06 (2011-2012) (stating that retention elections historically were advanced as an apolitical solution to partisan judicial selection and that sitting judges typically prevail, but noting that recently some retention campaigns have nonetheless fallen victim to politicization and that some judges have lost their seats).

[230] *See, e.g.*, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995) (examining the difficulty elected judges face when they are constitutionally bound to protect minority rights).

democratic process.[231] This finding adds data to the robust and complex debate over methods of judicial selection.[232]

For example, judges that narrowed the reach of felon disenfranchisement laws – thereby including convicted individuals in the electorate – sat on courts with appointed judiciaries and retention elections. Courts in California, Iowa, and Tennessee ruled that the state could not disenfranchise the plaintiffs who brought suit, thus limiting the scope of felon disenfranchisement; judges in these states are appointed initially and must withstand retention elections to keep their seats.[233] The judges that were stricter toward voting rights for felons, rejecting challenges to the application of the laws, faced regular judicial elections. The Washington Supreme Court and the Alabama Supreme Court both issued opinions upholding the laws and narrowly construing the constitutional right to vote for felons; justices on these courts are elected.[234] This makes sense: felons are not the most sympathetic group, so a judge facing an election against an opponent (as opposed to just a "yes" or "no" on retention) might be wary of issuing a ruling in favor of felon voting rights for fear that it will become a major campaign issue.

Decisions on the voting process seem to follow this trend as well, with elected judiciaries ruling narrowly toward voting rights and appointed judges issuing opinions that more broadly interpret the constitutional right to vote. For instance, the Pennsylvania Supreme Court – selected through partisan elections – analyzed the right to vote very narrowly in disenfranchising absentee voters who did not strictly comply with the rules for delivering their ballots.[235] The Minnesota Supreme Court, also comprised of judges who must face an election, similarly required strict compliance with voting rules to have an absentee ballot count.[236] But the

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[231] A fuller, quantitative inquiry into the correlation, if any, between the method of selection and a judge's ruling on right-to-vote cases is beyond the scope of this article.

[232] *See supra* note 181.

[233] *See supra* Part II.B; *see also* American Judicature Society, *supra* note 191. The Indiana Supreme Court is hard to categorize here, as it ruled both that the state could not disenfranchise someone for conviction of misdemeanor battery under the state constitution but that the state was authorized in disenfranchising anyone in jail. *See supra* note 125 and accompanying text. Indiana Justices are initially appointed. *See* American Judicature Society, *supra* note 191.

[234] *See supra* Part II.B; *see also* American Judicature Society, *supra* note 191.

[235] *See supra* Part II.C; In re Canvass of Absentee Ballots of November 4, 2003 Gen. Election, 843 A.2d 1223, 1234 (Pa. 2004); *see also* American Judicature Society, *supra* note 191.

[236] *See supra* Part II.C; Sheehan v. Franken, 767 N.W.2d 453, 462 (Minn. 2009) (per curiam); *see also* American Judicature Society, *supra* note 191.

Tennessee Court of Appeals – selected by the Governor with retention elections – ruled more broadly in allowing voters to violate an election statute to effectuate and protect the constitutional right to vote.[237] Similarly, an Arizona appellate court – chosen through merit selection – was more sympathetic to the argument that DRE machines might negatively impact voters such as disabled people than both the Georgia and Texas courts, which contain judges who face regular contested elections.[238] This is not to suggest that the Arizona ruling was correct and the Texas and Georgia rulings wrong as a legal matter, but only to point out one variable that might make a difference in whether judges are likely to interpret voting rights broadly for typically disfavored voters.

But the connection between the method of judicial selection and the scope of the opinion on voting rights does not hold for voter ID laws, likely reflecting the sheer partisanship of this issue. Appointed and elected judges have ruled both ways in these cases. For instance, both Missouri and Tennessee appoint their supreme court justices, who then face retention elections, and yet the courts ruled in opposite ways on voter ID.[239] Similarly, the elected justices in Pennsylvania expressed skepticism on the constitutionality of that state's voter ID requirement, but the elected justices in Michigan upheld the law.[240] As voter ID is such a partisan issue,[241] often debated in state legislatures along partisan lines, perhaps ideology simply wins out in the judiciary as well.

To the extent further data-driven evidence suggests that appointed judges may be more likely to construe voting rights broadly as compared to elected judges, we can use this information as part of the debate on judicial selection. Of course, the effect of judicial selection methods on voting rights is just one small part of that discussion, as there is a wealth of scholarship on the issue.[242] As an initial matter, however, the evidence on state voting rights cases suggests that, when the issue does not come down

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[237] *See supra* Part II.C; Stuart v. Anderson County Election Comm'n, 300 S.W.3d 683 (Tenn. Ct. App. 2009); *see also* American Judicature Society, *supra* note 191.

[238] *Compare* Chavez v. Brewer, 214 P.3d 397, 401 (Ariz. Ct. App. 2009) *with* Favorito v. Handel, 684 S.E.2d 257, 260 (Ga. 2009) *and* Andrade v. NAACP of Austin, 345 S.W.3d 1 (Tex. 2011); *see also* American Judicature Society, *supra* note 191.

[239] *See supra* Part II.A.; Weinschenk v. Missouri, 203 S.W.3d 201 (Mo. 2006); City of Memphis v. Hargett, 414 S.W.3d 88 (Tenn. 2013); *see also* American Judicature Society, *supra* note 191.

[240] *See* Applewhite v. Commw., 54 A.3d 1 (Pa. 2012); In re Request for Advisory Opinion Concerning Constitutionality of 2005 PA 71, 740 N.W.2d 444, (Mich. 2007).

[241] *See supra* Part III.A.

[242] *See supra* note 181.

to pure partisanship, appointed judges may be better positioned to construe the state-based right to vote robustly and thereby include more political minorities in the democratic process.

C. Selecting State Judges Who Espouse the Ideal of a Broad Fundamental Right to Vote

There is a lot to say about the characteristics we should value in selecting our judges, and the answer in many ways comes down to theories of democracy and representation.[243] As I have explained in previous work, I believe that the constitutional right to vote is the most important, fundamental right in our entire democratic structure.[244] Courts should therefore issue rulings in favor of expansive voter access, always with an eye to effectuating the constitutional right to vote.[245] It follows that we should select judges who espouse this value.

A failure to choose judges who understand the importance of allowing every member of society to participate in our democratic process risks creating courts that issue decisions undermining the very legitimacy of that democracy. Take, for instance, the Pennsylvania Supreme Court's opinion about whether absentee voters had to return their ballots in person themselves or could have a third party deliver the ballots for them.[246] Recall that local election officials had explicitly told voters before Election Day that they could allow a third party to deliver the ballots and that these votes would count.[247] The Pennsylvania Supreme Court, in a ruling that is extremely narrow for effectuating the constitutional right to vote, reversed that position.[248] The court's decision was grounded in a concern over potential voter fraud in the delivery of absentee ballots.[249] But devoid of evidence of fraud with these actual ballots, the result was the disenfranchisement of fifty-six voters who had relied on the county's

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[243] For some thoughts on this debate, see Chad Flanders, *What Is the Value of Participation?*, 66 OKLA. L. REV. 53, 56-62 (2013); Joshua A. Douglas, *The Foundational Importance of Participation: A Response to Professor Flanders*, 66 OKLA. L. REV. 81, 83-89 (2013); Michael J. Pitts, *P = E2 and Other Thoughts on What Is the Value of Participation?*, 66 OKLA. L. REV. 101, 112 (2013).

[244] *See, e.g.*, Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 145 (2008).

[245] For an argument that judges should apply a statutory canon of construction in favor of voter access, see Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).

[246] In re Canvass of Absentee Ballots of November 4, 2003 Gen. Election, 843 A.2d 1223, 1234 (Pa. 2004).

[247] *Id.* at 236-37.

[248] *Id.* at 247-50.

[249] *Id.* at 256-47.

official pronouncement. These votes may have altered who won, undermining the legitimacy of the elected official. The media hardly took notice of this drastic opinion striking down a "longstanding election practice by election boards across the state," with only a short mention in an AP alert.[250] Other judges, who would construe the constitutional right to vote more broadly, might have come to a different conclusion that would be more protective of the fundamental right to vote.[251]

How do we find these judges? First, as discussed earlier, we need to pay more attention to the kinds of analyses our current state judges employ on issues involving voting rights. This will help us discern whether judicial rulings reflect our core values regarding democratic participation. Legal analysis has nuance, and a judge that values the individual right to vote over state regulation of elections has a different view on the meaning of the constitutional right to vote than a judge who is more deferential to state regulation of the voting process. We need judges who will recognize that state constitutions go further than federal law in explicitly conferring the right to vote to all citizens. Second, to the extent there is any connection between the ideology of the judges deciding these cases and their judicial opinions, as is the case with voter ID, we can use that evidence to influence Governors, appointing commissions, and voters on the merits of the individuals seeking judicial office.[252] Finally, if the mode of analysis differs based on the method of judicial selection, as it appears to do for certain issues such as felon disenfranchisement, these cases can inform the debate over how we select our judiciary.

This article does some heavy lifting on the first inquiry – shedding more light on the role of state courts in dictating the scope of the right to vote. It also offers some preliminary thoughts on the second and third points.

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[250] *See* Mike Crissey, *State's Highest Court Bars Some Deliveries of Absentee Ballots*, ASSOCIATED PRESS, Mar. 9, 2004.

[251] Indeed, a federal court ruled that Ohio had to count ballots that were cast improperly in the wrong precinct due to poll worker error, even if counting those ballots would violate state law. *See* Ne. Ohio Coalition for the Homeless v. Husted, 696 F.3d 580 (6th Cir. 2012) (finding a due process violation in a state law requiring election officials to disregard wrong precinct ballots cast because of poll worker error); Hunter v. Hamilton County Bd. of Elections, 635 F.3d 219 (6th Cir. 2011) (finding an equal protection violation on the same issue).

[252] This suggests that we need more quantitative empirical data on judges and their rulings on voting rights. A previous study already showed that political party funding of judicial elections is tied significantly to a judge's ruling in a case. *See* Kang & Shepherd, *supra* note 61, at 1243-44.

Debate on these substantive issues should be a greater part of the judicial selection process itself. This is not to suggest that judicial selection should become more partisan or ideological than it already is. In an ideal world, judges would be truly "independent" and decide cases solely according to the "law." But that is unrealistic, for two reasons. First, the law is not so clear that there is always one true answer. Reasonable people can differ on whether they value the constitutional right to vote over state regulation of elections, or vice versa. When selecting a judge, then, we are making a choice between these two options. We should do so consciously. Second, judicial selection is already partisan, especially for elected judiciaries. We ignore the kinds of judges we elect, and their likely ruling on issues of importance such as the right to vote, at our peril.

CONCLUSION

State judges have a tremendous impact on how we understand the right to vote. When judges interpret the state-based constitutional right to vote broadly, they provide the best safeguard for the most fundamental right in our society. By contrast, when judges narrowly construe the constitutional protection for voting, they improperly constrict the import of the explicit conferral of voting rights within state constitutions.

As a scholarly community and a democratic society, we have failed to analyze state court decisions on voting rights in any robust and holistic manner to recognize these differences. Studying the cases demonstrates how some judges properly interpret the right to vote robustly and independently from the U.S. Constitution, while other judges simply follow federal guidance and thereby provide only narrow protection. This limited analysis, however, conflicts both with the explicit conferral of the right to vote within state constitutions and our overall concept of voting as the foundation of our democracy.

Beyond advocating for broader rulings as a legal matter, the preliminary evidence suggests that we should consider a potential judge's views on election law issues when vetting them and that decisions on voting rights should inform the continuing debate on judicial selection. Ultimately, if as a society we believe that the right to vote is among the most precious, fundamental rights we enjoy, then we should choose our state judges based on whether they will broadly interpret that state-based right. The initial data suggests that, at least in some contexts, liberal and appointed judges may be better suited at safeguarding voting as a fundamental right than their conservative and elected counterparts.

There is a role for the public as well. We need to educate ourselves about the positions of those who seek judicial office on issues of importance such as the rules for an election, and then vote accordingly. By becoming more informed citizens, we can influence state courts to make smarter decisions in upholding the fundamental, constitutional right to vote.