

---

---

Essay

## Voting Rights and the 2020 Election: A New Judicial Federalism for the Right To Vote

David Schultz<sup>†</sup>

### INTRODUCTION

The U.S. Supreme Court, and more generally the federal government, have largely abandoned the protection of voting rights in federal and state elections.<sup>1</sup> As America approaches the 2020 elections, recognition of this fact is critical if one wishes to protect the right to vote, promote free and fair elections in this country, and ensure that public views the results as legitimate.

This article contends that, for the foreseeable future, a new theory of judicial federalism is needed. This theory defies state courts and constitutions as the primary mechanisms protecting voting rights. Such a theory is critical because the threat to voting rights is not some transitory issue or isolated to the 2020 elections, but a longer-term problem that is not going away, made all the more prescient as it is not clear that the federal courts are adequately addressing the issue.

### I. THE RISE AND FALL OF FEDERAL PROTECTION FOR VOTING RIGHTS

The drafting of the original U.S. Constitution left the issue of voter eligibility to the states.<sup>2</sup> In doing so, the states largely

---

<sup>†</sup> Professor, Hamline University Department of Political Science, Visiting Professor, University of Minnesota School of Law. Copyright © 2020 by David Schultz.

1. Imani Gandy & Jessica Mason Pieklo, *The Republican Takeover of the Federal Courts Should Terrify You*, REWIRE.NEWS, (Apr. 16, 2019, 2:29 PM) <https://rewire.news/article/2019/04/16/the-republican-takeover-of-the-federal-courts-should-terrify-you/>.

2. See, e.g., ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000); DONALD GRIER STEPHENSON, JR., *THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW*

confined franchise rights to white males who owned property.<sup>3</sup> A series of constitutional amendments excluded specific reasons which could be used to deny the right to vote, including race, sex, poll taxes, and age.<sup>4</sup> However, the Constitution has never affirmatively granted a textually explicit right to vote,<sup>5</sup> although the Supreme Court has found that Article I, section 2<sup>6</sup> and the First Amendment<sup>7</sup> create rights to vote in federal and state elections, respectively. This right is not absolute or unequivocal and can be limited by the commission of felonies<sup>8</sup> or further regulated, so long as such regulation is not burdensome and is part of a normal or routine administrative process.<sup>9</sup>

Congress has also chosen to enact civil rights legislation to protect the right to vote, specifically the 1965 Voting Rights Act (VRA), along with subsequent reauthorizations and amendments in 1970, 1975, 1982, 1992, and 2006.<sup>10</sup> The Executive Branch, most recently under Barack Obama, sought to protect voting rights,<sup>11</sup> and the federal courts over time issued many opinions also enabling voting rights.<sup>12</sup>

But all that now seems like ancient history.

The Roberts Court has demonstrated a clear pattern of hostility toward promoting the integrity of elections and voting rights.<sup>13</sup> In addition to striking down the regulation of money in

---

(2004).

3. Keyssar, *supra* note 2, at 21–25; TRACY CAMPBELL, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION—1742-2004, 12 (2006).

4. Keyssar, *supra* note 2, at 21–25.

5. DAVID SCHULTZ, ELECTION LAW AND DEMOCRATIC THEORY, 88–92 (2014).

6. *United States v. Classic*, 313 U.S. 299 (1941).

7. *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

8. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

9. *Burdick v. Takushi*, 504 U.S. 428 (1992); *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

10. Voting Rights of 1965, Pub. L. No. 89-110, 79 Stat. 445.

11. *See e.g.*: David Ingram & Dave Warner, *Obama Administration Declares New Voter Rights Strategy*, REUTERS (July 25, 2013, 8:52 AM) <https://www.reuters.com/article/us-usa-justice-holder/obama-administration-declares-new-voter-rights-strategy-idUSBRE9600RO20130725>.

12. *See generally*: DAVID SCHULTZ, ELECTION LAW AND DEMOCRATIC THEORY, 83–119 (2014).

13. Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597 (2016).

politics in just about every case before it,<sup>14</sup> it has also upheld voter identification laws,<sup>15</sup> struck down the formula for section five of the VRA and effectively gutted its preclearance provision,<sup>16</sup> and declared that partisan gerrymanders are nonjusticiable issues for the federal courts.<sup>17</sup>

Congress has failed to pass any meaningful voting rights legislation since 2006 and has been unable to overturn the Supreme Court's VRA decision *Shelby County v. Holder*. The Trump Administration has abandoned Obama-era voting rights enforcement policies<sup>18</sup> and has intervened to argue that Texas no longer needs oversight of its voting laws.<sup>19</sup> Finally, the president's own continued denial or seeming indifference to proof of foreign interference in the 2016 U.S. presidential elections<sup>20</sup>—despite the conclusions of the report by the special investigator Robert Mueller<sup>21</sup>—underscore the lack of concern that the Trump Administration has regarding voting rights and election security. At the same time that the federal government seems to have abandoned efforts to protect voting rights, threats to these rights and the integrity of U.S. elections have never been greater. In 2020, states are litigating efforts to purge voter rolls,

---

14. See e.g.: *Randall v. Sorrell*, 548 U.S. 230 (2006); *Federal Election Commission v. Wisconsin Right to Life Committee*, 551 U.S. 449 (2007); *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); and *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014).

15. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

16. *Shelby County v. Holder*, 570 U.S. 529 (2013).

17. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

18. Joan Biskupic, *Trump Justice Dept. Reversing Obama-era Positions on Discrimination Policies*, CNN (February 4, 2019, 6:05 AM) <https://www.cnn.com/2019/02/04/politics/trump-justice-department-race/index.html>.

19. Alexa Urba, *Trump Administration Opposes a Return to Federal Oversight for Texas Redistricting, Reversing Obama-era Stance*, TEXAS TRIBUNE (Jan. 16, 2019, 5:00 PM) <https://www.texastribune.org/2019/01/16/trump-admin-decides-texas-doesnt-need-federal-oversight-redistricting/>.

20. Chuck Todd, Mark Murray, & Carrie Dann, *Trump Continues to Deny Russia Interfered in 2016. Here's Why That's a Problem*, NBC NEWS (July 2, 2018, 7:39 AM) <https://www.nbcnews.com/politics/first-read/trump-continues-deny-russia-interfered-2016-here-s-why-s-n888206>.

21. ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019) (discussing Russian interference in the 2016 US presidential elections).

<sup>22</sup> there is evidence of continued Russian interference in US elections,<sup>23</sup> and there is no indication that partisan disagreements over voting rights and fraud will subside in the near future.<sup>24</sup> Overall, much in the same way that the increased use of smart devices in our private lives increases the risk of hacking,<sup>25</sup> demands to make voting more internet-based will expose voting to new threats.

Simply put, the U.S national government, across all of the three branches, no longer seems to be involved in protecting voting rights and is complicit in what is the second great disenfranchisement in American history.<sup>26</sup>

## II. TURN TO STATES

If the federal government has turned its back on the protection of voting rights despite a continued threat to disenfranchise, it is time for states yet again to become a leader in this area. It is with some irony to reach this conclusion given that the federal intervention in voting rights occurred because states largely had discriminatory and exclusionary politics involving voting. But demanding that states take action to protect franchise would not be the first time that they were called to reenter the fray and defend rights.

---

22. Scott Bauer, *Wisconsin Appeals Court Puts Voter Roll Purge on Hold*, AP, (Jan. 14, 2020) <https://apnews.com/f3480dece25251ca878fb9a62299f073>.

23. U.S. SENATE SELECT COMMITTEE ON INTELLIGENCE, REPORT OF THE SELECT COMMITTEE ON INTELLIGENCE UNITED STATES SENATE ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION VOLUME 1: RUSSIAN EFFORTS AGAINST ELECTION INFRASTRUCTURE WITH ADDITIONAL VIEWS (2019); Zachary B. Wolf, *Russians are Still Meddling in US Elections, Mueller Said. Is Anybody Listening?* CNN (July 25, 2019, 2:04 PM) <https://www.cnn.com/2019/07/24/politics/russia-trump-election-interference/index.html>.

24. Danny Hakim & Michael Wines, *In Midterms, the Right to Vote Is Still at Issue as Partisan Hurdles Pile Up*, N.Y. TIMES, Nov. 4, 2008, at A22.

25. Amanda Maxwell, *Hacking Devices in the Not-So Smart Home*, NOW, (Oct. 22, 2018) <https://now.northropgrumman.com/hacking-devices-in-the-not-so-smart-home>.

26. The first disfranchisement was the period following the end of Reconstruction in the South in 1877, generally referred to as the Jim Crow era, where states used a variety of mechanisms to prevent Black people from voting ranging from poll taxes, literacy tests, grandfather laws, felon disenfranchisement laws to turning a blind eye to lynchings. See e.g.: C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1974), David Schultz, *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 484, 485 (2008).

From the New Deal until the 1970s, the federal courts, especially the Supreme Court under Chief Justice Earl Warren, lead on most constitutional decisions, generally expanding and protecting individual rights not adequately respected under state law.<sup>27</sup> But beginning in the 1970s, state courts became new and active players in protecting individual rights and settling policy disputes.<sup>28</sup> This occurred in part at the prompting of Justice Brennan, who urged state courts to use their own constitutions and authority to protect individual rights. His 1977 law review article ushered in the “new judicial federalism” that encouraged state courts to use their own constitutions to resolve disputes.<sup>29</sup> As a result, Hans Linde in Oregon and a handful of other states’ supreme court justices began employing state constitutional arguments in their opinions.<sup>30</sup>

The New Judicial Federalism is subject to conflicting evaluations regarding its efficacy,<sup>31</sup> yet it has produced a body of law based on state constitutions.<sup>32</sup> The U.S. Constitution, especially the Supremacy Clause, still binds state courts,<sup>33</sup> and they are subject to review when they decide on federal questions.<sup>34</sup> However, state courts can depart from the federal model in critical

---

27. See e.g.: JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); MICHAL R. BELKNAP, *THE SUPREME COURT UNDER EARL WARREN, 1953-1969* (2005).

28. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* (2009).

29. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490–91 (1977).

30. Williams, *supra* note 28, at 140–41.

31. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992). *Contra*: G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS*, 1–2 (1998).

32. Williams, *supra* note 28, at 1–5.

33. See *Martin v. Hunter’s Lessee*, 14 U.S. 304, 359 (1816), *Cohens v. Virginia*, 19 U.S. 264, 447 (1821).

34. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1032–33 (1983) (noting that state decisions rendered on adequate and independent state grounds are not subject to federal review unless there are federal questions left unresolved by them); *Michigan v. Mosley*, 423 U.S. 96, 120–121 (1976) (noting that states could impose higher standards than mandated by federal law). See generally Brennan, *supra* note 29 (discussing the paucity of federal questions presented to the Court prior to a “legal revolution” whereby state courts became more involved as “guardians of our liberties.”).

ways because of their different designs.<sup>35</sup> For example, state constitutions may allow for their courts to issue advisory opinions,<sup>36</sup> perform functions not normally given to federal courts,<sup>37</sup> or address expanded notions of state action and jurisdiction that contrast with federal courts.<sup>38</sup> But, most importantly, state appellate court decisions rendered on the basis of their own constitutions that do not implicate federal issues are essentially unreviewable by the U.S. Supreme Court.<sup>39</sup> State courts, if they render opinions on their own adequate and independent grounds, can forcefully forge a body of law that can protect and expand rights beyond those found in the U.S. Constitution and Bill of Rights.<sup>40</sup>

State courts are not encumbered by many of the same issues that limit federal courts, including the case and controversy requirement.<sup>41</sup> State courts do not necessarily face the counter-majoritarian problem<sup>42</sup> federal courts do because the latter are not

---

35. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 288, 299 (2009).

36. See Charles M. Carberry, *The State Advisory Opinion in Perspective*, 44 *FORDHAM L. REV.* 81, 81–82 (1975); Helen Hershkoff, *State Courts and the “Passive Virtues”*: *Rethinking the Judicial Function*, 114 *HARV. L. REV.* 1833, 1844–52 (2001).

37. Perhaps the most notable difference being that state courts are entrusted to regulate the practice of law including issues of admission to practice, promulgating and enforcing rules of professional conduct, and attorney ethics disciplinary matters. See, e.g., *MINN. STAT.* 480.05 (2018).

38. See Williams, *supra* note 28, at 188. Compare *N.J. Coal. Against the War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 770–71 (N.J. 1994), with *Robins v. Pruneyard Shopping Center*, 592 P.2d 341, 346–47 (Cal. 1979), *aff’d*, 447 U.S. 74 (1980) (showing contrasting examples of different state and federal approaches to the state action doctrine).

39. Williams, *supra* note 28, at 122.

40. Brennan, *supra* note 29, 490–91.

41. Jack L. Landau, *State Constitutionalism and the Limits of Judicial Power*, 69 *RUTGERS U. L. REV.* 1309, 1315 (2017).

42. “Counter-majoritarian” is a phrase coined by Alexander Bickel where judicial review by unelected judges “thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.” See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986).

elected.<sup>43</sup> On the other hand, state courts may face a “majoritarian” problem if elected.<sup>44</sup> The point is that state courts and constitutions form distinct institutions and textual documents that can guarantee rights, and what may be needed is either a general or specific theory of judicial review that empowers state courts to enable democratic-reinforcing practices.<sup>45</sup> This too includes voting rights.

State courts are in a unique place when it comes to franchise rights. Unlike the U.S. Constitution, which does not have a textually explicit clause affirmatively granting a right to vote, all 50 states do have such a clause.<sup>46</sup> Often these clauses are self-executing.<sup>47</sup> This means that state courts do not need to rely upon enabling legislation to enforce voting rights. The clauses themselves empower state courts to act.

What we have seen over the last few years is how state courts, responding to the retrenchment in voting rights by the federal courts and the U.S. in general, have stepped in to address the issues. For example, state courts using their own constitutions have reached opinions different from the Supreme Court regarding diverse topics such as voter IDs laws,<sup>48</sup> partisan gerrymandering,<sup>49</sup> and felon disenfranchisement.<sup>50</sup> While state

---

43. See Helen Hershkoff, *supra* note 36, at 1844–52 (2001) and Hans A. Linde, *The State and Federal Courts in Governance: Vive La. Différence!*, 46 WM. & MARY L. REV. 1273 (2005) (discussing among other things, how election of state judges might affect their role and institutional performances.).

44. The “Majoritarian problem” is a term used by Steven Croley and others to describe how popularly elected judges may be unwilling to protect minority rights for fear of thwarting the will of the majority. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725–26 (1995).

45. David Schultz, *State Courts and Democratic Theory: Toward a Theory of State Constitution and Judicial Review*, 45 MITCH. HAM. L. REV., 578 (2019).

46. Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101 (2014). However, Arizona’s clause is not explicit. Ariz. Const. art. II, § 21; *id.* art. VII, § 2.

47. Williams, *supra* note 28, at 343–44.

48. See *e.g.*, Weinschenk v. State, 203 S.W.3d 201, 211–12 (Mo. 2006); Martin v. Kohls, 444 S.W.3d 844, 852 (Ark. 2014); Applewhite v. Commonwealth, No. 330 M.D. 2012, 2014 WL 184988, at \*27 (Pa. Commw. Ct. Jan. 17, 2014).

49. See *e.g.*, League of Women Voters v. Commonwealth, 645 Pa. 1, 178 A.3d 737 (Pa. S.Ct. 2018); Common Cause v. Lewis, 18 CVS 014001 (September 3, 2019).

50. See *e.g.*, League of Women Voters of Cal. v. McPherson, 52 Cal. Rptr. 3d 585, 588 (Ct. App. 2006); May v. Carlton, 245 S.W.3d 340, 345–48 (Tenn. 2008); Chido v. Section 43.24 Panel, 846 N.W.2d 845, 847, 857 (Iowa 2014).

courts and constitutions have not uniformly ruled in favor of voting rights, they have often provided an important alternative to the federal litigation route.<sup>51</sup>

At this point the state court decisions are uniquely situated within specific constitutions and clauses to enforce voting rights but require two additional facets. One, a concerted state-strategy that affirmatively directs litigation at the state as opposed to the federal level to address voting rights. Two, a theory, either state-specific or more general for all the states, that recognizes the horizontal and vertical aspects of voting rights federalism.<sup>52</sup> By that, a strategy that understands how state courts communicate with one another and draw upon one another's precedents when ruling on their own constitutions.<sup>53</sup> This strategy would also appreciate how in other areas of jurisprudence, such as in marriage equality<sup>54</sup> and the right to die,<sup>55</sup> state courts acted first before the Supreme Court.

In effect, the call here is for a general theory of state constitutional voting rights law as a distinct jurisprudence. It would be a conscious legal strategy to initiate a voting rights strategy across 50 states to secure protection for the right to vote. It would be a theory that, as argued elsewhere, recognizes that: “[s]tate judicial systems are located in a different political and legal context when compared to the federal courts. They operate under unique state constitutions and traditions that often empower and obligate them to act in ways that contrast to the authority granted to federal courts.”<sup>56</sup>

State courts, unencumbered by the Article III constraints of the federal courts and, in many cases as elected bodies with explicit clauses in state constitutions, may be able to forge voting rights policies in ways that address the void left by the national government's abandonment of franchise rights.

---

51. See e.g., Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1 (2016), and Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014) (analyzing state constitutional voting rights litigation).

52. Williams, *supra* note 28, at 131–33.

53. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L. Q. 93 (2000).

54. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003). *But see* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

55. See *In re Quinlan*, 70 N.J. 10; 355 A.2d 647 (1976). *But see* *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990).

56. Schultz, *supra* note 45, at 606.



---

---

### III. IMPLICATIONS FOR 2020 AND BEYOND

What does a general or specific theory of state constitutional voting rights law or strategy mean for the 2020 election cycle and beyond? One, it should recognize that recourse to the federal courts as a comprehensive national strategy to address voting rights abuses is a naïve approach to protecting franchise rights and the integrity of elections, at least in 2020 if not the immediate future. As a matter of voting rights damage control, litigation in the federal courts should be avoided. Federal precedents and rulings potentially have nationwide implications if they go against voting rights. Litigating at the state level potentially confines bad decisions to one state while providing precedent for good decisions to be cited in other states with parallel state constitutional language.

Two, this strategy recognizes the reality of what US elections are—at least 50 separate jurisdictions across America. Even the presidential election, because of the Electoral College, is not really a national election but the battle to amass electoral votes across 50 states. Challenges to the fairness of any one state’s election rules might better be fought by way of the individual state’s right to vote, equal protection, or other constitutional clauses. As Justice Brennan admonished 40 years ago, a judicial federalism or recognition of the potency of state constitutions to litigate now voting rights claims may make the most sense given the inability or unwillingness of the federal government to act.<sup>57</sup>

Three, legal teams or plaintiffs across the country should be prepared both before and perhaps after the 2020 elections to develop state-specific strategies, especially for the crucial swing states,<sup>58</sup> for challenging election rules that endanger the right to vote.

Four, legal teams or plaintiffs should think about how precedents and principles in one state might serve as the appropriate basis for arguing voting rights in other states. In effect, they must consider if a party can use analysis and precedents from parallel or similarly worded constitutional clauses in one state favorably elsewhere.

---

57. Brennan, *supra* note 29, at 390–91.

58. DAVID SCHULTZ AND RAFAEL JACOB, EDS. PRESIDENTIAL SWING STATES (2d ed., 2018).

CONCLUSION

The national government has effectively abandoned the protection of voting rights in America. This means a return to the states and state constitutions as a primary means to support and further voting rights while at the same time mitigating damage that could be done to franchise and fair elections with adverse federal court decisions by a judiciary that is becoming less sympathetic. This brief article is a plea for a New Judicial Federalism for voting rights. It suggests that there is a need to construct either state-specific or more general jurisprudence and a litigation strategy to protect voting rights in preparation of the 2020 election and beyond.