

**THE PAST AS PROLOGUE: DEFENDING DEMOCRACY AGAINST
VOTER SUPPRESSION TACTICS ON THE EVE OF THE 2012
ELECTIONS**

*Ryan P. Haygood**

*“The past is never dead. It’s not even past.”
- William Faulkner¹*

ABSTRACT

We are experiencing an assault on voting rights that is historic both in terms of its scope and intensity. In the last two years, fifteen states passed twenty-six restrictive voting measures that threaten to disproportionately harm voters of color. As many as five million eligible voters are in danger of not being able to register and/or cast a ballot this November. This assault—which was launched to affect the 2012 elections as well as future ones—threatens to undermine the record levels of political participation achieved during the historic 2008 presidential election by suppressing the political participation of people of color, the poor, the elderly, and the young.

These concerted efforts to curtail the right to vote are a direct response to two important recent developments: first, the unprecedented levels of political participation by African Americans and other voters of color in the 2008 presidential election; and second, the significant growth of communities of color, as reflected in the 2010 Census.

This Article examines these coordinated, antidemocratic efforts and offers some important democracy-enhancing responses.

* Director of the Political Participation Group, NAACP Legal Defense and Educational Fund, Inc. (“LDF”). LDF’s Political Participation Group uses legal, legislative, and public education strategies to advocate for the full, equal, and active participation of African Americans and other marginalized groups in America’s democracy. I am thankful to my voting rights colleagues Dale Ho, Natasha Korgaonkar, and Leah Aden, past LDF intern Sophia Lin Lakin, and current LDF intern Jamelia Morgan for their work on this Article. Without their invaluable substantive contributions, this Article simply could not tell the story. A version of this Article was published previously by the National Association for the Advancement of Colored People. NAACP LEGAL DEF. AND EDUC. FUND, INC. & NAACP, DEFENDING DEMOCRACY: CONFRONTING MODERN BARRIERS TO VOTING RIGHTS IN AMERICA (2011), available at http://naacp.3cdn.net/67065c25be9ae43367_mlbrsy48b.pdf.

1. WILLIAM FAULKNER, *Requiem for a Nun*, in NOVELS 1942-1954, at 471, 535 (1994).

I. INTRODUCTION	1020
II. BACKGROUND.....	1021
III. THE RISE OF ELECTORAL STRENGTH OF VOTERS OF COLOR.....	1024
A. Historic Minority Participation in the 2008 Elections: “Most Diverse” Electorate in U.S. History	1025
IV. THE 2010 CENSUS: THE GROWTH OF COMMUNITIES OF COLOR	1026
V. DEMOCRATIC CONTRACTION: BLOCKING THE VOTE	1028
A. Block the Vote Measures Enacted	1028
B. Blocking the Vote at the Voter Registration Stage.....	1031
1. Restrictions on Access to Voter Registration Channels	1031
VI. BLOCKING THE VOTE AT THE EARLY AND ABSENTEE VOTING STAGE	1046
A. Shortening Early/Absentee Voting Periods.....	1047
VII. BLOCKING THE VOTE ON ELECTION DAY	1050
A. Photo Identification Requirements	1051
B. Deceptive Practices	1057
VIII. THE ASSAULT ON THE VOTING RIGHTS ACT	1059
IX. ENCOURAGE THE VOTE: THE CALL TO ACTION	1061
X. CONCLUSION	1063

I. INTRODUCTION

Recognized by the Supreme Court as the right that is “preservative of all rights,”² the right to vote is the cornerstone of our democracy. Our votes not only affirm the legitimacy of our democracy, but they also serve as our source of power to govern our elected officials. Thus, the question that every American should ask as we approach the November 2012 elections is: How can we collectively encourage *more* people to participate in the political process? Instead of embracing this important democracy-inclusion principle, however, many states are seeking to make voting more difficult for Americans through concerted efforts. Indeed, William Faulkner’s proclamation above is particularly prescient in the modern voting rights context, where we are experiencing an assault on voting rights that is historic, both in terms of its scope and intensity.

In the last two years, fifteen states passed twenty-six restrictive voting measures that threaten to disproportionately harm voters of color.³ As many as five million eligible voters are in danger of not being able to register or cast a ballot this November.⁴ It is important

2. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

3. *See infra* Part V.

4. *See infra* note 57 and accompanying text.

to note that this current assault on voting rights is consistent with the story of America's contested relationship with democracy—a story that has been characterized by expansion often followed by swift contraction. For people of color in particular, gains in political participation by their communities are frequently met with corresponding efforts to constrict the franchise.

This voting rights assault—which was launched to affect the 2012 elections as well as future ones—threatens to undermine the record levels of political participation achieved during the historic 2008 presidential election by suppressing the political participation of people of color, the poor, the elderly, and the young.

These concerted “block the vote” efforts are a direct response to two important recent developments: first, the unprecedented levels of political participation by African Americans and other voters of color in the 2008 presidential election; and second, the significant growth of communities of color, as reflected in the 2010 Census.

This Article examines these coordinated, antidemocratic efforts and offers some important democracy-enhancing responses. *First*, the Article provides the context for the emergence of these restrictive voting measures. *Second*, it details the restrictive voting initiatives proposed or implemented in a number of states and the disproportionate effects of those measures on voters of color in particular, including minority voters who are poor, elderly, and young. *Finally*, the Article places the focus where it belongs—on the democracy-expanding efforts that America must work to uphold. The Article offers recommendations to communities to empower them to stand for greater inclusion in this democracy. This Article serves as a call to action and a roadmap for voters and their communities to begin to actively counter the restrictive voting measures.

II. BACKGROUND

Nearly fifty years ago, in his speech proposing the bill that would become known as “the most successful piece of civil rights legislation ever adopted”⁵—the Voting Rights Act⁶—President Lyndon Johnson framed the challenge posed by our Nation's dark tradition of racial discrimination in voting:

Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to

5. *Voting*, U.S. DEP'T OF JUST., <http://www.justice.gov/crt/about/vot/> (last visited Sept. 27, 2012).

6. 42 U.S.C. §§ 1973 to 1973aa-6 (2006).

ensure that right.⁷

The story of America's democracy, however, as noted by historian Alexander Keyssar, has been a contested one, characterized by expansion often followed by swift contraction: gains in political participation by communities of color too often are met with corresponding efforts to constrict the franchise.⁸ The Black democratic experience provides a salient example. No other democracy in the world has ever enfranchised a large group, then disfranchised it—and then re-enfranchised it.⁹ Following the Civil War, Congress moved swiftly to establish widespread Black suffrage. Between 1866 and 1867, the percentage of Black males eligible to vote “shot up from .5 percent to 80.5 percent, with all of the increase in the former Confederacy.”¹⁰

By 1870, the U.S. Constitution featured two new amendments, the Fourteenth and Fifteenth, enshrining the right to vote.¹¹ With that, the first Reconstruction, a period of democratic expansion, was well underway. “Black office-holding emerged very rapidly” during Reconstruction.¹² For example, “[a]bout half of the lower house of South Carolina’s legislature . . . was [B]lack, 42 percent of Louisiana’s lower [state] house” was Black, and 29% of Mississippi’s state house was Black.¹³

By the 1890s, however, only “a generation after the great expansion in Black voting and office-holding,” Southern legislatures “extinguish[ed] voting rights for the great majority of” Blacks.¹⁴ Congress dismantled the Reconstruction-era statutes. In fact, “[a] House report from the Fifty-third Congress (1893-1895) demanded that ‘every trace of reconstruction measures be wiped from the books.’”¹⁵ Without the democratic protections of the Reconstruction-era statutes, discriminatory voting laws proliferated, as states implemented grandfather clauses, voter roll purges, poll taxes, and literacy and “understanding” tests—each of which was discriminatorily enforced against African American voters at the polls.¹⁶ To ensure that disfranchisement was complete, states also

7. Special Message to the Congress: The American Promise, 1 PUB. PAPERS 281, 282 (Mar. 15, 1965).

8. See ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF THE UNITED STATES, at xxiii (2009).

9. RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 1-2 (2004).

10. *Id.* at 3.

11. U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

12. VALELLY, *supra* note 9, at 3.

13. *Id.*

14. *Id.*

15. *Id.* at 1 (quoting H.R. Rep. No. 18, at 7 (1983)).

16. See generally Debo P. Adegbile, *Voting Rights in Louisiana: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 413, 416-19 (2008) (describing history of voting rights

tailored laws that disqualified people convicted of criminal offenses to apply to crimes thought to be committed by the newly-freed Blacks but not by whites.¹⁷ In addition, states passed “second generation” barriers to prevent African American participation in voting, enabling county councils and school boards to use at-large elections to submerge newly registered minority voters within white majorities, draw racial gerrymanders, close or secretly move polling stations in minority neighborhoods, and employ countless other strategies to minimize or to cancel out minority voting strength. The Supreme Court, slowly and reluctantly, invalidated these practices throughout the twentieth century,¹⁸ but the states, for nearly a century after the passage of the Fifteenth Amendment, nevertheless proved “unremitting and ingenious”¹⁹ in their methods of excluding Blacks from the political process.

Nearly a century of fierce struggle was required before Congress enacted the Voting Rights Act (“VRA”) to “combat widespread and persistent discrimination in voting.”²⁰ The VRA aims not only to guarantee the right of all citizens to participate in the electoral process, but also to provide a legal framework to prohibit or remedy a wide array of barriers that are used to threaten that right.²¹ At the heart of the VRA is section 5, which requires certain states and subjurisdictions with the most egregious histories and ongoing records of voting discrimination to submit any proposed changes to their voting and election laws either to the Department of Justice or the federal district court in Washington, D.C., for “pre-clearance” before that proposed change can be enacted.²² The Department of Justice rejects proposed changes that it deems retrogressive—that is, those that effectively worsen the position of minority voters in relation to existing rules—and those that are tainted by intentional discrimination.²³ Alternatively, the Department of Justice may

discrimination in Louisiana).

17. LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, *THE DISCRIMINATORY EFFECTS OF FELONY DISENFRANCHISEMENT LAWS, POLICIES AND PRACTICES ON MINORITY CIVIC PARTICIPATION IN THE UNITED STATES* 3-4 (2009), available at http://www.sentencingproject.org/doc/publications/publications/fd_UNMinorityForum.pdf.

18. See, e.g., *Louisiana v. United States*, 380 U.S. 145 (1965) (striking down Louisiana’s Grandfather Clause); *Smith v. Allwright*, 321 U.S. 649 (1944) (condemning Democratic Party’s practice of all-white primaries, which completely excluded African Americans from the political process); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (declaring poll taxes an unconstitutional violation of the Equal Protection Clause).

19. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

20. *Id.* at 328.

21. See *id.* at 315-16.

22. 42 U.S.C. § 1973c (2006).

23. See, e.g., *Notice of Preclearance Activity the Voting Rights Act of 1965, as Amended*, U.S. DEP’T OF JUST. (Oct. 11, 2011), <http://www.justice.gov/crt/about/>

request more information from states or jurisdictions about the impact of the proposed changes.²⁴ A number of barriers have been successfully challenged over time, assisted by litigation and other legal tools provided by the VRA, community activism, education, and political action.²⁵

As explained further below, however, history is repeating itself: following record minority participation in the elections of 2008 and the substantial growth of communities of color in the last decade, a new wave of “third generation” voting barriers has recently emerged. Most troubling is the fact that, in an effort to keep voters from challenging these barriers in the future, states are simultaneously attacking the VRA itself, seeking to eliminate indispensable tools designed to prevent these discriminatory voting laws from taking root and becoming entrenched.²⁶

III. THE RISE OF ELECTORAL STRENGTH OF VOTERS OF COLOR

Political participation by communities of color has grown significantly in recent years, as demonstrated by two recent events. First, during the 2008 elections, citizens of color participated in the election in record numbers and, more importantly, comprised a larger share of the eligible voting population than ever before.²⁷ Second, the data provided by the 2010 Census demonstrates that minority populations—and eligible voters within those populations—are expanding rapidly.²⁸ The Census Bureau reports that this population

vot/notices/vnote101111.php (noting the Attorney General’s objection to redistricting in East Feliciana, Louisiana, and redistricting in Amite, Mississippi); Letter from Thomas Perez, Assistant Att’y Gen., Dep’t of Justice, to Robert T. Sonnenberg, Counsel for Pitt Cnty. Schools (Apr. 30, 2012), available at <http://blogs.law.unc.edu/documents/civilrights/dojpittdenial.pdf> (Attorney General’s objection to proposed changes to Pitt County, North Carolina, school board’s rules).

24. See, e.g., *Notice of Preclearance Activity the Voting Rights Act of 1965, as Amended*, U.S. DEPT OF JUST. (Sept. 26, 2011), <http://www.justice.gov/crt/about/vot/notices/vnote092611.php> (noting that the Attorney General requested more information on Texas’s proposed voting qualifications and eligibility).

25. See Adegbile, *supra* note 16, at 416-19.

26. See *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011), *aff’d*, 679 F.3d 848 (D.C. Cir. 2012); *Complaint for Declaratory Judgment and Injunctive Relief, Arizona v. Holder*, 839 F. Supp. 2d 36 (D.D.C. 2012) (No. 11CV1559); *First Amended Complaint for Declaratory Judgment, Florida v. United States*, 820 F. Supp. 2d 85 (D.D.C. 2011) (No. 1:11-cv-01428); *Expedited Complaint for Declaratory Judgment, Georgia v. Holder*, No. 1:11-cv-01788 (D.D.C. Oct. 6, 2011); *LaRoque v. Holder*, 650 F.3d 777 (D.C. Cir. 2011) (involving an election referendum in Kinston, North Carolina).

27. MARK HUGO LOPEZ & PAUL TAYLOR, PEW RESEARCH CTR., *DISSECTING THE 2008 ELECTORATE: MOST DIVERSE IN U.S. HISTORY 1* (2009), available at <http://pewresearch.org/assets/pdf/dissecting-2008-electorate.pdf>.

28. See KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, *OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010*, at 5-17 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

growth will accelerate in the years to come.²⁹ As the following sections explain, states have responded to these two recent trends swiftly, enacting measures that have the effect of restricting the voting rights of people of color.

A. *Historic Minority Participation in the 2008 Elections: “Most Diverse” Electorate in U.S. History*

The 2008 elections marked a historic moment in the racial composition of the American electorate, “the most racially and ethnically diverse in U.S. history.”³⁰ People of color in 2008 comprised 26.6% of all U.S. citizens of voting age—a record share.³¹ Translating this demographic shift into political strength, voters of color registered and participated in the 2008 Presidential Election in the following record numbers:

- Nationally, the gap in voter turnout rate between eligible white voters (66.1%) and eligible African American voters (64.7%) was nearly eliminated.³²
- African American women had the highest voter turnout rate (68.8%)—a first for the nation.³³
- The number of African American voters who cast ballots in 2008 was 15.1% higher than in 2004, representing an increase of 2.1 million African American voters.³⁴ The number of Latino voters who cast ballots in 2008 was 28.4% higher than in 2004, representing an increase of nearly 2.2 million Latino voters.³⁵
- African American voters constituted 12.1% of voters nationally, an increase from 11.0% in 2004. Latino voters made up 7.4% of voters nationally, up from 6.0% in 2004.³⁶
- The total share of the white vote *decreased*.³⁷

Importantly, evidence from the 2010 midterm elections

29. Press Release, U.S. Census Bureau, An Older and More Diverse Nation by Midcentury (Aug. 14, 2008) [hereinafter An Older and More Diverse Nation by Midcentury], *available at* <http://www.census.gov/newsroom/releases/archives/population/cb08-123.html>.

30. LOPEZ & TAYLOR, *supra* note 27, at i.

31. *Id.* at 1.

32. Compare THOM FILE & SARAH CRISSEY, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2008: POPULATION CHARACTERISTICS 4 (2012), *available at* <http://www.census.gov/prod/2010pubs/p20-562.pdf>, with KELLY HOLDER, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004: POPULATION CHARACTERISTICS 4 (2006), *available at* <http://www.census.gov/prod/2006pubs/p20-556.pdf>.

33. LOPEZ & TAYLOR, *supra* note 27, at ii.

34. *See id.* at 4.

35. *Id.*

36. *Id.* at 3.

37. *Id.* at i.

demonstrates that, rather than representing an anomalous moment, the increased participation of voters of color has been sustained since 2008. Furthermore, although 2010 voting data reveals only a slight uptick in overall voter turnout from the 2006 midterm elections—41.0% in 2010 versus 40.4% in 2006³⁸—voters of color increased substantially as a share of the electorate in several states. In Texas, for example, African Americans increased from 8% of the voters in 2006 to 13% in 2010; in Ohio, African Americans increased from 12% to 14% of voters; and in New York, African Americans increased from 10% to 18% of voters.³⁹

Perhaps more compelling evidence that the historic 2008 turnout will be carried forward to future elections is the strong showing among young African American voters. Participating at the highest rate among all young people in 2010, African American youth turned out to vote at a rate of 27.5%, as compared to 24.0% in 2006.⁴⁰ This increase in turnout “continues a trend from 2008, when young African Americans showed the highest turnout rate among any youth racial/ethnic group since 1972.”⁴¹

IV. THE 2010 CENSUS: THE GROWTH OF COMMUNITIES OF COLOR

The 2010 Census data reveals that the nearly 10% population growth that America experienced over the last decade was almost entirely accounted for by growth among minority populations.⁴² From 2000 to 2010, the country’s non-Hispanic white population, which comprises approximately two-thirds of the total population, grew by only 1.2%.⁴³ As a result of this modest growth, the white population actually decreased as a percentage of the total population from 75.1% to 72.4%—the only major racial group to experience such

38. Compare Michael McDonald, U.S. ELECTIONS PROJECT, *2010 General Election Turnout Rates* (Dec. 28, 2011), http://elections.gmu.edu/Turnout_2010G.html, with Michael McDonald, U.S. ELECTIONS PROJECT, *2006 General Election Turnout Rates* (Dec. 28, 2011), http://elections.gmu.edu/Turnout_2006G.html.

39. See *Voting and Registration in the Election of November 2008 - Detailed Tables*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html> (follow “Table 4b. Reported Voting and Registration of the Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2008” hyperlink) [hereinafter *2008 Census Data—Sex, Race and Hispanic Origin*]; *Voting and Registration in the Election of November 2006 - Detailed Tables*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2006/tables.html> (follow “Table 4b. Reported Voting and Registration of the Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2006” hyperlink) [hereinafter *2006 Census Data—Sex, Race and Hispanic Origin*].

40. CTR. FOR INFO. & RESEARCH ON CIVIC LEARNING & ENGAGEMENT, *THE YOUTH VOTE IN 2010: FINAL ESTIMATES BASED ON CENSUS DATA 2, 4-5* (2011), available at <http://www.civicyouth.org/wp-content/uploads/2011/04/The-CPS-youth-vote-2010-FS-FINAL1.pdf>.

41. *Id.* at 4.

42. HUMES ET AL., *supra* note 28, at 3.

43. *Id.* at 4.

a decline.⁴⁴ Communities of color, meanwhile, grew at significant rates. The Census data reveals:

- The African American population grew 12.3% (to 38,929,319), significantly outpacing white population growth.⁴⁵ As an absolute value, most of this growth came from the South (i.e., Florida, Texas, North Carolina, Georgia).⁴⁶
- The Latino population grew a dramatic 43.0% (to 50,477,594), bringing it to 16.3% of the total population, up from 12.5% in 2000.⁴⁷ This growth represents more than half of the increase in the total population nationwide (15.2 million out of 27.3 million).⁴⁸ As an absolute number, most of this growth occurred in states with existing sizeable Latino communities, such as California, Texas, and Florida.⁴⁹ The highest growth rates, however, occurred in the Deep South, where Latino populations increased more than 50%.⁵⁰ South Carolina's Latino population, for example, grew at a rate of nearly 148%.⁵¹
- Other minority groups experienced similar surges in their populations. Most significantly, the Asian population increased by 43.3%, bringing it to 4.8% of the total U.S. population, up from 3.6% in 2000.⁵² At the same time, the American Indian and Alaska Native population grew 18.4%, and the Native Hawaiian and other Pacific Islander population grew 35.4%.⁵³

These demographic trends among minority populations confirm that America will soon be a majority-minority nation, with the Census Bureau projecting that this tipping point will occur by 2042.⁵⁴ Among Americans under the age of eighteen, this shift is projected to take place in 2023.⁵⁵ This means that from here on out every child who is born in the United States and who lives to 2023 will belong to the first post-majority-White generation. Indeed, the 2010 Census reveals that a number of states, particularly those in the South and

44. *Id.* at 4-5.

45. *Id.* at 4.

46. SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 7, 9 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

47. HUMES ET AL., *supra* note 28, at 3-4.

48. *Id.* at 3.

49. SHARON R. ENNIS ET AL., U.S. CENSUS BUREAU, THE HISPANIC POPULATION: 2010, at 5 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>.

50. *Id.*

51. *Id.* at 6.

52. HUMES ET AL., *supra* note 28, at 4.

53. *Id.*

54. *See* An Older and More Diverse Nation by Midcentury, *supra* note 29.

55. *Id.*

West, where minority population growth was most significant, have achieved or are on the cusp of achieving majority-minority status, including Arizona (42.2%), Florida (42.1%), Georgia (44.1%), Maryland (45.3%), and Nevada (45.9%).⁵⁶

The unprecedented minority voter turnout in the 2008 general elections provided a dramatic demonstration of the impact of significant minority presence at the polls. Even if this level of political participation was not sustained in 2010, the substantial and accelerating population growth among minority populations shows that the 2008 display of minority voting strength is not a passing phenomenon. Taken together, these voting and demographic trends foreshadow a political landscape in which communities of color will increasingly play a leading role. Indeed, as discussed more fully below, it is precisely this burgeoning political power that has engendered a backlash.

V. DEMOCRATIC CONTRACTION: BLOCKING THE VOTE

In the face of far-reaching demographic and electoral trends revealing unprecedented minority political mobilization in America, states have accelerated an assault on voting rights. These restrictive voting measures will have a disproportionate impact on minority, low-income, disabled, elderly, and young voters, and threaten to substantially undermine the political strength previously harnessed by minority communities during the 2008 Presidential Election. In the last year alone, over a dozen states imposed obstacles to voting at each key stage of the democratic process.⁵⁷

A. *Block the Vote Measures Enacted*

The Brennan Center for Justice estimates that the recent block the vote efforts could impede as many as five million eligible voters from registering or casting a ballot in 2012.⁵⁸ In the last two years, fifteen states passed twenty-six voting measures that threaten to disfranchise millions of voters, a disproportionate number of whom are people of color.⁵⁹ These restrictive voting measures can be summarized as follows:

56. HUMES ET AL., *supra* note 28, at 18.

57. WENDY R. WEISER & LAWRENCE NORDEN, BRENNAN CTR. FOR JUSTICE, VOTING LAW CHANGES IN 2012, at 2-3, 9 (2011), available at http://brennan.3cdn.net/9c0a034a4b3c68a2af_9hm6bj6d0.pdf; see also *infra* Table 1 (documenting restrictive voting measures enacted by states in the last two years).

58. WEISER & NORDEN, *supra* note 57, at 1.

59. See generally *id.* (discussing state restrictions on voting).

TABLE 1.
RESTRICTIVE VOTING MEASURES ENACTED IN
THE LAST TWO YEARS

<u>Form of Restriction</u>	<u>States Enacting Such Measures</u>	<u>Total</u>
<i>Barriers to Registration</i>		
Restrictions on Third-Party Registration	Florida; Texas	2
Restrictions on When and Where Individuals Can Register	Florida; Maine; Ohio; Wisconsin	4
Documentary Proof of Citizenship	Alabama; Kansas; Tennessee	3
Durational Residency Requirements	Wisconsin	1
Enhanced Felon Disfranchisement Laws	Florida; Iowa	2
Restrictions on Early or Absentee Voting	Florida; Georgia; Ohio; Tennessee; West Virginia	5
Photo ID Laws	Alabama; Kansas; Mississippi; Pennsylvania, Rhode Island; South Carolina; Tennessee; Texas; Wisconsin	9
TOTAL MEASURES ENACTED IN 2011		26

The main thrust of these efforts, however, is not distributed evenly throughout the country. The states that have passed these restrictions are, in many cases, the very same states that experienced high rates of minority population growth and political participation over the last decade. For example, block the vote efforts proliferated in three states that together account for nearly 22% of all African American voters in 2008: Georgia (1,334,000), Texas (1,253,000), and Florida (1,026,000).⁶⁰ Moreover, the eight states that had turnout rates of more than 70% of their eligible African American voters—Nevada, Missouri, Maryland, Mississippi, South Carolina, Michigan, Wisconsin, and Ohio—are all participants in this block the vote campaign.⁶¹ Similarly, two of the states that have seen some of the most aggressive block the vote efforts, Texas and Florida, accounted for 30% of all Latino votes cast in 2008.⁶² The three states that had more than 60% of their eligible Latino voters turn out to vote (as compared to a national rate of 50%)—Florida, North Carolina, and Maryland—are also a part of these restrictive voting efforts.⁶³

Among the fifteen states listed in the chart above are three of the four states that experienced the largest growth in African American population during the last decade: Florida, Georgia, and Texas (whose African American populations grew by approximately 664,000, 601,000, and 575,000, respectively).⁶⁴ The fourth state, North Carolina (whose African American population grew by approximately 300,000),⁶⁵ currently has restrictive voting legislation pending. Also among the states in the chart above are the three states that saw the highest growth rates in Latino populations during the previous decade: South Carolina (148%), Alabama (145%), and Tennessee (134%).⁶⁶ These measures, as well as other forms of voter suppression, are discussed in further detail below.

B. Blocking the Vote at the Voter Registration Stage

Since the substantial 2008 voter turnout and the 2010 Census—and in advance of the 2012 federal elections—states are narrowing voters' ability to register in various ways. These voter registration barriers comprise the primary impediment to voting, as evidence shows that making voter registration more difficult means that fewer

60. 2008 Census Data—Sex, Race and Hispanic Origin, *supra* note 39.

61. *See id.*; WEISER & NORDEN, *supra* note 57, at 1.

62. *See* 2008 Census Data—Sex, Race and Hispanic Origin, *supra* note 39.

63. *See id.*

64. *See* RASTOGI ET AL., *supra* note 46, at 8.

65. *Id.*

66. NAT'L COUNCIL OF LA RAZA, NATIONWIDE GROWTH IN THE LATINO POPULATION IS A BOON FOR THE COUNTRY 3 (2011), available at http://www.nclr.org/images/uploads/publications/nationwide_growth_latino_population_boon.pdf.

people will register.⁶⁷ Among other things, several states (1) placed restrictions on important voter registration channels; (2) limited when, where, and for how long voters can register; (3) enhanced registration eligibility requirements; (4) broadened the scope of laws that deny the vote to people with felony convictions; and (5) improperly purged voters from the registration roles.

1. Restrictions on Access to Voter Registration Channels

States have restricted two important channels through which minority voters disproportionately register to vote by (a) significantly restricting the manner in which voter registration drives must be conducted and (b) blatantly ignoring the mandates of the National Voter Registration Act (“NVRA”).

1. Restrictions on third-party registration: Within the last two years, states have enacted an array of measures that place restrictions on nonprofit organizations that conduct voter registration drives. These organizations play a critical role in ensuring participation in our democracy. More than any other democracy, the United States places the burden of registration on the voter.⁶⁸ Moreover, as one federal court recognized, voter registration drives serve not only as an important avenue for registration, but also implicate core political speech protected by the First Amendment. Such drives, the court found, are inextricably intertwined with efforts to “persuade others to vote, educate potential voters about upcoming political issues, communicate their political support for particular issues, and otherwise enlist like-minded citizens in promoting shared political, economic, and social positions.”⁶⁹ From 2000 to 2008, registration groups registered tens of millions of new voters, including close to nine million in 2008 alone.⁷⁰

Registration groups typically focus their resources on providing assistance to communities that face the greatest barriers to registration and voting. Voters of color constitute one such community as they generally have limited access to the Internet and fewer interactions with the Department of Motor Vehicles—two of the main channels citizens generally use to register to vote. Thus, these voter registration drives are crucial to increasing voter

67. Maria da Silva, *Why Aren't Voters Registering?*, BRENNAN CENTER FOR JUST. (Oct. 26, 2010), http://www.brennancenter.org/blog/archives/why_arent_voters_registering/.

68. WEISER & NORDEN, *supra* note 57, at 19.

69. League of Women Voters of Fla. v. Cobb, 447 F. Supp. 2d 1314, 1333 (S.D. Fla. 2006).

70. *Voting and Registration in the Election of November 2008 - Detailed Tables*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html> (follow “Table 14. Method of Registration by Selected Characteristics: November 2008” hyperlink) [hereinafter *2008 Census Data—Method of Registration by Selected Characteristics*].

registration among voters of color who are less likely to register through one of these other means.⁷¹

For example, in 2004, while only 7.4% of white voters registered at private drives, 12.7% of African American voters and 12.9% of Latino voters used this channel to register.⁷² The disparity was likewise apparent in 2008: while only 5.0% of white voters registered at private drives, 11.0% of African American voters and 9.6% of Latino voters registered at these events.⁷³ And 2010 was no different: 6% of white voters registered through a voter registration drive, as compared with 14% of Latino voters and 12% of African American voters.⁷⁴

As a result, restrictions that force third-party voter registration organizations to scale back their efforts will disproportionately impact African American and Latino voters, who are much more likely to register to vote through such drives. States have nevertheless proposed and implemented burdensome restrictions on third-party registration organizations. Such bills were signed into law in 2011 in Florida and Texas, which provide two prominent examples of these restrictive initiatives.

Florida, for example, sought unsuccessfully to impose substantial restrictions on organizations conducting voter registration drives: Voter registration drives in 2008 were responsible for 176,000, or 8.24%, of all registrations in the state.⁷⁵ Despite this impressive achievement, on May 19, 2011, Governor Rick Scott signed House Bill 1355 into law,⁷⁶ imposing the most restrictive obligations on voter registration groups in the country.⁷⁷

As a precondition to conducting a voter registration drive, the

71. See Letter from Lee Rowland, Brennan Ctr. for Justice, and Mark A. Posner, Lawyers' Comm. for Civil Rights Under Law, to Chris Herren, Voting Section Chief, Civil Rights Div., U.S. Dep't of Justice 11-12 (July 15, 2011) [hereinafter Letter from Lee Rowland to Chris Herren (June 15, 2011)], available at <http://www.lwvccfl.com/pdfs/2011-LWV-Letter-Dept-Justice.pdf> (discussing the extent to which minorities in Florida rely on voter registration drives).

72. *Voting and Registration in the Election of November 2004 - Detailed Tables*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html> (follow "Table 14. Method of Registration by Selected Characteristics: November 2004" hyperlink) [hereinafter *2004 Census Data—Method of Registration by Selected Characteristics*].

73. *2008 Census Data—Method of Registration by Selected Characteristics*, *supra* note 70.

74. See *New State Voting Laws: Barriers to the Ballot?: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 210 (2011) [hereinafter *Barriers to the Ballot?*] (statement of Justin Levitt, Professor of Law, Loyola Law School).

75. WEISER & NORDEN, *supra* note 57, at 1 n.1.

76. H.B. 1355, 2011 Reg. Sess. (Fla. 2011); see also Steve Bousquet, *It's Now Tougher to Vote*, TAMPA BAY TIMES, May 20, 2011, at 1A.

77. *Barriers to the Ballot?*, *supra* note 74, at 209.

law sought to require every individual or group to register with and receive permission from the state before so much as offering to touch a voter registration form from anyone other than a family member.⁷⁸ Further, Florida sought to require a volunteer collecting a registration form to track each and every registration form, blank or complete, and ensure its delivery to county officials within forty-eight hours or pay a penalty of fifty dollars for every late form.⁷⁹

The law would have had a pronounced adverse impact on minority registration in Florida, where African American and Latino voters rely heavily on voter registration drives. In 2008, for example, while only 6.3% of white Floridians registered to vote in registration drives, 12.1% of Latino and 12.7% of African American Floridians registered at these events.⁸⁰ Indeed, Florida's restrictive change caused leading voter registration groups, such as the Florida League of Women Voters, to cancel or to consider canceling their voter registration drives.⁸¹ These obligations would have also discouraged impromptu community voter registration drives that are often pulled together informally on campuses, in houses of worship, and community centers.

2. *Noncompliance with the National Voter Registration Act:* A number of states are not providing voter registration services to low-income constituents at state public assistance agencies, as required under the National Voter Registration Act of 1993 ("NVRA"). Section 7 of the NVRA requires states to offer voter registration services at all offices that provide public assistance or that provide services to persons with disabilities.⁸² As with third-party registration drives, minority voters register at public assistance agencies at significantly higher rates than their white counterparts. For example, in 2008, African American and Latino voters registered at public agencies

78. FLA. STAT. § 97.0575(1) (2011). The law must first be approved under the Voting Rights Act before going into effect in the five Florida counties covered by section 5, and the law is the subject of litigation pending before a federal district court. See Complaint, *Florida v. United States*, No. 1:11-CV-01428 (D.D.C. Aug. 1, 2011). Note that Florida law has a limited exception for the registration of "family members," exempting from the definition of third-party voter registration agency, "a person who seeks only to register to vote or collect voter registration applications from that person's spouse, child, or parent." FLA. STAT. § 97.021(37)(a).

79. FLA. STAT. § 97.0575 (3)(a)(1).

80. Letter from Lee Rowland to Chris Herren (June 15, 2011), *supra* note 71, at 12.

81. Press Release, League of Women Voters of Fla., Announcement Regarding Cessation of Voter Registration in the State of Florida (May 7, 2011), *available at* <http://www.lwvcolliercounty.org/pdfs/cessation.pdf>; *see also* Press Release, NAACP Legal Defense Fund, LDF Moves to Intervene on Behalf of Florida NAACP and African-American Voters in Florida Voting Rights Case (Sept. 7, 2011), *available at* <http://naacpldf.org/press-release/ldf-moves-intervene-behalf-florida-naacp-and-african-american-voters-florida-voting-ri>.

82. 42 U.S.C. § 1973gg-5(a)(2)(B) (2006).

three times as frequently as white voters.⁸³ In fact, as of October 2011, one million low-income people in five different states have registered to vote as a result of proper NVRA enforcement.⁸⁴ Too many states, however, are in violation of their NVRA obligations, which effectively disfranchises the poor and places increased pressure on third-party registration organizations to fill the void.

Voting rights organizations took action against a number of states in 2011 for NVRA noncompliance, including:

- Louisiana, where registrations from “public assistance offices have plummeted 88 percent since the law was first implemented: from nearly 75,000 in 1995-1996, to a mere 8,688 in 2007-2008.”⁸⁵
- Georgia, where registrations from public assistance offices have dropped from more than 100,000 in 1995-1996 to a paltry 4,430 in 2010.⁸⁶
- Michigan, where there has been “an 82.5% decrease in the number of voter registration applications submitted” at public assistance offices.⁸⁷
- Texas, where registrations from public assistance agencies have declined from 353,550 registrations in 1995-1996 to 6,338 in 2007-2008—a drop of more than 92%.⁸⁸

3. *Limitations on When and Where Voters Can Register:* Broad opportunities to register to vote have resulted in increased participation. For example, several states permit same-day registration, which allows voters to register and cast a ballot on the same day. The difference in turnout between states that do, and those that do not, offer same-day registration has been significant,

83. 2008 Census Data—Method of Registration by Selected Characteristics, *supra* note 70.

84. YOUJIN B. KIM & LISA DANETZ, DĒMOS, 1 MILLION NEW VOTERS AMONG THE 99%: HOW AGENCY-BASED VOTER REGISTRATION GIVES LOW-INCOME AMERICANS A VOICE IN DEMOCRACY 1 (2011), available at http://www.demos.org/sites/default/files/publications/Million_Mark_Demos.pdf.

85. Press Release, NAACP Legal Defense Fund, Louisiana Defaulting on Federal Obligations to Register Low-Income Residents (Jan. 12, 2011), available at <http://naacpldf.org/press-release/louisiana-defaulting-federal-obligation-register-low-income-residents>.

86. Press Release, Project Vote, Voting Rights Groups Sue Georgia for Neglecting Voting Rights of Low-Income Residents (June 6, 2011), available at <http://projectvote.org/newsreleases/657-voting-rights-groups-sue-georgia-for-neglecting-voting-rights-of-low-income-residents.html>.

87. Press Release, Project Vote, Michigan Failing to Offer Voter Registration to Public Assistance Clients (Aug. 22, 2011), available at <http://projectvote.org/newsreleases/754-michigan-failing-to-offer-voter-registration-to-public-assistance-clients.html>.

88. Letter from DĒmos, Project Vote, and NAACP to The Honorable Hope Andrade, Tex. Sec’y of State 1 (Feb. 10, 2011), available at http://www.projectvote.org/images/publications/NVRA/tx_nvra_notice_letter_sos.pdf.

with those states offering same-day registration leading the Nation in turnout, “historically boast[ing] turnout rates 10 to 12 percentage points higher than states that do not.”⁸⁹ According to Dēmos, in the 2010 midterm elections, same-day registration allowed “almost 640,000 Americans to register and vote”—a group of voters larger than the populations of Washington, D.C., Boston, Nashville, Denver, or the state of Vermont.⁹⁰

Nevertheless, many states are restricting the ability of voters to register on, or on the days leading up to, Election Day. In the past two legislative cycles, four states (Florida, Maine, Ohio, and Wisconsin) enacted or sought to enact a variety of measures that limit when a person can register to vote or update his or her voter registration information.⁹¹ These registration barriers primarily impede individuals who move frequently, a subset of the population that is disproportionately comprised of minorities. According to a report by the Pew Research Center, 43% of African Americans and 48% of Latinos had moved during the previous five years, as compared to only 27% of whites.⁹² African Americans and Latinos similarly report a higher likelihood of moving within the next five years: 59% of African Americans and 43% of Latinos reported that moving was very or somewhat likely, as compared to only 35% of whites.⁹³ In 2009-2010 alone, moreover, African Americans had the highest moving rate (16.7%), followed by Latinos (15.6%), Asians (13.9%), and whites with the lowest rate (10.8%).⁹⁴

Many individuals have also been forced to move in the wake of the foreclosure crisis, the effect of which has not been proportional across racial groups. The decline in home ownership rates among African Americans and Latinos in recent years (8%) is almost twice

89. DĒMOS, VOTERS WIN WITH SAME DAY REGISTRATION 1 (2010), *available at* http://www.demos.org/sites/default/files/publications/VotersWinSDR_2010_Demos.pdf.

90. DĒMOS, VOTERS WIN WITH SAME DAY REGISTRATION, 2010 MIDTERM ELECTIONS FACT SHEET 1 (2011), *available at* http://www.demos.org/sites/default/files/publications/Voters_Win_2010_demos.pdf.

91. *See 2012 Summary of Voting Law Changes*, BRENNAN CENTER FOR JUST. (Sept. 7, 2012), http://www.brennancenter.org/content/resource/2012_summary_of_voting_law_changes/ (“Florida and Wisconsin passed laws making it more difficult for people who move to stay registered and vote. Ohio ended its weeklong period of same-day voter registration, and the Maine legislature passed a law eliminating Election Day registration.”).

92. D’VERA COHN & RICH MORIN, PEW RESEARCH CTR., AMERICAN MOBILITY: WHO MOVES? WHO STAYS PUT? WHERE’S HOME? 22 (2008), *available at* <http://pewsocialtrends.org/files/2011/04/American-Mobility-Report-updated-12-29-08.pdf>.

93. *Id.* at 23.

94. Press Release, U.S. Census Bureau, Census Bureau Reports Housing is Top Reason People Moved Between 2009 and 2010 (May 23, 2011), *available at* http://www.census.gov/newsroom/releases/archives/mobility_of_the_population/cb11-91.html.

that of whites (4.5%).⁹⁵ The disparity is likely greater in states more heavily affected by foreclosures, like Florida⁹⁶ and Wisconsin⁹⁷—both states that have restricted registration opportunities.⁹⁸ As a result, state measures that shorten the period of time prior to an election, during which an individual can register or update his registration information after a move, will be formidable obstacles for minority voters.

In 2011, bills that reduced opportunities to register or to update registration information were introduced in a number of states, and four of those bills—in Florida,⁹⁹ Maine,¹⁰⁰ Ohio,¹⁰¹ and Wisconsin¹⁰²—were passed and signed into law. Of the remaining bills, one failed to pass (New Hampshire),¹⁰³ and the other passed but was vetoed by the governor (Montana).¹⁰⁴ Notable among these initiatives are the following changes to existing election law:

- Florida eliminated the right of registered voters who move across counties to update their voter registrations to reflect their new addresses at the time of voting. As part of a recent overhaul of its election laws under House Bill 1355, Florida now prohibits voters who move from one of Florida's sixty-seven counties to another from updating their address information in person at the polls at the time of voting, and only permits such voters to cast provisional ballots.¹⁰⁵

According to one estimate based on 2008 election figures, nearly 34,000 additional Florida voters will now be required to

95. DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, FORECLOSURES BY RACE AND ETHNICITY: THE DEMOGRAPHICS OF A CRISIS 2 (2010), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf>.

96. Shirley Allen, *Florida Has Nation's Highest Foreclosure Rate*, LOANRATEUPDATE.COM (Feb. 18, 2011), <http://loanrateupdate.com/mortgages/florida-has-nation's-highest-foreclosure-rate>.

97. *States with the Highest Foreclosure Rates*, CNBC.COM, http://www.cnbc.com/id/29655038/States_With_the_Highest_Foreclosure_Rates?slide=2 (last visited Sept. 27, 2011).

98. See 2012 Summary of Voting Law Changes, *supra* note 91.

99. See *infra* note 105 and accompanying text.

100. See *infra* note 112 and accompanying text.

101. S.B. 194, 129th Gen. Assemb., 2011 Reg. Sess. (Ohio 2011).

102. Wisconsin has moved the deadline for late registrants to register to the Friday before an election from the day before an election. WIS. STAT. ANN. § 6.29 (West 2011).

103. H.B. 223, 2011 Leg., Reg. Sess. (N.H. 2011); *Bill Status for H.B. 223*, N.H. GEN. CT.—BILL STATUS SYSTEM, http://gencourt.state.nh.us/bill_status/bill_status.aspx?lsr=714&sy=2011&sortoption=&txtsessionyear=2011&q=1 (last visited Sept. 27, 2012) (showing bill's status as "Inexpedient to Legislate").

104. H.B. 180, 62nd Leg., Reg. Sess. (Mont. 2011); see also *Bill Status for H.B. 180*, MONT. LEG., [http://laws.leg.mt.gov/laws11/LAW0208W\\$BLAC.QueryView?P_BILL_DF_T_NO=LC0838&P_BLAC_APPL_SEQ=42](http://laws.leg.mt.gov/laws11/LAW0208W$BLAC.QueryView?P_BILL_DF_T_NO=LC0838&P_BLAC_APPL_SEQ=42) (last visited Sept. 22, 2012) (showing action taken as "Vetoed by Governor").

105. H.B. 1355, 2011 Leg., Reg. Sess. (Fla. 2011); FLA. STAT. § 101.043(1)(b) (2011).

cast provisional ballots.¹⁰⁶ Because minorities in Florida, as in the rest of the country, “have higher mobility and foreclosure rates than whites, they are the voters most likely to move,” and will therefore be “disproportionately forced to cast . . . provisional ballot[s] under the new law.”¹⁰⁷ This consequence is troubling because provisional ballots are counted less frequently than are normal ballots. During the 2008 elections, fewer than half (only 48.59%) of all provisional ballots cast in Florida were actually counted.¹⁰⁸

In addition, voters must return to the local election authority after Election Day and provide supporting documentation to ensure that the ballot is counted.¹⁰⁹ This additional trip during working hours poses a particularly high barrier for minority voters in Florida, who have not only lower rates of vehicle ownership,¹¹⁰ but also higher rates of poverty,¹¹¹ making it more difficult to take time off from work to vote. This law remains subject to review under section 5 of the Voting Rights Act.

- Maine attempted to eliminate a thirty-eight-year-old policy allowing Election Day voter registration. On June 21, 2011, Maine Governor Paul LePage signed L.D. 1376 into law,

106. See Matt Dixon, *With Presidential Election Looming, Florida Election Law Rewrite Moves Forward*, FLA. TIMES-UNION (Apr. 25, 2011, 12:00 AM), <http://jacksonville.com/news/metro/2011-04-25/story/presidential-election-looming-florida-election-law-rewrite-moves-forward>.

107. Cooper Levey-Baker, *Live-Blogging the Senate’s Field Hearing on New Voting Restrictions*, FLA. INDEP. (July 27, 2012, 12:35 PM), <http://www.floridaindependent.com/66467/senate-field-hearing-voter-suppression>.

108. See PEW CTR. ON THE STATES, PROVISIONAL BALLOTS: AN IMPERFECT SOLUTION 6 (2009), available at <http://www.pewstates.org/research/reports/provisional-ballots-85899419002>. We note that, although some of these ballots were rejected because voters were not properly registered, the Pew Center on the States points out that “it is probable that at some point between registering to vote and casting a ballot, many experienced a voter or administrative error due to an outdated, inefficient registration system.” *Id.* at 4. Fifty thousand provisional ballots were rejected in 2008 because voters who voted at the wrong precinct “may have been provided with incorrect precinct information in advance or redirected to the wrong precinct on Election Day due to administrative errors in the registration system,” while 27,000 “were disallowed because of various errors . . . some [of which] were the result of administrative problems at the polls.” *Id.*

109. *Voter Identification Requirements*, NAT’L CONF. OF ST. LEGIS., www.ncsl.org/legislatures-elections/elections/voter-id.aspx#State_Reqs (last updated Sept. 5, 2012).

110. See Letter from Bill Lann Lee, Acting Assistant Attorney Gen., Civil Rights Div., to Robert A. Butterworth, Attorney Gen., State of Fla. (Aug. 14, 1998), available at http://www.justice.gov/crt/about/vot/sec_5/ltr/l_081498.php.

111. Nat’l Women’s Law Ctr., *What the Stats Tell Us About Poverty in U.S.*, OPPOSING VIEWS (Sept. 10, 2012), <http://www.opposingviews.com/i/health/story-behind-numbers-poverty> (“Poverty rates were also higher for many minority groups than they are for whites . . .”).

seeking to end the state's long practice of Election Day voter registration.¹¹² This was a striking move, as Maine's policy has been credited with consistently producing one of the highest turnout rates in the country. In 2008, nearly 60,000 people in Maine registered to vote on Election Day,¹¹³ while in 2010, four out of five same day registration voters registered on Election Day.¹¹⁴ Soundly rejecting this block the vote measure, on November 8, 2011, the people of Maine voted by a substantial margin to overturn this law and restore Election Day voter registration.¹¹⁵

4. *Enhanced Registration Eligibility Requirements:* In most states, a voter typically establishes her eligibility to register and to vote by an affidavit attesting that she is a U.S. citizen over eighteen years old and that she meets other state eligibility requirements.¹¹⁶ Some states have recently implemented additional barriers to registration by toughening the eligibility criteria for registration, including: (a) laws requiring documentary proof of citizenship; and (b) extended durational residency requirements. These additional registration hurdles are particularly difficult for many people of color to overcome.

a. *Documentary Proof of Citizenship:* Three states (Alabama, Kansas, and Tennessee) enacted documentary proof of citizenship requirements.¹¹⁷ Documentary proof of citizenship, whether to register or to vote, is an especially burdensome eligibility criterion because official documents that actually establish citizenship are limited to items such as an original birth certificate, naturalization papers, or a passport.¹¹⁸ One study estimates that “[a]s many as 7% of United States citizens . . . do not have ready access to citizenship documents.”¹¹⁹ In 2008, proof of citizenship would have thus

112. See L.D. 1376, 125th Leg., 1st Reg. Sess. (Me. 2011); see also Tom Bell, *Bill to End Same-Day Registration Approved*, PORTLAND PRESS HERALD, June 11, 2011, at A1.

113. Rebekah Metzler, *Maine's Same-Day Voter Registration Ban Signed, Challenged*, PORTLAND PRESS HERALD, June 22, 2011, at A1.

114. DÉMOS, *supra* note 90, at 2.

115. Eric Russell, *Mainers Vote to Continue Election Day Registration*, BANGOR DAILY NEWS, Nov. 9, 2011.

116. See *Voter Identification Requirements*, *supra* note 109 (detailing each state's voter identification requirements); see also *Voter ID Laws Passed Since 2011*, BRENNAN CENTER FOR JUST. (June 5, 2012), http://www.brennancenter.org/content/resource/voter_id_laws_passed_in_2011/ (discussing the most recent voter ID legislation and their requirements).

117. WEISER & NORDEN, *supra* note 57, at 1 n.1.

118. See BRENNAN CTR. FOR JUSTICE, *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 2* (2006) [hereinafter *CITIZENS WITHOUT PROOF*], available at http://www.brennancenter.org/page/-/download_file_39242.pdf.

119. *Id.*

presented a significant registration obstacle to more than 14 million citizens of voting age.¹²⁰ In fact, for many citizens, these documents simply do not exist. Individuals born on reservations or outside a hospital, for example, may never have been issued official birth documents, or original documents may have been destroyed over the years.

While many Americans do possess such documents, they often do not have ready access to them, storing them in safe deposit boxes or with parents far from their current residence. Even those who have ready access to these documents may face difficulties, as their documents may not reflect accurate information. One survey, for example, found that “only 66% of voting-age women with ready access to . . . proof of citizenship have a document with [their] current legal name.”¹²¹

The difficulty that many Americans would have in meeting a documentary proof of citizenship requirement is alone cause for concern, but the disproportionate effect of this requirement on people of color is even more alarming. Minorities will bear the brunt of proof of citizenship laws because they are the least likely to have ready access to citizenship documents.¹²² In particular, proof of citizenship requirements—such as laws requiring voters to produce government-issued photo identification, discussed later in this Article—have a uniquely burdensome impact on elderly African American voters, many of whom, because they were born when de jure segregation prevented equal access to hospitals, simply do not have a birth certificate.¹²³ Thus, many elderly African Americans are, by virtue of their race and the history of racial discrimination in this country, *incapable of satisfying the requirements of these laws*.

More broadly, racial disparities in access to citizenship documentation exist because of broad socio-economic disparities correlated with race. For example, “[c]itizens earning less than \$25,000 per year are more than twice as likely to lack ready documentation of their citizenship” as others, and “at least 12 percent of voting-age American citizens earning less than \$25,000 per year do not have a readily available U.S. passport, naturalization document, or birth certificate.”¹²⁴ Given the substantial racial

120. See *id.*; FILE & CRISSEY, *supra* note 32, at 3.

121. CITIZENS WITHOUT PROOF, *supra* note 118, at 2.

122. See MATT A. BARRETO ET AL., VOTER ID REQUIREMENTS AND THE DISENFRANCHISEMENTS OF LATINO, BLACK AND ASIAN VOTERS 17-18 (Sept. 1, 2007), available at http://faculty.washington.edu/mbarreto/research/Voter_ID_APSA.pdf.

123. See *New State Voting Laws: Barriers to the Ballot?: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 219-20 (2011) (statement of Justin Levitt, Professor of Law, Loyola Law School).

124. CITIZENS WITHOUT PROOF, *supra* note 118, at 2.

disparities nationwide with respect to the poverty rate—as of 2009, 25.8% of African Americans and 25.3% of Latinos lived in poverty, compared with only 9.4% of whites¹²⁵—it is clear that these documentary proof requirements disproportionately burden minorities.

Poverty rate disparities also demonstrate that voters of color are among those who are the least able to bear the costs of obtaining citizenship documentation. In instances where citizenship documents can be replaced or obtained in the first instance, individuals face an expensive and time-consuming process. A replacement birth certificate can exceed \$20,¹²⁶ a passport costs \$110,¹²⁷ and replacement naturalization documents cost \$345.¹²⁸ The additional expense of traveling to the relevant government office to obtain such documents constitutes another burden, particularly for people living in poverty, who tend to have less access to transportation.¹²⁹ Moreover, a citizen seeking replacement citizenship documents must navigate cumbersome government agencies, which often requires taking unpaid time from work in order to travel to a specific office, fill out forms, and wait in long lines.

Prior to 2011, Arizona was an outlier as the only state to require proof of citizenship to vote or to register to vote.¹³⁰ Since then, at least twelve states—Alabama,¹³¹ Colorado,¹³² Connecticut,¹³³ Kansas,¹³⁴ Maine,¹³⁵ Massachusetts,¹³⁶ New Hampshire,¹³⁷

125. CARMEN DENAVAS-WALT ET AL., INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009, at 14 (2010), available at <http://www.census.gov/prod/2010pubs/p60-238.pdf>.

126. *Texas Vital Statistics – Birth Certificates*, TEXAS DEP'T OF ST. HEALTH SERVS., http://www.dshs.state.tx.us/vs/reqproc/certified_copy.shtm (last updated July 26, 2012).

127. *Passport Fees*, TRAVEL.STATE.GOV, http://travel.state.gov/passport/fees/fees_837.html (last visited Sept. 12, 2012).

128. *Instructions for Form N-565, Application for Replacement Naturalization/Citizenship Document*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (July 8, 2011), <http://www.uscis.gov/files/form/n-565instr.pdf>.

129. See Ami Cholia, *Lack of Transportation Affects Our Nation's Poor the Most*, ALTTRANSPORT (Oct. 19, 2010, 7:38 PM), <http://alttransport.com/2010/10/lack-of-transportation-affects-our-nations-poor-the-most/>.

130. See *Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010), *aff'd in part, rev'd in part*, 677 F.3d 383 (9th Cir. 2012); Steven Rosenfeld, *Arizona Will Ignore Federal Court's Ruling on Restrictive Voter Law*, PROJECT VOTE (Apr. 19, 2012), <http://www.projectvote.org/in-the-news/819-arizona-will-ignore-federal-courts-ruling-on-restrictive-voter-law.html>.

131. S.B. 256, 2011 Gen. Assemb., Reg. Sess. (Ala. 2011).

132. S.B. 11-018, 68th Gen. Assemb., 1st Reg. Sess. (Colo. 2011).

133. H.B. 5231, 2011 Gen. Assemb., Reg. Sess. (Conn. 2011).

134. H.B. 2067, 2011 Leg., Reg. Sess. (Kan. 2011).

135. S.P. 241, 125th Leg., 1st Reg. Sess. (Me. 2011).

136. H.B. 194, 187th Gen. Court, Reg. Sess. (Mass. 2011).

137. H.B. 515-FN, 2011 Gen. Court, Reg. Sess. (N.H. 2011).

Nevada,¹³⁸ Oregon,¹³⁹ South Carolina,¹⁴⁰ Tennessee,¹⁴¹ and Texas¹⁴²—have all introduced legislation that would require, with some variation, proof of citizenship to register to vote. Alabama,¹⁴³ Kansas,¹⁴⁴ and Tennessee¹⁴⁵ passed and enacted proof of citizenship laws in 2011. In April 2011, the U.S. Department of Justice precleared Georgia’s proof of citizenship requirement (introduced and passed in 2009).¹⁴⁶ Alabama’s proof of citizenship law remains subject to review under section 5 of the Voting Rights Act.¹⁴⁷

Proof of citizenship advocates argue, as they do for voter photo ID requirements, that this heightened level of documentary proof is essential to keep noncitizens from fraudulently voting.¹⁴⁸ But there have been no “documented cases in which individual noncitizens have either intentionally registered to vote or voted while knowing that they were ineligible.”¹⁴⁹ Indeed, most allegations of noncitizen voting are generated by clerical mistakes or errors in data collection, a result of some of the same flawed and error-prone lists and methodologies that render purge programs vulnerable to manipulation.¹⁵⁰

b. Durational Residency Requirements: Durational residency registration requirements, such as time limitations to register, disproportionately penalize populations that move frequently. As part of the 2011 Wisconsin bill that moves up the deadline for late

138. S.B. 178, 2011 Leg., 76th Sess. (Nev. 2011).

139. H.B. 2804, 76th Leg. Assemb., Reg. Sess. (Or. 2011).

140. S. 304, 2011 Gen. Assemb., 119th Sess. (S.C. 2011).

141. S.B. 352, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011).

142. S.B. 14, 82d Leg., Reg. Sess. (Tex. 2011).

143. Alabama’s law must be approved by the U.S. Department of Justice or a federal court before it can go into effect. S.B. 256, 2011 Gen. Assemb., Reg. Sess. (Ala. 2011).

144. H.B. 2067, 2011 Leg., Reg. Sess. (Kan. 2011).

145. S.B. 352, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011).

146. S.B. 86, 150th Gen. Assemb., Reg. Sess. (Ga. 2009); Press Release, Brian P. Kemp, Ga. Sec’y of State, Secretary of State Kemp Announces Approval of Georgia’s Proof of Citizenship Requirement for New Voter Registration Applicants (Apr. 4, 2011), *available at* <http://www.sos.ga.gov/pressrel/elections/20110404Secretary%20of%20State%20Kemp%20Announces%20Approval%20of%20Georgia's%20Proof%20of%20Citizenship%20Requirement%20for%20New%20Voter%20Registration%20Applicants.htm>.

147. At the time of this writing, a federal court had temporarily enjoined the Alabama law. *Hispanic Interest Coal. of Ala. v. Bentley*, No. 5:11-CV-2484-SLB, 2011 WL 5516953, at *53 (N.D. Ala. Sept. 28, 2011) (granting preliminary injunction).

148. *See, e.g., How Does Requiring a Voter ID Prevent Election Fraud?*, HERITAGE FOUND., <http://www.askheritage.org/how-does-requiring-a-voter-id-prevent-election-fraud/> (last visited Sept. 27, 2012).

149. JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, *THE TRUTH ABOUT VOTER FRAUD* 18 (2007), *available at* <http://www.truthaboutfraud.org/pdf/TruthAboutVoterFraud.pdf>.

150. *Id.*

registration, the state has also extended its durational residency requirement for registering to vote from ten days to twenty-eight days of consecutive residency.¹⁵¹ Because minorities have higher foreclosure rates than whites, they are the voters most likely to move. Wisconsin, moreover, ranked in the top ten states with the highest foreclosure rates in July 2011.¹⁵² As a result, minority voters in Wisconsin likely will be substantially impeded by this enhanced residency requirement.

5. *Increased Disfranchisement of People with Felony Convictions:* Blocking the voting rights of people with felony convictions is one of the most significant barriers to political participation in this country. Nationwide, more than 5.3 million Americans who have been convicted of a felony are denied access to the one fundamental right that is the foundation of all other rights.¹⁵³ Four million of the disfranchised have completed their sentences and live, work, pay taxes, and raise families in their communities.¹⁵⁴ In 2007, thirty-eight percent of those disfranchised while serving prison sentences were African Americans¹⁵⁵ and twenty-one percent were Hispanic.¹⁵⁶

a. The History of Felon Disfranchisement: Laws that deprive people convicted of criminal offenses of the right to vote trace their history to the conclusion of the Civil War, when they were specifically tailored to those offenses that African Americans were thought to be most likely to commit. These intentionally discriminatory laws were “guided by the belief that [African Americans]” in the South—who were newly emancipated and generally impoverished after the Civil War—were more likely to commit property offenses than were whites, who were thought to commit more “robust” crimes.¹⁵⁷ For example, the 1890 Mississippi Constitution “required disfranchisement for such crimes as theft, burglary, and receiving money under false pretenses, but not for robbery or murder.”¹⁵⁸ Through this convoluted reasoning, someone could be disfranchised for stealing a chicken but not for killing the chicken’s owner.

151. WIS. STAT. ANN. § 6.29 (West 2011).

152. *States with the Highest Foreclosure Rates*, CNBC.COM, http://www.cnbc.com/id/29655038/States_With_the_Highest_Foreclosure_Rates?slide=2 (last visited Sept. 27, 2012).

153. See JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 77 (2006).

154. See *id.*

155. See LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, *supra* note 17, at 16.

156. See *id.*

157. RYAN P. HAYGOOD, JENIGH GARRETT & DALE HO, NAACP LEGAL DEF. & EDUC. FUND, *FREE THE VOTE: UNLOCKING DEMOCRACY IN THE CELLS AND ON THE STREETS* 4 (2010), available at <http://naacpldf.org/files/publications/Free%20the%20Vote.pdf>.

158. See Ryan P. Haygood, *Juneteenth: Free At Last?*, *THE BLACK COMMENTATOR* (June 10, 2004), http://www.blackcommentator.com/94/94_juneteenth.html (citing Miss. Const. of 1890, art. 12, § 241).

Today, felon disfranchisement statutes continue to weaken the voting power of African American and Latino communities. This uneven effect is largely the result of the “disproportionate enforcement of the ‘war on drugs’ in [African American] and Latino communities, which has [drastically increased] the class of persons subject to disfranchisement.”¹⁵⁹ Nowhere are the effects of felon disfranchisement more prominent than in the African American community. A staggering 13% of all African American men in this country are denied the right to vote, and in some states up to 40% of the African American male population may be permanently disenfranchised.¹⁶⁰ “Given current rates of incarceration,” an astonishing “three in ten of the next generation of [African American] men [will] . . . be disfranchised at some point during their lifetime.”¹⁶¹

The effects of felon disfranchisement are not limited only to the disfranchised themselves, but also extend to eligible and future voters who are discouraged from voting.¹⁶² Voting, like many forms of civic participation, is often a learned behavior; a child whose parent is unable to vote can herself develop an alienation from the culture of voting.¹⁶³ These laws marginalize the voices of community members who are deprived of the collective power of voting alongside relatives and neighbors and engender a culture of nonparticipation that erodes mainstream civic engagement.¹⁶⁴

b. Felon Disfranchisement in 2011: In 2011 two states—Florida and Iowa—joined Virginia and Kentucky in holding the distinction of having the most restrictive felon disenfranchisement laws in the country.¹⁶⁵ Each of these four states denies the right to vote permanently to all individuals convicted of any felony offense.¹⁶⁶

159. Haygood, *supra* note 159; see also Marc Mauer, *Felon Disenfranchisement: A Policy Whose Time Has Passed?*, 31 HUM. RTS. 16, 17 (2004) (referencing “compelling evidence of discriminatory racial dynamics in the . . . prosecution of the war on drugs”).

160. SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2012), available at http://sentencingproject.org/doc/publications/fd_bs_fdlaw_sinus_Aug2012.pdf.

161. *Id.*

162. See J. Whyatt Mondesire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 TEMP. POL. & CIV. RTS. L. REV. 435, 438 (2001) (explaining “voting is a learned behavior” from parents and some children many never see their parents vote).

163. *Id.*; see also Paul Allen Beck & M. Kent Jennings, *Family Traditions, Political Periods, and the Development of Partisan Orientation*, 53 J. OF POL. 742, 745-47 (1991) (finding that politicized family environments foster children’s subsequent political involvement).

164. See MARC MAUER, JOINT CTR. FOR POLITICAL AND ECON. STUDIES FOCUS, DISENFRANCHISING FELONS HURTS ENTIRE COMMUNITIES 5, 6 (2004), available at www.prisonpolicy.org/scans/sp/focus-mayjune04.pdf.

165. Jessie Allen, *Documentary Disenfranchisement*, 86 TUL. L. REV. 389, 393-94 (2011).

166. *Id.*

Florida imposed a mandatory five-year waiting period and petition process for the restoration of rights for individuals who have completed their sentences. In March 2011, Florida, “which [already had] the largest disfranchised population” of any state in the country (approximately one million), rolled back state rules enacted four years ago “that eliminated the post-sentence waiting period” and provided for automatic approval of reinstatement of rights for individuals convicted of nonviolent felony offenses.¹⁶⁷ The previous rule was put into effect in 2007, allowing the restoration of rights to more than 154,000 people who had completed their sentences.¹⁶⁸

Under Florida’s new rules, all individuals who have completed their sentences, even those for nonviolent offenses, must wait at least five years before they may apply to the Clemency Board for the restoration of their civil rights, including the right to register to vote.¹⁶⁹ Some offenders even have a mandatory seven-year period before they may petition.¹⁷⁰ Even worse, the five-year waiting period for an individual convicted of a nonviolent offense resets if the person is simply arrested for a criminal offense—even if charges are eventually dropped or the person is acquitted of all allegations.¹⁷¹ By most accounts, these new clemency rules make Florida’s the most restrictive felon disfranchisement approach in the country.¹⁷²

Iowa requires all individuals who have completed their sentences to apply for the restoration of their rights—an application that is contingent on the payment of all “outstanding financial obligations.”¹⁷³ In January 2011, Iowa Governor Terry Branstad, in one of his first acts after being sworn into office, rescinded Executive Order 42, a 2005 order that had automatically restored voting rights to individuals with criminal convictions once they had completed their sentences.¹⁷⁴ Under Executive Order 42, approximately 100,000 state citizens had their voting rights restored.¹⁷⁵ Under Executive

167. Letter from Marc Mauer, Exec. Dir., The Sentencing Project, to Sen. Richard Durbin, Chairman of the Subcomm. on the Constitution, Civil Rights and Human Rights, and Sen. Lindsey Graham, Ranking Member of the Subcomm. on the Constitution, Civil Rights and Human Rights 2 (Sept. 8, 2011), available at http://sentencingproject.org/doc/publications/Subcommittee_hearing_letter_9-8-11.pdf.

168. Peter Wallsten, *In Florida, Republicans Make it Harder for Freed Felons to Vote*, WASH. POST, Mar. 10, 2011, at A04.

169. FLA. R. OF EXEC. CLEMENCY 9(A) (2011).

170. FLA. R. OF EXEC. CLEMENCY 10(A).

171. See FLA. R. OF EXEC. CLEMENCY 9(A); see also Erika Wood, *Turning Back the Clock in Florida*, BRENNAN CENTER FOR JUST. (Mar. 11, 2011), http://www.brennancenter.org/blog/archives/turning_back_the_clock_in_florida.

172. See, e.g., WEISER & NORDEN, *supra* note 57, at 35.

173. *Disenfranchisement News*, SENTENCING PROJECT (Jan. 20, 2011), http://www.sentencingproject.org/detail/news.cfm?news_id=1058 [hereinafter *Disenfranchisement News*].

174. Iowa Exec. Order No. 70 (2011).

175. See *Disenfranchisement News*, *supra* note 173.

Order 70, individuals with felony convictions will now have to petition the governor individually to regain their voting rights.¹⁷⁶ As with all felon disfranchisement laws, the new order will have a disproportionate impact on African Americans, who constitute only 2.8% of the Iowa population, but are about a quarter of the state's prison population.¹⁷⁷

Particularly troubling is the link that has been drawn between the restoration of voting rights and the monetary obligations of those seeking such restoration. According to Executive Order 70, approval of a restoration application requires not only that the individual complete his sentence, but also that he meet all outstanding financial obligations, including any fines or court costs.¹⁷⁸

This additional impediment to restoration of voting rights is dangerously similar to the insidious practice of poll taxes, which required a fee in order to vote. States enacted poll taxes after the passage of the Fifteenth Amendment in order to prevent the recently enfranchised African Americans from voting. The Twenty-Fourth Amendment together with the Supreme Court decision in *Harper v. Virginia Board of Education* announced unequivocally that such taxes were unconstitutional at both the state and federal levels.¹⁷⁹ Just as with poll taxes of the past, Stephanie Fawkes-Lee and Marty Ryan, two Iowa-based public policy advocates, argue: "The right to vote should not be based on a duty to pay. If it were, we would revert back to the days in which wealthy, white, male landowners would be a privileged voting class."¹⁸⁰

In addition to these changes in Florida and Iowa, legislators in five other states introduced bills that would expand felon disfranchisement: Alabama, Maryland, South Carolina, Washington, and West Virginia.¹⁸¹ Meanwhile, in Nevada, the governor vetoed a

176. *See id.*

177. *See id.*

178. Dar Danielson, *Branstad: Pay Fines, Restitution to Get Voting Rights Back*, RADIOIOWA (Jan. 18, 2011), <http://www.radioiowa.com/2011/01/18/branstad-will-put-in-new-plan-for-restoring-felon-voting-rights/>.

179. 383 U.S. 663, 666 (1966) (holding that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard").

180. Stephanie Fawkes-Lee & Marty Ryan, *Guest Column: Ex-Felons Saddled with Debt Forfeit Voting Rights*, DES MOINES REG. (Jan. 19, 2011, 7:34 PM), [http://www.brennancenter.org/page/-/Democracy/Des Moines Register Guest Column 1.19.2011.pdf](http://www.brennancenter.org/page/-/Democracy/Des_Moines_Register_Guest_Column_1.19.2011.pdf).

181. *Bill Status for SB 243*, ALA. LEGIS. INFO. SYS. ONLINE, <http://alisondb.legislature.state.al.us/acas/ACASLoginMac.asp?SESSION=1058> (follow "bills" hyperlink; then follow "status" hyperlink; then search "SB243") (last visited Sept. 27, 2012) ("Died in the basket"); *House Bill 385*, MD. GEN. ASSEMB., <http://senate.state.md.us/2011rs/billfile/HB0385.htm> (last visited Sept. 2, 2012) (pending); *H3168 Session 119 (2011-2012)*, S.C. LEG., <http://www.scstatehouse.gov/query.php> (select session "119 - (2011-2012)" and search "3168"; then select "Session

bill that would have automatically restored voting rights to any convicted felon who honorably completed his or her sentence.¹⁸²

6. *Voter Purges*: Even registered voters face threats to their registered status. In addition to making it harder to register initially, some states are also improperly purging registered voters from state registration rolls. Purge programs purport to maintain the purity of voter registration lists by removing the names of individuals ineligible to vote in that state or jurisdiction.¹⁸³ The purge process, however, lacks transparency, vests substantial discretion in election officials, and relies on flawed and error-prone methods that are vulnerable to manipulation.¹⁸⁴ As a result, purges too often result in the disqualification of eligible voters.¹⁸⁵ Recent incidents of improper purges show that communities of color are particularly vulnerable to improper purging.¹⁸⁶ For example, in 2000, more than 12,000 eligible voters in Florida were wrongfully purged when the state relied on an unreliable match process to identify registered voters who shared a name with an individual in an electronic database of people convicted of criminal offenses.¹⁸⁷ In early June, the Department of Justice filed a lawsuit requesting that the court enjoin Florida from conducting these purges.¹⁸⁸

VI. BLOCKING THE VOTE AT THE EARLY AND ABSENTEE VOTING STAGE

In addition to barriers to registration, a number of states have passed or considered measures that impede the actual casting of ballots by registered voters by placing new restrictions on the early and absentee voting processes. In 2011, five states (Florida, Georgia, Maine, Tennessee, and West Virginia) imposed new restrictions on

119 – (2011-2012) – H 3168) (last visited Sept. 27, 2012); *HB 1030-2011-12*, WASH. ST. LEG., <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1030&year=2011#documents> (last visited Sept. 27, 2012) (pending); *Bill Status*, W. VA. LEG., http://www.legis.state.wv.us/Bill_Status/bill_status.cfm (under “Bill Text Search,” select “Bills 2011” and search “2089”) (last visited Sept. 27, 2012) (pending).

182. Lee Rowland, *A Missed Opportunity in Nevada*, BRENNAN CENTER FOR JUST. (June 17, 2011), http://www.brennancenter.org/blog/archives/a_missed_opportunity_in_nevada/.

183. See *Voter Suppression: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 165 (2008) (testimony of Kristen Clarke, Co-Director, Political Participation Group, NAACP LDF).

184. *Id.* at 165-66.

185. *Id.* at 166.

186. See *Voter Registration: Assessing Current Problems: Hearing Before the S. Comm. on Rules and Admin.*, 111th Cong. 17 (2009) (testimony of Kristen Clarke, Co-Director, Political Participation Group, NAACP LDF).

187. *Id.*

188. See Steve Bousquet, *Judge Halts Federal Attempt to Block Florida’s Voter Purge*, MIAMI HERALD (June 27, 2012), <http://www.miamiherald.com/2012/06/27/2871392/judge-halts-federal-attempt-to.html>.

early and absentee voting.¹⁸⁹

A. Shortening Early/Absentee Voting Periods

Getting to the polls on Election Day is difficult for many voters. Many working individuals cannot afford to take time off of work (or simply lack the flexibility to be able to), low-income voters often lack easy access to transportation to the polls,¹⁹⁰ the elderly and disabled may be unable to travel to the polls,¹⁹¹ and students and active service members may be absent from their voting precincts on Election Day. To assist those voters who cannot reach polls on Election Day itself, almost all states provide some alternative to the traditional in-person, precinct-based Election Day method for casting a ballot.¹⁹² These alternatives usually involve a version of early, or absentee, voting. Whether because of a lack of transportation, an inflexible work schedule, or long lines and waiting periods on Election Day,¹⁹³ voters of color have been more likely to take advantage of the flexibility provided by these additional voting days.¹⁹⁴

Nevertheless, in the 2011 legislative cycle, bills were introduced in ten states to reduce early or absentee voting periods, with such bills passing in five states: Florida (enacted, subject to preclearance),¹⁹⁵ Georgia (enacted),¹⁹⁶ Maine (enacted),¹⁹⁷ Maryland

189. FLA. STAT. §§ 101.657(1)(d), 101.6923 (2011); GA. CODE ANN. § 21-2-385(d) (2011); ME. REV. STAT. tit. 21-A, § 753-B (2011) (banning in-person absentee voting during the two business days before an election); TENN. CODE ANN. § 2-6-102 (2011); S.B. 581, 2011 Leg., 80th Sess. (W. Va. 2011); W. VA. CODE § 3-3-3 (2011); see also Eric Russell, *Groups Challenge Voter Law; Petition Aims to Repeal Ban on Election Day Sign-Up*, BANGOR DAILY NEWS, July 9, 2011, at A1.

190. See Cholia, *supra* note 129.

191. Andrew Ward et al., *Ensuring the Enfranchisement of People with Disabilities*, 20 J. DISABILITY POL'Y STUD. 79, 79 (2009); Renee McEldowney & Pamela B. Teaster, *Land of the Free, Home of the Brave: Voting Accommodations for Older Adults*, 21 J. AGING & SOC. POL'Y 159, 167-68 (2009).

192. See *Absentee and Early Voting*, NAT'L CONF. OF ST. LEGIS., <http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx> (last updated Sept. 4, 2012) (describing each state's absentee or early voting procedures).

193. In 2008, 27% of African American voters reported waits half an hour or more, as compared to only 11% of white voters. R. MICHAEL ALVAREZ ET AL., 2008 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS: FINAL REPORT 42 (2009) [hereinafter CALTECH/MIT VOTING TECHNOLOGY PROJECT], available at <http://www.vote.caltech.edu/sites/default/files/Final%20report20090218.pdf>.

194. See, e.g., Letter from NAACP Legal Defense and Educational Fund to Chris Herren, Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice (June 17, 2011) [hereinafter Letter from NAACP LDF to Chris Herren (June 17, 2011)], available at http://www.naacpldf.org/files/case_issue/2011_06-17%20LDF%20joint%20statement%20to%20AG%20regarding%20Florida%20election%20laws.pdf; see also WEISER & NORDEN, *supra* note 57, at 24; John Lewis, Op-Ed., *A Poll Tax by Another Name*, N.Y. TIMES, Aug. 27, 2011, at A19.

195. FLA. STAT. § 97.0575 (3)(a)(1) (2011).

(pending but with unfavorable committee report),¹⁹⁸ Nevada (no further action allowed),¹⁹⁹ New Mexico (defeated),²⁰⁰ North Carolina (pending),²⁰¹ Ohio (enacted subject to voter referendum),²⁰² Tennessee (various bills enacted),²⁰³ and West Virginia (enacted).²⁰⁴ Highlights of these efforts include:

- *Florida's elimination of the first week of early voting*: Florida sought to reduce the number of early voting days from fourteen to eight days,²⁰⁵ and also gave local supervisors of elections discretion over early voting hours, changing the hours that early voting sites must operate from a mandatory eight hours per day (other than weekends), to a discretionary range of six to twelve hours per day.²⁰⁶ As a result, Florida sought to not only eliminate the first week of early voting in Florida, but also to reduce the total hours of early voting from a mandatory ninety-six hours to a minimum of only forty-eight hours.

This change would have inflicted particularly harsh burdens on minority communities, who rely heavily on early voting periods to cast their ballots. In the 2008 election, over 2.6 million votes were cast during Florida's early in-person voting period, accounting for an estimated 31.25% of all ballots cast.²⁰⁷ During the 2008 general election, African Americans were 22% of voters during the first week of early voting in Florida statewide, despite being only 13% of the Florida electorate. "Overall, nearly 54% of Florida's African[

196. GA. CODE ANN. § 21-2-385(d) (2011).

197. ME. REV. STAT. tit. 21-A, § 753-B (2011); see Russell, *supra* note 189.

198. H.B. 850, 2011 Gen. Assmb., Reg. Sess. (Md. 2011); *Information on House Bill 850*, MD. GEN. ASSEMBLY, <http://mlis.state.md.us/2011rs/billfile/hb0850.htm> (last visited Sept. 27, 2012).

199. A.B. 311, 2011 Leg., 76th Sess. (Nev. 2011); *Information on A.B. 311*, NEV. LEGIS., <http://www.leg.state.nv.us/session/76th2011/Reports/history.cfm?ID=654> (last visited Sept. 27, 2012).

200. H.B. 352, 50th Leg., 1st Sess. (N.M. 2011); *Information on H.B. 352*, N.M. LEGIS., http://www.nmlegis.gov/lcs/_session.aspx?Chamber=H&LegType=B&LegNo=352&year=11 (last visited Sept. 27, 2012).

201. S.B. 657, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011); *Information on Senate Bill 657*, N.C. GEN. ASSEMBLY, <http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2011&BillID=S657> (last visited Sept. 12, 2012).

202. S.B. 194, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

203. 2011 Tenn. Pub. Acts 412; 2011 Tenn. Pub. Acts 381; 2011 Tenn. Pub. Acts 115.

204. S.B. 581, 2011 Leg., Reg. Sess. (W. Va. 2011); W. VA. CODE § 3-3-3 (2011).

205. H.B. 1355, 2011 Leg., Reg. Sess. (Fla. 2011); FLA. STAT. § 101.657(1)(d) (2011).

206. FLA. STAT. § 101.657(1)(d).

207. Howard L. Simon, Editorial, *Legislators Suppressed Vote Without Evidence of Fraud*, ORLANDO SENTINEL, May 9, 2012, at A18.

]American voters in 2008 voted at early-voting sites.”²⁰⁸

- *Florida’s elimination of early voting on the Sunday before Election Day*: Florida also sought to eliminate early voting on the last Sunday before Election Day, a day on which African American churches in Florida have traditionally conducted a sizeable portion of their election assistance efforts. One such example is the “Soul to the Polls” effort, in which churches encourage their congregants, after fulfilling their spiritual duties at church, to discharge their civic responsibilities by organizing transportation from Sunday services directly to the election booth.²⁰⁹ African Americans comprised one-third of the entire statewide turnout on the last Sunday before the 2008 election.²¹⁰ Florida’s proposed reduction to the early voting, a change that was subject to review under section 5 of the Voting Rights Act, was recently struck by a three-judge federal court in Washington, D.C. as harmful to minority voters.²¹¹
- *Georgia’s reduction of the early voting period from forty-five days to twenty-one days*: Reversing its pre-2008 election decision to expand early in-person voting from one week to forty-five days before the election, Georgia has returned to a shortened early voting period of only twenty-one days. Like the shortening of early voting in Florida, this change will disproportionately affect voters of color. According to a Pew Center on the States survey of voters in three Georgia counties, more than 60% of African Americans who voted in the 2008 general election did so during the early period, as compared to 57.7% of white voters.²¹² As a result, African Americans cast 35% of all early ballots, even though they comprised only 30% of those eligible to vote in the general

208. Letter from NAACP LDF to Chris Herren (June 17, 2011), *supra* note 195, at 4.

209. *New State Voting Laws: Barriers to the Ballot?: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 169-71 (2011) (statement of Ryan P. Haygood, Director, Political Participation Group, NAACP Legal Defense & Educational Fund); *accord* Justin Levitt, *A Devil in the Details of Florida’s Early Voting Law*, ELECTION L. BLOG (May 23, 2011, 3:24 PM), <http://electionlawblog.org/?p=18296>; Laura Leslie, *Why Ban Sunday Voting?*, WRAL.COM (June 16, 2011), <http://www.wral.com/news/state/nccapitol/blogpost/9737378/>; Frank Cerabino, *Early Voting Change Might Hinder Blacks*, PALM BEACH POST, July 7, 2011, at 1B.

210. *See* Editorial, *Voting Law’s Sunday Punch*, OCALA.COM (June 17, 2011, 6:30 AM), <http://www.ocala.com/article/20110617/opinion/110619758>.

211. *See Section 5 Covered Jurisdictions*, U.S. DEPT OF JUST., http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Sept. 27, 2012).

212. CHARLES S. BULLOCK, III, ET AL., PEW CTR. ON THE STATES, A SURVEY OF GEORGIA VOTERS IN THE 2008 GENERAL ELECTION 15 (2009), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/GA_voters.pdf.

election.²¹³ In addition, African Americans voted early in the forty-five-day period—a portion of the early voting window that has since been eliminated—casting almost 40% of all the ballots during that time.²¹⁴

- *Ohio's return to 2004 election rules*: Ohio reversed many of the voting conveniences introduced after the 2004 general election²¹⁵—at a time when the nation watched while Ohioans in many counties waited up to ten hours at the polls.²¹⁶ Among these reversals is a reduction in Ohio's thirty-five-day early voting period.²¹⁷ In 2008, approximately 30% of all Ohio voters cast their ballots during the early voting period.²¹⁸ As a result, despite record turnout in 2008, Ohio did not suffer a reprise of the long waits at the polls witnessed in 2004.

Ohio's newly shortened voting period signals a return to the ten-hour waits from 2004, particularly in urban areas where minority communities are concentrated, and where the proportion of early voters is as high as 40% in places like Franklin County.²¹⁹ The changes to early voting also include a ban on in-person voting on Sundays.²²⁰ As one commentator notes, this particular ban, as in Florida, is “a transparent effort to limit voting by the African American community—whose members often come to vote in groups after church” on Sunday.²²¹

VII. BLOCKING THE VOTE ON ELECTION DAY

In addition to limiting opportunities to vote before Election Day, numerous states have added insult to injury by imposing laws that restrict access to the polls on Election Day itself. Deceptive practices are also being used to disseminate false or misleading information

213. *Id.* at 2-3.

214. *Id.* at 2.

215. See Robert Vitale, *Banned Voting Options Popular: 234,000 Absentee or Early Ballots That New Law Ends Were Cast in County in '08*, COLUMBUS DISPATCH, July 24, 2011, at 1A.

216. Adam Cohen, Editorial, *No One Should Have to Stand in Line for 10 Hours to Vote*, N.Y. TIMES, Aug. 26, 2008, at A18.

217. Vitale, *supra* note 215.

218. Ashley Killough, *Obama Campaign Sues Over Ohio's Cutoff Date for Early Voting*, ABC ACTION NEWS (July 18, 2012), http://www.abcactionnews.com/dpp/news/political/elections_local/obama-campaign-sues-over-ohios-cutoff-date-for-early-voting.

219. See Vitale, *supra* note 215.

220. S.B. 194, 129th Gen. Assemb., Reg. Sess. 2011-2012 (Ohio 2011).

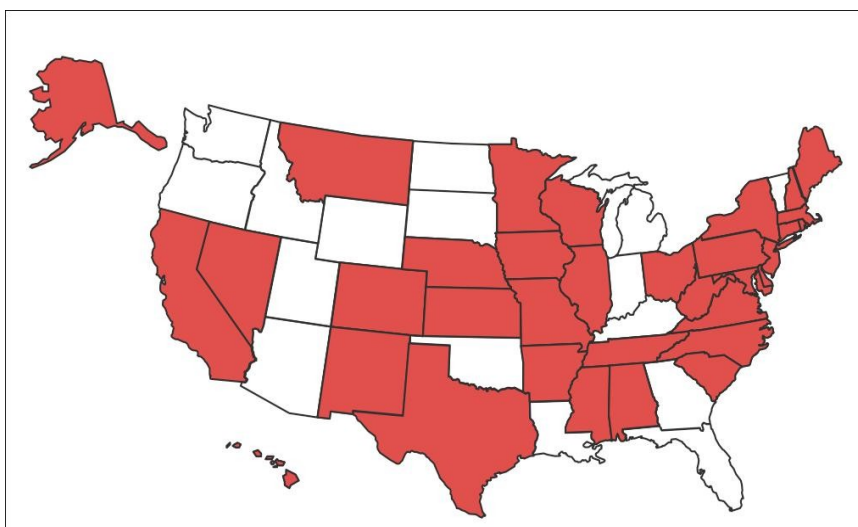
221. Daniel Takaji, *Guest Post: Blocking the Vote in Ohio*, INNOVATION OHIO (June 22, 2011), <http://innovationohio.org/blog/guest-post-blocking-the-vote-in-ohio>; see also Editorial, *Toledo Rally Aims to Spread Opposition to Election Bills*, TOLEDO BLADE (July 15, 2011), <http://beta.toledoblade.com/local/2011/07/15/Toledo-rally-aims-to-spread-opposition-to-election-bills.html>.

about the voting process in order to prevent eligible voters from casting a ballot.

A. Photo Identification Requirements

The push for laws requiring voters to present valid government-issued photo identification at the polls represents the heart of the modern block the vote campaign.

STATES WHERE VOTER ID LEGISLATION WAS INTRODUCED²²²



A driver's license, for example, can cost up to \$45.²²³ For many Americans, these underlying costs are, as a practical matter, prohibitive. Poll taxes of as little as \$1.50 have been deemed an unconstitutional burden on the right to vote.²²⁴ For impoverished individuals—who are disproportionately people of color—the \$15 that they must spend to obtain a government-issued photo ID “is \$15 that they must subtract from their meager ability to feed, shelter, and clothe their families.”²²⁵

Nevertheless, as the Brennan Center's map above demonstrates, thirty-four states, in a coordinated effort, introduced photo

222. WEISER & NORDEN, *supra* note 57, at 7.

223. See, e.g., *WA State Licensing: Driver Licensing Fees*, WASH. ST. DEP'T OF LICENSING, <http://www.dol.wa.gov/driverslicense/fees.html> (last visited Sept. 20, 2012).

224. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding that “a State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any other fee an electoral standard”).

225. *Weinschenk v. State*, 203 S.W.3d 201, 214 (Mo. 2006).

identification requirements for voting in 2011.²²⁶ Although requiring or requesting voters to provide some form of voter identification to register or to vote is not an entirely novel imposition,²²⁷ these 2011 initiatives are notable in their coordination, their pervasiveness, and their restrictiveness. These new laws prohibit many common forms of previously acceptable identification like student IDs, social security cards, utility bills, and bank statements.²²⁸

During 2011, laws requiring a voter to present a valid photo ID in order to cast a vote were passed in eight states: Alabama, Kansas, Mississippi, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin.²²⁹ The Department of Justice rejected South Carolina and Texas' photo ID measures, and the states sought preclearance from a three-judge panel of the United States District Court for the District of Columbia.²³⁰ The District Court denied preclearance to the Texas law; the South Carolina case is still pending. In Missouri, despite a ruling from the Missouri Supreme Court that such laws violate the state constitution, and the governor's veto of a photo ID bill, a constitutional amendment authorizing a photo ID requirement passed the legislature and will be on the November 2012 ballot.²³¹ Photo ID laws were also passed in Minnesota, Montana, New Hampshire, and North Carolina, but were ultimately vetoed by each state's governor.²³² A number of other states have photo ID bills that are still pending, while voters are initiating voter ID requirements through ballot measures in Massachusetts.²³³

These efforts are highly coordinated. Many of these proposals take their inspiration from model voter photo ID legislation developed by the American Legislative Exchange Council ("ALEC"), an advocacy group that brings together state legislators and private interests,²³⁴ and enables "a consistent pipeline of special interest

226. See *Voter Identification Requirements*, *supra* note 109.

227. See *id.* A number of states merely request that a voter present photo identification, allowing voters who lack photo identification to cast ballots if they attest to their own identity: Florida, Hawaii, Idaho, Louisiana, Michigan, and South Dakota. A larger number of states currently require or request only a non-photo identification to vote: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, North Dakota, Ohio, Oklahoma, Utah, Virginia, and Washington. *Id.*

228. See *Voter ID Laws Passed Since 2011*, *supra* note 116 (summarizing the voter ID laws passed in 2011 and 2012).

229. See *Voter Identification Requirements*, *supra* note 109.

230. *Id.*

231. Jason Hancock, *Photo IDs for Voters Revived Amendment Is Heading to Ballot Next Year: Ballot Issue Will Include Early Voting Period, Too*, ST. LOUIS POST-DISPATCH, May 10, 2011, at A1.

232. See *Voter Identification Requirements*, *supra* note 109.

233. *Id.*

234. See Editorial, *The Republican Threat to Voting: New Voter ID Requirements Are Unnecessary and Will Suppress the Vote*, N.Y. TIMES, Apr. 27, 2011, at A26; Ari

legislation [to be] funneled into state capitols.”²³⁵ The first two photo ID laws were enacted in 2005 in Georgia and Indiana.²³⁶ Recent proposals, while varying slightly in order and language, substantively resemble ALEC’s model legislation and generally follow the same format.

1. *Severe Limitations on Acceptable Forms of ID:* A voter must present a valid photo ID at the polls in order to cast a vote. What constitutes a valid photo ID is usually defined in detail by state statutes, and to a large extent is limited to identification issued by a state or the federal government. Stricter versions require an unexpired ID. Of particular note among the currently enacted statutes are:

- South Carolina passed a law that accepts only photo IDs issued by either South Carolina or the United States.²³⁷ According to South Carolina’s own Election Commission, nearly 239,000 of the state’s 2.7 million *registered* voters (or almost 10%) do not have any form of state-issued photo ID.²³⁸ Because an individual must produce a birth certificate in order to obtain a state-issued ID, voters who never received or have lost or misplaced a birth certificate may simply be unable to obtain even the free state-issued ID.
- Tennessee, Texas, and South Carolina passed laws that do not accept any kind of student ID, *even those identification cards issued by the state itself*.²³⁹ This restriction creates a particularly unnecessary obstacle for many college students, especially those attending schools far from their hometown.
- A recent investigation conducted by the League of Young Voters, defendant-intervenors represented by LDF in a challenge to Texas’ proposed photo ID measure under section 5 of the Voting Rights Act, indicated that Texas’s photo ID law would have disfranchised hundreds of students at Texas’s historically Black colleges and universities, where many students do not have and cannot obtain a Texas state-issued

Berman, *The GOP War on Voting*, ROLLING STONE (Aug. 30, 2011, 7:40 PM), <http://www.rollingstone.com/politics/news/the-gop-war-on-voting-20110830>.

235. AMERICAN ASS’N FOR JUSTICE, ALEC: GHOSTWRITING THE LAW FOR CORPORATE AMERICA 3 (2010), *available at* http://www.justice.org/cps/rde/xbcjr/justice/ALEC_Report.pdf.

236. The Indiana requirement was challenged as an undue burden on the right to vote, but the United States Supreme Court upheld the law in a 2008 decision. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

237. Act of May 18, 2011, 2011 S.C. Acts 27, § 5 (to be codified at S.C. CODE ANN. § 7-13-710).

238. See *SC Voter ID Ads Overlook Absentee Option*, WJBF-TV (Oct. 26, 2011), <http://www.wltx.com/video/1242217732001/1/SC-Submits-Response-to-Voter-ID-Law->

239. *Voter Identification Requirements*, *supra* note 109.

identification card other than a student ID card.²⁴⁰ Many of these students do not have the underlying documentation necessary to obtain a state-issued photo ID, cannot afford to pay for those underlying documents, come from out-of-state and cannot locate those underlying documents, or simply lack transportation to obtain a state-issued photo ID.²⁴¹ Remarkably, although Texas will not accept a state-issued student ID for voting, it will accept a concealed handgun license.²⁴² In an important move, a three-judge federal court in Washington, D.C. recently rejected Texas' proposed photo ID under section 5 of the Voting Rights Act, recognizing that it would be harmful to minority voters.²⁴³

2. *Provisional Ballots Go Uncounted:* States try to assuage concerns over unfair photo ID laws by arguing that voters who lack such ID may cast a provisional ballot instead. This option, however, offers no consolation because voters must still present a valid photo ID to designated election officials within a prescribed time period—often within just a few days of the election—in order for their provisional ballots to be counted. This is no true alternative to photo ID requirements. Tennessee, for example, counts a provisional ballot cast by a voter without the requisite photo ID only if the voter provides an acceptable ID to the administrator of elections by the close of business on the second day after the election.²⁴⁴

3. *Photo IDs that Are Purportedly “Free”—But Actually Cost a Lot of Money:* In all of the currently enacted laws, states purport to provide for some form of free identification, available before Election Day. But the costs of obtaining a valid government-issued photo ID—even the purportedly “free” IDs—can be significant. Individuals applying for these IDs typically must present certain underlying documentation, often some combination of a birth certificate, passport, social security card, and the like—all of which cost money to obtain. Obtaining a birth certificate in Texas, for example, costs \$22,²⁴⁵ and the underlying costs are similar in other states.

240. See Expedited Complaint for Declaratory Judgment, *Texas v. Holder*, No. 1:12-cv-00128 (D.D.C. Mar. 12, 2012).

241. See *New State Voting Laws: Barriers to the Ballot?: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 177-78 (2011) (statement of Ryan P. Haygood, Director, Political Participation Group, NAACP Legal Defense & Educational Fund).

242. See TEX. ELEC. CODE ANN. § 63.0101 (2012); see also H.B. 2067, 2011 Leg., Reg. Sess. (Kan. 2011).

243. *Texas v. Holder*, No. 12-cv-00128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012) (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)) (finding that Texas failed to show that the law did “not lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise”).

244. See TENN. CODE ANN. § 2-7-112(e) (2011).

245. *Texas Vital Statistics – Birth Certificates*, TEX. DEP'T OF STATE HEALTH SERVS.,

Moreover, as discussed earlier, many elderly African Americans will be entirely incapable of producing the underlying documentation, because they never received such documentation. Even where missing documents can be replaced, the individual will have to pay to replace them.

Requiring voters to present valid photo identification will prevent many voters from casting ballots, including a disproportionate number of voters of color. An astonishing 25% of African Americans (over 6.2 million African-American voters) and 16% of Latinos (over 2.96 million Latino voters) do not possess valid photo ID.²⁴⁶ By comparison, only 8% of whites are without a current government-issued photo ID.²⁴⁷ Another study found that 19% of African Americans, but only 3% of whites, do not possess a driver's license.²⁴⁸ In addition, given their higher mobility rates, minorities are less likely to have photo ID showing a current address, even if they have an otherwise valid photo ID.

That voter photo ID requirements will keep a disproportionate number of eligible minority voters from casting a ballot is not merely a prediction. In the 2008 election, the Pew Center on the States reported that in Georgia, which has had a voter photo ID law in place since 2005, 30% of African Americans cited a lack of a photo ID as an important reason for voting absentee (which does not require a photo ID), as compared with 19% of white voters.²⁴⁹ An Associated Press analysis in South Carolina showed that the proposed voter ID law there would similarly disproportionately affect African American precincts.²⁵⁰

Moreover, due to discriminatory enforcement, these laws place disproportionate burdens on all minority voters, not just those who lack a photo ID. Nationally, 70% of all African American voters and 65% of all Latino voters were asked to show photo identification at the polls during the 2008 election, as opposed to only 51% of white voters.²⁵¹ As a result, eligible African American voters were forced to cast provisional ballots at a rate four times higher than were white voters. As noted above, provisional ballots are often not counted as

http://www.dshs.state.tx.us/vs/reqproc/certified_copy.shtm (last updated July 26, 2012).

246. See JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, FAST FACTS ON THE IMPACT OF PHOTO ID: THE DATA 2 (2008), available at http://www.brennancenter.org/page/-/Democracy/_%20ID-related%20stats.pdf.

247. *Id.*

248. See Charles Stewart III, *What More Can We Learn from SC?*, ELECTION UPDATES (Aug. 30, 2011, 10:32 AM), <http://electionupdates.caltech.edu/?p=4185> (referencing CALTECH/MIT VOTING TECHNOLOGY PROJECT, *supra* note 194).

249. Bullock, III, et al., *supra* note 212, at 7.

250. See Jim Davenport, *Analysis Finds Black Areas Hit Most by Voter ID Law*, AUGUSTA CHRON., Oct. 19, 2011, at B5.

251. See CALTECH/MIT VOTING TECHNOLOGY PROJECT, *supra* note 193, at 42-44.

frequently as regular ballots. The racially discriminatory effects of photo ID laws have not been lost on some of the proponents of such laws. In October 2011, political strategists in South Carolina publicly boasted that suppression of the African American vote was “why we need [v]oter ID [laws] in [South Carolina].”²⁵²

Proponents of photo ID requirements argue that the burden of producing such ID is minimal, and cite the fact that identification is required in many common transactions in modern life—for example, purchasing alcohol or certain over-the-counter medicines.²⁵³ These comparisons are inapposite for many reasons. Unlike buying Sudafed, or even boarding a plane, the right to vote is a constitutional right, and the most fundamental political right in a democracy. The exercise of that right should never be conditioned on a person’s wealth.

4. *The Myth that Photo ID is Needed to Prevent Voter Fraud:* Proponents of photo ID laws argue that such measures are necessary to prevent in-person voter fraud.²⁵⁴ But if voter fraud were the main reason that states have passed legislation requiring photo ID, then those states would allow Election Day registration, since the ID required to vote would be the same ID required to register on any other day. Instead, the risk of voter fraud appears to be little more than an ex post facto rationalization for discriminatory laws.

Instances of in-person voter fraud are extraordinarily rare. In Ohio, for example, a statewide survey of votes cast in 2002 and 2004 found that out of more than 9,000,000 voters, there were *four instances* of voter fraud.²⁵⁵ In fact, there are far more reported UFO sightings than reports of impersonation at the polls, with a grand total of nine suspected fraudulent votes that could have been prevented by restrictive photo ID laws since 2000—a period in which over 400 million votes were cast in general elections alone.²⁵⁶ With

252. Joan McCarter, *South Carolina GOP Operative Admits Suppressing Black Vote Is Goal of Voter ID Law*, DAILY KOS (Oct. 19, 2011, 11:27 AM), <http://www.dailykos.com/story/2011/10/19/1028056/-South-Carolina-GOP-operative-admits-suppressing-black-vote-is-goal-of-voter-ID-law>.

253. See, e.g., Lizette Alvarez, *G.O.P. Legislators Move to Tighten Rules on Voting*, N.Y. TIMES, May 29, 2011, at A1; Kris W. Kobach, Op-Ed., *The Case for Voter ID*, WALL ST. J., May 23, 2011, at A21; Fredreka Schouten, *State Voter ID Laws on the Rise; Opponents Say Turnout will Suffer*, USA TODAY, June 20, 2011, at 1A; see also Bousquet, *supra* note 76 (indicating Florida Governor Rick Scott stated that he “want[ed] to make sure that there’s no fraud involved in elections” when he signed election bill).

254. See, e.g., Alvarez, *supra* note 253; Kobach, *supra* note 253; Schouten, *supra* note 253; see also Bousquet, *supra* note 76.

255. COAL. ON HOMELESSNESS & HOUS. IN OHIO AND THE LEAGUE OF WOMEN VOTERS OF OHIO, A JOINT REPORT ON ELECTION REFORM ACTIVITIES IN OHIO 1 (2005) [hereinafter COAL. ON HOMELESSNESS & HOUS. IN OHIO], available at http://www.cohio.org/pdf/COH_Election_Reform_Report.pdf.

256. See Justin Levitt, *The Real Victims of Election ID Laws*, POLITICO (June 14,

in-person electoral fraud occurring at a rate of 0.000002%,²⁵⁷ an individual is more likely to be struck by lightning than to impersonate another voter at the polls.²⁵⁸

This absence of voter impersonation makes sense. Not only is voter fraud an extremely inefficient way to influence the outcome of an election, but federal law already provides a hefty deterrent: for each act of in-person impersonation fraud in a federal election, the perpetrator risks up to five years in prison and a \$10,000 fine, in addition to any penalties imposed under state law.²⁵⁹ Noncitizens face possible deportation.²⁶⁰

When it comes to the false rationale that photo ID measures also combat fraudulent noncitizen voting, the myth is even more clear: there is no evidence whatsoever that any noncitizen has ever risked the considerable criminal sanctions associated with fraudulent voting, nor would a noncitizen risk the even greater sanction of being deported.²⁶¹ It makes no sense that a noncitizen—or the particular target of the right wing, an undocumented immigrant—would try to purposely cast a fraudulent vote. Indeed, even in the rare recorded instances in which noncitizens have knowingly registered or voted, investigations have shown that these individuals did so only because they mistakenly believed that they were eligible to register or vote.²⁶²

ALEC founder Paul Weyrich made the point of voter suppression tactics clear when he stated that “our leverage in the elections quite candidly goes up as the voting populace goes down.”²⁶³ The attack on voting rights is not about protecting our democratic process; it is about control and manipulation of the electorate by any means, no matter how discriminatory.

B. Deceptive Practices

Some of the most clearly intentional and discriminatory block the vote efforts are deceptive practices. Frequently targeted at minorities and in minority neighborhoods, deceptive practices are the intentional dissemination of false or misleading information about the voting process—with the intent to prevent an eligible voter from

2011, 9:29 PM), <http://www.politico.com/news/stories/0611/56939.html>.

257. *Id.*

258. LEVITT, *supra* note 150, at 3, 4, 6; COAL. ON HOMELESSNESS & HOUS. IN OHIO, *supra* note 255, at 1.

259. *See* 42 U.S.C. § 1973i(c) (2006).

260. *See* 8 U.S.C. § 1227(a)(6)(A) (2006).

261. *See* MEXICAN AM. LEGAL DEF. & EDUC. FUND, THE MYTH OF WIDESPREAD NON-CITIZEN VOTING 7-8 (2008), available at http://maldef.org/truthinimmigration/Rebuttal_to_Heritage_Foundation.pdf; *see also* LEVITT, *supra* note 150, at 18-19.

262. LEVITT, *supra* note 149, at 18.

263. Berman, *supra* note 234.

casting a ballot.²⁶⁴ Although the use of these tactics is not a new phenomenon, experience from the 2010 elections demonstrates that these devices will continue, and may even increase, through the exploitation of the particular vulnerabilities created by the economic downturn.

Historically, deceptive practices have taken the form of fliers with misinformation distributed in a particular neighborhood, but recent efforts have made use of misleading robocalls and innovative tactics employing email, the Internet, and other new media.²⁶⁵ For example, members of the 2010 campaign to reelect the former Maryland governor have been indicted for an anonymous robocall targeted at African American voters. At the direction of Julius Henson, a political operative employed by the campaign to reelect Governor Robert L. Ehrlich, a Republican, robocalls were made on election night to mostly African American neighborhoods against his Democrat opponent, Martin O'Malley—the candidate favored by African Americans.²⁶⁶ The robocall, which went out to more than 110,000 voters on November 2, 2010, left the following anonymous message:

Hello. I'm calling to let everyone know that Governor O'Malley and President Obama have been successful. Our goals have been met. The polls were correct and we took it back. We're okay. Relax. Everything is fine. The only thing left is to watch it on TV tonight. Congratulations and thank you.²⁶⁷

As a result of an investigation into these robocalls, the Office of the Maryland State Prosecutor has indicted both Julius Henson and one of the governor's de facto campaign managers on multiple counts of state election law violations, including "attempt[ing] to influence a voter's decision whether to go to the polls to cast a vote through the use of . . . fraud."²⁶⁸ The indictment describes a document outlining an election strategy for the Ehrlich campaign "designed to promote confusion, emotionalism, and frustration among African American Democrats, focused in precincts where high concentrations of AA vote."²⁶⁹ The document provided a "Targeting Methodology" that outlined a statewide effort whereby the African American vote,

264. See Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343, 345 (2010) ("Deceptive practices tend to target racial and language minorities.").

265. *Id.* at 346-50.

266. *Maryland v. Universal Elections, Inc.*, No. CCB-10-3183, 2012 WL 1940543, at *1-2 (D. Md. May 29, 2012).

267. *Id.* at *2.

268. Press Release, Office of the State Prosecutor, State of Md., Paul E. Schurick, Senior Official with Ehrlich for Md. Comm. and Julius Henson, Owner of Politics Today, Inc., Charged Criminally (June 16, 2011) [hereinafter *Indictment Press Release*] (on file with author); see also John Wagner, *Ehrlich Aide Faces Robo-Call Charges*, WASH. POST, June 17, 2011, at A01.

269. *Indictment Press Release*, *supra* note 268, at 3.

concentrated in 472 precincts, was targeted for voter suppression efforts.²⁷⁰ The document even expressly stated that “the first and most desired outcome . . . is voter suppression.”²⁷¹

VIII. THE ASSAULT ON THE VOTING RIGHTS ACT

In 2006, Congress reauthorized key provisions of the Voting Rights Act (“VRA”) based on substantial evidence of continuing voter discrimination and its prediction that additional discrimination would occur in the future.²⁷² The recent block the vote efforts described in this Article reflect the discrimination that Congress feared was still possible. Nevertheless, we are facing aggressive legal challenges to the VRA based on the notion that its protections are no longer needed. To the contrary, the VRA is the very tool needed to protect voters in many places from these block the vote efforts. In 1965, Congress enacted the VRA to “combat [the] widespread and persistent discrimination in voting.”²⁷³ The VRA not only gives meaning to the right to vote for all citizens, it also protects this right by providing tangible legal tools to proactively challenge discriminatory voting laws and practices.

The VRA’s core defense in this ongoing struggle to protect voting rights is section 5.²⁷⁴ Section 5 applies to certain states and subjurisdictions with the most egregious histories and ongoing records of voting discrimination.²⁷⁵ All or part of sixteen states are covered by section 5.²⁷⁶ These jurisdictions, known as “covered jurisdictions,” must submit any proposed changes to their voting and election laws to the federal government for “preclearance” (i.e., review) either by the Department of Justice or by a three-judge panel of the federal district court in Washington, D.C., before that proposed change can be implemented.²⁷⁷ A proposed voting change will be “precleared” only if the covered jurisdiction demonstrates (1) that the

270. *Id.* at 3-4.

271. *Id.* at 3 (alterations in original).

272. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) (amending 42 U.S.C. §§ 1971, 1973 (1982)).

273. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

274. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 438 (1965) (codified as amended at 42 U.S.C. § 1973b (2006)).

275. *See id.*

276. *See Section 5 Covered Jurisdictions*, U.S. DEPT OF JUST., http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Sept. 27, 2011). Virginia is listed by the Department of Justice’s Civil Rights Division as a “state covered as a whole.” *Id.* It must be noted, however, that several political subdivisions have “bailed out” from section 5 coverage pursuant to section 4 of the VRA and are no longer covered. *Section 4 of the Voting Rights Act*, U.S. DEPT OF JUSTICE, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited Sept. 27, 2012).

277. *About Section 5 of the Voting Rights Act*, U.S. DEPT OF JUST., http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Sept. 23, 2012).

change was not adopted with a discriminatory purpose, and (2) that it will not worsen the position of minority voters in that jurisdiction.²⁷⁸ Section 5, along with the other tools provided in the VRA, has proven extremely effective in blocking and deterring racially discriminatory voting practices and in protecting the gains in access to the ballot that have been achieved. In fact, a number of the restrictive measures discussed in this article will not go into effect—despite being passed and signed into law—unless they pass the preclearance process.

Notwithstanding the vital function it plays in strengthening our democracy, the VRA—and section 5 in particular—is under heavy attack with constitutional challenges currently before the federal courts. Indeed, there have been more constitutional challenges to section 5 since 2010 than there were in the previous forty-five years of the Act's existence. The attacks include:

- *Shelby County v. Holder*:²⁷⁹ Shelby County, Alabama, filed a constitutional challenge to section 5 of the Voting Rights Act. The United States Court of Appeals for the District of Columbia Circuit recently rejected that challenge, finding that section 5 remains necessary in the modern era to combat modern day discrimination.²⁸⁰ Shelby County has appealed the decision to the United States Supreme Court.²⁸¹
- *Florida v. United States*:²⁸² As an alternative to its preclearance request before a three-judge panel for changes to its voting requirements described above, Florida sought a declaratory judgment that section 5 is unconstitutional.
- *Texas v. Holder*:²⁸³ As an alternative to its preclearance request before a three-judge panel to approve its proposed photo ID measure, Texas sought a declaratory judgment that section 5 is unconstitutional. That issue is pending before a three-judge federal district court in Washington, D.C.
- *Arizona v. Holder*:²⁸⁴ On August 30, 2011, Arizona filed a similar challenge to the preclearance provisions of the VRA.

278. 28 C.F.R. § 51.10 (2009).

279. *Shelby Cnty. v. Holder*, 811 F. Supp.2d 424 (D.D.C. 2011), *aff'd* 679 F.3d 848 (D.C. Cir. 2012).

280. *Shelby Cnty. v. Holder*, 679 F.3d 848, 873 (D.C. Cir. 2012).

281. Petition for Writ of Certiorari, *Shelby Cnty. v. Holder*, No. 12-96 (U.S. July 20, 2012).

282. Complaint, *Florida v. United States*, No. 1:11-CV-01428 (D.D.C. Aug. 1, 2011); *see also* First Amended Complaint, *Florida v. United States*, No. 1:11-CV-01428 (D.D.C. Oct. 11, 2011).

283. Expedited Complaint for Declaratory Judgment, *Texas v. Holder*, No. 1:12-cv-00128 (D.D.C. Mar. 12, 2012).

284. Complaint for Declaratory Judgment and Injunctive Relief, *Arizona v. Holder*, 839 F. Supp. 2d 36 (D.D.C. 2012) (No. 11CV01559).

Arizona later withdrew its challenge.²⁸⁵

- *Georgia v. Holder*:²⁸⁶ Like Florida, Georgia sought a declaration before a three-judge panel that section 5 of the VRA was unconstitutional as an alternative to preclearance for a set of redistricting plans. Georgia's redistricting plans were ultimately approved by the Department of Justice.²⁸⁷
- *LaRoque v. Holder*:²⁸⁸ In 2010, several prospective candidates and voters from Kinston, North Carolina, filed a suit challenging the constitutionality of section 5 in response to the Attorney General's denial of preclearance for a voting change that would have replaced partisan with nonpartisan elections. The Department of Justice ultimately precleared the voting change at issue, thus mooted the constitutional challenge.²⁸⁹ The plaintiffs nevertheless appealed to the United States Supreme Court.

IX. ENCOURAGE THE VOTE: THE CALL TO ACTION

The historic participation by communities of color in the 2008 elections provides a glimpse into the possibility of sustained and meaningful minority voting strength and the promise of political participation that reflects the true and growing diversity within our country. These signs of progress toward a more robust exercise of the right to vote are remarkable and provide reason for celebration.

Yet the recent surge of restrictive and exclusionary voting initiatives is poised to derail the complete realization of this promise. The efforts represent yet another chapter in the struggle to expand American voting rights. Advocates, voters, and communities cannot stand on the sidelines and accept this contraction of voting rights. Instead, as advocates we must push back, employing all available tools and advocacy techniques, from litigation and political action to grassroots organizing.

Here is what we must do:

1. *Inform Yourself.* Become an expert by learning about

285. Stipulation of Dismissal Without Prejudice, *Arizona v. Holder*, No. 1:11-CV-01559 (D.C. Cir. Apr. 10, 2012).

286. Expedited Complaint for Declaratory Judgment, *Georgia v. Holder*, No. 1:11-cv-01788 (D.D.C. Oct. 6, 2011).

287. See Press Release, Samuel Owens, Attorney Gen. of Ga., Justice Approves Georgia's Redistricting Plans (Dec. 23, 2011), available at http://law.ga.gov/00/press/detail/0,2668,87670814_167294941_180098889,00.html; see also Kristina Torres, *Feds OK Georgia Voting Lines, GOP Advantage*, ATLANTA JOURNAL-CONSTITUTION (Dec. 28, 2011, 6:53 AM), <http://www.ajc.com/news/news/local/feds-ok-georgia-voting-lines-gop-advantage/nQPnj/>.

288. *LaRoque v. Holder*, 650 F.3d 777 (D.C. Cir. 2011) (involving an election referendum in Kinston, North Carolina).

289. *LaRoque v. Holder*, 679 F.3d 905, 907 (D.C. Cir. 2012) (holding that Attorney General's withdrawing of objection rendered case moot).

restrictive voting initiatives that have been enacted or are under consideration in our states, and about the efforts that are underway to challenge those initiatives. Also, find out what initiatives have not been enacted so that you may recognize misinformation about requirements in your state. As you learn more about voting in your community, keep in mind the essential questions listed below, which all voters should equip themselves to answer. If you are not sure of the answers, then find out from your local board of elections well in advance of Election Day. The Board of Elections in your city or county, and your Secretary of State, must have the answers to each of these important questions:

1. Am I registered to vote?
 - a. If not, where and when can I register to vote, and what must I bring to register?
 - b. If so, does my voter registration file include my current address? If not, how can I update my address?
2. When does the voter registration period close for the next election cycle?
3. After I register to vote, how do I verify my registration?
4. If I was convicted of a criminal offense, did I lose my voting rights? If so, how do I apply to have them restored?
5. If I am currently incarcerated awaiting disposition of a criminal charge, am I still eligible to register to vote? If yes, how do I apply for an absentee ballot?
6. Am I eligible for an absentee ballot? If so, how and when do I request one? When can I cast my absentee vote?
7. Does my state require government-issued photo identification or proof of citizenship to register to vote or to vote?
 - a. If so, which forms of identification are acceptable?
 - b. If the form of identification I have is not acceptable, where can I obtain an acceptable one?
 - c. What documents do I need to get the required identification?
 - d. Is it free? If not, can I apply for a fee waiver? Note that many offices wait for you to ask for a fee waiver and will not offer it themselves, even though you may be entitled to one.
8. Does my state offer early voting? If so, what is the early voting period, and where do I cast my early vote?
9. If I am voting in person on Election Day, where is my polling place?
10. What if I have moved since I last voted?

2. *Empower Your Community.* Tell others in your community about the discriminatory aims of these laws. Let them know how imperative access to the ballot is as a tool to effect change in your community and, ultimately, in your city, in your state, and in our

country. Provide your family, friends, neighbors, and community with the information that they need to ensure that their votes are counted and their voices are heard. Walk them through the questions above, and help them find answers to each of them.

3. *Each One, Bring One to the Polls.* Do not go to the polls alone! Commit to bringing at least one first-time voter, or a voter who would otherwise have difficulty voting, with you. Start early because assisting a new or lapsed voter may require you to assist and encourage the voter to register or confirm their registration well in advance of Election Day.

Additionally, if you live in a state with a new voter identification law, you may need to take steps to ensure that your voting friend is prepared to vote.

4. *Volunteer.* We must push back against block the vote efforts by volunteering to, among other things, serve as a Poll Monitor who helps guide affected voters through the new requirements for registering or voting. You may also volunteer to provide transportation or other support to help voters meet the new requirements and get to the polls.

5. *Take Action.* Contact your local, state, and federal representatives, and the Department of Justice if you live in a jurisdiction covered by section 5 of the Voting Rights Act, and let them know that block the vote laws are antidemocratic, discriminatory, and should be relegated to history books, along with Jim Crow laws, literacy tests, and poll taxes. Urge your elected officials to support important, democracy-expanding policies.

6. *Spread the Word about the National Voter Registration Act.* The National Voter Registration Act (“NVRA”) is a nationwide federal law passed in 1993 to bring voter registration closer to the people. The NVRA requires states to offer voter registration services at all offices that provide public assistance or that “provid[e] services to persons with disabilities.”²⁹⁰ Thus, some state agencies, such as departments of motor vehicles, welfare offices, and certain other agencies, offer voter registration materials to those who use the services at those offices. You can let your family, friends, and neighbors know about this voter registration facilitation requirement, and let NAACP LDF know if you utilize services at one of the NVRA-designated offices and you are not offered an opportunity to vote.

X. CONCLUSION

Consistent with its history, democracy in America will always be contested, as historian Alexander Keyssar has observed.²⁹¹ It is

290. 42 U.S.C.A. § 1973gg-5(a)(2) (2006).

291. See KEYSSAR, *supra* note 8, at xxiii.

characterized by periods of progress and retrenchment. As Keyssar notes, most of the American expansions in voting have occurred following periods of war when the reality of scores of returning service members has stimulated a conversation about the deeper ideals to which we are committed as a nation.²⁹² Thus, the current voter suppression efforts are occurring precisely at a time when history tells us that we should be extending the vote. With our steadfast commitment we can resist the antidemocratic efforts and extend the vote to more Americans. Our “more perfect Union” depends upon it.²⁹³

292. *Id.* at xxiv.

293. U.S. CONST. pmbl.