“Courting Compromise: How Courts and Lawsuits Have Softened Strict State Voter Identification Requirements”

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Abstract: Legal scholars and others have paid much attention to litigation challenging the legality of new strict voter identification laws, which some Republican-dominated states have adopted as part of the "voting wars." These scholars have focused on the question whether courts have upheld or blocked such laws on federal constitutional, state constitutional, or statutory grounds, such as violation of the Voting Rights Act. On these questions, courts, and Justices, have divided. Just as important, however, as these courts' final legal rulings is the role that courts and litigation have played in easing strict voter identification requirements even when courts have ultimately upheld these laws against challenge. South Carolina eased its law during a trial over whether its identification law could be precleared under the now-moribund preclearance provisions of the Voting Rights Act. A few years later, North Carolina used South Carolina's easing as a model for its own softening on the eve of a trial on the legality of its law. Pennsylvania courts put the state's law on hold until the state could demonstrate its department of transportation could handle the provision of IDs, and the state eventually gave up on its law. Wisconsin's state Supreme Court eased provisions of the law for indigent defendants, paving the way for federal courts to reject a challenge to the loosened state law. The United States Court of Appeals for the Fifth Circuit, in accepting a voting rights challenge to part of Texas voter identification law, suggested a remedy which would have the court ease the law for those lacking the right documentation.

This pattern demonstrates that courts and litigation do not function so much as an on-off switch as much as a dimmer switch on questions of voting rights. Rather than courts simply upholding or striking down such laws, they are rewriting them, or pressuring states to rewrite them in significant ways. Not only does this increase the power of the courts; it also provides potential litigation strategies for legal challengers, working for compromised easing of strict laws, and even winning by losing.