What Became of Fundamental Rights?: Of Voter IDs and Voting Rights
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> "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." – Chief Justice Earl Warren, writing for the Court in *Reynolds v. Sims* 377 U.S. 533 (1964) at 555
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> " the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights." — Justice Douglas, writing for the Court in *Harper v. Virginia Board of Elections* 383 U.S. 663 (1966) at 669.
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> "The right to vote is a fundamental right. It is guaranteed by the 14th and 15th amendments to the Constitution." — Introduction to the Voting Rights Act Amendments of 1970.

On January 17, 2014, a Pennsylvania Commonwealth Court judge struck down Pennsylvania's 2012 voter identification law, issuing a permanent injunction against its enforcement and writing that "Voting laws are designed to assure a free and fair election; the voter ID law does not further this goal."[1] While another appeal to the state Supreme Court remains possible,[2] Pennsylvania's Constitution has more robust protection for would-be voters than do the constitutions of many states; the state constitution states that "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[3] Judge McGinley, writing for the Court, stated that "The Commonwealth recognizes the right of suffrage as 'fundamental' and 'pervasive of other basic civil and political rights."[4] With the record indicating that hundreds of thousands of citizens lacked compliant photo IDs, the Court analyzed the provisions of Pennsylvania's Voter ID law under strict scrutiny, noting also that the "Voter ID Law as written would not in many respects survive rational basis review [as was employed in *Crawford v. Marion County Election Board*]."[5]

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[1] Amy Worden, "Judge Strikes Down Pa.'s Voter ID law," *Philadelphia Inquirer* January 18, 2014, A1. The Voter ID law is also known as Act 18.

[2] A short of this case can be found at the ACLU Pennsylvania website: http://www.aclupa.org/our-work/legal/legaldocket/applewhite-et-al-v-commonwealth-pennsylvania-et-al/voter-id-lawsuit-timeline/. The State Supreme Court returned the case to Commonwealth Court Judge Robert Simpson (September 18, 2012), who had declined to issue a preliminary injunction, with instructions that he should block the law unless the State had provided "liberal access" to acceptable voter ID cards or unless he was no longer convinced that the law would disenfranchise voters. A preliminary injunction allowing voters to vote without the photo ID was then issued by Judge Simpson covering the fall 2012 election, extended to the May 2013 primaries (a "soft rollout" of the Voter ID law).

[3] Pennsylvania Constitution, Article I, §5. This language dates to the 1874 amendments to the Pennsylvania Constitution.

[4] Applewhite et al. v. Commonwealth of Pennsylvania et al. 330 M.D. 2012 at 35, citing *Bergdoll v. Kane* 57 PA 72 (1999). http://www.pacourts.us/assets/files/setting-647/file-3490.pdf?cb=a5ec29

[5] *Applewhite* at 37; quote at footnote 25. http://www.pacourts.us/assets/files/setting-647/file-3490.pdf?cb=a5ec29, referencing *Crawford v. Marion County Election Board* 553 U.S. 181 (2008).

This was merely the latest salvo in the voter ID wars, but it was fortunate for would-be Pennsylvania voters who are poor, elderly,[6] disabled, African-American or Latino, or who were urban dwellers without automobiles, women who changed their names upon marriage or divorce, and many more citizens that the law was challenged under the state constitution and not the federal one. The Wisconsin Supreme Court is currently considering two challenges to that state's voter ID law, which was softened somewhat by the legislature to better withstand challenges. With "qualifications requisite for electors of the most numerous branch of the state legislature"[7]— the standard for voting in elections for U.S. representatives, senators, and presidents—in most cases[8] resting in the hands of states, there is arguably no federal constitutional right to vote in the United States.

In striking down poll taxes in 1966, the Supreme Court stated that "the right to vote is too precious, too fundamental to be so burdened or conditioned."[9] Poll taxes, enacted to make it difficult for African-Americans to vote, had also affected a number of poor white citizens. The decision was based in a reading of the equal protection clause of the Fourteenth Amendment. Voter affluence or payment of a fee could no longer be used to exclude a citizen from the voting booth. There was good reason to believe, in the aftermath of the 1966 decision in *Harper v. Virginia Board of Elections*, that the Court had recognized the right to vote as a fundamental right, and if so, there needed to be a compelling governmental interest in order to burden it, with government bearing the responsibility of demonstrating that compelling interest. Following the logic of Benjamin Cardozo, writing for the Court in *Palko*, if the right to vote were flagged as a fundamental right representing "the very essence of a scheme of ordered liberty," although nowhere mentioned in the Bill of Rights or expressly mentioned as a right of citizens of the United States in the original Constitution, it would apply to the states.[10] Chief Justice Warren's claim in *Reynolds* (a malapportionment case that did not raise apparent red flags about racial discrimination) that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government"[11] seemed to support the view that the right to vote belonged in that pantheon of fundamental rights of citizens of the United States. The view that voting belonged among the fundamental rights was underscored in *Kramer v. Union Free School District No. 15* a few years later, where the Court again invoked strict scrutiny "because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in

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[6] Pennsylvania authorized elder-care facilities to issue photo IDs so that their senior residents do not have to travel to obtain them, the *Philadelphia Inquirer* estimated that, in Philadelphia, nearly 20% of registered voters aged 65-79 lack an acceptable photo ID, and the figure rises to 27.4% of those 80 and older. Elderly voters vote disproportionately Republican, especially those who are not from the city proper.

[7] U.S. Constitution, Article I §2; Amendment 17 (1913), modifying Article 1 §3.

[8] This is not a paper on the Voting Rights Act, its preclearance provisions, or on *Shelby County*, although a more through examination of race-based restrictions on voting would reveal that qualifications are not simply left in the hands of states (poll taxes, literacy tests, grandfather clauses being prime examples).

[9] *Harper v. Virginia Board of Elections* 383 U. S. 663 (1966) at 670.

[10] *Palko v. Connecticut* 302 U.S. 319 (1937).

[11] Citation in epigraph.

determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government."[12]

Despite assertions by the federal government that voting was a fundamental right—language enshrined in the introduction to the Voting Rights Act Amendments of 1970—state regulations that lack an extremely clear racially discriminatory purpose are not now being reviewed under strict scrutiny. In the 2008 decision in *Crawford v. Marion County Election Board*, the Court upheld Indiana's new voter identification law, finding the state's asserted interest in preventing voter fraud and in maintaining the integrity of the electoral process sufficient, and the alleged burden on those without requisite identification minor. Justice Stevens, writing for himself, Chief Justice Roberts, and Justice Kennedy in *Crawford*, noted that the question at hand was of petitioner's right to facial invalidation of the Indiana statute, seeming to leave open the possibility that they might consider a post-election challenge differently.[13] Their opinion balanced interests, and while Justice Souter accepted a need to balance, he dissented (joined by Justice Ginsburg), claiming the state had not met its evidentiary burden even under this standard. The chief object of the legislation, these dissenters suggested, was in "deterring poorer residents from exercising the franchise."[14] However, Justices Scalia, Thomas, and Alito, concurring in the judgment, made clear that the classes complaining of disparate impact under the Fourteenth Amendment here are not protected classes and that burdens imposed by this photo identification law, as a "generally applicable, nondiscriminatory voting regulation," should not be judged on the basis of its individual impacts.[15] Justice Breyer was left alone, in dissent, to liken the burden imposed on voters to that found unconstitutional in *Harper*.

The 2008 decision gave a "green light" for other states to pass similar, or even more restrictive, voter identification laws. Because of *Harper*, Indiana and other states made alternate official photo identifications for purposes of voting free, but the Court seemed unconcerned that there might be many inconveniences ("incidental"? "minor"?) involved in attempting to obtain the documents needed to acquire one, or to travel (frequently more than once) to a place that issued a free, official photo identification. While Arizona's effort to require proof of citizenship from would-be voters was rebuffed by the Supreme Court last term,[16] that decision should not be over-read by voting rights optimists. Justice Scalia's majority opinion upheld federal pre-emption of state efforts to add documentary evidence of citizenship to the attestation found in the

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[12] Chief Justice Warren writing for the Court in *Kramer v. Union Free School District No. 15* 395 U.S. 621 (1969) at 626.

[13] Justice Scalia notes and disapproves of this possibility in the concurrence.

[14] Souter, J. dissenting (joined by Justice Ginsburg), slip opinion in *Crawford v. Marion County Election Board* 553 U.S. 181 (2008), dissent at 30.

[15] *Crawford v. Marion County Election Board* 553 U.S. 181 (2008), slip opinion, concurrence by Scalia, joined by Thomas and Alito at p. 3. I will refrain from hazarding a view about what Chief Justice Rehnquist and Justices Scalia, O'Connor, Kennedy, and Thomas meant when they invoked the "fundamental right of each voter" in the matter of standards for vote recounting under the Equal Protection Clause in *Bush v. Gore*, and will leave that puzzle (mess?) to other colleagues in the room who have written about the case.

[16] *Arizona v. the Inter Tribal Council of Arizona* 570 U.S. ___ (2013).

form created under the 1993 National Voter Registration Act, since the NVRA required states to "accept and use" that form. This was not a case decided on the basis of voter rights or the Fourteenth Amendment. And Marty Lederman makes the claim that "The Court categorically holds — without dissent — that the Elections Clause of Article I of the Constitution (Art. I, § 4, cl. 1) "empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them."[17] This, at least, is in the majority opinion.[18]

Returning to the *Crawford* matter: what sort of evidence, and how much, do states need to demonstrate in order to sustain claims of voter fraud and dangers to the integrity of the electoral process? The state's interest in assuring elections free of fraud and public confidence in the integrity of the electoral process has been taken to be a substantial governmental interest. How should the Court gauge how substantial were the governmental interests in passing these recent measures that burden (or inconvenience in the best case, if you prefer) the right to vote? I would argue that the Court has been employing something far closer to rational basis review in examining the claims states have advanced. Few documented cases of voter impersonation, multiple voting, or voter fraud have been uncovered[19] despite a great deal of effort to do so. The George W. Bush Administration Justice Department made protracted efforts to find and prosecute such cases under federal authority.[20] And for the states, how much deference to undocumented or poorly documented claims is warranted? I thought we understood that, under

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[17] Marty Lederman, *Pyrrhic victory for federal government in Arizona voter registration case? [UPDATED with reference to Shelby County]*, SCOTUSblog (Jun. 17, 2013, 3:02 PM), http://www.scotusblog.com/2013/06/pyrrhic-victory-for-federal-government-in-arizona-voter-registration-case/ Referencing *Arizona v. Inter Tribal Council of Arizona* 570 U.S. ___ (2013).

[18] Scalia, J. for the Court, *Arizona v. Inter Tribal Council*, Section III. It is unlikely that the two dissenters, Justices Thomas and Alito, would contest this claim, although I did not carefully read their dissents in support of Arizona's interpretation of their powers to seek additional proof of citizenship. I did not read Justice Kennedy's concurrence carefully to head count Lederman's contention that this particular point was unanimous.

[19] See Lorraine C. Minnite, *The Myth of Voter Fraud* (Ithaca: Cornell University Press, 2010). Minnite contends that actual voter fraud is extremely rare in American elections, and that baseless allegations of voter fraud have been used by political elites and operatives to shape the electorate in ways that advantage these political elites. She provided expert testimony for the ACLU in the Pennsylvania case (see http://www.aclupa.org/files/1913/7960/9095/Minnite.pdf. Tova Andrea Wang, in *The Politics of Voter Suppresion: Defending and Expanding Americans' Right To Vote* claims that in the past 50 years, Republicans have been engaging in subtle forms of vote suppression for political purposes, and suggests ways (including addressing felon disenfranchisement) to create a larger and more inclusive electorate.

[20] A small number of convicted felons who mistakenly thought their right to vote had been restored constitute the bulk of the evidence; state public officials engaging in fraudulent vote acquisition schemes could also be found. On the Bush Administration's quest, see Eric Lipton and Ian Urbina,"In 5-Year Effort, Scant Evidence of Voter Fraud," *New York Times*, April 12, 2007, available at http://www.nytimes.com/2007/04/12/washington/12fraud.html?pagewanted=all&_r=0. At least eight U.S. attorneys were fired, apparently for failure to prosecute more cases of voter fraud. See, for example, op. ed. by David C. Iglesias, "Why I was Fired," http://www.nytimes.com/2007/03/21/opinion/21iglesias.html?_r=0. See also Dan Eggen and Amy Goldstein, "Voter- Fraud Complaints by GOP Drove Dismissals," http://www.washingtonpost.com/wp-dyn/content/article/2007/05/13/AR2007051301106.html.

the Fourteenth Amendment, and even where fundamental rights were at stake, states cannot try to correct hypothetical problems or nonexistent ones.[21]

If unsubstantiated claims about vote fraud circulate in social media and on the airwaves, is state action warranted because of spreading doubts—even if erroneous—about the integrity of the electoral process?[22] Since *Buckley* suggested that Congress, at least, could act to prevent not only corruption but the appearance of corruption, could not states do the same? Appearances matter.[23] Or, at least, they did until *Citizens United*, when Justice Kennedy told the American public that "independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption."[24] On some readings, Congress lost the ability to regulate anything other than quid pro quo corruption through campaign finance laws—not appearances that might threaten the perceived integrity of the electoral process.[25] Do states reserve more power to regulate access to the ballot box because of beliefs about corruption among a segment of the electorate? And what of the beliefs about the integrity of the electoral system among those who are being burdened?

The *Crawford* decision, coupled with the election of Barack Obama in 2008 in which significant numbers of new, Democratic-leaning voters and high numbers of African-American voters participated, mobilized a number of states to enact new voter identification laws. Participation of Latino voters in the southwest was also seen as a potential force, and with their tendency to cast votes for Democrats, a few states generated new proof of citizenship requirements for good measure. Voter registration drives were also saddled with new restrictions in a number of these states; early voting was limited in some of them. Just between the start of 2011 and September 2012, eleven states enacted photo ID laws; of these, in every case but one, the restrictive measures were passed by states with Republican legislatures and Republican governors.[26] Six states have enacted or modified voter ID laws between September, 2012 and the present.[27] Missouri may join the list.[28] Other state legislatures have considered such bills. Legal

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[21] I am thinking here, of *City of Richmond v. J.A. Croson Co*. 488 U.S. 469 (1989), applying strict scrutiny to the City of Richmond's minority business set aside program, and of *Regents of the University of California v. Bakke* 438 U.S. 265 (1978) on affirmative action. Both denied that states can use affirmative action to remedy societal or generalized problems—the state actor invoking a remedy needs specific evidence of (here, their own complicity in) wrongdoing. Is the analogy I am drawing too far-fetched?

[22] See discussion in Richard L. Hasen, *The Voting Wars: From Florida 2000 to the Next Election Meltdown* (New Haven: Yale University Press, 2012).

[23] Buckley v. Valeo 424 U.S. 1 (1976).

[24] Kennedy, J. writing for the Court in *Citizens United v. F.E.C.* 558 U.S. 310 (2010) , slip opinion at 45.

[25] For a good example, see the discussion by Richard L. Hasen, "Citizens United and the Illusion of Coherence," 109 *Mich. L. Rev*. 581 (2011) at 596: in explaining the meaning of corruption, Kennedy wrote, "When Buckley identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption."

[26] The exception is Rhode Island.

[27] The newest state laws have been passed in Arkansas, New Hampshire, North Carolina, North Dakota, Tennessee, Virginia, and Indiana.

[28] While Missouri has a Democratic governor, the Republican-controlled legislature can pass and submit to the voters an amendment to the state constitution, and the legislature seeks to pass a companion bill (for which they may have a veto-proof majority) stipulating which forms of identification would be acceptable. Reid Wilson, "Missouri

challenges delayed implementation of other state-enacted measures; federal challenges were made under the pre-clearance provision of the Voting Rights Act in states where some districts were so covered (until *Shelby*).[29] The Wisconsin Supreme Court is currently considering two challenges to that state's voter ID law, which was softened somewhat by the legislature to better withstand challenges, and another Wisconsin case is in federal court.

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In 2012, Justice Souter (retired) spoke about the great range of breadth of language in the Constitution; some language is very specific and some terms such as "equal protection" are extraordinarily broad. Justice Souter referred to the Constitution as including "a menu of approved values, the application of which has got to be worked out over time." Making these values work out in practice was an assignment left to the future (including the Supreme Court in that process).[30] Some rights are recognized in order to make practical sense of what the Constitution says are the values to protect. Our capacity to see facts (or what Ronald Kahn calls "social facts") depends on what our experience has opened our eyes to, and this varies over time. Souter seemed to echo Justice Douglas's view in *Harper* that "the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights."[31] But any teleological view of the nation's—or the Court's—understanding of voting as a fundamental rights seem to be inaccurate in light of experience.

In the nation's history, access to the franchise has been a struggle. Voting was sometimes seen as a privilege to be earned, including long after the passage of the Fourteenth and Fifteenth Amendments. Universal suffrage has hardly been the norm.[32] As some groups won the right to vote (when property and taxpaying qualifications were dropped), restrictions were sometimes simultaneously or subsequently tightened for other groups. Only by the final quarter mark of the 20th century, Alexander Keyssar asserts, can it be said that the United States has

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Likely to Pass Voter ID Bill This Year," GovBeat, *Washington Post*, January 31, 2014, accessed at http://www.washingtonpost.com/blogs/govbeat/wp/2014/ 01/31/missouri-likely-to-pass-voter-id-bill-this-year/

[29] After *Shelby County v. Holder* 570 U.S. ___ (2013), Attorney General Holder has invoked another section of the VRA to challenge Texas for having known or should have known that Latino and African-American voters lacked the forms of identification required by the law. This is the subject of other papers.

[30] Retired Justice David Souter, "How Does the Constitution Keep Up with the Times?" September 17, 2012, Concord, N.H. The interview with Margaret Warner, PBS News Hour inaugurated the year-long Constitutionally Speaking series sponsored by the University of New Hampshire School of Law, the New Hampshire Supreme Court Society, the New Hampshire Humanities Council, and the New Hampshire Institute for Civic Education. The interview can be watched at http://law.unh.edu/news/2012/11/constitutionally-speaking.

[31] Citation in epigraph.

[32] An authoritative treatment is Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States*, revised edition (New York: Basic Books, 2009).

achieved something near universal suffrage.[33] Only in this time period has the right to vote been widely seen as a *fundamental* right, a right to be protected by the federal government. Even so, the story is complicated and hardly linear, and delineation of state and federal government responsibilities has and continues to be contested.

Each state adopts its own rules and requirements for voting and conducting elections, and historically, states have had wide latitude. The Constitution permits this; instead of stipulating nationwide qualifications for voting in federal elections, the framers simply stated that, in elections for members of the House of Representatives, "Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[34] When the Seventeenth Amendment was passed establishing direct election of Senators, this same language was used to indicate eligibility to vote.[35] States further decentralize the process and give election administration responsibility to county, city, and township governments. There are thousands of election rules and practices—not just 50 state election systems but more like 4600 ones (more than the number of counties in the U.S.).[36] For much of the nation's history, the following—and more—have varied by state:

- Voter registration rules and deadlines
- Rules for how candidates get on the ballot
- What kind of documents, if any, a would-be voter needed to produce to vote (e.g., sealed naturalization papers[37])
- Ballot design (Palm Beach County butterfly ballot that was so confusing in 2000 election)
- Whether or not a citizen may vote in a primary election (must one be registered as a Democrat or Republican? Are parties private organizations so that they can bar African Americans from participating in party primaries?)[38]
- Literacy tests
- Poll taxes
- How voter rolls are maintained, purged, and what recourse citizens have when their names are not on the rolls
- Access to absentee ballots, early voting
- Whether convicted felons are barred from voting– while serving their sentences (currently Vermont, Maine alone permit felons to vote from behind bars), while on probation or parole, after a certain number of years, or in some cases, permanently.[39]

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[33] Keyssar, *Right to Vote*, 228. Felony disenfranchisement remains an important exception to this movement toward universal suffrage.
[34] U.S. Constitution, Art. I, Sec. 2.
[35] U.S. Constitution, Amendment XVII (1913).
[36] See Spencer Overton, *Stealing Democracy: The New Politics of Voter Suppression* (W.W. Norton, 2006) for this point, and for a sense of this array of variations.
[37] Alexander Keyssar, "The Strange Career of Voter Suppression," *New York Times*, February 12, 2012 (op-ed), available at http://campaignstops.blogs.nytimes.com/2012/02/12/the-strange-career-of-voter-suppression/?_php=true&_type=blogs&_r=0
[38] *Smith v. Allwright* 321 U.S. 649 (1944) ruled unconstitutional the white-only primary, which for the Democrats was the de facto election in the South.

- Whether students and graduate students attending college in the state can vote there
- How long one has to have lived in the state in order to vote.[40]
- Whether immigrants could vote before they were citizens, which has sometimes been possible, especially in the late 19th and into the first two decades of the 20th century.[41]
- Whether Native Americans could vote even when granted U.S. citizenship and even after World War II.[42]

Election observers from the Vienna-based Organization for Security and Cooperation in Europe (OSCE) came to the U.S. for the first time in 2004 (they usually observe elections for fairness in emergent democracies), and observers in Florida reported that "they had less access to polls than in Kazakhstan, that the electronic voting had fewer fail-safes than in Venezuela, that the ballots were not so simple as in the Republic of Georgia and that no other country had such a complex national election system."[43]

The United States is not one of the nations in which citizens have a clearly established constitutional right to vote. While the Voting Rights Act, Motor Voter, and provisional ballot requirements and assistance to states that upgrade their voting equipment in the Help America Vote Act were all steps indicating an increased federal role in the electoral process, the federal government could do much more than it does to regulate federal elections. Under Article 1, §Sec. 4, although the "times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof," "Congress may at any time by law make or alter such regulations, except as to the places of chusing Senators." Short of having Senators elected out of state, it seems, Congress has wide latitude to regulate the manner of holding elections—at least for federal office. Political gerrymanders may be off limits, since the Court has all but claimed that districting for partisan purposes is a nonjusticiable

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[39] A summary of these state laws regarding felon disenfranchisement, updated to 2/12/2014, can be found at http://felonvoting.procon.org/view.resource.php?resourceID=286.

[40] The Voting Rights Amendments of 1970 eliminated long-term residency requirements for voting for president and vice-president, limiting residency to a maximum 30 days and stipulating that anyone otherwise qualified to vote who failed to meet such a residency requirement be allowed to vote in the state in which they had previously resided. http://www.law.umaryland.edu/marshall/usccr/documents/cr11032.pdf. In 1972, the Supreme Court extended the maximum thirty day residency rule to state and local elections in *Dunn v. Blumstein* 405 U.S. 330 (1972).

[41] See Ronald Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States* (Taylor & Francis, 2006); Leon E. Aylsworth, "The Passing of Alien Suffrage," *American Political Science Review* 25 #1 (February 1931): 114-16, noting that 1928 was the first national election in over 100 years in which no alien could vote for any office and briefly reviewing the history of extension, withdrawal of the franchise; Jamin B. Raskin, "Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage," 141 *University of Pennsylvania Law Review* (April 1993): 1391-1470. Some states and territories, seeking to attract settlers, offered access to the vote upon declaration of intent to become a full citizen.

[42] Several states continued to deny Native Americans ("Indians not taxed") the right to vote in the immediate aftermath of World War II, but after most states yielded in the late 1940s (sometimes after losing court battles), the Utah legislature became the last to concede the issue after Allen v. Merrell 6 Utah 2d 32 (1956) was vacated by the Supreme Court and returned to Utah for rehearing. See Keyssar, *Right to Vote*, 203-204.

[43] *International Herald Tribune*, November 3, 2004; Thomas Crampton. See http://www.freerepublic.com/focus/news/1267205/posts?page=83.

political question,[44] but there are many ways in which a Congress with the will to do so could act to protect the right to vote.

Congress, however, has no such apparent will. They did not take the invitation in *Northwest Austin Municipal Utility District No. 1 v. Holder*[45] to revise the Voting Rights Act so that shenanigans in Ohio would count the same as shenanigans in Alabama or Texas, which more or less foreordained the outcome in *Shelby* this past year. And the Court is showing few signs of coming to the rescue of the right to vote when it is burdened by the states.

The Court has been increasingly concerned with the "federalism costs" of national regulations,[46] including voting regulations that interfere with state and local prerogatives. In such an environment, we should not expect much of the Court when it comes to questioning new voter ID laws. It is unlikely that, absent a finding that only African-Americans and Latinos were targeted by new identification requirements, many state restrictions will fall. While a constitutional Amendment creating a federally guaranteed right to vote might be desirable, it, too, is unlikely to surface in the highly toxic and polarized atmosphere on Capitol Hill. The fundamental right to vote in *Harper* seems to have died at a very young age.

[44] *Vieth v. Jubelirer* 541 U.S. 267 (2004); Kennedy failed to provide the fifth vote for the nonjusticiability plurality view because he thought that perhaps, at some point if not then, a judicially manageable standard could be found.
[45] *Northwest Austin Municipal Utility District v. Holder* 541 U.S. 267 (2009).
[46] These are specifically mentioned as too great by the *Shelby County* majority.