

BUFFALO BUSINESS FIRST

Voting Rights Act turned upside down

SPOTLIGHT: Election Law

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Buffalo attorney Frank Housh sees voter-related laws as one of the more crucial civil rights matters of the modern era.

It may have been a battle that was won in a previous generation but the fight was brought back into the spotlight in the wake of a 2013 **U.S. Supreme Court** decision.

The Voter Registration Act was somewhat dismantled after *Shelby County v. Holder*, which in a 5-4 decision held that it was unconstitutional to require states that were once identified with a history of racial discrimination to obtain pre-clearance from the federal government before they can make changes to their election law.

For three years, those states have been free to make changes to election law or district maps without having to get approval from the Justice Department.

Since then, 18 states have passed or tried to pass voter ID laws, Housh said. In 2016, 14 states will have new voting restrictions in place for the first time in a presidential election. Housh called such efforts the equivalent of Jim Crow Laws, which enforced racial segregation, or poll taxes, from the 1950s and '60s.

“These are laws specifically geared toward preventing people from exercising their voting franchise,” he said. “And that’s not me saying that. There is an example of the Fourth Circuit Court of Appeals saying that when they struck down the North Carolina ID voter scheme.”

Housh is founder of Housh Law Offices and chairman of the Western New York Lawyer Chapter of the American Constitution Society. He is familiar with the topic, having made presentations to local and state bar associations and conducting training for poll monitors before an election.

Deeming the Voting Rights Act as unconstitutional has allowed different states to create impediments to voting, according to Housh, who said it doesn’t just occur in the Deep South. The country has a history prior to the 1965 Voting Rights Act of using structural legislation to prevent minorities from voting, and he said the *Shelby County* decision allows that to continue.

Housh said where he was born and raised — in the Midwest — there are laws to prevent Native Americans from voting. In other places, laws have been created to keep Latinos and Asians out of the polls.

He graduated from the University of Kansas and later moved to Buffalo, where he earned a law degree from the UB School of Law.



Buffalo attorney Frank Housh called new voting restrictions in 14 states the equivalent of Jim Crow Laws, which enforced racial segregation, or poll taxes, from the 1950s and '60s.

“Any sort of restriction of the voting franchise will have the effect of keeping people who should be there away from the polls, so that needs to be very carefully done,” he said. “Voting is not a license or privilege; it’s a constitutional right. It can’t be taken away like someone’s driver’s license.”

The Supreme Court’s decision did have some legitimate arguments, he said. Some of the places that had pre-clearance restrictions actually experienced a tremendous amount of minority voting participation, so they wondered why they had to keep going through clearance to change election law rules. According to Housh, it’s because shortly after the decision, some of the same jurisdictions were passing voter ID laws.

Craig Bucki, a litigator and partner at Phillips Lytle, said that in the decision, the court discerned that circumstances have changed in the country since the Voter Rights Act was passed and insufficient justification was demonstrated to indicate that the same formula should apply today.

Three years removed from that decision, the biggest impact Bucki sees is in various voting procedures taking place in local communities. There have been some recent determinations about whether early voting will take place in a given community.

“Some people are legitimately upset and concerned about the impact this will have on voter rights, voter turnout and the availability that people have to be able to vote,” he said.

Bucki’s practice involves state and municipal government, public authorities and other quasi-governmental entities, which includes representing political candidates in election law disputes. He assigns the Democratic election inspectors in the town of Amherst and answers questions about Election Day procedures and rules. He also has managed campaigns, so he realizes the importance of following rules.

Vanessa Glusheski is co-vice chair of the local chapter of the American Constitution Society and runs her own practice on Buffalo’s West Side. She said the high court’s decision indicated that the states’ right to draw their own district was more important than subjecting them to a requirement that the court didn’t believe was necessary anymore.

Cases challenging redistricting have come up before the Supreme Court, she said. And there may be more to come with states getting even more aggressive with voter redistricting, she said.

There are two similar cases of voter redistricting-related matters that will be argued before the Supreme Court in December: Bethune-Hill v Virginia and McQueary v Harris, which challenge that many of the minorities in these communities have been packed into a few districts to help allow Republican control in other districts.

Glusheski said the Supreme Court historically has noted that it would not find that political gerrymandering is unconstitutional because it is part of the political process of competing for power. However, racial gerrymandering is another story. She said scholars say that the court shouldn’t find that these redistricting plans are racially driven, while others believe it flies in the face of the Voting Rights Act to dilute the vote of African-Americans.

These cases could have implications on voter rights for years to come, according to Glusheski.

“Because of the history of this country, this is a little bit more sensitive (of a topic),” she said. “The states are taking the position that they’re trying to comply with the Voting Rights Act and that it is a political maneuver, not a racial maneuver, and they can’t help that minorities tend to be more aligned with Democrats than Republicans.”

Voter IDs, rigged elections

According to Housh, the problem with requiring voter ID at polling places is that it assumes everyone has a middle-class lifestyle. He said many people don’t take part in activities requiring an ID, and some may not even have \$10 for a birth certificate to prove their identity.

Housh said he is pleased that most of the voter ID plans were set aside by the Circuit Courts because of attorney challenges. In places such as Texas, North Carolina, Kansas and Wisconsin, voter ID proposals were turned away for being discriminatory.

The decision of the Fourth Circuit Court from a case in North Carolina held that this practice violated the Voting Rights Act. The court added that it was done intentionally to disenfranchise African-American voters.

In Texas, Bucki said, there was a proposal to drastically limit the number of polling places for early voting. It singled out a number of polling places that were predominantly African-American communities. After a public outcry, it was reversed as a matter of policy without having to go to court.

“That’s one example of what can happen with a lot less procedure than would have been required in the days when you did have pre-clearance,” he said. “In that sense, the decision has been impactful in terms of providing opportunities for these previously pre-clearance communities to fiddle with the voting system in ways that are legitimately concerning.”

Some say voter IDs are a necessity in protecting against voter fraud.

Bucki pointed to claims made by Republican candidate Donald Trump that the presidential election is rigged. Bucki refuted that by citing the findings of a study by a professor at Loyola Law School who found that since 2000, there have been only 31 confirmed incidents of voter fraud nationwide.

“Now that the pre-clearance requirement has been thrown out the window, it may be, perhaps, why you’re seeing more of these efforts to require additional identification and limit the number of polling places that have early voting opportunities,” he said. “It used to be that you had to follow a very complex procedure to get the approval to change election laws. Now that procedure in pre-clearance communities is gone until a new formula is adopted.”

While voter fraud is rare, there were a few notable cases of it that have gone through the court system in Western New York over the past year.

“In many of the cases where people allege fraud, a voter ID wouldn’t have helped,” Housh said. “These are people who falsely register. It’s sort of like identity fraud. Those types of things happen, of course. The elections aren’t perfect. But the system that we have is relatively effective in enforcement.”

The process is overseen by the boards of elections in every county and at the state level, and those boards are set up so that there is an equal amount of Democrats and Republicans on staff, Bucki said. There is a paper trail left by the source ballots, which are the bubble sheets that are filled out. He said in New York state the process will be administered “fairly and honestly.”

“I certainly have confidence in that system, which is bipartisan, and we can all be assured that even if you’re in a county that is heavily Democratic or Republican, that there is equal representation between the two parties at the administrative level,” he said.

Focus on NYS voter rights and rules

While New York has not made any major changes in voter law, Housh said the state still lags behind many others and, because of that, is 48th in voter turnout. New York has yet to implement any of the advanced voting plans adopted by most other states. For the most part, the only way one can vote in the state is by turning up on Election Day.

New York doesn’t have early voting nor does it have automatic voter registration when one gets a license. To vote using an absentee ballot, an affidavit must be submitted explaining why the person needs it. The state was also the last to get new voting machines to replace the levered machines.

“New York can go much farther than it has to reform its voter and election law and get more people to vote,” Housh said. “I hope to see New York liberalize our laws.”

While voter ID rules vary from state to state, New York does not require photo ID at polling places, according to Bucki. A voter must simply sign the book before voting, though when registering to vote, some identifying information must be provided.

Housh talks with state pollsters about simple problems that come up on Election Day. Among the topics is how an affidavit ballot must be offered to a person whose name does not appear in the voter role books. Once an affidavit ballot is filled out, it will be determined by the Board of Elections if it should be counted.

As part of an inquiry that followed more than 1,000 complaints from voters during the presidential primary in April, the state Attorney General’s Office found that some poll workers do not receive guidance about their legal obligations with respect to affidavit ballots. In response, Attorney General Eric Schneiderman recently called on the Board of Elections to issue clear guidance to poll workers about the affidavit ballot process before the Nov. 8 election.

Also, if the voting machine is broken, a provisional ballot should be offered to voters and then put into a lockbox and later counted by the Board of Elections, Housh said.

Bucki has seen candidates working with their team on a campaign push until the final hour. According to law, those people must stay 100 feet away from the polling places. Election inspectors will estimate the 100 feet and place a sign that indicates where the line exists.

Bucki said an absentee ballot in New York will count as long as it is sent and postmarked by a day before the election. If someone missed the Nov. 1 deadline for requesting an absentee ballot, they can go in person to the Board of Elections up until Nov. 7 to fill one out.

Housh, who hopes to see a new Voter Rights Act passed by Congress, maintains a simple philosophy when it comes to election law: "Everyone should vote for who they want. It should be easy to register and vote, and all of the votes should be counted."

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