CHALLENGING VOTER ID LAWS: THE NEED FOR REFORM

by MANOJ S. MATE

While much of media coverage of politics and elections this past summer focused on the major party conventions, another major story has been unfolding in the federal courts. Over the past few months, federal courts across the country have issued a string of decisions challenging enforcement of Voter ID laws and other voting restrictions, in battleground swing states like Ohio, North Carolina, and Wisconsin, and in Indiana and Texas.

While these decisions have helped to partially limit the deleterious impact of Voter ID laws, they also illustrate that federal litigation cannot fully address the major flaw in our current system of election administration—namely, that our federal system provides far too much leeway and discretion to states to limit voting rights in the name of electoral integrity. In contrast to other countries, the U.S. constitutional structure delegates the bulk of election administration to state governments. Faced with state laws that disenfranchised minority voters in the South and other states, and in response to the Civil Rights Movement's push for reform in the areas of civil rights and voting rights in the 1960s, the federal government was forced to intervene through the enactment of the Voting Rights Act of 1965.

However, the existing statutory and doctrinal framework in voting rights cases has been significantly weakened by two recent Supreme Court decisions. First, the Court's decision in *Crawford v. Marion County Election Board*[1] in 2008, applying a balancing approach to the review of voting restrictions, upheld Indiana's voter ID law and signaled that voting laws found to be reasonable and nondiscriminatory restrictions would be reviewed under a lower standard of scrutiny. Second, by effectively eliminating federal preclearance for most states, the Court's 2013 decision in *Shelby County v. Holder* greatly weakened federal power under the Voting Rights Act to restrict changes to election laws made by states. Following *Shelby*, states moved to aggressively enact and enforce restrictions on voting. Like other voting restrictions, Voter ID laws are aimed at discouraging and suppressing voting among racial and ethnic minority groups, the poor, the elderly, the disabled, and even college students, as these groups often lack the documents or government identification required by these laws.

There has been notable variation in how federal courts have adjudicated challenges to Voter ID laws across the country. As Richard Hasen has noted, some circuit courts, including the Seventh Circuit in Indiana, and the Fifth Circuit in Texas,[2] instead of invalidating and enjoining laws in their entirety, have ordered "softening" of these laws as a remedy, remanding to district courts to provide voters with alternative methods to satisfy Voter ID requirements.[3] By contrast, the Fourth Circuit enjoined all of the challenged provisions of North Carolina's Voter ID law.[4]

Both North Carolina and Texas alleged that the underlying purpose behind their laws was to deter and prevent voter fraud, and to promote public confidence in the electoral system. The Fourth and the Fifth Circuits ultimately reached different outcomes based on a crucial difference—the Fourth Circuit held that the North Carolina law was *motivated* by a discriminatory purpose, while the Fifth Circuit found that there was insufficient evidence of such a purpose. The Fifth Circuit held that there was evidence to prove only that Texas's law did have an impermissible discriminatory *effect* and that the law violated

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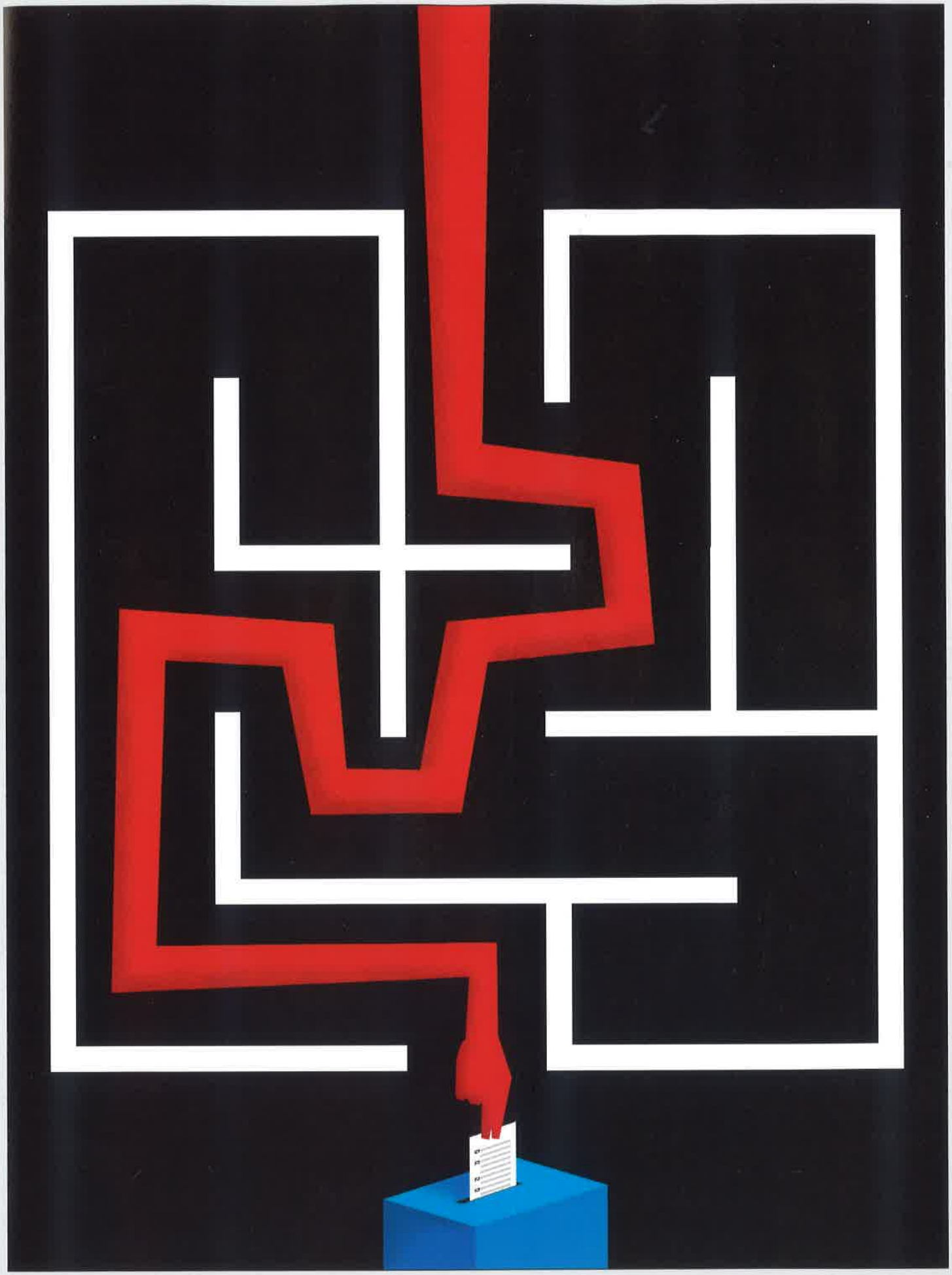


Section 2 of the Voting Rights Act, while the Fourth Circuit's decision was more far reaching in holding that North Carolina's law violated both Section 2 of the Voting Rights Act, and the Equal Protection Clause of the Fourteenth Amendment.

Texas

Prior to the *Shelby County* decision, the state of Texas enacted SB 14, one of the strictest voter identification laws in the nation. The law only allowed for certain types of identification, including a driver's license, U.S passport, a concealed-handgun license, and an election identification certificate issued by the state.[5] As Texas was still covered under the Voting Rights Act's preclearance provision at that time, the Department of Justice blocked SB 14, and following an appeal to the three-judge federal district court in D.C., that court also blocked the law. Texas later appealed to the Supreme Court, but, following *Shelby County*, remanded the case for dismissal.[6]

After Governor Greg Abbott announced that the state would enforce SB 14, the law was challenged in federal district court. The district court invalidated the law, finding that it was enacted with a racially discriminatory purpose in violation of the 14th and 15th amendments, that the law impermissibly burdened voting rights, and that the law violated Section 2.[7]

On appeal, the Fifth Circuit in 2015 held that the district court had not followed the correct standard in evaluating purpose, and remanded back to the district court on this issue. Although the Fifth Circuit also held that the law violated Section 2 of the Voting Rights Act, it did not enjoin the law, but remanded back to the district court to craft a remedy that would provide for alternative identification. And in July 2016, an *en banc* panel of the Fifth Circuit held in a 9-6 decision that the law did violate Section 2 of the Voting Rights Act because the law had a racially discriminatory effect, and again remanded to the district court to craft a remedy to the violation. On remand, the district court issued an order setting forth an agreed interim plan that provided for accepting alternative identification for voters who submit a signed "reasonable impediment declaration."[8]

North Carolina

North Carolina had been covered under the preclearance requirement of the Voting Rights Act, and many of its laws that were aimed at restricting or diluting African American voting strength had been blocked either through Section 5 or through private suits under Section 2.[9] Following *Shelby County*, North Carolina's Republican-controlled legislature moved quickly to enact new voting restrictions. However, following the lawsuit by plaintiffs that challenged North Carolina's laws under Section 2 of the Voting Rights Act, the state enacted another law that added a "reasonable impediment" exemption to the Voter ID requirement.

After requesting and receiving racial data regarding use of different forms of identification and voting practices by African Americans, the North Carolina legislature enacted SL 2013-381 which introduced a series of restrictions on voting, including requiring voters to present only certain types of photo identification for voting, eliminating the first week of early voting, eliminating one day of Sunday voting, and eliminating same-day registration.[10] The new restrictions were enacted based on data showing that African Americans disproportionately voted through these types of voting mechanisms.

Pre-*Shelby County*, North Carolina's Voter ID law had allowed voters to present all forms of government-issued IDs, including expired IDs, as an alternative to DMV-issued photo IDs. However, after *Shelby County*, North Carolina amended the law to disallow many

of the forms of alternative photo identification that African American voters used, while allowing IDs that white voters were more likely to have. The district court upheld the law, holding that it served a legitimate state interest in seeking to counter voter fraud. Significantly, the district court held that the enactment of the law was not motivated by a racially discriminatory purpose, but rather by partisan objectives.

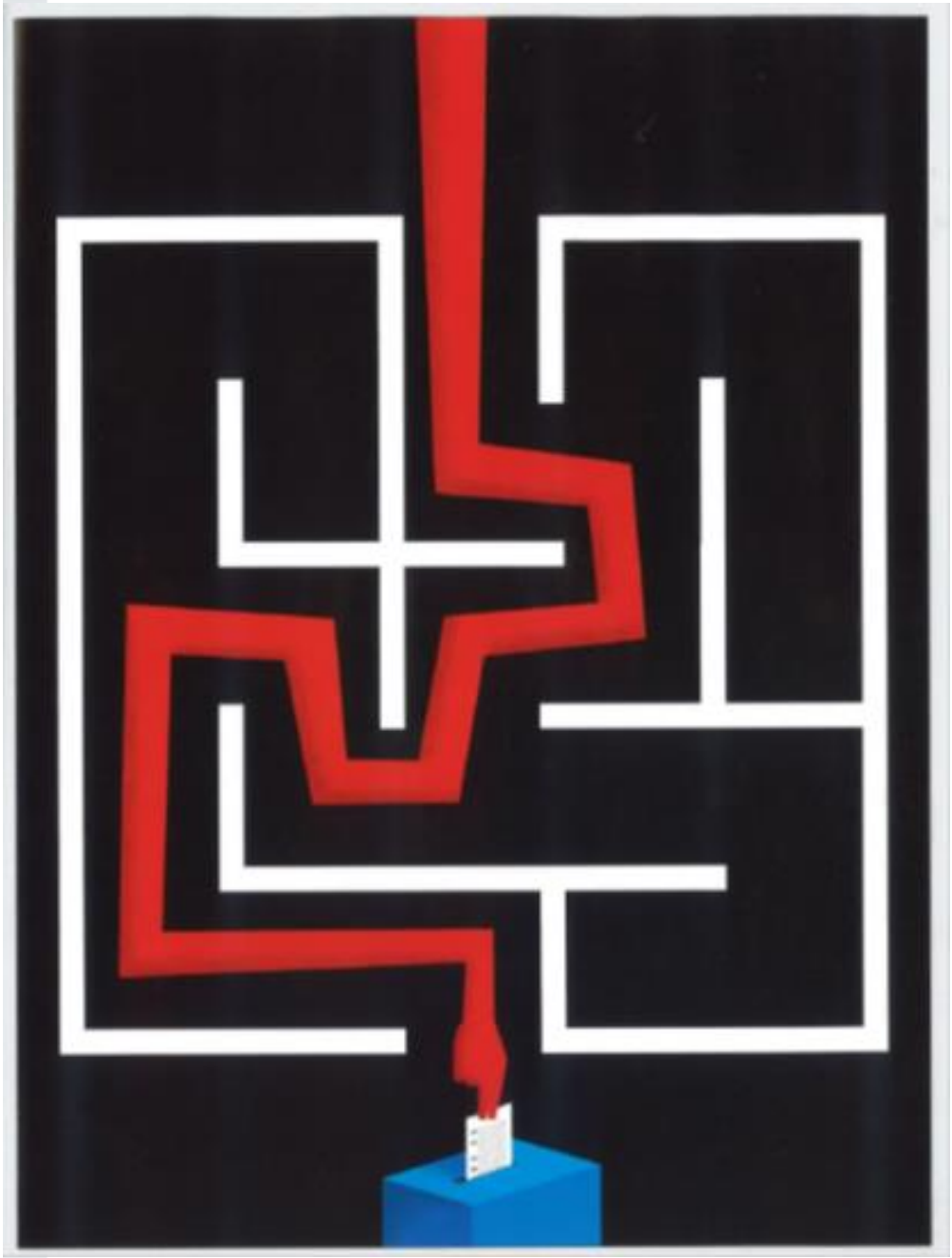
However, on appeal, the Fourth Circuit overturned the district court and enjoined all of the following challenged provisions of the law: the photo ID requirement, the rollback of early voting, the elimination of same-day registration, out-of-precinct voting, and pre-registration. Noting that the law's provisions targeted African-Americans "with almost surgical precision," the Fourth Circuit overturned the district court's finding that there was no discriminatory purpose, pointing to "smoking gun" evidence of discriminatory intent that included the legislature's request for racial data regarding voting practices immediately before enacting a new law that restricted those very voting practices. In contrast to the Indiana law upheld in *Crawford*, the Fourth Circuit found that the North Carolina law was enacted precisely *because* of its disproportionate impact on African-American voters. Applying a totality of the circumstances analysis, the 4th Circuit concluded that the North Carolina law was motivated by discriminatory purpose and that the challenged provisions violated Section 2 of the Voting Rights Act.

The Need for Reform

QUICK LOOK
Voter ID laws discourage and suppress voting among racial and ethnic minority groups, the poor, the elderly, the disabled, and even college students . . .

The North Carolina and Texas cases illustrate the range of approaches federal courts adopt in adjudicating challenges to Voter ID laws. As illustrated in these cases, the remedy federal courts provide depends on whether there is a finding of discriminatory purpose: if there is a finding of discriminatory *purpose*, federal courts can and are more likely to invalidate and enjoin a law. If only discriminatory *effect* can be proven, courts have been reluctant to invalidate and enjoin laws, and circuit courts often end up remanding them back to lower courts to issue limited remedies that allow for alternative forms of documentation or identification.[11]

Significantly, the North Carolina litigation provides the rare exception of a state legislature providing courts with "smoking gun" evidence of discriminatory intent. Generally, it is difficult to prove discriminatory purpose, as legislators are cautious in avoiding statements or actions that may reveal such intent. Since discriminatory purpose can often be hidden, circuit courts are more likely to find that there was only a discriminatory effect (as the Fifth Circuit did in Texas), and to remand to district courts to craft remedies that provide for softening of voter ID laws. While softening may provide for some alternatives for voters, it still does not entirely eliminate increased burdens on the fundamental right to vote. Under our federal structure, court remedies in voting rights cases have varied across circuits, as reflected by outcomes in North Carolina and Texas. The current state of affairs is problematic in that it does not provide for strong remedies in most cases, and also fails to provide for uniformity. As such, recent experience with voting rights litigation in the federal courts suggests the need for changes in the doctrinal approach that governs these cases, and the need for major reforms aimed at strengthening the Voting Rights Act, and reforming the structure of



election administration in the United States.

First, in line with the Fourth Circuit's decision in the North Carolina case, the Supreme Court should move away from the balancing approach applied in *Crawford* to Voter ID laws, and move toward more searching scrutiny of such laws. The major shortcoming with the balancing approach is that it results in a high degree of court deference to review of voting restrictions, based on the state interest in electoral integrity. In privileging electoral integrity, this framework limits and weakens the scope of federal district court remedies to "softening" and other forms of compromise.

Second, the passage of voting restrictions in the post-*Shelby* era suggest the need for a much stronger federal role and presence in election administration and voting rights, and the need for restoring the protections of the Voting Rights Act, including updating the preclearance formula. Indeed, recent news in North Carolina further supports the need for restoring the Voting Rights Act's protections: in the wake of the Fourth Circuit's decision enjoining North Carolina's voting restrictions, local election boards in that state appear to be adopting rules aimed at suppressing voting by African-Americans.[12] Significantly, in hearing an appeal from the Fourth Circuit's decision, the Supreme Court on August 31 deadlocked in a 4-4 vote, thus allowing the Fourth Circuit's decision enjoining the restrictive provisions of the law to stand. As a result, the enjoined provisions of the North Carolina law will remain blocked at least through election day in November.[13]

In many other polities, national election commissions play significant roles in administering elections. Recent efforts by states to restrict voting underscores the urgent need for the enactment of legislative reforms aimed at providing for stronger and centralized federal control over election administration, including a stronger role for the Federal Election Commission, in order to safeguard and protect voting rights nationally.

ENDNOTES

(1) *Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181 (2008).

(2) *See Veasey v. Abbott*, 2016 WL 3923868.

(3) *See* Richard Hasen, *Softening Voter ID Laws Through Litigation: Is it Enough?*, UC Irvine School of Law Legal Studies Research Paper No. 2016-07, forthcoming Wisconsin Law Review Forward, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2743946.

(4) *North Carolina State Conference of the NAACP v. McCrory*, __ F. Supp. 3d __, 2016 WL 1650774 (M.D..N.C. 2016), *rev'd*, 2016 WL 4053033 (4th Cir. 2016) (reversing trial court decision upholding North Carolina's voter identification law).

(5) Erick Eckholm, *Texas ID Law Called Breach of Voting Rights Act*, N.Y. Times, August 5, 2015.

(6) Hasen, *supra* note 3, at 5.

(7) *Id.*

(8) *Id.*

(9) *Id.* at 9.

(10) *North Carolina State Conference of the NAACP v. McCrory*, __ F. Supp. 3d __, 2016 WL 1650774, (M.D. .N.C. 2016), *rev'd*, 2016 WL 4053033 (4th Cir. 2016).

(11) *Id.*

(12) Michael Wines, *Critics Say North Carolina Is Curbing Black Vote. Again*, N.Y. Times, August 30, 2016.

(13) Adam Liptak, *Supreme Court Blocks North Carolina from Restoring Strict Voting Law*, N.Y. Times, August 31, 2016.

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