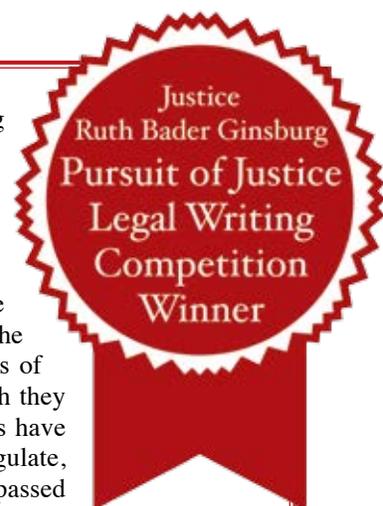


# In the Name of Electoral Integrity

The Evolving Constitutionality of Voter Identification Law

By Mark T. Wilhelm



“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” - *McCullough v. Maryland*, 17 U.S. 316, 421 (1819).

In mid-2012, Viviette Applewhite, a 93-year-old Philadelphian, walked through a local grocery store with her purse hanging on her shoulder. Someone walked past her, cut the purse from its strap, and quickly fled. In the purse was not only her money, but also her Social Security card. Having never owned a driver’s license, and having just lost her Social Security card, Applewhite had a problem: it was unlikely that she would be able to get a new Social Security card in time for the upcoming November election. Without that card, she could not obtain the photo identification necessary to comply with Pennsylvania’s newly passed voter identification law. “[F]or the first time in decades,” Applewhite feared that she would be unable to vote.

The right to vote in a republican system of government is held in high regard. As the United States Supreme Court has stated, voting “in a free and unimpaired manner is preservative of other basic civil and political rights,” and in order to protect this important right, “any alleged infringement . . . must be carefully and meticulously scrutinized.” That is because “voting is of the most fundamental significance under our constitutional structure.”

From senior citizens like Applewhite to college students, voter identification (voter ID) laws pose a significant obstacle to citizens exercising their right to vote. Voter ID laws can take many forms and have differing levels of strictness. However, at their most basic, they are laws passed at the state level that require potential voters to present some form of state issued photo identification in order to exercise their right to vote.

There are relatively few justifications for voter ID laws: most center on protecting the legitimacy of the electoral process and stopping voting related fraud. Yet the issue with voter ID laws is that they – either intentionally or unintentionally – restrict the right of some citizens to vote. Emerging research on the practical impact of voter ID laws demonstrates that these laws are not only actually decreasing voter turnout generally, but also decreasing turnout in particular demographics. With these competing interests in mind, numerous state legislatures have decided to pass and enforce voter ID laws. Very few courts reviewing these laws have found them to be unconstitutional.

This essay examines those voter ID laws and analyzes their impact on the voting public. Part II provides a background on voter ID laws and reviews recent cases determining their constitutionality. Part III then analyzes the impact of recent Supreme Court decisions on the spread of voter ID laws. Part III further examines the logical and practical challenges

posed by voter ID laws, concluding that definitive judicial action would be necessary to slow the spread of these laws.

States are allowed the power to regulate elections pursuant to the Tenth Amendment to the Constitution, as “[e]ach state has the power to prescribe the qualifications of its officers, and the manner in which they shall be chosen . . . .” Certain limits have been placed on that power to regulate, including in 1965, when Congress passed the Voting Rights Act (VRA). The VRA was designed to address disproportionate voting rates along racial lines. It prohibits discrimination in voting administration, and the Act subjected specific jurisdictions with a history of racial discrimination to heightened scrutiny when changing their voting laws. In the words of the United States Supreme Court, the VRA constituted “a drastic departure from basic principles of federalism” through its unequal treatment of the states. While the VRA passed an initial facial challenge regarding its constitutionality, states have continued to challenge the Act’s validity.

In the past five years, states “have enacted a plethora of laws” aimed at restricting citizens’ right to vote, most notably through voter ID laws. Research has shown that voter ID laws have a real, negative impact on voter turnout. In fact, one recent empirical study estimated their impact to be between 1.6 percent and 2.2 percent in a given election. While that impact may seem small in isolation, applied across the country, voter ID laws either prohibit or deter some 3 million to 4.5 million potential voters from voting, even in just a mid-term election. Research has also shown that racial minorities are disproportionately affected by voter ID laws, and some have argued that the laws amount to nothing more than a recharacterization of clearly unconstitutional literacy tests. With this impact in mind, citizens and interest groups alike have undertaken lawsuits to enjoin the enforcement of and ultimately overrule voter ID laws. This section highlights both state and federal judicial decisions related to those challenges.

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