

Complexity Confronting State Judges and the Right to Vote

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In response to Joshua A. Douglas, *State Judges and the Right to Vote*,
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I. INTRODUCTION

Professor Douglas offers valuable insight into state judiciaries and state cases regarding the right to vote.¹ State judges, after all, do often adjudicate significant right-to-vote disputes and construe state laws that may impact the right to vote. And state constitutional guarantees, and corresponding judicial decisions, regarding that right to vote are too often underappreciated.

I would like to amplify Professor Douglas’s article by highlighting some of the reasons why litigants may prefer or the media may tend to emphasize federal voting rights over state voting rights. It is not simply because interpretations of voting rights under the federal Constitution would have an impact in all fifty states—although, to be sure, the universality is an important (and attractive) aspect for litigants.² Instead, it is because state laws affecting the right to vote are far more complicated when one examines how state election laws operate.

This short piece runs orthogonally to Professor Douglas’s article and seeks to identify some of the complexity confronting state judges in these voting rights disputes, and why state courts may be more or less valuable in particular kinds of disputes. State constitutions, direct democracy, and the limited authority of the federal courts in some areas create unique challenges and opportunities for litigants in many states. Understanding these situations informs the scope of state judicial influence in construing the right to vote.

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¹ Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1 (2016).

² Further, the interplay between federal and state election law is an area of growing scholarly attention. See, e.g., Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237 (2012); Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159 (2015); Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. (forthcoming 2016).

II. DIRECT DEMOCRACY

Professor Douglas rightly notes that many of the most salient recent challenges to voter identification laws have occurred in state courts.³ The Supreme Court's decision in *Crawford v. Marion County Election Board* effectively foreclosed facial challenges to photo voter identification laws under a line of cases concerning voters' constitutional right to associate with political candidates on the ballot.⁴ Some justices on the Court characterized the burden on voters as "limited,"⁵ while others described it as a "generally applicable, nondiscriminatory voting regulation."⁶ Such a slight burden, as characterized by the Court, could be justified by a legitimate state interest. The Court ultimately found that Indiana could justify the law by pointing to a few "legitimate" interests, including modernizing elections, preventing voter fraud, and safeguarding voter confidence.⁷

For those concerned that voter identification laws impede the right to vote, there may be few opportunities left in federal court. Plaintiffs have pursued two major prongs of attack. One line of cases has challenged voter identification laws under Section 2 of the Voting Rights Act.⁸ And another line, as Professor Douglas aptly notes, has occurred in state courts citing state constitutional law provisions.⁹

But consider a complicating case of a state voter identification law: Mississippi. In 2009, the Mississippi state legislature considered a photo voter identification law.¹⁰ The governor and secretary of state supported a photo identification requirement for all voters.¹¹ But the Mississippi House had included an exemption for voters 65 and over, and permitted some nonphoto forms of identification.¹² The governor had indicated his intent to veto such a

³ Douglas, *supra* note 1, at 1.

⁴ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 (2008) (plurality opinion). Admittedly, some laws may be more onerous than Indiana's photo identification law and tip the balance in the other direction of another case using a facial challenge under the Court's right of association cases.

⁵ *Id.* at 202–03 (quoting *Burdick v. Takushi*, 504 U.S. 428, 439 (1992)).

⁶ *Id.* at 205 (Scalia, J., concurring in judgment).

⁷ *Id.* at 191–97 (plurality opinion).

⁸ *See, e.g., Veasey v. Abbott*, 796 F.3d 487, 493 (5th Cir. 2015); *see also* Douglas, *supra* note 1, at 22.

⁹ Douglas, *supra* note 1, at 22.

¹⁰ *Voter ID Bills Die in Mississippi Legislature*, PICAYUNE ITEM (Mar. 4, 2009), <http://www.picayuneitem.com/2009/03/voter-id-bills-die-in-mississippi-legislature/> [https://perma.cc/6BQD-BJYQ].

¹¹ *Id.*

¹² H.B. 1533 § 19(7), 2009 Leg., Reg. Sess. (Miss. 2009), <http://billstatus.ls.state.ms.us/documents/2009/pdf/HB/1500-1599/HB1533PS.pdf> [https://perma.cc/PP5B-QKRG].

law.¹³ And the House bill had included an early voting period deemed unacceptable to some members of the Senate, which failed to take up the bill.¹⁴

If this photo identification bill had simply been enacted as a typical law, then a state court in Mississippi, faced with a legal challenge to the law, might have construed it in light of the state constitution's right to vote.¹⁵ But after the proposed law failed in the state legislature, photo voter identification proponents pursued Initiative 27, a ballot measure ultimately approved by the voters.¹⁶ Initiative 27 amended the state constitution to require all voters, except for those in a state-licensed care facility or with a religious objection, to show a form of photo identification before voting.¹⁷

Direct democracy can have a dramatic impact on how one construes the right to vote. To the extent the right to vote is a standalone constitutional right, judicial construction of the right to vote may significantly influence judges' construction of state voting laws. But if a state constitution adds express conditions to the right to vote, as Mississippi's now does, and as other states' constitutions may in the near future,¹⁸ the state judge's role is dramatically diminished.

Of course, a state court can still adjudicate whether the ballot initiative complies with state requirements, such as the single subject rule or other conditions on ballot initiatives generally.¹⁹ And a ballot initiative enacting a voter identification law as an ordinary statute rather than a constitutional amendment, as occurred in Oklahoma, may still face a traditional challenge under the state constitution's right to vote.²⁰

Direct democracy, accordingly, may be more modest in its impact when initiatives involve statutes rather than constitutional amendments. And their

¹³ Haley Barbour, Governor, State of Miss., State of the State Address (Jan. 13, 2009) (transcript available at http://www.realclearpolitics.com/articles/2009/01/mississippi_gov_haley_barbours.html [<https://perma.cc/RBR8-VZQD>]).

¹⁴ *Voter ID Bills*, *supra* note 10.

¹⁵ MISS. CONST. art. XII, § 241; *see* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101 & n.76 (2014).

¹⁶ Miss. Sec'y of State, Initiative #27 Voter Identification, <http://www.sos.ms.gov/initiatives/Voter%20Identification-PW%20revised.pdf> [<https://perma.cc/C3EN-XMTE>] (informational brochure describing the proposed constitutional amendment); Miss. Sec'y of State, Official Tabulation of Vote for Statewide Initiative Measure No. 27, <http://www.sos.ms.gov/links/elections/results/statewide/Statewide%20Initiative%20Measure%2027%20-%20General%20Election%202011%20Results.pdf> [<https://perma.cc/WM2S-64BN>].

¹⁷ MISS. CONST. art. XII, § 249-A.

¹⁸ Associated Press, *Missouri: Another Try for a Voter ID Measure*, N.Y. TIMES (Feb. 18, 2015), <http://www.nytimes.com/2015/02/19/us/politics/missouri-another-try-for-a-voter-id-measure.html> [<https://perma.cc/528Q-M4S6>].

¹⁹ *See generally* Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983); John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule*, 9 ELECTION L.J. 399 (2010).

²⁰ *See, e.g.*, *Gentges v. Okla. State Election Bd.*, 319 P.3d 674, 675 (Okla. 2014).

scope can be wide ranging in terms of affecting the right to vote—for instance, a 2011 Maine referendum overturned a same day election registration repeal that the legislature had enacted and the governor had signed.²¹ Oregon voters approved statewide vote by mail in 1998.²² Indeed, the list of direct democracy measures affecting the right to vote is expansive.²³

But the right to vote itself may find conditions within the state constitution in ways that give slightly different contours to the right to vote than if such a right were defined in more abstract terms or on a standalone basis. It is perhaps one reason to find federal courts more tempting for such challenges. It is not only the power of a judicial decision in a federal forum to potentially apply on a national scale.²⁴ It is, instead, for the simple reason that the constitutional right to vote may itself be conditioned within the state constitution—and a decision under the federal Constitution would not need to heed the state constitution.

Except, of course, in those cases where the federal Constitution has no answer whatsoever, such as, perhaps, the area of voter qualifications.

III. VOTER QUALIFICATIONS

Professor Douglas explains that state constitutions typically identify who gets to vote, a significant power affecting the right to vote at the most basic level.²⁵ The scope of enfranchisement may serve to limit judicial construction of state laws affecting voter qualifications. Two situations concerning qualifications are useful to consider in this context. The first are those situations in which state political actors, and even the people as voters, have been deeply involved regarding decisions about the qualifications to vote, including in the area of felon and ex-felon disenfranchisement. These situations suggest, perhaps, a less robust role for state judges than may otherwise be anticipated. The second are those situations in which the

²¹ Eric Russell, *People's Veto of Same-Day Voter Registration Ban Will Be Question 1 in November*, BANGOR DAILY NEWS (Sept. 8, 2011), <http://bangordailynews.com/2011/09/08/politics/people's-veto-of-same-day-voter-registration-ban-will-be-question-1-in-november/> [https://perma.cc/3TAE-SDR2]; Eric Russell, *LePage Signs Bill Banning Same-Day Voter Registration, but Critics Vow to Fight*, BANGOR DAILY NEWS (June 21, 2011), <http://bangordailynews.com/2011/06/21/politics/same-day-voter-registration-banned-but-critics-vow-to-fight/print/> [https://perma.cc/T3D3-Y888].

²² See Sieon Roux, *Oregon Leads the Way in Loving Vote-By-Mail*, OREGONIAN (Oct. 25, 2008), http://www.oregonlive.com/politics/index.ssf/2008/10/Oregon_leads_the_way_in_loving.html [https://perma.cc/F68U-T6YK].

²³ Cf. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2676 (2015) (addressing the constitutionality of a voter initiative petition that established an independent redistricting commission); Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. CAL. L. REV. 997, 998 (2005).

²⁴ See Douglas, *supra* note 1, at 7.

²⁵ Douglas, *supra* note 1, at 47.

Supreme Court's recent robust reservation to the states over the power to determine voter qualifications means that states constitutions—and state courts—are the principle, if not exclusive, source of the right to vote. And that suggests that state courts, not federal courts, are particularly useful forums for resolution of such disputes.

Many nonjudicial actors in states regularly take steps that deeply implicate qualifications for the right to vote. For instance, an Iowa governor issued an executive order granting ex-felons the right to vote in 2005. When another governor took office in 2011, he revoked the order and returned to the old disenfranchisement standard.²⁶ In 2015, Kentucky's outgoing governor issued an executive order granting the right to vote to all nonviolent ex-felons, which the governor-elect cited favorably but reserved the right to reexamine the details upon taking office.²⁷ Proponents of a Florida ballot initiative also hope to enfranchise ex-felons.²⁸

And altering qualifications is not simply limited to the domain of ex-felons. In 2010, for instance, the people of Kansas amended the state constitution to revoke from the Kansas legislature the power to exclude people with mental illnesses from voting.²⁹ That same year, the people of Vermont approved a constitutional amendment permitting seventeen-year-olds to vote in primary elections if they turned eighteen before the general election.³⁰

Before one frets that state courts lack much power in this area,³¹ it is at least worth noting that state executives and voters have been unusually active in this area, illustrated from recent events described above, and in historic activity in the states.³²

²⁶Marc Meredith & Michael Morse, *The Politics of the Restoration of Ex-Felon Voting Rights: The Case of Iowa*, 10 Q.J. POL. SCI. 41, 44 (2015); see Muller, *supra* note 2, at 1267 n.188.

²⁷Eric Eckholm, *Kentucky Governor Restores Voting Rights to Thousands of Felons*, N.Y. TIMES (Nov. 24, 2015), <http://www.nytimes.com/2015/11/25/us/kentucky-governor-restores-voting-rights-to-thousands-of-felons.html> [https://perma.cc/QP68-2WVM].

²⁸Dan Sweeney et al., *Florida Among Nation's Toughest Places to Have Voting Rights Restored*, SUN SENTINEL (Jan. 25, 2015), <http://www.sun-sentinel.com/news/florida/sfl-felon-voting-rights-20150121-htlmstory.html> [https://perma.cc/SU6X-M8GC].

²⁹Wichita Eagle, *Vote 'Yes' on Amendment Question 2*, DODGE CITY DAILY GLOBE (Oct. 16, 2010), <http://www.dodgeglobe.com/article/20101016/NEWS/310169983> [https://perma.cc/WM7P-HSA6].

³⁰Press Release, Jim Condos, Vt. Sec'y of State, *New Constitutional Amendment Allows 17-Year-Olds to Vote in 2012 Primaries* (Feb. 21, 2012), <http://vtdigger.org/2012/02/21/new-constitutional-amendment-allows-17-year-olds-to-vote-in-2012-primaries/> [https://perma.cc/47WK-VATV] (“[I]n the General Election of 2010, Vermont voters overwhelmingly approved a Constitutional Amendment”); Vermont Proposal 5, *As Passed by the House and Senate* (2008), <http://www.leg.state.vt.us/docs/2010/bills/intro/PR0005.pdf> [https://perma.cc/6NS2-9LVJ] (codified at VT. CONST. ch. II, § 42).

³¹*Cf.* Douglas, *supra* note 1, at 24 (“Given that many state constitutions have sanctioned felon disenfranchisement for years, there is often no plausible state-based legal argument against the laws.” (footnote omitted)).

³²Muller, *supra* note 2, at 1281–84.

But while state courts may be constrained by their constitutions—constitutions that governors enforce and voters amend—federal courts may be even more constrained in the domain of voter qualifications. In *Arizona v. Inter Tribal Council*, the Supreme Court considered whether the National Voter Registration Act (NVRA) preempted Arizona’s proof-of-citizenship requirement.³³ Arizona, like all states, only permits citizens to vote.³⁴ Arizona had enacted law that required election officials to reject voter registration applications that lacked sufficient evidence of citizenship. The NVRA required Arizona to accept a standard federal registration form, which did not require additional documentation. And the Election Assistance Commission, responsible for administering the federal registration form, refused to alter the form to comply with Arizona’s law.

Faced with a conflict between Arizona’s law and the NVRA, the Supreme Court spoke broadly when it concluded that the Elections Clause formed “no part of the power to be conferred upon the national government.”³⁵ Voter qualifications, subject to certain constitutional floors,³⁶ are matters left to the states, even in federal elections.³⁷ Arizona had attempted to argue that its voter registration law was actually a qualification. The Court demurred on this point, explaining that it was solely addressing the question of citizenship at a qualification.³⁸ The Court went on to uphold the NVRA federal form as a proper exercise of congressional power to regulate the “[m]anner” of elections.³⁹

Even if the determination of who is qualified to vote remains in the hands of the states, and even if they often remain beyond the reach of the state judiciary, qualifications controversies extend to other contexts. Professor Douglas rightly identifies photo voter identification laws as one area that might fall into the realm of qualifications disputes—the Arkansas Supreme Court, for instance, found that a voter identification law impermissibly added a qualification to the state constitution’s enumerated qualifications for voters.⁴⁰

³³ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013).

³⁴ Federal law also prohibits aliens from voting in federal elections. *See* 18 U.S.C. § 611(a) (2012). But that law may exceed the scope of federal power in this area. *See infra* note 35; *see also* Derek Muller, *Is a Federal Ban on Alien Voting Unconstitutional?*, EXCESS OF DEMOCRACY BLOG (June 21, 2013), <http://excessofdemocracy.com/blog/2013/6/is-a-federal-ban-on-alien-voting-unconstitutional> [<https://perma.cc/FCX5-K3HS>].

³⁵ *Inter Tribal*, 133 S. Ct. at 2258 (quoting THE FEDERALIST NO. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

³⁶ *See* Muller, *supra* note 2, at 1281.

³⁷ *Inter Tribal*, 133 S. Ct. at 2258; *see also id.* at 2258 n.8 (concluding that *Oregon v. Mitchell*, 400 U.S. 112, 143 (1972), could not support the proposition that a federal law could control the qualifications to vote in federal elections).

³⁸ *Id.* at 2259 n.9.

³⁹ *Id.* at 2267–68 (Thomas, J., dissenting).

⁴⁰ Douglas, *supra* note 1, at 20–21 (identifying argument in Arkansas that a photo voter identification law added a qualification beyond the enumerated qualifications in the state constitution); *see also* *Martin v. Kohls*, 444 S.W.3d 844, 853–54 (Ark. 2014).

Indeed, Texas has recently (unsuccessfully) defended its photo voter identification law from a Section 2 challenge precisely on the basis that it is a qualification to vote.⁴¹ And Arizona, facing subsequent challenges to its registration law alongside states like Kansas, has attempted to revive the claim that registration is a voter qualification.⁴²

States seeking to escape federal regulation of their election laws may go too far in these claims. They may face a challenge under their own state constitutions. Because state constitutions usually define the exclusive set of qualifications for voter eligibility, state laws aggressively defended as qualifications in federal court may be deemed improper additional qualifications beyond the scope of the state constitution—precisely what took place in Arkansas. Even though judicial review of such a statute would not necessarily occur under a state constitution’s broader language regarding the right to vote, it would certainly devolve to the state judiciary to determine the propriety of such laws. And it may be the case that some state laws add qualifications to the enumerated constitutional qualifications of voters, which would place the judiciary in the most likely position to evaluate the claims of otherwise-eligible voters affected by such laws.

IV. CONCLUSION

Professor Douglas notes that judicial ideology and judicial selection can impact how the right to vote is construed.⁴³ There are many commentaries on state judicial elections or retention votes generally, from discussions about the system itself⁴⁴ to the voter behavior in those elections.⁴⁵ And Professor

⁴¹ See, e.g., Defendants’ Motion to Dismiss at 27, *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (No. 2:13-CV-193), 2013 WL 6046807 (“The States also hold a constitutionally protected prerogative to establish the qualifications for voting in state and federal elections. That includes the right to require voters to obtain and present photo identification when appearing to vote at the polls.” (citation omitted)); *Veasey*, 71 F. Supp. 3d at 632, *aff’d in part, vacated in part, remanded sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *reh’g en banc granted* No. 14-41127, 2016 WL 929405 (5th Cir. Mar. 9, 2016); see also U.S. CONST. art. I, § 2, cl. 1; cf. *Inter Tribal*, 133 S. Ct. at 2258 (“Prescribing voting qualifications, therefore, ‘forms no part of the power to be conferred upon the national government’ by the Elections Clause, which is ‘expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections.’” (quoting THE FEDERALIST NO. 60, *supra* note 35, at 371)). But the Supreme Court has suggested that identification laws may not be voter qualifications. See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 193 (2008) (plurality opinion); see also Derek T. Muller, *The Play in the Joints of the Election Clauses*, 13 ELECTION L.J. 310, 319–20 (2014).

⁴² *Kobach v. U.S. Election Assistance Comm’n*, 772 F.3d 1183, 1188 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015).

⁴³ See Douglas, *supra* note 1, at 32–47 (Part IV).

⁴⁴ See, e.g., Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others that Have Been Tried*, 32 N. KY. L. REV. 267 (2005).

⁴⁵ See, e.g., Jordan M. Singer, *The Mind of the Judicial Voter*, 2011 MICH. ST. L. REV. 1443.

Douglas's article refines the discussion to the area of election law in a thoughtful way.

But state courts are sometimes complicated places for litigants. Direct democracy can cure some of the issues that Professor Douglas identifies.⁴⁶ Or it can complicate them, by adding constitutional conditions to the right to vote. State constitutions can make the state judicial forum less hospitable in the event that the state constitution binds the judge's construction of the right to vote. Or they can make the state forum more hospitable, as states provide unique opportunities that federal courts simply cannot provide.⁴⁷ But state courts can significantly—too often in underappreciated ways—shape the right to vote, and Professor Douglas ably points us toward thinking more critically about their role.

⁴⁶ See, e.g., Douglas, *supra* note 1, at 3 & nn.11–12 (describing the aspiration for a “broad” and “robust” right to vote).

⁴⁷ Cf. Douglas, *supra* note 1, at 5–7 (describing in Part II.A the volume of state election law litigation).