The Voting Rights Act and the Politics of Identity: A Jurisprudential Analysis of Federal Court Decisions on Voting Rights

OR:

What the Federal Courts Talk About When They Talk About Race

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**INTRODUCTION**

In the wake of Shelby County v. Holder (2013), many states rushed in to erect voting barriers that likely wouldn’t have survived the preclearance process provided for under Section 5 of the Voting Rights Act of 1965 as amended in 1982. This was especially true of southern states (Bazelon, pg. 41). Texas and North Carolina, for example, rapidly passed strict voter ID laws. The Obama administration stepped in and challenged these laws, and found success at the lower federal court level in both states. Under President Trump, however, this situation will change in two fundamental ways. One, of course, is implicated in the ascension of Senator Jeff Sessions to the post of U.S. Attorney General atop the Department of Justice. Sessions has been a leader in making the charge that massive voter fraud is a serious electoral problem in the U.S. As such, as the direction of Attorney General Sessions the DOJ reversed its position on the claim in the Texas case “that the ID law was enacted with the intention of discriminating against minority voters” (Fessler, 2017).  The DOJ noted that the Texas legislature has plans to address the concern that minority voters would be adversely affected by the law, and that effort should be allowed to proceed. This is clearly a precursor to a much broader shift within the DOJ to no longer challenge voter ID laws in the states and to perhaps even side with the states when such laws come under legal challenge from other interested parties. It seems likely that the DOJ under Sessions will be similarly uninterested in pursuing redistricting cases that might be argued to be contra the interests of nonwhite voters.

A second way in which the election of Trump to the White House will make a big difference for voting rights is the fact that Senate Republicans obstructed not only President Obama’s effort to fill an open slot on the U.S. Supreme Court for over a year, they also blocked his attempts to fill many lower judicial positions over that same time span. It is estimated that there are now over 100 such positions for Trump to fill at the very outset of his presidency, the most of any President in forty years. In one account in the New York Times from 19 March the estimate is that “Mr. Trump already has 124 judgeships to fill….[t]hat includes 19 vacancies on the federal appeals courts” (Lipton and Peters, 2017). Additionally, it is estimated, based on the age of current federal judges, that “between 70 and 90 appeals court positions to open up over the next four years,” giving the Trump administration the chance to name as many as half of all appellate judges by the end of his current term as President (Lipton and Peters). As such, and even more so with each passing year, Trump will be able to remake the federal judiciary in ways that will have a large impact on how these courts are going to deal with voting rights cases—from a position right now that is distinctly open to Voting Rights Act and 14th Amendment challenges to voter ID laws and redistricting that arguably degrades the political power of minorities to a position more in tune with supporters of such laws and redistricting efforts. In short, for those who favor a reading of the Voting Rights Act that takes the concerns of minority voters seriously these are, and are going to continue to be, hard times. And while it is true that we do not yet know who Sessions will name to head up the Civil Rights Division of the DOJ, his choice is unlikely to allay those fears.

 The two issues this paper will address will be redistricting and electoral administration (voter identification laws, early voting procedures, voting on Sundays or not, voting allowed, or not, out of precinct, etc.). I will examine some of the more significant federal court cases handed down by the lower federal courts (both appellate and trial) between January 1 of 2016 and 1 April of 2017. The analysis to follow is not yet complete, but I have tried to give the reader a flavor for the arguments I wish to make about the politics of identity through the lens of these decisions. Also worth noting is that I will be paying particular attention to those cases where there is a dissenting opinion, as these give us a clearer sense of how federal judges view, often very differently, the highly contested issues surrounding the law and politics of race and ethnicity.

The first issue I will address in this paper will be redistricting. The basic legal questions involve whether redistricting has been done without violating either the 14th Amendment’s equal protection clause or the Voting Rights Act of 1965 as amended in 1982, specifically Section Two. The Supreme Court’s precedents have made it clear that the redistricting process cannot use race or ethnicity as “predominant factor” in the redrawing of electoral lines, as this would transgress the 14th Amendment’s equal protection clause. Furthermore, to the extent that mapdrawers DO take race into account, they must only do so in furtherance of a compelling governmental interest. And as it turns out, in some cases that compelling interest could include satisfying the terms of the VRA, which, in the view of the Supreme Court, sometimes *requires* that the redistricting process take race into account under certain conditions. Most importantly, and this comes to us from the Supreme Court’s decision in Thornburg v. Gingles (1986), those conditions include whether or not a racial or ethnic minority group is dense and compact enough to form a majority in an electoral district, whether or not the minority group is politically cohesive, and whether or not the white majority votes as a bloc to deny the candidate preferred by the minority community.

Also relevant to any discussion of the role that race might play in the redistricting process is the often fine (imaginary?) line between what constitutes partisan gerrymandering (here almost anything goes, as per relevant Supreme Court precedent, see especially Davis v. Bandemer (1986) and Vieth v. Jubelirer (2004)) and what constitutes racial gerrymandering (governed, as just noted, by the often conflicting demands of the 14th Amendment and the Voting Rights Act of 1965). As I will argue in my analysis, the question here will be whether or not partisanship was the driving factor behind the redrawing of lines or was it race? And the answer to that question may tell us more about the eye of the beholder than the thing that is being beholden. And, relatedly, how that beholder thinks about issues of racial and ethnic identity versus partisan identity. And what motivated the actions of the mapdrawers—was it race and ethnicity or was it partisanship? More importantly, is it possible to disentangle these two things? As per a Gallup poll from 2013, the Republican Party is roughly 90% white, while the Democratic Party is about 60% white (Gallup Poll, 2013). Racial and ethnic identity, in short, greatly overlaps partisan identity. As two legal scholars have pointed out, the ideal solution to this dilemma of sorting out motive would be to have two major political parties that are more heterogenous in terms of racial and ethnic identity (Cain and Zhang, 2016: 902). However, “[t]he Trump nomination [and now, of course, his successful election to the White House] shut that option down in 2016” (902).

This paper will also analyze a handful of voter identification/electoral administration cases. Here the question will be centered on the likely impact of such laws—are they essentially race and ethnicity neutral in effect? Are they racially and ethnically neutral in motivation? Or are they a way to effect, either intentionally or not, a marginal denial of voting rights based on race and ethnicity?

Before moving on to the body of this paper’s analysis, however, let me take note of the argument of Cain and Zhang. These two scholars suggest that perhaps the federal courts could apply a particularly rigorous voting rights analysis to states where the issues of BOTH electoral administration (i.e. voter identification laws) AND redistricting have been implemented in the wake of Shelby County. And most especially when it can be shown that both of these electoral changes have had the *effect* of undermining the political power of minority voters (903).

**REDISTRICTING, RACE, AND PARTISANSHIP**

In the Wisconsin case, Whitford v. Gill, decided in November of 2016, the Western District Court found that the Wisconsin legislature had violated the 14th Amendment’s Equal Protection clause by engaging in a high degree of partisan gerrymandering. In the 2012 election, for example, Republican candidates for the Assembly won only 48.6% of the statewide vote but won 61% of the seats (84). This advantage, the Court noted, would persist through at least the year 2020, when another round of redistricting would take place (*ibid*). Notable here is the failure of either the majority opinion or the dissent to take note of the connection between partisan gerrymandering and racial gerrymandering. In short, given a case where at least some discussion of the links between partisanship and race would seem merited, there was, instead, utter silence. That being said, Hasen’s claim is that the problem of conjoined polarization is very minimal in a state like Wisconsin, while it is rather substantial in southern states. As such, the court may well have been right in refusing to articulate the relevance of racial and ethnic identity in a case about partisan redistricting.

The Fifth Circuit Court of Appeals, in Fairley v. Hattiesburg (2016), upheld a lower court’s decision to deny plaintiffs’ claim that the city in question had violated Section Two of the Voting Rights Act by choosing a redistricting plan that provided for two districts with an African American majority and three with a white majority. Although the opinion is listed as per curiam, and at the end of this opinion we get the following: “**CONCUR BY:** Carl E. Stewart[.] **CONCUR[.]** Carl E. Stewart, Chief Judge, dissenting:”, it seems clear that in fact two of the judges favor the city (Judges Clement and Haynes), while one judge, Judge Stewart, sides with the plaintiffs. This odd use of conflicting terms may be explained by the fact that this case is unpublished, and therefore, I suspect, only lightly edited. Haynes and Clement, perhaps notably, were put on the bench by Republican Presidents, while Stewart was nominated by a Democrat (more on this below, in a separate section).

The court majority (or per curiam, as the court would, it appears, wrongly list it) in this case notes, credibly, that while they themselves might have decided the case differently, they are bound to uphold the lower court decision unless that decision be deemed clearly erroneous. The city in this case was presented with three alternative redistricting plans for city council elections. One would create three white-majority districts and two black-majority districts, while two would create three black-majority districts and two white-majority districts. The City Council voted for the first plan, which then received Section Five preclearance under the now-quiescent element of the Voting Rights Act that the U.S. Supreme Court rendered inoperative in Shelby. Notably perhaps this preclearance would have been given by a DOJ headed up by Eric Holder. This plan then went into effect, and was then challenged by some of the citizens of Hattiesburg. The federal trial court ruled in favor of Hattiesburg, hence this case on appeal.

While the court did find that plaintiffs had met all three *Gingles* requirements, they then applied the “totality of circumstances” test to rule in favor of the city. It is very much the exception rather than the rule that typically a plaintiff’s ability to satisfy the three *Gingles* requirements will result in a finding that Section Two of the VRA has been violated. The trial court found that, roughly speaking, African Americans in Hattiesburg enjoyed political power proportionate to their numbers. Supportive as well of their decision, they argued, was the recent election of an African American mayor in a citywide election. The Fifth Circuit Court of Appeals, then, rules that the trial court’s final disposition of this case was not clearly erroneous and should stand.

Judge Stewart, in dissent (despite the odd use of the term “concur” just prior to his dissent), took exception to the above holding. Judge Stewart finds it suspicious that of the three plans presented to the city, the one most favorable to white voters was chosen—this despite the fact that African Americans make up about 53% of the total citywide population, while whites make up just over 40%. Even if you take into account only the voting-age population, there are still a greater number of African Americans in the city (about 48%) than whites (46%). While it is manifestly true that when you have only five electoral districts, there is no way to get to exact racial proportion, Stewart expresses skepticism about the city’s ultimate choice from among the three plans. Stewart also points out that the city also could have created an electoral scheme in which there were two black-majority districts, two white-majority districts, and one racially balanced district. Instead, from among all of these possibilities, the one most favorable to whites was chosen.

In the recently decided Perez v. Abbott from Texas, a three-judge panel for the Fifth Circuit Court of Appeals held, on 10 March of 2017, that the fact that an electoral district is majority-HCVAP (Hispanic community voting age population) does NOT preclude a Voting Rights Act Section 2 claim—due in part to the fact that Latinos as a group under-perform other groups (primarily whites and blacks). The Court here uses a totality of circumstances test—has that minority group faced a history of discrimination in voting rights and a history of discrimination in housing, health care, education, and employment such that they are socioeconomically disadvantaged, thus less likely to participate in politics. Arguably this reflects an embedded, contextual reading of race and ethnicity in American history and politics—rather than the more theoretically pristine legal formalism often preferred by those who are less sensitive to the historical and contemporary realities faced by many citizens of color in the U.S. We see here, then, an interest in engaging in a conversation about racial and ethnic identity in a way that reflects the lived experiences of the minority community in question, including, notably, the historical experiences of that community.

Judges Rodriguez and Garcia, writing for the Fifth Circuit, argue that the plaintiffs, Hispanics living in Nueces County, Texas, can indeed plausibly argue that the fact of having a majority HCVAP district does not preclude a Section Two claim. This is because, as has been argued by other courts and experts in the field, the opportunity to elect the candidate of their choice must be more than just theoretical. The practical, “real” opportunity to exercise the Latino community’s political influence, of course, is not the same as providing “a guarantee of success.” The Court here notes that the district in question elected a Latino Republican (Canseco, no not the former Major League Baseball player!) in 2010, but Canseco, while Latino, was NOT the minority-preferred candidate in that contest. Latinos in this midterm election significantly underperformed, plus the Tea Party had their greatest success in this election cycle. In fact, in this particular election cycle, while the HCVAP for CD23 was 58.5%, the Latino share of the voting electorate n 2010 was only 40.77%. The majority, then, discusses the issue of racial/ethnic identity from the point of view of the minority community bringing the legal action against the Texas legislature, which is about what should be expected under the terms articulated by the VRA. Yes, a Latino candidate did win CD23, but the minority-preferred candidate narrowly lost. And this, for Judges Rodriguez and Garcia, is the dispositive issue, not the identity of the winning candidate.

Additionally, and as per the testimony of the mapdrawer for CD23, the emphasis was on adding into Canseco’s district (in an effort to ensure his re-election in 2012) Latino Republicans and subtracting Latino Democrats—this in an effort to maintain the appearance of a Latino opportunity district while enhancing the chances Canseco winning reelection in a less favorable election cycle. On top of this, the Court held that the mapdrawer intentionally (although steadfastly denied by said mapdrawer) moved into Canseco’s district low-turnout Latino populations and moved out of his district high-turnout Latino communities. The legislature, in short, “intended to decrease and successfully decreased the performance of CD23 for minority-preferred candidates….[therefore] [t]here was both discriminatory motive and improper use of race to achieve the desired goal.”

 Judge Smith, in dissent, disagreed profoundly with his colleagues on the bench. He first addresses the issue of mootness, and argues that his brethren failed to follow a previous decision by the Fifth Circuit Court of Appeals that seemed to declare the instant case moot (Davis v. Abbott, 2015, 781 F.3d 207). For purposes of this paper this issue is almost purely technical and procedural and fails to significantly engaged the issue of race.

 Judge Smith, however, argued that he also needed to take issue with how his fellow judges disposed of the merits of plaintiff’s claim that the Texas redistricting plan from 2011 violated federal law. He suggests that Judges Rodriguez and Garcia committed “clear error) when they found both a violation of the Voting Rights Act of 1965, Section Two, and the 14th Amendment’s equal protection clause. Most importantly for our purposes, and again, without falling too deeply down the bottomless well of legal technicalities and procedure, he declares that the question (“What this case is really about”) is whether the Texas legislature in 2011 “enacted [the challenged plans] for the purpose of diluting minority voting strength rather than protecting incumbents and preserving Republican political strength won in the 2010 elections” [Quote drawn from the State of Texas’ brief in the case].

 The Supreme Court has made it clear, in a long line of case law, that race CANNOT be a predominant factor in the drawing of electoral boundaries, as this runs afoul of the 14th Amendment’s equal protection clause. Additionally, race may need to be taken into account under the terms of the Voting Rights Act, in order to avoid diluting the voting strength of minority voters. The question here, then, is did the Texas legislature accurately thread the needle created by the competing claims of the 14th Amendment and the Voting Rights Act. Judge Smith concludes, in brief, that “Texas redistricting in 2011 was essentially about politics, not race.” This assumes, of course, that one can draw a clean line in the United States between politics and race. That seems like an implausible assumption. Texas, Judge Smith concedes, “has a strong correlation between race and party.” And the conclusion that he draws from this fact is that Texas was focused only on partisan advantage and not racial discrimination.

Smith finds that the fact that one of the Republican incumbents that benefitted from the redistricting plan in CD 23 was a Hispanic Republican and one of the Democratic incumbents that was harmed by the plan (in CD 25) was Anglo dispositive of the race issue—the focus here was pure partisan advantage and NOT illegitimate racial consciousness. Notably, as per the majority’s argument, above, Canseco was NOT the Latino-preferred candidate in that election (and this, I might add, is the benchmark under the terms of the VRA, the ability of a minority community to elect the candidate of their choice, which may not necessarily even be a Latino individual). Rather, his Democratic opponent was the preferred candidate. Additionally, and related to the parenthetical comment above, Doggett, the “loser” under the Texas legislature’s redistricting plan, while Anglo, WAS the Latino-preferred candidate in CD25. Smith, in short, engages in a discussion of racial identify that strongly suggests, or really pretty much baldly states, that the Voting Rights Act has not been violated if a minority CANDIDATE wins a district or an Anglo CANDIDATE loses a district. This without regard to the preferences of the minority group bringing the legal action, which, under the terms and conditions of the VRA, are meant to be at the very center of how that law is to be understood.

Smith does concede that the majority get it right in regard to the “DFW” district. In that particular case, the mapmaker himself admitted that “he used race as the sole criteria for assigning a significant portion of voters into and out of CD 26, and that his sole basis for regarding them as a community of interest was their race.”

Judge Smith thus argues that, for the most part, race was a minor factor at best in much of what the Texas legislature did in the wake of the census of 2010 and the resultant need to redistrict the state. Rather, and critically, the predominant motive was partisanship, not race, and therefore the legislature’s work ran afoul of neither the 14th Amendment’s equal protection clause nor the Voting Rights Act, Section Two. Although, as we saw in Wisconsin case, too much partisan redistricting can indeed violate the 14th Amendment’s promise of equal protection of the law.

Judge Smith, in his own words, “saved the worst for last.” Here he excoriates the Obama administration for intervening on behalf of the plaintiffs. He argues that the plaintiffs in this case had the benefit of highly skilled and experienced legal counsel native to Texas, and had no need of the U.S. government’s intervention on their behalf. The State of Texas’ legal counsel, however, was “badly outnumbered” and “though for the most part they are relatively new to Texas redistricting (at least as compared to plaintiffs’ counsel)”, they also did a good job of representing their client’s interests. Smith decried the Department of Justice’s legal counsel for their “contempt for Texas and its representatives” throughout the legal proceedings, including “chewing gum while court was in session” and “regularly rolling her eyes at State witnesses’ answers that she did not like.” Judge Smith’s diatribe against the Obama DOJ concludes with this fierce broadside: The DOJ attorneys “viewed state officials and the legislative majority and their staffs as a bunch of backwoods hayseed bigots who bemoan the abolition of the poll tax and pine for the days of literacy tests and lynchings.” Heavens. This strikes me as an early 21st century version of the Southern argument against Reconstruction via the carpetbaggers and scalawags from the hated and victorious North.

We see, then, that Judge Smith is more than willing to engage the race issue in this case, albeit he believes that the engagement should be focused on the nefarious racial motives of the federal government and not on the possible racial motive of the Texas legislature.

Regarding redistricting, Hasen argues that the courts should more tightly regulate line drawing motivated by partisan considerations—given how hard it is to disentangle party from race, particularly in southern states, Hasen thinks this is the way to go. Ideally, of course, redistricting, rather than being left up to partisan legislatures and governors, would be farmed out to relatively neutral commissions, as is the case in California and a few other states. But in the meantime, Hasen argues, treat partisan redistricting as more, if you will, suspect. Right now, of course, the Supreme Court, while ruling that partisan redistricting is indeed justiciable, has been unable to agree on a specific standard to guide a legal analysis of such line drawing. Notably, the Wisconsin case, below, lays out just such a standard in finding that Wisconsin did indeed cross the 14th Amendment’s equal protection clause. It will be interesting to track this case as it works its way towards the Supreme Court, presumably one with a newly minted Justice Gorsuch. Hasen’s core claim he summarizes thusly: “the two are so inextricably linked under the conditions of conjoined polarization [when race and partisanship closely match one another] that to discriminate on the basis of one is to discriminate on the basis of the other” (Hasen, 2017). He calls this, cleverly, “party all the time.” But in the context of federal courts that are prepared to evaluate critically partisan redistricting as a form of racial redistricting, not the hands-largely-off approach to partisan line drawing that the Supreme Court has endorsed.

**ELECTORAL ADMINISTRATION LAWS AND RACE/ETHNICITY**

In Lee v. VA Board of Elections (2016), the Fourth Circuit Court of Appeals held that a lower court’s decision rejecting a VRA, Section Two challenge to Virginia’s voter identification law must be upheld. Unanimously the Court decided that Virginia’s law, because it accepted a wide variety of photo identification, gave voters a variety of ways to “cure” the lack of such within three days after an election (via the casting of a provisional ballot), and provided to all Virginia residents a free photo identification card upon request, it does not violate the relevant provisions of the Voting Rights Act of 1965. The Court held that the law in question did not have a disproportionately adverse impact on voters of color in Virginia, and only imposed fairly minimal burdens on the voting process for all Virginians. Perhaps significantly, all three judges were put there by Bush Presidents--two by H.W., one by W.

 As noted by the Court, “plaintiffs have simply failed to provide evidence that members of the protected class have less of an opportunity than others to participate in the political process” (601). Notably, the Court specifically rejects the plaintiffs’ claims that citizens of color in Virginia are less likely to already possess the necessary documents to vote in elections in that state, and therefore the resultant disparate impact constitutes, among other things, a violation of the VRA (which specifically prohibits a situation whereby minority voters “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice” (VRA, 1965, Section 2, subsection “b”). This is so, the Court opines, because “Every decision that a State makes in regulation its elections will, inevitably, result in somewhat more inconvenience for some voters than for others” (601). The Court concludes that “Section 2 does not sweep away all election rules that result in a disparity in the convenience of voting” (601). They likewise reject the claim that key political actors in Virginia enacted the voter identification law to intentionally disenfranchise voters of color.

 In Feldman v. Arizona Secretary of State’s Office (2016), a divided Ninth Circuit Court of Appeals panel upheld a lower court’s decision to deny plantiffs’ motion for a preliminary injunction to suspend a voter identification law. The underlying issue was whether the state could reject votes cast outside of a voter’s registered precinct. It was found, via an expert report submitted by plaintiffs, that “minorities were over-represented amongst those who cast OOP [out of precinct] ballots in certain Arizona population centers.”

 Chief Judge Thomas, however, writing in dissent, begs to differ with the above analysis and conclusions. Thomas argued that the “complicated, kaleidoscope method of designating polling places” in densely populated urban areas effectively disenfranchises minority voters (631). Additionally, he found that provisional ballots cast by voters were more likely to be ultimately rejected thusly: “131% for Hispanics, 74% higher for African Americans, and 39% higher for Native Americans than for white voters” (632). And to make matters yet more troubling, “fully 35% of the ballots rejected as being cast out-of-precinct were discarded in error” (632). Finally, to heap insult onto injury, the percentages of erroneously discarded ballots fell out thusly: “80% higher for Hispanics, 34% for African Americans, and 26% higher for Native Americans in comparison with white voters” (632).

 Clearly, then, we get a fuller picture of the underlying dynamics in this jurisdiction. The majority chose not to take note of any of the above statistics, which rather clearly buttress a claim of disparate impact based on race and ethnicity. Instead, Thomas opines, his brethren use a standard of “meaningful electoral impact” (635). And under this standard, the court rejects the plaintiffs’ claims as electorally insignificant. But as the dissenting judge points out, the Voting Rights Act is targeted at electoral practices that disproportionately screen out minority voters—no mention is made of a requirement that the impact be electorally significant.

 In N.E. Ohio Coalition for the Homeless v. Husted (2016), we get a Sixth Circuit Court of Appeals decision that overturns a trial court’s holdings regarding electoral administration issues. Actually, the appellate court upheld one of the trial court’s holdings and overturned two. The Sixth Circuit held, broadly, that any set of election rules impose “de minimis” burdens on the right to vote, and Ohio in this case merely enacted just such de minimis burdens. Furthermore, there was no solid evidence that said changes had a disparate impact on African American voters.

 Judge Keith, in dissent, disagrees in the strongest possible terms: “the majority shuts minorities out of our political process. Rather than honor the men and women whose murdered lives opened the doors of our democracy and secured our right to vote, the majority has abandoned the court’s standard of review in order to conceal the vote of the most defenseless behind the dangerous veneers of factual findings lacking support and legal standards lacking precedent” (639). He then goes on to list a long series of civil rights heroes who were murdered, including pictures: Emmett Till, Medgar Evers, Jimmie Lee Jackson, James Reeb, Martin Luther King, etc. The majority’s response is that while they “deeply respect” this history, this history, without more, “determine the outcome of today’s litigation….” (639).

 Judge Keith emphasizes that not only is history on his side, but the law as well. Most notably, Keith argues that the court should have considered not just the impact of each individual voting practice, but the aggregate impact of said policies. This would more nearly reflect the Supreme Court’s own view of the VRA, which requires a “totality of circumstances” test for determining cases under that law (660).

 As in the previous (Feldman) case, the majority in Husted emphasizes the fact that so few voters are affected by the policy changes in question. As a result, Keith argues, the court never fully engages the dispositive issue of disparate impact based on race and/or ethnicity. Keith concludes his fiery dissent with this” “states are audaciously nullifying a right for which our ancestors relentlessly fought and--in some instances—even tragically died” (668).

 Interestingly enough, I came across an interview with Judge Keith in Slate. In this interview the author, Stern, noted that Keith is 94 years old and his grandparents were former slaves in the state of Georgia—thus the “unusually fervent dissent.” And in Keith’s own words, he wanted, in his dissent, to “dramatize the racist attitude of the majority.” Clearly Keith is not one for mincing words. Judge Keith, after arguing passionately for the importance of using the law to advance social change and make good on the promise of “equal justice under law,” concludes that “I’m just a Detroit boy who got his voice.” A nice, and personal, touch in an arena where the biographical details and personal voice of the judges are often obscured via the use of deracinated legal jargon.

We will conclude this section of the paper by reviewing a case that Hasen considers paradigmatic of how the federal courts SHOULD construe the issue of partisan/racial/ethnic redistricting. In North Carolina State Conference of the NAACP v. McCrory (2016) the Fourth Circuit Court of Appeals held that a lower federal trial court erred when they ruled that North Carolina’s redistricting in the wake of the 2010 census violated neither the 14th Amendment nor the Voting Rights Act of 1965 as amended in 1982. In the 4th Circuit’s view, the trial court “missed the forest in carefully surveying the many trees” (215). Most importantly, the lower court did not adequately appreciate the “inextricable link between race and politics in North Carolina” (ibid). Notably as well, it was the day after the Supreme Court handed down Shelby that a prominent North Carolina state legislator announced plans for an ““omnibus” election law” (ibid). In the 4th Circuit’s view, there can be little question that the legislature in NC acted with racially discriminatory intent in enacting this voter law.

The 4th Circuit argues that in North Carolina the close match between party and race means that even if the professed intent of the legislature was to enact partisan electoral laws, that effectively amounts to racial electoral laws, and thus they run afoul of both the 14th Amendment and the VRA. Particularly damning, the court holds, is the fact that “the General Assembly’s eagerness to, at the historic moment of Shelby County’s issuance, rush through the legislative process the most restrictive law North Carolina has seen since the era of Jim Crow-bespeaks a certain purpose” (230). And the court is having none of it. Also highly relevant, in the view of the majority, is that the legislature had requested data, broken out by race, regarding a wide range of electoral administration issues (early voting, same-day registration, DMV-issued registration, etc., at 230). The trial court, in short, clearly erred when deciding otherwise—that this was merely yet another case of partisan wrangling rather than systemic racial discrimination. The court in this case expressed the most profound skepticism about the state’s proferred, racially neutral reasons for the election law changes. The court summarizes this element of the case thusly: “the array of electoral “reforms” the General Assembly pursued…were not tailored to achieve its purported justifications, a number of which were in all events insubstantial” (239).

Judge Mott authors a quiet and limited dissent in this case, suggesting only that the court’s decision to strike down all of North Carolina’s electoral laws went just a bit too far. In her opinion, the state’s photo identification requirement, while initially illegal, seem to have been remedied by the legislature when in enacted, in 2015, a “reasonable impediment” exception to the earlier requirement (243). Under this revision, voters lacking the required photo identification could file a provisional ballot as long as they testified that they were barred from getting such identification because of a reasonable impediment. In her view the legislature did NOT act with discriminatory intent, and whether or not the “fix” would rescue the initially illegal photo identification law should be tested in practice before the 4th Circuit renders a definitive judgment about this new law.

**PARTY AFFILIATION OF JUDGES AND THEIR DECISIONS ON VOTING RIGHTS**

Richard Hasen has postulated that the raging debate over whether redistricting and electoral administration regulations are about party or race/ethnicity has created a situation whereby a sort of “eye of the beholder” viewpoint prevails. That is, federal judges put in the bench by Democratic Presidents will tend to see race/ethnicity as a significant motivating factor behind electoral schemes, while those put there by Republicans will typically see political party as the primary motive behind voter identification laws and electoral regulations. What can we deduce from the admittedly very small sampling of judicial decisions looked at in this paper? We will exclude the decision in Wisconsin, as in that case the court held that party was the primary motivating factor, but because it caused such deep unfairness for the minority party, it therefore violated the14th Amendment’s equal protection clause. And as Hasen has noted, I a state like Wisconsin the remarkably low level of conjoined polarization of race and party doesn’t engender the same race/party issues as it the case with southern states. Here's the breakdown of partisan affiliation and issues of race/ethnicity and party in the remaining cases:

Of the eight judges who ultimately sided with the plaintiffs making a claim of the illegitimate use of race in electoral law/redistricting, seven were put on the court by Democratic Presidents while one was put in the court by a Republican President. And in the case of the one Republican judge who sided with the plaintiffs, it is perhaps notable (or perhaps not) that he is a Latino Republican (Xavier Rodriguez). Worth noting as well is that fact that one of the judges who we might count as a Democratic-appointed judge was initially nominated to a federal trial court by President W. Bush, then promoted to the 4th Circuit Court of Appeals by President Obama (Judge Floyd). Of the ten judges who came down on the side of the defendant against claims involving the illegal use of race in the field of elections, all ten were put on the federal bench by Republican Presidents. It would appear, then, that Hasen’s speculation about the likelihood of partisan identification having a big impact on how a judge views a case involving race/ethnicity and partisanship is dead on: judges put there by Democratic Presidents are indeed strongly inclined to see race/ethnicity as the key variable, while those put there by Republican Presidents are strongly disinclined to see race and ethnicity as having played a substantial role in the field of elections.

**CONCLUSIONS**

As the foregoing analysis makes clear, it is indeed the case that where one sits plays a substantial role in shaping where one stands on the issue of voting rights in the United States. If a judge was put on the federal bench by a Democratic President, they seem strongly inclined to “see” the significance of race and ethnicity in voting rights cases, while those judges put there by a Republican President are similarly predisposed to see race and ethnicity as being of marginal or no significance in such cases. Federal judges, in short, are a lot like the rest of us! And this fact most definitely does not bode well for those who might like to see a federal judiciary stand strong for the voting rights of people of color during a time when electoral administration issues are becoming increasingly salient in the wake of Shelby County (2013). And, of course, redistricting issues tend to become prominent every ten years, and 2020 is on the relatively near horizon at this time. It is clear that President Trump will have ample opportunity to create a federal judicial system that is likely to become increasingly hostile to citizens of color on the issue of voting rights, especially if the elevation of Gorsuch to the U.S. Supreme Court is an indication of what his lower federal court nominees are likely to look like.

My analysis of the judicial opinions on both sides of the voting rights coin give the reader a sense of how one can make the good-faith argument that race does matter (to steal a phrase from Cornel West) in a voting rights case, or how, alternatively, one can make the similarly good-faith argument that race is not particularly relevant to contemporary voting rights cases/issues.

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