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A VOTE DELAYED IS A VOTE DENIED: A PREEMPTIVE APPROACH TO ELIMINATING ELECTION ADMINISTRATION LEGISLATION THAT DISENFRANCHISES UNWANTED VOTERS

Gilda R. Daniels*

[E]lectorates are much more the product of political forces than many have appreciated Within limits, they can be constructed to a size and composition deemed desirable by those in power.¹

INTRODUCTION

The Supreme Court case *Crawford v. Marion County Election Board*² demonstrated the need for more checks in our unbalanced electoral system. In *Crawford*, the Supreme Court found that the Indiana voter identification law, one of the most restrictive in the country, did not impinge on voters' constitutional rights.³ Although the law has been deemed constitutional, why, as Justice Ginsburg asked during the *Crawford* oral argument, would elected officials pass legislation that would make it harder for eligible citizens to vote, particularly those challenged with economic and disabling circumstances that make it difficult to participate?⁴ The answer lies within the legislature's ability to submit legislation without examining the costs to the constituents.

* Assistant Professor, University of Baltimore School of Law. I would like to thank the faculty at the University of Baltimore School of Law, Professor Daniel P. Tokaji, and James Chin for their helpful comments when I presented this article at the Mid-Atlantic People of Color Convention (MAPOC) at the University of Maryland School of Law. I would also like to thank the American Constitution Society at Vanderbilt University School of Law, which allowed me to share an earlier version of this article entitled *Can You See Me Now: How Voter ID Laws Disenfranchise Eligible Citizens*.

¹ Stanley Kelley, Jr., Richard Ayres & William G. Bowen, *Registration and Voting: Putting First Things First*, 61 AM. POL. SCI. REV. 359, 375 (1967).

² 128 S. Ct. 1610 (2008).

³ *Id.* The Indiana voter ID case is discussed in more detail in Part II.B.1 of this Article.

⁴ Transcript of Oral Argument at 52-53, *Crawford*, 128 S. Ct. 1610 (Nos. 07-21, 07-25) (JUSTICE GINSBURG: I'd like you to concentrate on the one group of people where I think you can make a facial challenge and may not [sic] all speculating, and that's the indigent people

In an effort to determine voter eligibility and access to the voting booth, our democratic system has allowed political forces to develop laws that would meet its aims of either granting or denying access to the franchise. Caught in this web of regulations, practices, and procedures is the “unwanted voter”—the disabled, elderly, poor, or minority voter. New millennium models of exclusion, such as overly restrictive identification requirements, unwarranted voter purges, restrictive voter registration rules, and increasing costs for underlying documents to support citizenship and eligibility for voting, are creating a caste system in the electoral process. The practice of using various methods of exclusion is not limited to one political party. Historically, Southern Democrats and, more contemporaneously, Republicans, are guilty of manipulating the political process to disenfranchise unwanted voters.⁵ Accordingly, the common strand that connects the political forces, regardless of party affiliation, is the desire to extinguish the voting power of the poor, minority, or elderly voter.

The unwanted voter’s equal participation in elections could change outcomes far beyond the expectations of the political elite. As a result, the political elites have historically developed mechanisms, such as felon purges and partisan gerrymanders, to thwart, and in some instances deny, the unwanted voter’s access to the franchise. African-American voters were denied voting rights after the passage of the Fifteenth Amendment, when Southern segregationists used restrictive voting tactics to halt the progress of Reconstruction.⁶ However, this is not simply a matter of history. Today,

who can’t get—don’t have the photo ID. They don’t drive, and they can’t get up the money to get the birth certificate or whatever else. They do have a burden that, it seems to me, the State could easily eliminate if they want those people to vote, and that is to say okay, do the affidavit, the whole thing in your local precinct; we’ll make it easy for you and not send you away, send you off to the county courthouse to get it validated. Why—why, if you really wanted people to vote, wouldn’t you do it that way?).

⁵ Dr. Martin Luther King, Jr. cautioned against establishing an affinity for one political group over the other in the cause for civil rights in his *Give Us the Ballot* speech. Dr. King stated:

This dearth of positive leadership from the federal government is not confined to one particular political party. Both political parties have betrayed the cause of justice. [Oh yes] The Democrats have betrayed it by capitulating to the prejudices and undemocratic practices of the southern Dixiecrats. The Republicans have betrayed it by capitulating to the blatant hypocrisy of right wing, reactionary northerners. These men so often have a high blood pressure of words and an anemia of deeds. [laughter]

Dr. Martin Luther King, Jr., *Give Us the Ballot*, Address at the Prayer Pilgrimage for Freedom (May 17, 1957) (transcript available at http://www.stanford.edu/group/King/publications/speeches/Give_us_the_ballot.html).

⁶ See discussion and references *infra* Section I.A.

unwanted voters face restrictive voter identification (“voter ID”) laws, as well as partisan voter purges, felon disenfranchisement, and other laws passed in the name of election reform.⁷ Nevertheless, nothing prevents a legislator from submitting and passing into law measures that could disenfranchise eligible voters.

In 2005, for instance, Georgia passed a law that limited the acceptable forms of voter ID to select government-issued forms of photo identification, such as a driver’s license, passport, or military ID. The sponsor of the voter ID legislation, Georgia Representative Sue Burmeister of Augusta, stated that after the September 11 terrorist attacks and reading John Fund’s *Stealing Elections*,⁸ she was concerned about the ease with which voter fraud occurred.⁹ When asked if she had considered the impact that the bill would have on minority voters, she responded, “[I]f there are fewer black voters because of this bill, it will only be because there is less opportunity for fraud.”¹⁰ She further explained that black voters in her precinct only voted when paid.¹¹ This starkly discriminatory remark is rare, but it illustrates the low anecdotal threshold permitted and required for the introduction of legislation affecting the fundamental right to vote.

This Article does not argue against methods that ensure accurate voting. Instead, it argues that when legislatively drafted and implemented in such a manner that eligible citizens are barred from the voting booths, these “conniving methods” disenfranchise America’s citizens in ways similar to the Bull Connor¹² methods of the past, in which African-Americans were prohibited from registering and casting ballots, thereby thwarting African-American political participation. Accordingly, this Article recommends protections for the disenfranchised voter to safeguard the fundamental right to vote. It proposes that jurisdictions provide a Voter Impact Statement (VIS) to

⁷ This Article primarily discusses voter purges and voter ID. Future articles will address other means of disenfranchising eligible voters, such as voter caging, voter challenges, provisional ballots, and voter intimidation.

⁸ JOHN FUND, *STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY* (2004).

⁹ ROBERT BERMAN ET AL., DEPUTY CHIEF OF THE VOTING SECTION, U.S. DEP’T OF JUSTICE, SECTION 5 RECOMMENDATION MEMORANDUM 6 (Aug. 25, 2005), available at <http://www.votingrights.org/news/downloads/Section5RecommendationMemorandum.pdf>.

¹⁰ *Id.*

¹¹ *Id.*

¹² Theophilus Eugene “Bull” Connor was a police officer and Public Safety Commissioner in Birmingham, Alabama, during the civil rights movement. His antics during that time made him a symbol of racial bigotry. See WILLIAM A. NUNNELLY, *BULL CONNOR* (1991).

the Election Assistance Commission (EAC) developed in the Help America Vote Act (HAVA),¹³ certifying that proposed major election administration legislation does not disparately impact America's unwanted voters. The use of impact statements ensures that legislators do not rely on conjecture and anecdotes, but rather involve the community in a discussion of how best to frame a fair electoral process. This approach would ensure that legislatures seriously consider the implications of election administration actions, contemplate alternatives, and assess the potential impact on the electorate. It would also require that the state engage in community outreach to make the process more transparent. The Voter Impact Statement could limit litigation and its exorbitant costs, boost voter confidence, and enhance legislative accountability.

This proposal may be controversial, particularly since HAVA's Election Assistance Commission (EAC)¹⁴ and the Department of Justice¹⁵ have come

¹³ In 2002, Congress passed the Help America Vote Act (HAVA) to provide funding to replace outdated voting machines and created the Election Assistance Commission to serve as a "clearinghouse" for election administration matters. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666. HAVA is codified at 42 U.S.C. §§ 15301-15545 (Supp. III 2003). For a detailed description of HAVA's legislative history, see Leonard Shambon & Keith Abouchar, *Trapped by Precincts? The Help America Vote Act's Provisional Ballots and the Problem of Precincts*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 133, 160-65 (2007).

¹⁴ See Tova Andrea Wang, *A Rigged Report on U.S. Voting*, WASH. POST, Aug. 30, 2007, at A21. For Tova Andrea Wang's comments on the Inspector General's report that found no wrongdoing in the premature release of the EAC Voter Fraud report, see http://electionlawblog.org/archives/2008_03.html (Mar. 14, 2008, 09:00 EST).

¹⁵ The Department's preclearance of the Georgia voter identification legislation set off what has been called a "firestorm" of activity in the media. Because Georgia is a state covered by Section 5 of the Voting Rights Act, the subsequent preclearance of the voter ID legislation only fueled the flames. The ripple effect of the Department's decision has also called into question its decisions in other areas. See, e.g., Carlos Campos, *Feds Investigate Photo ID Letters Sent to Ga. Voters*, ATLANTA J. CONST., Nov. 4, 2006, at 1A; Carlos Campos, *Justice Seeks Info on Struck-Down Photo ID Law*, COX NEWS SERVICE, Nov. 3, 2006; Carlos Campos & Nancy Badertscher, *U.S. OKs Latest ID Voter Law; Opponents Vow They Will Continue to Fight*, ATLANTA J. CONST., Apr. 22, 2006, at 1E; Carlos Campos, *Voter ID Ruling Bias Charged*, COX NEWS SERVICE, Apr. 10, 2006; Dan Eggen, *Criticism of Voting Law Was Overruled: Justice Dept. Backed Georgia Measure Despite Fears of Discrimination*, WASH. POST, Nov. 17, 2005, at A01; *Lawyers' Committee Criticizes DOJ Decision to Preclear Discriminatory Georgia Voter ID Law*, U.S. NEWSWIRE, Aug. 31, 2005; *Obama Questions Justice Department Ruling to Pre-Approve Restrictive Georgia Voter ID Law*, STATES NEWS SERVICE, Nov. 30, 2005; Dan Seligson, *Voter ID Rules a Hot Button Issue*, CAMPAIGNS & ELECTIONS, Oct.-Nov. 2005, at 33; Jim Wooten, *Slings, Arrows Fail to Derail Voter ID Law*, ATLANTA J. CONST., Aug. 30, 2005, at 13A.

under fire for allegedly using their oversight authority for political purposes. Currently, the EAC serves as a “clearinghouse” for election administration issues and requires jurisdictions to report to it in order to receive funding for a myriad of election-related projects. It is logical to take the EAC’s authority one step further and require a jurisdiction passing voting legislation to conduct an impact study and ensure that the legislation does not disparately impact America’s unwanted voters or place them in a worse position.¹⁶ This preemptive approach presumes that political forces will work to benefit themselves and burden the unwanted voter when politically expedient.¹⁷

Part I of this Article provides a historical perspective of major voting rights legislation and explains the concept of the “unwanted voter.” Part II discusses new millennium disenfranchising methods, such as voter ID laws and voter purges, and describes how the politically empowered can manipulate these seemingly neutral laws and use them to disenfranchise a distinct part of the electorate. Finally, Part III describes the legal framework for this Article’s proposal and particularly discusses Congress’s authority to regulate federal elections. Part III also describes a preemptive approach to election administration changes that borrows concepts from the Section 5 review process that currently applies to voting changes in certain parts of the country as well as the use of Environmental Impact Statements under the National Environmental Policy Act.¹⁸

I. A HISTORICAL PERSPECTIVE: AMERICA’S UNWANTED VOTERS

[A]ll types of conniving methods are still being used to prevent Negroes from becoming registered voters. The denial of this sacred right is a tragic betrayal

¹⁶ See *Beer v. United States*, 425 U.S. 130 (1976) (establishing the retrogressive standard for Section 5 enforcement); see also *infra* Part III.B.1 (discussing Congress’s authority to regulate election administration).

¹⁷ See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 403 (2006) (discussing the nexus between racial and partisan gerrymandering to the exclusion of minority voters); see also Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 760 (2007) (“If the justification for incumbency protection is to keep the constituency intact so the officeholder is accountable for promises made or broken, then the protection seems to accord with concern for the voters. If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters.”).

¹⁸ National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (2000).

of the highest mandates of our democratic traditions and it is democracy turned upside down.¹⁹

In 1957, Dr. Martin Luther King, Jr. gave a speech illuminating the need for free and fair access to the ballot box in light of the violent opposition to the Supreme Court's *Brown v. Board of Education*²⁰ decision. In the speech, he advocated that nondiscriminatory access to the ballot would alleviate the need "to worry the federal government about our basic rights."²¹ Fifty years later, the struggle continues. New millennium methods such as restrictive voter identification laws and voter purges have the impact of hindering minorities, the elderly, the disabled, and others from freely participating in the democratic process. Checks on the legislative process are needed to ensure that eligible citizens are not disenfranchised.

A. *The Impotency of the Fifteenth Amendment*

Disenfranchisement stretches back to the birth of our nation. Early in our nation's history, the opportunity to participate in the electoral process was granted primarily to white male property owners.²² After the Civil War, in 1870, Congress passed the Fifteenth Amendment, which granted the right to vote, regardless of "race, color, or previous condition of servitude."²³ During Reconstruction, African-American electoral success was unprecedented.²⁴ This

¹⁹ King, *supra* note 5.

²⁰ 347 U.S. 483 (1954).

²¹ *Id.* In 1957, civil rights leaders, entertainers, and others organized the "Pilgrimage" to encourage federal officials to realize the promise of the then-three-year-old *Brown v. Board of Education* Supreme Court decision. More than twenty thousand people listened to three hours of speeches. Dr. King spoke last and focused his comments primarily on the need to ensure voting rights to the disenfranchised Southern Negro. King, *supra* note 5.

²² ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 5 (2000) ("The linchpin of both colonial and British suffrage regulations was the restriction of voting to adult men who owned property.").

²³ The Fifteenth Amendment of the United States Constitution states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, §§ 1-2.

²⁴ Fifteen African-Americans were elected to the United States House of Representatives and two to the United States Senate from previously confederate states. States with majority African-American populations were underrepresented in elected office. For example, between 1870 and 1876, only Mississippi elected two African-American United States senators and only one member of the House of Representatives; most Southern states, despite their high African-American populations, only elected one African-American to federal office. South Carolina was

success, however, was short-lived.²⁵ Towards the end of the century, Southern whites, who were outnumbered by former slaves, realized that to allow African-Americans to vote would allow for the full-scale integration of former slaves into society and could eliminate the ability of whites to control African-Americans. This would allow African-Americans to dictate political outcomes, which made segregationists uncomfortable and led to the enactment of various disenfranchising laws.²⁶ Segregationists began to “turn back the clock on the broadly progressive franchise provisions that had been etched into state constitutions.”²⁷ The South enacted measures, such as poll taxes, literacy tests, and all-white primaries, that would limit the effect of the new and populous electorate.²⁸

In 1897, the last African-American Reconstruction-era congressman from the South was elected, and he left Congress in 1901.²⁹ At the dawn of the twentieth century, segregationists employed violent measures to ensure white political supremacy. In 1900, South Carolina Senator “Pitchfork” Ben Tillman,

the lone exception, with its African-American representatives in the majority. See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877*, at 352 (Henry Steele Commager & Richard B. Morris eds., 1988); see also J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* (1999); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974).

²⁵ President Rutherford B. Hayes’s decision to remove the federal troops from the South caused the steady and sure decline of black electoral success and violence in the Southern states.

²⁶ Opponents of black franchisement instituted constitutional conventions in the South to develop laws that would prevent former slaves from freely participating in the political process. See KOUSSER, *supra* note 24 (providing a history of the Southern constitutional conventions). Convention participants openly argued for the discriminatory removal of African-American voters. At the Virginia convention, one delegate proclaimed, “Discrimination! . . . [T]hat, exactly, is what this Convention was elected for . . . with a view to the elimination of every negro voter . . .” See 2 Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia 3076 (1906).

²⁷ Keyssar explains that many of these measures “technically” did not violate the Fifteenth Amendment. In 1890, Mississippi implemented residency requirements for the specific purpose of disenfranchising the “negro voter.” KEYSSAR, *supra* note 22, at 111-12.

²⁸ “In short order, other states followed suit, adopting—in varying combinations—poll taxes, cumulative poll taxes . . . literacy tests, secret ballot laws, lengthy residence requirements, elaborate registration systems, confusing multiple voting-box arrangements, and eventually, Democratic primaries restricted to white voters. Criminal exclusion laws also were altered to disfranchise men convicted of minor offenses, such as vagrancy and bigamy.” *Id.* at 112.

²⁹ George Henry White, a Republican member of the United States House of Representatives, first elected in 1896, was the last African-American to leave Congress during the period of Reconstruction. See Documenting the American South, George H. White – Biography, <http://docsouth.unc.edu/nc/whitegh/bio.html> (citing *DICTIONARY OF NORTH CAROLINA BIOGRAPHY* (William S. Powell ed., UNC Press 1996) (1979)).

who led that state's push for segregation, stated: "We have done our level best. . . . We have scratched our heads to find out how we could eliminate the last one of them. We stuffed ballot boxes. We shot them We are not ashamed of it."³⁰ It would take seventy years for another African-American from a former slave state to be elected to the U.S. House of Representatives.³¹ It would take almost 100 years for Congress to recognize the impotency of the Fifteenth Amendment and enact the Voting Rights Act of 1965.

B. *The Voting Rights Act of 1965*

Almost ninety years after passage of the Fifteenth Amendment, Congress passed a civil rights bill that included some voting protections, including making voter intimidation a federal crime.³² Congress passed additional legislation in 1960 and 1964 that included voting rights provisions, but it used a jurisdiction-by-jurisdiction approach that was costly, time-consuming, and ineffective.³³ Voter registration gaps between white and black eligible voters

³⁰ RAYFORD W. LOGAN, *THE BETRAYAL OF THE NEGRO, FROM RUTHERFORD B. HAYES TO WOODROW WILSON* 91 (Da Capo Press 1997) (1954).

³¹ Congressman Parren Mitchell (D-MD) was elected to the United States House of Representatives in 1971. MITCHELL, Parren James – Biographical Information, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000826> (last visited Oct. 4, 2008). Congresswoman Barbara Jordan (D-TX) and Congressman Andrew Young (D-GA) were both elected to the United States House of Representatives in 1973. JORDAN, Barbara Charline – Biographical Information, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=J000266> (last visited Oct. 4, 2008); YOUNG, Andrew Jackson, Jr. – Biographical Information, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=Y000028> (last visited Oct. 4, 2008).

³² The Civil Rights Act of 1957 created the United States Commission on Civil Rights, transferred the Civil Rights Section to a more powerful Division with an Assistant Attorney General, and proposed that civil rights cases, including voting cases, be removed from state courts to federal courts. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634. It was, however, seen primarily as a symbolic measure with little enforcement.

³³ In *South Carolina v. Katzenbach*, the Court noted:

In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination. The Civil Rights Act of 1957 authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds. Perfecting amendments in the Civil Rights Act of 1960 permitted the joinder of States as parties defendant, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systematic discrimination. Title I of the Civil Rights Act of 1964 expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify Negroes from voting in federal elections. Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination.

remained embarrassingly wide.³⁴ Then-Attorney General Katzenbach pleaded with Congress and President Lyndon B. Johnson to give the Department of Justice more authority to combat the racial disparities in voter registration, voter intimidation, and the horrific means used to intimidate black voters. In addition, while violence continued in the South (including Bloody Sunday), civil rights marchers were thwarted in their attempts to begin a march from Selma, Alabama, to Montgomery, Alabama, to bring awareness to the problems with voter registration.³⁵ These actions prompted President Johnson and Congress to give the federal government the tools it needed to combat the conniving methods of the South. President Johnson signed the Voting Rights Act of 1965 into law on August 6, 1965.³⁶

The Voting Rights Act (VRA) of 1965 is considered one of the most important and effective pieces of congressional legislation.³⁷ The VRA addressed the devious actions that legislators employed against America's

383 U.S. 301, 313 (1966).

³⁴ In March of 1965 in Alabama, 19.3% of blacks were registered, compared with 69.2% of whites, evidencing an almost 50% gap in registration. Likewise, other Southern states also had substantial gaps in registration: Georgia (35.2%), Louisiana (48.9%), North Carolina (50.0%), South Carolina (38.4%), Virginia (22.8%), and, most egregious, Mississippi (63.2%). Only 6.7% of Mississippi's eligible black voting-age population was registered. For this and other empirical evidence on this issue, see BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 23 (1992).

³⁵ In President Lyndon B. Johnson's speech on March 15, 1965, one week after the thwarted Selma, Alabama march across the Edmund Pettus Bridge, designated as "Bloody Sunday," he stated:

There is no cause for pride in what has happened in Selma. There is no cause for self-satisfaction in the long denial of equal rights of millions of Americans 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 insure that right. Yet the harsh fact is that in many places in this country men and women are kept from voting simply because they are Negroes. . . . For the fact is that the only way to pass these barriers is to show a white skin. . . . We have all sworn an oath before God to support and to defend [the] Constitution. We must now act in obedience to that oath.

President Lyndon B. Johnson, Special Message to the Congress: *The American Promise* (Mar. 15, 1965).

³⁶ At the signing of the Voting Rights Act of 1965, President Johnson called the passage of the VRA a "triumph for freedom" and linked the need for the VRA to the history of the Negro in America. See National Archives and Records Administration, President Lyndon B. Johnson's Remarks in the Capital Rotunda at the Signing of the Voting Rights Act, Aug. 6, 1965, available at <http://www.lbjlib.utexas.edu/Johnson/archives/home/speeches/home/650806.asp>.

³⁷ President Lyndon B. Johnson called the Voting Rights Act of 1965 "one of the most monumental laws in the entire history of American freedom." DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965*, at 132 (1978).

unwanted voters. The VRA outlawed practices such as literacy tests, empowered federal registrars to register citizens to vote, and gave the Attorney General the power to bring widespread litigation instead of the piecemeal approach of the past.³⁸ As a result, in approximately thirty years, wide disparities between blacks and whites in voter registration narrowed considerably throughout the South, and the number of African-American elected officials increased exponentially.³⁹

The VRA contains two primary enforcement provisions: Section 2 prohibits discrimination in voting based on race, color, or language minority status, and Section 5 requires specified jurisdictions to submit all of their voting administration changes to the Attorney General or United States District Court for the District of Columbia prior to implementation. Each is described in turn. Although both are important, neither provides full protection against modern-day manipulative voting-suppression methods.

1. Section 2 of the VRA

Congress included a nationwide prohibition against discrimination in voting in Section 2 of the Act.⁴⁰ This provision prohibits racial discrimination in any voting standard, practice, or procedure, including redistricting plans. Under Section 2, “[p]laintiffs must demonstrate that . . . the devices result in unequal access to the electoral process.”⁴¹ This section of the VRA allows for

³⁸ Professor Pamela Karlan refers to this first wave of litigation immediately following passage of the VRA as first generation lawsuits. See Pamela S. Karlan, *The Impact of the Voting Rights Act on African-Americans: Second and Third Generation Issues*, in VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES 121, 122 (Mark E. Rush ed., 1998).

³⁹ From 1970 to 1998, the number of black elected officials increased from 1469 to 8868. In 1999, African-Americans held thirty-seven seats in the United States House of Representatives, constituting nine percent of the seats in the House. Only one black governor, however, and two black senators were elected in the twentieth century. At the end of the century, African-Americans constituted only two percent of elected officials nationwide. THEODORE CAPLOW, LOUIS HICKS & BEN J. WATTENBERG, *THE FIRST MEASURED CENTURY: AN ILLUSTRATED GUIDE TO TRENDS IN AMERICA, 1900-2000*, at 186 (2001).

⁴⁰ See *Voinovich v. Quilter*, 507 U.S. 146, 152 (1993) (“Congress enacted § 2 of the Voting Rights Act of 1965 to help effectuate the Fifteenth Amendment’s guarantee that no citizen’s right to vote shall ‘be denied or abridged . . . on account of race, color, or previous condition of servitude.’”) (citations omitted).

⁴¹ *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986).

both vote dilution and vote denial claims.⁴² Vote dilution occurs when a person is allowed to cast a ballot, but that ballot is not counted equally with other votes. It generally refers to a group's right to have its votes cast equally; e.g., black to white votes. Vote denial occurs when an individual is not allowed to cast a ballot due to some voting practice, procedure, or voting mechanism; e.g., literacy tests or felon disenfranchisement.

a. Vote Dilution

The Supreme Court's decision in *Thornburg v. Gingles*⁴³ established the framework for vote dilution claims. To challenge a method of election that allows for large voting districts, i.e., at-large or multimember systems, plaintiffs must satisfy all three preconditions set out in *Gingles*: geographic compactness, political cohesion, and legally significant white bloc voting.⁴⁴ If a plaintiff succeeds in satisfying these preconditions, the court is required to consider the totality of the circumstances⁴⁵ and to determine, based upon an evaluation of

⁴² Professor Daniel Tokaji makes a similar distinction in *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006) (describing voter ID cases as "the new vote denial" and exploring the application of Section 2 to these cases).

⁴³ 478 U.S. 30.

⁴⁴ The *Gingles* preconditions are as follows:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate.

Id. at 50-51.

⁴⁵ In *Gingles*, the Supreme Court adopted several factors that the Senate Judiciary Committee suggested should be considered in the totality-of-circumstances analysis:

[T]he history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

the past and present reality, whether the political process is equally open to minority voters. However, plaintiffs are not limited to proving the matters referred to as the Senate factors—which include demonstrating a history of discrimination in housing and education, racial appeals, and lack of access to the slating process—but can also demonstrate circumstances beyond those factors.

Vote dilution cases under Section 2 of the VRA have been extremely helpful in ensuring that all Americans have equal access to the electoral process. In the 1980s and '90s, voting rights attorneys waged a vigorous assault on practices and procedures, such as at-large districts, that tended to exclude African-Americans from the political structure.⁴⁶ This second generation of voting rights claims laid the groundwork for further voting rights advances.⁴⁷ These successes, however, prompted the use of more subtle, but just as effective, suppression methods.

b. Vote Denial

While vote dilution protects group rights, which requires, *inter alia*, a plaintiff to prove that the group is politically cohesive and can elect a candidate of choice, vote denial claims are brought on behalf of individuals or groups who are denied the opportunity to cast a ballot.⁴⁸ Only a few cases address the requirements for a Section 2 vote denial claim, and those cases are not unified on what is needed for a successful claim.⁴⁹

The elements of a vote denial claim include the practice or procedure that denies the plaintiff an equal voting opportunity based on race or language minority

Id. at 44-45.

⁴⁶ See, e.g., *Holder v. Hall*, 512 U.S. 874, 876 (1994) (Section 2 challenge to size of governing bodies); *Growe v. Emison*, 507 U.S. 25, 40 (1993) (Section 2 challenge to single-member districts); *Chisom v. Roemer*, 501 U.S. 380, 385 (1991) (Section 2 challenge to state multi-member judicial districts).

⁴⁷ Professor Pamela Karlan refers to this wave of litigation as second generation lawsuits. Karlan, *supra* note 38, at 122-23 (discussing first and second generation voting rights claims). See also Anthony A. Peacock, *From Beer to Eternity: Why Race Will Always Predominate Under the Voting Rights Act*, in *REDISTRICTING IN THE NEW MILLENNIUM* 119, 124-27 (Peter F. Galderisi ed., 2005).

⁴⁸ Vote denial cases challenging the lack of minority poll workers and other election administration methods have been challenged under this theory for decades.

⁴⁹ See, e.g., *Roberts v. Wamser*, 679 F. Supp. 1513 (E.D. Mo. 1987), *rev'd on other grounds*, 883 F.2d 617, 620 (8th Cir. 1989).

status.⁵⁰ The challenge derives from any practice or provision that denies to member(s) of a protected racial or language minority equal opportunity to participate in the political process.⁵¹ The plaintiff must show that the challenged practice or provision (e.g., felon disenfranchisement statute, language barrier, or poll worker hostility) harms or denies the right to cast a ballot or participate in the political process. Generally, courts look to the totality of relevant circumstances, including the history of official discrimination in the jurisdiction; socioeconomic disparities between whites and minorities; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health; the tenuousness of the jurisdiction's asserted justification for the challenged law or practice; and the jurisdiction's lack of responsiveness to minority concerns.

2. *Importance of Section 5 of the VRA*

The importance of Section 5 is difficult to overstate.⁵² It provides a preemptive attack on discriminatory voting practices. Its requirement that

⁵⁰ See, e.g., *Toney v. White*, 476 F.2d 203, 207-08 (5th Cir. 1973) (selective purge of black, but not white, no-contact voters from rolls), *vacated by majority on reh'g*, 488 F.2d 310, 311 (5th Cir. 1973); *Dillard v. Town of N. Johns*, 717 F. Supp. 1471, 1476 (M.D. Ala. 1989) (official help to white candidates while hindering campaigns of black candidates); *Harris v. Siegelman*, 695 F. Supp. 517, 529 (M.D. Ala. 1988) (discrimination against black poll workers); *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1264 (N.D. Miss. 1987) (failure to make local clerks deputy registrars or to implement satellite registration accessible to black voters), *aff'd*, *Miss. State Chapter, Operation Push v. Mabus*, 932 F.2d 400, 402 (5th Cir. 1991); *Goodloe v. Madison County Bd. of Election Comm'rs*, 610 F. Supp. 240, 241-42 (S.D. Miss. 1985) (selective invalidation of one notary's absentee ballots—all from black voters—without individualized review, with resulting racial disparity in invalidations); *Brown v. Dean*, 555 F. Supp. 502, 504 (D.R.I. 1982) (polling place locations interacting with low minority car ownership and poor public transit to cause “constructive disenfranchisement” of minority voters); *James v. Humphreys County Bd. of Election Comm'rs*, 384 F. Supp. 114, 124 (N.D. Miss. 1974) (assistance to physically handicapped—mostly white—voters but not illiterate—mostly black—voters); *Puerto Rican Org. for Political Action v. Kusper*, 350 F. Supp. 606, 611 (N.D. Ill. 1972) (failure to provide assistance to language minority voters), *aff'd*, 490 F.2d 575, 580 (7th Cir. 1973); *Brown v. Post*, 279 F. Supp. 60, 62-63 (W.D. La. 1968) (failure to provide absentee ballots); see also Tokaji, *supra* note 42, at 709-18; cf. *Campaign for a Progressive Bronx v. Black*, 631 F. Supp. 975, 976 (S.D.N.Y. 1986) (dilution under amended Section 2).

⁵¹ See, e.g., *Harris v. Graddick*, 615 F. Supp. 239, 240 (M.D. Ala. 1985) (finding that underrepresentation of minority poll officials will “impede and impair” access to the political process).

⁵² See *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990* (Chandler Davidson & Bernard Grofman eds., 1994) (discussing the impact of

specific jurisdictions, referred to as “covered jurisdictions,”⁵³ submit all voting changes—from moving a polling place across the street to a congressional redistricting—to either the Attorney General of the United States or the District of Columbia United States District Court allows the reviewing entity to determine whether the change has the purpose or effect of denying the right to vote based on race, color, or language minority status.⁵⁴ Regardless of whether the jurisdiction chooses to submit the change to the Attorney General or the District Court for the District of Columbia, the jurisdiction must demonstrate that the submitted change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or [language minority group].”⁵⁵ Section 5’s preclearance requirement mandates that a “covered jurisdiction” demonstrate, prior to the enactment of legislation, that its proposed change is free from a discriminatory purpose or effect.⁵⁶

If a jurisdiction decides to submit the change to the Attorney General, he has sixty days to review the change and either preclear or object. If the Attorney General does not take any action within the sixty-day period, the change is deemed precleared. Further, if the Attorney General takes an action, his subsequent preclearance or objection is not subject to scrutiny.⁵⁷

C. *The More Things Change, the More They Stay the Same*

“[T]he gerrymander was handed down from *politician* to *politician*, every one of them knowing that they were cheating *voters* by *manipulating* elections.

preclearance procedures on the creation of majority-black legislative districts to avoid an objection).

⁵³ 42 U.S.C. § 1973b(b) (2000) (defining “covered jurisdictions” as those jurisdictions that on November 1, 1964 utilized a “test or device” that restricted the right to vote and where less than fifty percent of the voting-age population was registered to vote on November 1, 1964, or less than fifty percent of registered voters actually voted in the 1964 presidential election). In 1965, the entire states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia were covered. Only parts of Arizona, Hawaii, Idaho, and North Carolina were covered.

⁵⁴ 42 U.S.C. § 1973c(a) (2000).

⁵⁵ *Id.*

⁵⁶ *Id.* Pursuant to Section 5, “covered jurisdictions” can receive preclearance of voting changes through the Attorney General or a declaratory judgment in the United States District Court of the District of Columbia. See Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225 (2003).

⁵⁷ See *Morris v. Gressette*, 432 U.S. 491, 504-05 (1977) (holding Section 5 decisions final and not subject to judicial review).

The hanging-chad mess in Florida is small stuff compared with this systematic theft of our right to vote.”⁵⁸

After passage of the Voting Rights Act of 1965, African-American voter registration⁵⁹ and the number of African-American elected officials began to rise.⁶⁰ In an effort to yet again thwart democratic advances, legislatures used the redistricting process to eliminate those voters deemed expendable to their political cause.

The most transparent occasion to discard unwanted voters occurred through redistricting, more particularly, through racial and partisan gerrymandering. In these cases, political elites drew lines that excluded voters they deemed useless to incumbency protection. The very existence of partisan gerrymandering demonstrates that there are some voters that incumbents want and need in their districts and others that they would prefer to have outside the district boundary lines. In most jurisdictions today, African-American voters are largely equated with the Democratic Party.⁶¹ Consequently, Republican legislators often use party as a proxy for race and cast the unwanted African-American voter in Democratic districts.⁶² Far from politics as usual, political parties have used

⁵⁸ Jim Boren, *The Political Corruption of Redistricting*, FRESNO BEE, July 1, 2007, at J3.

⁵⁹ See, e.g., GROFMAN ET AL., *supra* note 34, at 23-24 (indicating that the gap between white and African-American voters decreased significantly and in some instances disappeared in some Southern states between 1965 and 1988).

⁶⁰ The number of African-American elected officials stood at 1469 in 1970. In 2000, 9040 African-Americans held elected offices in the United States. See DAVID BOSITIS, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY, 2000, at 5 (2002), <http://www.jointcenter.org/publications1/publication-PDFs/BEO-pdfs/BEO-00.pdf>.

⁶¹ African-Americans tend to be extremely loyal to the Democratic Party. In the 2006 midterm U.S. House of Representatives elections, eighty-nine percent of African-Americans voted Democratic. Only eleven percent of African-American voters cast ballots for Republican U.S. House candidates. See DAVID A. BOSITIS, BLACKS AND THE 2006 MIDTERM ELECTIONS, 2006, http://www.jointcenter.org/index.php/publications_recent_publications/black_elected_officials/blacks_and_the_2006_midterm_elections.

⁶² See Barbara Y. Phillips, *Reconsidering Reynolds v. Sims: The Relevance of Its Basic Standard of Equality to Other Vote Dilution Claims*, 38 HOW. L.J. 561, 575-81 (1995) (discussing parallels between partisan gerrymandering and vote dilution claims). A few scholars have discussed the perplexity of discarded voters in the *Shaw v. Reno* context. 509 U.S. 360 (1993). Samuel Issacharoff developed the term “filler people,” which refers to those persons who are not members of the majority race in a redistricting scheme who are used to “fill” the district. Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 292 (1996). Professor Guy-Uriel E. Charles has characterized “filler people” as “political losers.” Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 619 (2007). While “filler people” are included in a district to satisfy

redistricting to carve out their constituents of choice at the expense of the voting rights of eligible voters. To exclude eligible citizens, both Democrats and Republicans have utilized schemes to varying degrees, including redistricting, voter ID laws, and voter purges.

The Supreme Court case *League of United Latin American Citizens v. Perry*⁶³ embodies a current example of redistricting to disenfranchise unwanted voters. In 2003, the Republican Party initiated a mid-decade redistricting of the Texas congressional plan.⁶⁴ The most contentious part of the plan involved District 23, which included Laredo, Webb County, Texas—a previously politically cohesive Latino community that was effectively split into two new districts to maximize Republicans' political strength.⁶⁵ This was an extremely contentious effort to “pack” minorities into Democratic districts and increase the number of Republican districts. The Court found that splitting District 23 violated Section 2 of the VRA and rejected the state's contention that the district was drawn for political, rather than racial, reasons.⁶⁶ In his opinion, Justice Kennedy stated, “Even if we accept the District Court's finding that the State's action was taken primarily for political, not racial, reasons, . . . the redrawing of the district lines was damaging to the Latinos in District 23.”⁶⁷ Notwithstanding the state's assertions that race was not the predominant factor in redrawing the congressional district lines, the fact remained that the effect was damaging to the minority community. Republicans certainly had preconceived notions and data no less, which indicated that Latino voters in Webb County, Texas, were not strong Republican voters.⁶⁸ Consequently, with the political power to redraw the congressional district, they sought to discard the unwanted Latino voters to preserve the Republican party's interest. This

“one person, one vote” requirements, unwanted voters are not needed or recognized for any purpose, and because they could, if empowered, affect the outcome of elections, more often than not they are *excluded* from districts in order to control outcome, not included.

⁶³ 548 U.S. 399 (2006).

⁶⁴ *Id.* at 423-24. One of the primary issues in this case was whether the redistricting constituted an unconstitutional political gerrymander. The Justices did not reach agreement on that issue but did find that the redistricting plan violated Section 2 of the Voting Rights Act. *Id.* at 442.

⁶⁵ *Id.* at 439.

⁶⁶ *Id.* at 442.

⁶⁷ *Id.* at 440.

⁶⁸ In 2002, the Republican incumbent only received eight percent of the Latino vote. Latinos had also become the majority in District 23 (57.5%) by 2003. *Id.* at 423-24, 439-42. The Court found that “[t]he changes to District 23 undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive.” *Id.* at 439.

perfunctory castaway method of redistricting compares well with the stereotypes outlawed in the criminal jury selection process.

In criminal law, attorneys are prohibited from using peremptory challenges, which can be used for any reason, against potential jurors with assumptions or whose assumptions are rooted in racial stereotypes regarding the impartiality of the juror.⁶⁹ In the landmark case *Batson v. Kentucky*, the prosecutor used his peremptory challenges to strike the African-American jurors that remained in the jury pool, leaving the accused African-American male to plead his case before an all-white jury.⁷⁰ The Court found that this use of peremptory challenges violated the Sixth and Fourteenth Amendments to the United States Constitution and amounted to purposeful discrimination.⁷¹ In a 7-2 decision, the Supreme Court held:

Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges “for any reason at all, as long as that reason is related to his view concerning the outcome” of the case to be tried, . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant. . . . [I]t was impermissible for a prosecutor to use his challenges to . . . deny to blacks “the same right and opportunity to participate in the administration of justice enjoyed by the white population.”⁷²

Although attorneys cannot use race as a proxy in jury selection, legislators can consider race under the proxy of party affiliation in formulating districts and election administration laws, essentially denying unwanted voters the right to participate equally in the political process. Clearly, a void exists. The establishment of uniform standards in election administration legislation, such as mandating Voter Impact Statements, can help fill the void and protect voter access and the integrity of the legislative process.

⁶⁹ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Georgia v. McCollum*, 505 U.S. 42 (1992); *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁷⁰ 476 U.S. at 83.

⁷¹ *Id.* at 89.

⁷² *Id.* at 89, 91 (emphasis added).

II. NEW MILLENNIUM METHODS: CONTEMPORARY NOTIONS OF UNWANTED VOTERS

In 2000, the country watched as election officials in Florida counted ballots after the presidential candidates demanded recounts in a too-close-to-call election.⁷³ The Florida and United States Supreme Court proceedings and the daily ballot counts changed the way America thought about the process of electing the President of the United States. The aftermath of the 2000 presidential election also changed the way we access the vote.⁷⁴

Since the 2000 presidential election, state and federal legislators have attempted to address the complicated task of correcting the many problems that were exposed, such as outdated voting machines, voter purges, and voter discontent. America watched as the courts, both state and federal, determined who would be President.⁷⁵ While much attention was placed on Florida, voting irregularities occurred in states across the country and in greater proportions.⁷⁶ The stark realization that the election problems were not confined to Florida, but were symptomatic of problems across the nation, prompted many legislators to act.⁷⁷ On both the state and federal levels, legislators sought to remedy the myriad of election administration dilemmas.

⁷³ Samantha Levine, *Hanging Chads: As the Florida Recount Implodes, the Supreme Court Decides Bush v. Gore*, U.S. NEWS & WORLD REP., Jan. 17, 2008, at A1, available at <http://www.usnews.com/articles/news/politics/2008/01/17/the-legacy-of-hanging-chads.html>; Jeffrey L. Rabin, *Election Workers' Nightmare*, L.A. TIMES, Nov. 10, 2000, at Main News; EAGLETON INSTITUTE OF POLITICS, RUTGERS UNIVERSITY, 2000 PRESIDENTIAL ELECTION, <http://www.eagleton.rutgers.edu/e-gov/e-politicalarchive-2000.htm>.

⁷⁴ See Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1209-13 (2005) (describing the many reports that evolved after the 2000 election detailing voting irregularities).

⁷⁵ The 2000 presidential election is the centerpiece for election reform. Scholars have discussed the implications of that election and the Supreme Court's intervention. See *Bush v. Gore*, 531 U.S. 1046 (2000); see also *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000); *Gore v. Harris*, 773 So. 2d 524 (Fla. 2000); Edward B. Foley, *Refining the Bush v. Gore Taxonomy*, 68 OHIO ST. L.J. 1035 (2007); Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1 (2007); Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO ST. L.J. 1007 (2007).

⁷⁶ See generally U.S. CIVIL RIGHTS COMMISSION REPORT, ELECTION REFORM: AN ANALYSIS OF PROPOSALS AND THE COMMISSION'S RECOMMENDATIONS FOR IMPROVING AMERICA'S ELECTION SYSTEMS (2001), available at <http://www.usccr.gov/pubs/vote2000/eleceref/main.htm>.

⁷⁷ From 2000 to 2002, America saw an increase in election reform laws. In state legislatures, approximately 3643 election-related bills were introduced; 492 were passed into law. The number of election reform bills continued to increase as jurisdictions sought to comply

The proliferation of election administration legislation on the federal and state levels since the 2000 presidential election resulted in thousands of legislative measures that, unfortunately, require little assessment regarding their impact on America's unwanted voters.⁷⁸ On the federal level, Congress sought to address the 2000 presidential election by implementing comprehensive changes to America's election administration process. While admirable, some of the reforms have reaped supposedly unintended consequences.⁷⁹

A. *The Help America Vote Act: Voter ID and the EAC*

The road to federal election reform is paved with hanging chads, dimpled ballots, and voters who were turned away from the polls. In 2002, Congress used its Elections Clause⁸⁰ authority and passed the Help America Vote Act (HAVA)⁸¹ with the stated purpose of

establish[ing] a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission (EAC) to assist in the administration of federal elections and to otherwise provide

with HAVA. NATIONAL CONFERENCE OF STATE LEGISLATURES, THE STATES TACKLE ELECTION REFORM: SUMMARY OF 2003 LEGISLATIVE ACTION (May 11, 2004), available at <http://www.ncsl.org/programs/legismgt/elect/taskfc/03billsum.htm>.

⁷⁸ Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 653-63 (2007) (addressing the need for more reliable data and empirical studies on voter fraud and the impact of fraud-preventing legislation).

⁷⁹ See Herbert E. Cihak, *The Help America Vote Act: Unmet Expectations?* 29 U. ARK. LITTLE ROCK L. REV. 679 (2007) (citing problems with voting equipment); Brandon Fail, *HAVA's Unintended Consequences: A Lesson For Next Time*, 116 YALE L.J. 493 (2006) (arguing that HAVA's accelerated timetable for replacing outdated voting equipment could harm the ability to produce the best alternatives and stifle technological innovations); Gerald M. Feige, *Refining the Vote: Suggested Amendments to the Help America Vote Act's Provisional Balloting Standards*, 110 PENN ST. L. REV. 449 (2005) (suggesting changes to HAVA's provisional balloting system); R. Bradley Griffin, *Gambling with Democracy: The Help America Vote Act and the Failure of the States to Administer Federal Elections*, 82 WASH. U. L.Q. 509 (2004) (arguing that HAVA gave the states too much control over the administration of federal elections); David C. Kimball, Martha Kropf & Lindsay Battles, *Helping America Vote? Election Administration, Partisanship, and Provisional Voting in the 2004 Election*, 5 ELECTION L.J. 447 (2006) (discussing the role of local and state election officials in administering provisional ballots).

⁸⁰ Although the power to establish the "times, places and manner" of elections is given to the states, Congress has the power to regulate elections under Article I, § 4 of the United States Constitution. U.S. CONST. art. I, § 4, cl. 1; see *infra* Part IV.B.

⁸¹ Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666. HAVA is codified at 42 U.S.C. §§ 15301-15545 (Supp. III 2003). For a detailed description of HAVA's legislative history, see Shambon & Abouchar, *supra* note 13, at 160-65 (2007).

assistance with the administration of certain federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of federal elections, and for other purposes.⁸²

After passage of the Act, Congress members hailed its benefits. Senator Christopher Dodd claimed that HAVA was covering ground the VRA had not tilled and that HAVA was the first time in over 213 years that the federal government was taking “a very protective involvement in the conduct of elections.”⁸³ Representative Steny Hoyer declared that the new law would “strengthen the foundation of democracy and shore up public confidence in this most basic expression of American citizenship, the right to vote and to have one’s vote counted.”⁸⁴

Although Congress hailed the passage of the Act, others were more cautious.⁸⁵ While federal election reform was sorely needed to address the lack of a national standard in conducting elections, as the flaws of the 2000 presidential election made clear, HAVA is part of the problem rather than part of the solution.⁸⁶ The stated purpose of the Act is laudable; however, it erected additional barriers to voting by increasing voter ID requirements and allowing the states to determine how and under what conditions they would count provisional ballots.⁸⁷

The legislation, though, grants too much unsupervised power to the states.⁸⁸ It creates minimum standards for states to follow in election administration. HAVA mandates provisional ballots, allowing voters to cast ballots despite the lack of proper identification.⁸⁹ It also requires that first-time

⁸² H.R. REP. NO. 107-730, at 1 (2002) (Conf. Rep.).

⁸³ 148 CONG. REC. S10,488 (Oct. 16, 2002) (statement of Sen. Dodd).

⁸⁴ 148 CONG. REC. H7,841 (Oct. 10, 2002) (statement of Rep. Hoyer).

⁸⁵ See Cihak, *supra* note 79.

⁸⁶ See Tokaji, *supra* note 74, at 1207 (“[T]hese changes in federal law have arguably made things worse instead of better, at least in the short term.”).

⁸⁷ See Shambon & Abouchar, *supra* note 13, at 158-65. See generally Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424 (2004).

⁸⁸ Feige, *supra* note 79 (suggesting revisions to HAVA’s provisional ballot-counting regulation and proposing strengthening voters’ rights); Griffin, *supra* note 79 (arguing that HAVA provides states too much control over federal election procedures); Tokaji, *supra* note 74 (assessing the 2004 election and the failure of election reform to remedy election administration problems).

⁸⁹ The administration of provisional ballots, however, has been called into question for the myriad of ways that election administrators determine whether to count the ballot. In 2004, the

voters in a jurisdiction who registered by mail vote in person and provide an acceptable form of ID.⁹⁰ A photographic ID of the voter is acceptable but is not the exclusive means for verifying ID.⁹¹ Other means include documentation that includes the voter's name and address, including, but not limited to, a current utility bill or bank statement.⁹² One of the unintended consequences of this provision, however, is that many states changed their voter ID requirements not just for first-time mail registrants, but for all voters.⁹³ Some states that lacked an identification requirement were forced to include one to comply with HAVA's identification requirement for first-time voters who register by mail.

Prior to HAVA, the primary form of identification was signature verification, which allowed voters to sign their names on the voter rolls instead of presenting ID. Ironically, HAVA was not focused on voter identification. After the 2000 presidential election, Congress was concerned about faulty machines and provisional balloting. Nevertheless, both state and federal legislators seized upon an opportunity to invent a problem with voter fraud and

first year that HAVA required states to provide provisional ballots, nearly 1.9 million of those ballots were cast and 1.2 million provisional ballots were counted, which left more than half a million people disenfranchised. ELECTION DATA SERVS., 2004 ELECTION DAY SURVEY REPORT, PART 2 SURVEY RESULTS 6-5 (2005), available at <http://www.eac.gov/clearinghouse/2004-election-day-survey-1>. Moreover, poll worker confusion and unavailable ballots accounted for even more disparities. A People for the American Way report found: "There was widespread confusion over the proper use of provisional ballots, and widely different regulations from state to state—even from one polling place to the next—as to the use and ultimate recording of these ballots." PEOPLE FOR THE AM. WAY FOUND. ET AL., SHATTERING THE MYTH: AN INITIAL SNAPSHOT OF VOTER DISENFRANCHISEMENT IN THE 2004 ELECTIONS 8 (2004), available at <http://www.lawyerscomm.org/2005website/publications/images/preliminaryreport.pdf>.

⁹⁰ The HAVA ID requirement only applied to first-time voters by mail and those first-time mail registrants who did not provide a copy of any voter identification. Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1666, 1712.

⁹¹ The acceptable forms of voter ID are expansive compared to some of the state practices and only require a copy of a document that includes a voter's name and address. *Id.*

⁹² Acceptable forms of identification under HAVA include a driver's license or other photo ID; a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; or, if voting by mail, the voter must submit with the ballot a copy of a current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter. *Id.*

⁹³ After the Act's passage, many states changed their requirements for first-time voters to comply with HAVA, thereby increasing the number of jurisdictions that require some form of identification to vote. ELECTION REFORM INFORMATION PROJECT, VOTER ID LAWS (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/voter%20id%20laws.pdf>.

legislate a solution through voter ID requirements.⁹⁴ Unfortunately, America's unwanted voters have been swept up in the frenzy.

HAVA also created the Election Assistance Commission (EAC) as the administrative body that oversees the implementation of HAVA initiatives.⁹⁵ Although the EAC is a bipartisan body, its short history has been criticized as ineffective and highly partisan.⁹⁶ HAVA allows jurisdictions to petition the EAC for HAVA funds for a myriad of election administration programs, including voter education and poll worker training.⁹⁷ The jurisdiction must certify that the intended purpose of the funds will not violate various voting laws, including the National Voter Registration Act (NVRA) and the VRA's preclearance requirements.⁹⁸ The certification is simply a statement made in the funding proposal and does not require the jurisdiction to perform a studied inquiry into the impact of the proposal on its eligible voters. By contrast, for Section 5 "covered jurisdictions" to receive "preclearance," they must demonstrate that the submitted proposal does not "retrogress" or place minority voters in a worse position.⁹⁹ Likewise, under Section 2 of the VRA, jurisdictions are prohibited from implementing discriminatory voting practices

⁹⁴ LORRAINE C. MINNITE, *PROJECT VOTE, THE POLITICS OF VOTER FRAUD 5* (2007), available at www.projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf (finding that "[t]he claim that voter fraud threatens the integrity of American elections is itself a fraud"); LORI MINNITE & DAVID CALLAHAN, *DEMOS, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD 13-18* (2003) (discussing the lack of relationship between election fraud and requiring photo identification). See generally U.S. ELECTION ASSISTANCE COMMISSION REPORT, *ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY* (2006). The two consultants hired to conduct and prepare this report, however, have been extremely outspoken regarding the EAC's handling of the project and its final report as reaching a partisan result and not exemplary of their work. See Wang, *supra* note 14.

⁹⁵ 42 U.S.C. § 15321 (Supp. III 2003) (establishing EAC); *id.* at § 15322 (granting authority over the administration of federal elections, serving as a "national clearinghouse" for election administration information). Congress granted the Attorney General enforcement authority. *Id.* at § 15511. Jurisdictions must certify that the jurisdiction will use the HAVA funds "in a manner that is consistent with" the Voting Rights Act of 1965, including its Section 5 preclearance requirements, *id.* at § 1973; the Voting Accessibility for the Elderly and Handicapped Act, *id.* at § 1973ee; the Uniformed and Overseas Citizens Absentee Voting Act, *id.* at 1973ff; the National Voter Registration Act of 1993, *id.* at § 1973gg; the Americans with Disabilities Act of 1990, *id.* at § 12101; and the Rehabilitation Act of 1973, 29 U.S.C. § 701 (2000).

⁹⁶ Wang, *supra* note 14, at A21.

⁹⁷ 42 U.S.C. § 15301 (Supp. III 2003). States may also use HAVA funds for improving election administration for federal offices and improving polling place accessibility. *Id.*

⁹⁸ *Id.*

⁹⁹ *Beer v. United States*, 425 U.S. 130, 141 (1976).

or procedures. This prohibition, however, is retrospective: it applies after the practice has been adopted and thus cannot protect voters before an injury occurs. A preemptive approach to voting administration is therefore warranted.

Congress's authority to enact HAVA has not been challenged. Litigation under the Act has consisted primarily of Department of Justice enforcement proceedings against jurisdictions for noncompliance. These include suits against jurisdictions that failed to meet, or were in jeopardy of missing, the prescribed completion dates for HAVA tasks such as creation of statewide computerized voting databases.¹⁰⁰ HAVA must be modified to strengthen voter access and confidence. The problems with provisional ballots and the restrictive voter ID laws attributed to HAVA's requirements illustrate that change is needed to ensure that HAVA is a viable tool in the administration of elections.

B. Voter ID: No Legislative Proof, No Problem

In an effort to comply with HAVA's voter ID requirements for first-time mail registrants, many states adopted laws that changed the voter ID requirements to comply with federal law. In 2000, only eleven states required all voters to show identification.¹⁰¹ Today, twenty-three states and the District of Columbia meet the minimum HAVA requirements that first-time voters who register by mail and do not provide any verification of their identity must vote in person and provide identification at the polls.¹⁰² Moreover, eighteen states now require all voters to present some form of identification.¹⁰³ Prior to

¹⁰⁰ *United States v. Bolivar County, Miss.*, No. 2:08-cv-00033-B-A (N.D. Miss. filed Feb. 15, 2008) (provisional ballots); *United States v. Galveston County, Tex.*, No. 3:07-cv-00377 (S.D. Tex. filed July 16, 2007) (posting Spanish language materials and provisional ballots); *United States v. New Jersey*, No. 06-4889 (D.N.J. filed Oct. 12, 2006) (computerized statewide database); *United States v. Maine*, No. 06-86-B-W (D. Me. filed July 28, 2006) (failure to provide an accessible voting system); *United States v. Alabama*, No. 2:06-cv-392-SRW (M.D. Ala. filed May 1, 2006) (statewide computerized voting database); *United States v. Westchester County, N.Y.*, No. 7:05-CV-00650 (S.D.N.Y. filed Jan. 19, 2005) (posting Spanish language materials and violating § 203).

¹⁰¹ ELECTION REFORM INFORMATION PROJECT, VOTER ID LAWS (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/voter%20id%20laws.pdf>.

¹⁰² *Id.*

¹⁰³ *Id.*

HAVA, the primary form of identification was signature verification, which allowed voters to sign the voter rolls instead of presenting ID.¹⁰⁴

Three states—Georgia, Indiana, and Missouri¹⁰⁵—adopted more restrictive laws that require voters to show government-issued identification. Voting rights advocates and political parties in these states challenged these restrictive laws.

1. *Indiana Voter ID Legislation*

Until 2005, Indiana citizens only needed to provide a signature to vote. That changed with the passage of the most restrictive voter ID law in the country, which requires all voters to show a government-issued photo ID before casting ballots.¹⁰⁶ Voters without a photo ID must cast a provisional ballot and subsequently return to the clerk's office within ten days and produce a photo ID or sign an affidavit stating that the voter cannot obtain proof of ID due to indigency or a religious objection to being photographed.¹⁰⁷ The photo ID requirement does not apply to absentee ballots.¹⁰⁸

The Indiana Democratic Party, League of Women Voters, and other interested persons challenged the Indiana voter ID bill as violative of the United States Constitution.¹⁰⁹ The plaintiffs and voting rights organizations viewed the law as overly burdensome, the additional costs to obtain underlying supporting documents as a poll tax, and the different rules governing absentee ballots and in-person voting as violative of Equal Protection.¹¹⁰ Indiana argued that the

¹⁰⁴ CENTER FOR DEMOCRACY AND ELECTION MANAGEMENT, CARTER-BAKER COMMISSION ON FEDERAL ELECTION REFORM: STATUS OF THE RECOMMENDATIONS, SEPTEMBER 2005-JUNE 2007, at 3 (2007), available at http://www.american.edu/ia/cdem/usp/np/abc_progress_2007_06_12.pdf.

¹⁰⁵ This Article will discuss the Indiana and Georgia cases, highlighting the lack of legislative standards and the undue burden placed on voters to prove the intended or unintended consequences of the legislation. For a detailed discussion of the Missouri case, see Evan D. Montgomery, *The Missouri Photo-ID Requirement for Voting: Ensuring Both Access and Integrity*, 72 MO. L. REV. 651 (2007).

¹⁰⁶ *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 950 (7th Cir. 2007) (citing IND. CODE § 3-5-2-40.5 (2002 & Supp. 2008) (effective July 1, 2005); § 3-10-1-7.2 (July 1, 2005); § 3-11-8-25 (2002 & Supp. 2008) (effective July 1, 2005)).

¹⁰⁷ IND. CODE § 3-11-8-25.1 (2002 & Supp. 2008) (effective July 1, 2005); see also David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 503-08 (2008) (discussing the litigation surrounding the Indiana voter ID law).

¹⁰⁸ See Schultz, *supra* note 107, at 503-04.

¹⁰⁹ See *Crawford*, 472 F.3d 949.

¹¹⁰ *Id.* at 950.

statute was justified to prevent voter fraud.¹¹¹ The State, however, did not present any evidence that voter fraud was an issue in Indiana; it only provided examples of voter fraud that occurred.¹¹²

a. Lower Court Opinion

In *Crawford v. Marion County*, the Seventh Circuit decided on a clearly partisan vote that the new voter ID requirements did not violate the Constitution.¹¹³ Although the court acknowledged that Indiana had an “absence of prosecutions” for fraud, it placed the burden on the plaintiffs to prove the severity of the harm, instead of asking the legislature to prove the need for the legislation and weigh any potential harm to the voters.¹¹⁴ The court stated, “How many impersonations there are we do not know, but the plaintiffs have not shown that there are fewer impersonations than there are eligible voters whom the new law will prevent from voting,”¹¹⁵ thus shifting the burden from the legislature to the voters.

Judge Posner recognized that the proposed law would adversely impact poor voters. He wrote, “Even though it is exceedingly difficult to maneuver in today’s America without a photo ID, . . . the Indiana law will deter some people from voting.”¹¹⁶ He also acknowledged that the people who would be most heavily affected would be poor and vote for the Democratic party:

No doubt most people who don’t have photo ID are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates. Exit polls in the recent midterm elections show a strong negative correlation between income and voting Democratic, with the percentage voting Democratic rising from 45 percent for voters with an income of at least \$200,000 to 67 percent for voters having an income below \$15,000.¹¹⁷

¹¹¹ *Id.*

¹¹² *Id.* at 950-51.

¹¹³ *Id.* at 954.

¹¹⁴ *Id.* at 953.

¹¹⁵ *Id.* at 953-54.

¹¹⁶ *Id.* at 951.

¹¹⁷ *Id.* at 951-52 (citations omitted).

Judge Posner's emphasis on the individual seems misplaced.¹¹⁸ A more reasoned analysis would consider whether the law's stated purpose was met or whether less restrictive means were available.

Judge Evans, dissenting in *Crawford*,¹¹⁹ characterized the Indiana voter ID law as "a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."¹²⁰ Partisanship aside, the "veil" of voter fraud is in fact very thin.

b. Supreme Court Opinion

At the Supreme Court oral argument in *Crawford*,¹²¹ Justice Ginsburg stated that the voter ID law would adversely affect poor voters and that the State could have developed less burdensome mechanisms to meet its purported aim of quashing voter fraud.¹²²

On April 28, 2008, the Supreme Court decided *Crawford v. Marion County Election Board*,¹²³ which addressed whether the Indiana statute requiring voters to present government-issued photo identification, including a valid driver's license, United States passport, or military identification, violated the Equal Protection Clause of the Fourteenth Amendment.¹²⁴ The dissent argued that the law could prevent 43,000 citizens who lack the government-issued IDs from voting. Further, Justices Ginsburg and Souter marveled that Indiana did not present evidence of a "single instance" of in-person voter fraud. Despite this shortcoming, the Supreme Court held that the law "protect[ed] the integrity and

¹¹⁸ Overton, *supra* note 78, at 673 (arguing that a judge's emphasis on the plethora of opportunities to obtain a photo ID and the individual's responsibility to obtain that ID is misplaced. "Judges who emphasize individual responsibility avoid issues of vote dilution While the simple task of bringing a photo-identification to the polls may not appear to be an unreasonable obstacle for an individual voter, judges should examine whether this requirement reduces voter turnout in the aggregate. The problem with a focus on individual responsibility is that politics involves not simply individual rights but also associational and structural concerns.").

¹¹⁹ 472 F.3d at 954.

¹²⁰ *Id.*

¹²¹ *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

¹²² Transcript of Oral Argument at 52, *Crawford*, 128 S. Ct. 1610. (Nos. 07-21, 07-25).

¹²³ 128 S. Ct. 1610.

¹²⁴ The Court issued a 6-3 decision with four separate opinions. The dissenters argued that the Indiana voter ID law imposed "nontrivial burdens on the voting right of tens of thousands . . . and a significant percentage of those individuals are likely to be deterred from voting." *Id.* at 1627 (Souter, J., dissenting) (citations omitted).

reliability of the electoral process itself.” The Court opined that it was not unreasonable to require photo identification to vote, considering that photo identification is commonplace in today’s society to access federal buildings and cash checks.¹²⁵ The Court held that the State’s interest in preventing voter fraud outweighed the perceived burden placed on individual voters.¹²⁶

If the state legislature had prepared a Voter Impact Statement that weighed the purported need to combat voter fraud against the impact on unwanted voters, it would have been more difficult to blindly support the partisan agenda and potentially disenfranchise eligible voters. With a VIS, at minimum, the legislators would have had to consider the impact of the legislation on unwanted voters.

2. *Georgia Voter ID Legislation*

As early as 1997, Georgia enacted a voter ID law that allowed voters to present both photographic and non-photographic forms of identification. In 2003, Georgia expanded its voter ID law to comply with HAVA by adding non-photographic forms of identification, such as utility bills, bank statements, and paychecks, as an acceptable form of identification for voters. Because Georgia is a state covered by Section 5, it submitted the proposed law to the United States Attorney General prior to implementing the change.

The Attorney General precleared the changes.¹²⁷ The 2003 statute also included a fail-safe provision that allowed a voter to sign a sworn statement attesting to his or her identity and vote a regular ballot if the voter could not produce one of the acceptable forms of identification.¹²⁸ The bill, however, contained cumbersome provisions for absentee voting.¹²⁹

¹²⁵ *Id.* at 1618.

¹²⁶ The Court stated that “[t]he severity of the burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted.” *Id.* at 1621 (majority opinion).

¹²⁷ Submission for Preclearance to Section 5, dated June 10, 2005 (Submission No. 2005-2029) (No-objection letter dated Aug. 26, 2005); No-objection letter from Attorney General to Georgia (Aug. 26, 2005) (on file with author).

¹²⁸ GA. CODE ANN. § 21-2-417 (2003) (amended 2006).

¹²⁹ To vote absentee, a voter had to qualify and meet one of the stated acceptable reasons, which included absence from the precinct the entire day, inability to vote because of physical disability, providing constant care to someone with a disability, a religious holiday, being seventy-five years of age or older, or being military personnel stationed outside county of residence. GA. CODE ANN. § 21-2-380 (2003).

In 2005, the Georgia state legislature passed Act No. 53 (H.B. 244), which limited the forms of acceptable voter identification from seventeen to six: a driver's license, a passport, a state- or government-issued ID, a state or federal government-issued employee ID, a military ID, or a tribal ID.¹³⁰ It also provided for no-excuse absentee voting, which allowed a voter to cast an absentee ballot without attesting to some type of hardship or reason for an absence on Election Day. It also imposed restrictions on provisional balloting.¹³¹ The bill allowed voters to attest to indigency to obtain a state ID card for voting purposes at no cost; however, costs of supporting documents

¹³⁰ Act 53, § 59, 2005 Ga. Laws 53 (2005) (codified as amended at GA. CODE ANN. § 21-2-417 (2008)). The seventeen acceptable forms of identification were as follows:

- (1) A valid Georgia driver's license;
- (2) A valid identification card issued by a branch, department, agency, or entity of the State of Georgia, any other state, or the United States authorized by law to issue personal identification;
- (3) A valid United States passport;
- (4) A valid employee identification card containing a photograph of the elector and issued by any branch, department, agency, or entity of the United States government, this state, or any county, municipality, board, authority, or other entity of this state;
- (5) A valid employee identification card containing a photograph of the elector and issued by any employer of the elector in the ordinary course of such employer's business;
- (6) A valid student identification card containing a photograph of the elector from any public or private college, university, or postgraduate technical or professional school located within the State of Georgia;
- (7) A valid Georgia license to carry a pistol or revolver;
- (8) A valid pilot's license issued by the Federal Aviation Administration or other authorized agency of the United States;
- (9) A valid United States military identification card;
- (10) A certified copy of the elector's birth certificate;
- (11) A valid social security card;
- (12) Certified naturalization documentation;
- (13) A certified copy of court records showing adoption, name, or sex change;
- (14) A current utility bill, or a legible copy thereof, showing the name and address of the elector;
- (15) A bank statement, or a legible copy thereof, showing the name and address of the elector;
- (16) A government check or paycheck, or a legible copy thereof, showing the name and address of the elector; or
- (17) A government document, or a legible copy thereof, showing the name and address of the elector.

GA. CODE ANN. § 21-2-417 (2003) (amended 2006).

¹³¹ Act 53, § 50, 2005 Ga. Laws 53 (2005) (codified as amended at GA. CODE ANN. § 21-2-380 (2008)).

verifying identity, such as birth certificates, were not waived.¹³² Georgia did not conduct any statistical analysis of the impact the legislation would have on minority voters.¹³³ Instead, it relied on data that compared the number of driver's licenses to the number of registered voters.¹³⁴ The requirements for obtaining a driver's license differed greatly from the requirements for voter eligibility. For example, a person younger than eighteen could acquire a driver's license and did not have to be a citizen to receive a driver's license.¹³⁵ Accordingly, the number of persons with driver's licenses would be comparable to the number of registered voters, but not exemplary of the number of registered voters with a valid driver's license.

In previous years, the Attorney General had objected to voter identification changes if the laws decreased the number of acceptable forms of identification or eliminated safeguards, such as affidavit voting, that would allow a voter to cast a regular ballot.¹³⁶ Consequently, laws that increased the types of

¹³² The fees associated with the underlying documents: \$10 for a basic birth certificate; approximately \$46 for additional services, such as rush delivery; \$210 for naturalization documents. BERMAN, *supra* note 9, at 12-13, 18.

¹³³ This bill had a clearly racial appeal. Only one member of the Black Caucus voted in favor of the bill, arguing that the bill was "colorblind." *Id.* at 5. Other members of the Black Caucus protested the bill and unsuccessfully offered amendments to the legislation. Outraged, Black Caucus members brought shackles and sang songs to demonstrate the racist reversal of fortune. Black Caucus members were furious over the small number of acceptable IDs and staged a walkout. Despite the outcries from the opponents, the bill passed the House with a vote of 91 to 7 and in the Senate with a vote of 31 to 20. *Id.* All of the black legislators, with one exception, voted against, abstained, or excused themselves from voting on the bill. *Id.* Only one of the three Hispanic legislators voted in favor of the bill. *Id.*

¹³⁴ *Id.* at 6-7.

¹³⁵ A driver's license is considered a document that proves identity, not citizenship. Consequently, possessing a driver's license does not indicate voter eligibility. For a comparison, see also the requirements for proof of identity to comply with the Deficit Reduction Act to receive Medicare effective July 1, 2006; summary available at <http://www.cms.hhs.gov/MedicaidEligibility/downloads/Medicaid%20Fact%20Sheet.pdf>.

¹³⁶ Objection letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., to Sheri Marcus Morris, Assistant Attorney Gen., La. (Nov. 21, 1994) (on file with author); objection letter from Loretta King, Acting Assistant Attorney Gen., Civil Rights Div., to Sheri Marcus Morris, Assistant Attorney Gen., La. (Feb. 21, 1995) (on file with author); BERMAN, *supra* note 9, at 44. Louisiana required first-time voters who registered by mail to show a driver's license or other photo ID. BERMAN, *supra* note 9, at 44. The legislation did not include provisions for an ID card fee waiver for indigent voters. *Id.* In 1997, Louisiana modified the submission and allowed voters to sign an affidavit and provide a current voter registration certificate or information in the precinct register in lieu of a photo ID and included a fee waiver for obtaining a special ID from the state. *Id.* at 45.

acceptable forms of identification were precleared.¹³⁷ This history was ignored in the Georgia voter ID determination.

After some internal controversy, the Attorney General precleared the Georgia statute. Analysts within the Department of Justice recommended that the Attorney General object.¹³⁸ They concluded that the legislature “intentionally adopted the voter identification restrictions for the purpose of disenfranchising black voters.”¹³⁹ Notwithstanding these findings, the Attorney General precleared the Georgia voter ID law.¹⁴⁰

Once the state received preclearance, it could implement the new voter ID law. However, private citizens and advocacy groups filed a federal lawsuit alleging the voter ID law unduly burdened the right to vote and constituted an unconstitutional poll tax. In *Common Cause/Georgia v. Billups*, the district court struck down the statute.¹⁴¹ It acknowledged the State’s interest in preventing voter fraud but apparently found Secretary of State Cathy Cox’s testimony attesting to the lack of in-person voter fraud persuasive.¹⁴² The court

¹³⁷ No-objection letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., to C. Havird Jones, Jr., Assistant Attorney Gen., S.C. (June 1, 1984) (on file with author). Prior to 1965, South Carolina required voters to produce a voter registration certificate at the polling place. BERMAN, *supra* note 9, at 42. In 1984, South Carolina added a driver’s license and a Highway Department ID card as acceptable forms of ID. *Id.* In 1988, the state “reinstated a statutory provision requiring registration boards to issue certificates of registration to all voters as well as duplicates to those who may have lost the original notification.” *Id.* at 42-43. No-objection letter from Attorney General to Alabama (Aug. 7, 2003) (on file with author). In 2002, Alabama required all voters to present photo or non-photo ID to vote in person and absentee. BERMAN, *supra* note 9, at 43. It also provided fail-safe methods; for example, a voter without ID could vote a challenged ballot or regular ballot if identified by two election officials, or the voter could cast a provisional ballot. *Id.* No-objection letter from Attorney General to Arizona (Oct. 7, 2005) (on file with author). The controversial Proposition 200 requires that voter registration applicants submit “evidence of U.S. citizenship and that county recorders shall reject the application if no evidence of proof of citizenship is attached.” BERMAN, *supra* note 9, at 45-46. The legislation provides six acceptable forms of citizenship evidence. *Id.* at 46. The legislation was precleared because it allowed numerous forms of photo and non-photo ID. *Id.* at 46-47.

¹³⁸ BERMAN, *supra* note 9, at 51.

¹³⁹ “Save for Rep. Burmeister’s inflammatory statement that blacks in her district vote only because they are paid, we have found no evidence to suggest that proponents had data pointing to the retrogressive effect of the legislation and nevertheless intentionally adopted the voter identification restrictions for the purpose of disenfranchising black voters.” *Id.* at 38.

¹⁴⁰ See *infra* note 15 (media and scholarly references to the Department of Justice’s handling of the preclearance).

¹⁴¹ 406 F. Supp. 2d 1326, 1365-66 (N.D. Ga. 2005).

¹⁴² See *id.* at 1350-51.

granted a preliminary injunction, finding that the plaintiffs had a likelihood of success in proving that the statute violated the Equal Protection Clause and the Twenty-Fourth Amendment.¹⁴³

The judge's attention to the plight of the unwanted voter, regarding how costly measures could preclude access to the polls, caused the legislature to revise its voter ID law. A subsequent version of the Georgia voter ID law eliminated the need to pay for the photo ID and the need to claim poverty to receive a free ID, but the law still required needy voters to pay for underlying documents such as birth certificates or passports.¹⁴⁴ The Attorney General precleared this change, but it too was met with litigation.¹⁴⁵

In *Common Cause/Georgia League of Women Voters, Inc. v. Billups (Common Cause II)*, the court acknowledged evidence that approximately 700,000 Georgians did not possess a valid government-issued photo ID.¹⁴⁶ Utilizing the sliding scale in *Burdick v. Takushi*,¹⁴⁷ the court found that the revised law was not narrowly tailored to address voter fraud.¹⁴⁸ Nonetheless, it upheld the law, finding, *inter alia*, that the need to purchase secondary materials to obtain the ID did not constitute a poll tax.¹⁴⁹

¹⁴³ See *id.* at 1376. The court stated:

Because, as a practical matter, most voters who do not possess other forms of Photo ID must obtain a Photo ID card to exercise their right to vote, even though those voters have no other need for a Photo ID card, requiring those voters to purchase a Photo ID card effectively places a cost on the right to vote. In that respect, the Photo ID requirement runs afoul of the Twenty-fourth Amendment for federal elections and violates the Equal Protection Clause for State and municipal elections.

Id. at 1369. The court believed that many voters would not take advantage of the Department of Driver Services fee waiver because of a reluctance to declare indigence. *Id.* at 1369-70. The court opined that the fee waiver violated the Twenty-Fourth Amendment: "[A]ny material requirement imposed upon a voter solely because of the voter's refusal to pay a poll tax violates the Twenty-Fourth Amendment." *Id.* at 1370 (citing *Harman v. Forssenius*, 380 U.S. 528, 542 (1965)).

¹⁴⁴ See *Common Cause/Ga. League of Women Voters of Ga., Inc. v. Billups*, 439 F. Supp. 2d 1294, 1336 (N.D. Ga. 2005).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1311.

¹⁴⁷ 504 U.S. 428 (1992).

¹⁴⁸ *Common Cause II*, 406 F. Supp. 2d at 1355.

¹⁴⁹ *Id.*

C. Voter Purges

Kelvin King was turned away from the polls here in November when records showed that he was ineligible to vote as a convicted felon. County election officials learned days later that King's civil rights had been restored eight months earlier.

Sandylynn Williams had voted in every election since she was 18. But this time, election officials confused her with her sister—a felon who had once used Williams's name—and refused to let her vote.

"They sent me a letter of apology, and I just laughed," recalled Williams, 34, who said she had planned to vote for Democratic nominee Al Gore. "I was cheated out of voting."¹⁵⁰

The electoral process requires that states compile lists of eligible and legal voters. The process of removing ineligible voters from state-compiled registered-voter lists is called voter purge. States have the authority under the Elections Clause to determine the eligibility of voters.¹⁵¹ Although state governments have passed legislation that designates specific individuals, such as felons, as ineligible voters, as the above excerpt demonstrates, voter purge can also cause the removal or invalidation of eligible and legal voters from voter lists.

Critics have described the voter purges in Florida during the 2000 election as "[a] wildly inaccurate voter purge list that mistakenly identified 8,000 Floridians as felons thus ineligible to vote and that listed 2,300 felons, despite the fact that the state had restored their civil rights."¹⁵² Moreover, in 2004, Florida once again embarked on an effort to cleanse the voter rolls and questioned the eligibility of more than 40,000 registered voters based on felon status.¹⁵³ Florida withdrew the list after advocacy groups and the media revealed that the list included persons who were eligible to vote—a disproportionate number of whom were African-Americans (22,000)—while

¹⁵⁰ Robert E. Pierre, *Botched Name Purge Denied Some the Right to Vote*, WASH. POST, May 31, 2001, at A01.

¹⁵¹ See U.S. CONST. art. I, § 4, cl. 1.

¹⁵² Verified Voting Foundation, *Open Voter Purge List*, June 12, 2004, <http://www.verifiedvotingfoundation.org/article.php?id=2394>.

¹⁵³ Ford Fessenden, *Florida List for Purge of Voters Proves Flawed*, N.Y. TIMES, July 10, 2008, at A13.

exempting large numbers of Hispanics.¹⁵⁴ The party affiliation of the alleged ineligible voters did not go unnoticed; the Republican administration sought to once again disenfranchise thousands of African-American, and likely Democratic, voters.¹⁵⁵ Voters who want to challenge this method of purging bear the burden of proving they have not been convicted of a disenfranchising offense.

States must follow the federal regulations to ensure uniform and nondiscriminatory list-maintenance procedures. Section 8 of the NVRA requires states to maintain voter registration lists for federal elections.¹⁵⁶ The Act also requires that election officials notify voters that their applications were accepted or rejected and keep accurate and current voter registration lists, including purging those persons who have died or moved or who meet the felon disenfranchisement requirements.¹⁵⁷ Before persons can be removed or list-maintenance procedures can be performed, the NVRA requires that list-maintenance programs be uniform and nondiscriminatory and comply with the VRA.¹⁵⁸ Purges cannot occur within ninety days before a federal election.¹⁵⁹ Additionally, states cannot remove voters for the sole reason that they did not vote in several prior elections.¹⁶⁰ The NVRA requires that the jurisdiction place these inactive voters on an inactive list only after adhering to the NVRA fail-safe provisions, which allow for removal of voters from registration lists if they have been convicted of a disqualifying crime or adjudged mentally incapacitated.¹⁶¹

¹⁵⁴ See *id.*; see also Ford Fessenden, *CAMPAIGN 2004: Civil Rights Board Wants Inquiry on Florida Voter-Purge List*, N.Y. TIMES, July 16, 2004, at A17; Robert Yoon, *CNN Asks Florida Court for Ineligible Voters List*, CNN, May 28, 2004, <http://www.cnn.com/2004/ALLPOLITICS/05/28/fla.vote/index.html>. State officials admitted that the list was racially discriminatory. "After The New York Times examined the data, state officials acknowledged that the method for matching lists of felons to those of voters automatically exempted all felons who identified themselves as Hispanic," thus accounting for the large disparities in the number of blacks and Hispanics on the felon list. Fessenden, *supra* note 153, at A13.

¹⁵⁵ See Fessenden, *supra* note 153, at A13. Partisan concerns are an issue in voter ID and voter purge legislation. It is, however, very difficult to ignore that in the Florida voter purge, it has been Republican officials endorsing the use of flawed purge lists that have overwhelmingly targeted African-American and Democratic voters. *Id.*

¹⁵⁶ 42 U.S.C. § 1973gg-6 (2000).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* The NVRA also provides additional safeguards under which registered voters would be able to vote notwithstanding a change in address in certain circumstances. For example,

Despite the attempt to federalize list-maintenance procedures, no uniformity exists. Advocacy groups have criticized the methods jurisdictions use to purge registered voters, particularly the questionable manner in which felons are removed.¹⁶² Although the stated purpose of the NVRA is to increase voter registration and participation, the Department of Justice is under attack for under-enforcing the voter registration aspect of the Act and over-enforcing the voter purge requirements.¹⁶³

There are numerous problems with the way voter lists are purged. According to an American Civil Liberties Union/DEMOS survey conducted in 2004, approximately twenty-five percent of the states surveyed compile their purge lists without reference to any legislative standards; half of the states that were surveyed purged their voter lists using only an individual's name and address, which lessens the probability of a 100 percent match.¹⁶⁴ No state surveyed codified any specific or minimum set of criteria for its officials to use in ensuring that an individual with a felony conviction is the same individual being purged from the voter rolls.¹⁶⁵ "Two-thirds of the states surveyed do not require elections officials to notify a voter when they purge them from the voter rolls, denying these voters an opportunity to contest erroneous purges."¹⁶⁶ The combined report suggests that states pass legislation that would narrowly define how voter purges are used and implement a better process to notify individuals who are purged.¹⁶⁷

voters who move within a district or a precinct will retain the right to vote even if they have not re-registered at their new address. *Id.*

¹⁶² See ACLU ET AL., PURGED! HOW A PATCHWORK OF FLAWED AND INCONSISTENT VOTING SYSTEMS COULD DEPRIVE MILLIONS OF AMERICANS OF THE RIGHT TO VOTE (2004), available at http://www.aclu.org/FilesPDFs/purged%20-voting_report.pdf.

¹⁶³ Editorial, *What Congress Should Do*, N.Y. TIMES, Oct. 24, 2004, § 4, at 10. Critics of voter purges suggest that instead of carrying out the primary function of the NVRA—increasing voter registration and participation—the Department of Justice's Voting Section is concentrating its NVRA enforcement priority on pressuring jurisdictions to trim the voter rolls. See Steven Rosenfeld, *Bush Government to Poor Voters: We Don't Want You to Vote*, ALTERNET, July 17, 2007, <http://www.alternet.org/story/56957>. Contrary to the NVRA's mandate to make voting easier and to increase voter participation, the Department of Justice recently threatened to sue ten states in an attempt to force them to purge voter rolls before the 2008 presidential election. *Id.*

¹⁶⁴ ACLU, *supra* note 162, at 2. A name and address match only allows for a less than 100 percent match, meaning non-felon John Smith could get purged instead of John Smith, Jr.

¹⁶⁵ *Id.* at 3.

¹⁶⁶ *Id.* at 2.

¹⁶⁷ *Id.* at 3-4.

D. Impact on Unwanted Voters

Where are the unwanted voters today? Are unwanted voters still African-Americans? Or do unwanted voters comprise educational and income levels that disproportionately affect the minority voter? Disenfranchising methods have become more covert and partisan since the days of poll taxes and literacy tests. Today, citizens affected by voting restrictions are regarded as collateral damage, not intentional targets.

The impact of voter ID laws falls upon America's poor, disabled, elderly, and minority voters.¹⁶⁸ States also use voter purges in a discriminatory manner to eliminate the unwanted voter from the electoral process.¹⁶⁹ Although subtle, they harm the ability of eligible voters to participate in the electoral process.

Because of the attention on voter ID laws, many scholars conducted studies to determine the disparities among minorities, elderly, and poor voters.¹⁷⁰ Many of those studies found that racial minorities and older people were less likely to possess the required government-issued photo identification that Indiana's contested voter ID law currently requires.¹⁷¹ Social scientists concluded that more restrictive voter ID laws caused "significant" obstacles for minority, poor, and low-income voters.¹⁷²

¹⁶⁸ See Overton, *supra* note 78, at 658 (acknowledging that the United States compares poorly to other democracies in voter participation).

¹⁶⁹ See *supra* Part II.C.

¹⁷⁰ MATT A. BARRETO, STEPHEN A. NUNO & GABRIEL R. SANCHEZ, THE DISPROPORTIONATE IMPACT OF INDIANA VOTER ID REQUIREMENTS ON THE ELECTORATE 5 (2007), http://depts.washington.edu/uwiser/documents/Indiana_voter.doc (research found that minorities were less likely to have the requisite government-issued ID than white voters); MATT A. BARRETO, STEPHEN A. NUNO & GABRIEL R. SANCHEZ, VOTER ID REQUIREMENTS AND THE DISENFRANCHISEMENT OF LATINO, BLACK, AND ASIAN VOTERS 1 (2007), http://www.vote.caltech.edu/VoterID/apsa07_proceeding_209601.pdf (study conducted at exit polls at 2006 elections in California, New Mexico, and Washington State found that minorities were less likely to have a driver's license and documentary proof of identification at the polls); M.V. HOOD III & CHARLES S. BULLOCK III, WORTH A THOUSAND WORDS?: AN ANALYSIS OF GEORGIA'S VOTER IDENTIFICATION STATUTE 19 (2007), available at [http://www.vote.caltech.edu/VoterID/GAVoterID\(Bullock-Hood\).pdf](http://www.vote.caltech.edu/VoterID/GAVoterID(Bullock-Hood).pdf) (finding that blacks and Hispanic voters were more than twice as likely not to have the requisite government-issued photo identification); JOHN PAWASARAT, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN 3 (2005), available at <http://www.vote.caltech.edu/VoterID/DriversLicense.pdf> (finding that only forty-five percent of African-American males possessed a valid driver's license).

¹⁷¹ *Id.*

¹⁷² Brief of R. Michael Alvarez et al. as Amici Curiae in Support of Petitioners at 14, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 830 (2008) (Nos. 07-721, 07-25) (arguing

The Brennan Center for Justice conducted a survey that found seven percent of United States citizens did not have access to U.S. passports, birth certificates, or naturalization papers, which are needed to obtain a driver's license.¹⁷³ Approximately twelve percent of low-income citizens did not possess these documents, and forty-eight percent of voting-age women with access to birth certificates did not have documentation that included their current legal names.¹⁷⁴ The survey also revealed that more than twenty-one million individuals do not have government-issued photo identification, comprising eleven percent of United States citizens.¹⁷⁵ Eighteen percent of elderly citizens lack photo ID, and a shocking twenty-five percent of African-American voting-age citizens lack current government-issued photo ID, as compared to only eight percent of white voting-age citizens.¹⁷⁶ Fifteen percent of America's voting-age citizens earning less than \$35,000 were also less likely to have a photo ID.¹⁷⁷

It is also worth noting that according to the American Association of People with Disabilities, approximately four million disabled Americans are without a driver's license or photo ID.¹⁷⁸ The AARP estimates that as many as "36 percent of Georgia residents 75 or older lack driver's licenses."¹⁷⁹ In 2001, the Federal Election Reform Commission estimated that as many as ten percent of eligible voters were without a driver's license or photo ID.¹⁸⁰ The same report found that those who lack photo ID are disproportionately poor and urban.¹⁸¹

that the Indiana photo ID restrictions imposed "severe" restrictions on minority and other affected groups).

¹⁷³ BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 2* (2006), available at http://www.brennancenter.org/page/-/d/download_file_39242.pdf. This requirement for underlying documents will also have implications for citizens once the Real ID Act becomes effective in 2008.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 3.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES ET AL., *STATEMENT IN OPPOSITION TO A NATIONAL VOTER IDENTIFICATION CARD 2* (2005), http://www.brennancenter.org/page/-/d/download_file_10169.pdf.

¹⁷⁹ Deanna Wrenn, *States Debate Photo ID at the Polls*, ST. PAUL PIONEER PRESS, Mar. 31, 2005, at B3.

¹⁸⁰ JOHN MARK HANSEN, *Verification of Identity*, in TASK FORCE ON THE FEDERAL ELECTION SYSTEM, *TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS VI*, 4 (2001), available at <http://www.tcf.org/list.asp?type=PB&pubid=246>.

¹⁸¹ *Id.*

Traditionally, poor voters have not participated at the same rates as more affluent, middle-aged, white voters.¹⁸² Statistics from the 2004 presidential election demonstrate this trend. In that election, Americans turned out to vote at the highest rate in twelve years.¹⁸³ Fifteen million more people turned out in November 2004 than in the previous presidential election.¹⁸⁴ The nation also enjoyed its highest registration rate in twelve years.¹⁸⁵

In the 2004 presidential election, non-Hispanic whites constituted seventy-five percent of potential voters, African-Americans were twelve percent, Hispanics were eight percent, and Asian-Americans were three percent.¹⁸⁶ However, non-Hispanic whites actually cast seventy-nine percent of the votes in that election, African-Americans cast eleven percent, Hispanics cast six percent and Asian-Americans cast two percent.¹⁸⁷ Persons fifty-five and over constituted thirty-five percent of actual voters.¹⁸⁸ Persons with lower incomes and educational attainment were less likely to cast votes.¹⁸⁹ Non-high school graduates accounted for only eight percent of those who actually voted.¹⁹⁰ Voters whose income was \$20,000 or below represented approximately eight percent of voters in the 2004 election.¹⁹¹ Those who held bachelor's degrees or higher represented thirty-two percent of voters, and families with incomes of

¹⁸² See KELLY HOLDER, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004 10 tbl.C (2006), available at <http://www.census.gov/prod/2006pubs/p20-556.pdf>.

¹⁸³ *Id.* at 1. The 2004 presidential election had the highest voter turnout in twelve years, sixty-four percent in 2004 compared to sixty-eight percent in 1992. *Id.* One hundred and twenty-six million people voted in the November 2004 presidential election. *Id.*

¹⁸⁴ *Id.* Fifteen million more people turned out to vote than the previous four-year period, despite the voting-age population only increasing by eleven million.

¹⁸⁵ *Id.* at 1-2. Seventy-two percent of the eligible population was registered as compared to seventy percent in 2000 and seventy-five percent in 1992. *Id.*

¹⁸⁶ *Id.* at 8.

¹⁸⁷ *Id.* at 8.

¹⁸⁸ *Id.* "Young adults constituted 13 percent of the total voting-age citizen population in 2004 and 9 percent of the voting population. In comparison, adults aged 55 and older composed 31 percent of the voting-age citizen population and 35 percent of the population that voted in the presidential election." *Id.*

¹⁸⁹ See *id.*

¹⁹⁰ *Id.* at 10, tbl.C.

¹⁹¹ *Id.*

\$50,000 or more constituted fifty-four percent of actual voters.¹⁹² Also in 2004, thirty-two million people were not registered to vote.¹⁹³

At a time when very small margins decide elections, placing more burdens on voters will adversely impact voter participation. The National Commission on Election Reform's Task Force on the Federal Election System found that a photo ID requirement would "impose an additional expense on the exercise of the franchise, a burden that would fall disproportionately on people who are poorer and urban."¹⁹⁴ The "conniving methods" of the past and the new millennium methods of the present disproportionately affect America's unwanted voters. Although there is a strong argument that these new millennium methods discriminate against unwanted voters, the courts have decided otherwise.¹⁹⁵ Questionably constitutional practices are quieting the voices of thousands of eligible voters. The nexus between added burdens—fewer forms of acceptable voter ID, unlawful voter purges—disproportionately falls on the unwanted minority, poor, or elderly voter, which creates a caste system of voters who are unmotivated and dissuaded from participating in the franchise. Requiring a Voter Impact Statement would, at a minimum, ensure that legislatures would consider the impact of changes to election administration laws on this vulnerable part of the electorate. If legislators do not deliberate their plight, these vulnerable voters will be denied the free and fair access to the polls that others enjoy.

III. A PREEMPTIVE APPROACH

A. *The Voter Impact Statement (VIS)*

Other statutes require impact statements to gauge the effect of proposed administrative changes.¹⁹⁶ The National Environmental Policy Act (NEPA)¹⁹⁷

¹⁹² *Id.*

¹⁹³ *Id.* at 13, tbl.E. According to the census, forty-seven percent lacked interest, seventeen percent did not meet the registration deadlines, seven percent were ineligible, six percent were permanently disabled or ill, five percent did not know how or where to register and four percent believed their one vote would not make a difference.

¹⁹⁴ HANSEN, *supra* note 180, at 4.

¹⁹⁵ *See supra* Part II.

¹⁹⁶ Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 32, 35-36 (2007) (noting that victim impact statements are commonly used and calling for racial impact statements to judge the potential racial disparities in sentencing proposals).

has required Environmental Impact Statements (EIS) since 1969.¹⁹⁸ NEPA requires federal government agencies to make an assessment of the environmental effects of their activities when they plan to undertake major federal actions that could “significantly affect the quality of the human environment.”¹⁹⁹ NEPA defines “major Federal action” as including “actions with effects that may be major and which are potentially subject to Federal control and responsibility.”²⁰⁰ Since 2003, agencies have submitted approximately 570 drafts and final EIS reports per year.²⁰¹

An EIS generally discusses the purpose and need for the proposed action, describes the affected environment, includes alternatives to the legislation, and provides an analysis of the alternatives.²⁰² The EIS does not preclude government agencies from implementing the proposal. It does, however, require that government officials conduct a searching and thorough analysis of their proposals and consider the alternatives and their impacts.²⁰³

In the context of voting, a similar searching analysis is needed to protect voting rights. In *Crawford v. Marion County Election Board*,²⁰⁴ the Supreme Court found that the Indiana legislature’s purported rationale for passing the

¹⁹⁷ National Environmental Policy Act of 1969 § 101, 42 U.S.C. § 4331 (2000). NEPA requires:

[C]ooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Id.

¹⁹⁸ Mauer, *supra* note 196, at 32.

¹⁹⁹ 42 U.S.C. § 4332 (2000).

²⁰⁰ 40 C.F.R. § 1508.18 (2008).

²⁰¹ See COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENTS FILED 1973 THROUGH 2007 (2008), available at http://ceq.hss.doe.gov/nepa/EISs_by_Year_1970_2007.pdf. In 2005, over seventy percent of the Environmental Impact Statements filed came from the Forest Service, components within the Department of the Interior, and the Department of Transportation. See COUNCIL ON ENVIRONMENTAL QUALITY, CALENDAR YEAR 2005 FILED EISs (2005), available at http://ceq.eh.doe.gov/nepa/EIS/Filed_%20EIS_2005_by_Agency.pdf.

²⁰² 42 U.S.C. § 4332 (2006).

²⁰³ *Id.* §§ 4321-4332. Similar to the United States Department of Justice, Civil Rights Division, Voting Section, which has responsibilities for administration of the Voting Rights Act under Section 5 and its enforcement under various sections, the Council on Environmental Quality (CEQ) is statutorily required to oversee NEPA and has administrative and enforcement authority over the Environmental Impact Statements. See *id.* §§ 4321-4370f.

²⁰⁴ 128 S. Ct. 1610 (2008).

most restrictive voter ID law in the country did not violate constitutional principles.²⁰⁵ Consequently, these citizens need less expensive and less time-consuming ways to ensure that their access to the ballot is not contingent upon color, race, age, economic status, or physical ability. One way to protect these citizens' ability to combat legislation that would disparately impact certain classes of people is to employ a preventative measure such as federal review of Voter Impact Statements.

In requiring a VIS, the EAC should require jurisdictions to provide a type of hybrid document that encompasses parts of Sections 2 and 5 of the Voting Rights Act and, for simplicity, major components of the Environmental Impact Statement. Like Section 2, this requirement should apply to every state in the union, and the jurisdiction should demonstrate that the legislation does not infringe upon the right to vote. As under Section 5, states should be required to seek "preclearance" of legislation prior to implementation. The VIS should include information found in Section 5 submissions and a Section 2 totality-of-circumstances analysis.

Other scholars and at least one study have suggested Voter Impact Statements as tools for addressing election issues. The report to the U.S. Election Assistance Commission on best practices to improve voter identification requirements recommended that states publish a "Voting Impact Statement" "as they assess their voter ID requirements" to protect the "integrity of the ballot."²⁰⁶ It suggested that the VIS include an assessment of the number of voters that would be "kept from the polls," given a provisional ballot or deemed ineligible because of the voter ID laws.²⁰⁷

Professor Dan Tokaji argued for an "electoral impact report" as a means of addressing the politicalization of the Department of Justice.²⁰⁸ His process, however, is limited to the Section 5 process and merely makes the Section 5 memorandum, which the Department of Justice, Civil Rights Division, Voting Section produces to analyze submissions, public. This approach places the burden on the federal agency and not on the jurisdiction seeking to implement a

²⁰⁵ *Id.* at 1624.

²⁰⁶ THOMAS O'NEILL & TIM VERCELLOTTI, EAGLETON INSTITUTE OF POLITICS, BEST PRACTICES TO IMPROVE VOTER IDENTIFICATION REQUIREMENTS PURSUANT TO THE HELP AMERICA VOTE ACT OF 2002, at 9, 12 (2006), available at http://www.eagleton.rutgers.edu/News-Research/VoterID_Testimony.pdf.

²⁰⁷ *Id.* at 9.

²⁰⁸ Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 How. L.J. 785, 787 (2006) (discussing the possibility of "partisan manipulation").

voting change. The Department of Justice produces and prepares the Section 5 memorandum based on its independent investigation, and the memorandum is not released to the submitting jurisdiction or the general public.²⁰⁹

Additionally, the Section 5 memorandum is an incredibly thorough and highly analytical tool in determining whether the proposed voting change has the effect or purpose of placing minority voters in a worse situation. The VIS standard proposed in this Article can be employed in determining the legitimacy of proposed legislation, but the process of preparing an extensive Section 5 memorandum is unnecessary. If legislators utilize the VIS, it should alert them to any potential disparities in their proposals, whether they choose to address the disparities by amending legislation or providing alternatives. The most important advantage of the VIS is that the election officials and the community are on notice. Congress has the constitutional authority to mandate that jurisdictions submit a VIS for major election administration changes and assess those changes prior to execution to guarantee that the fundamental right to vote is not overly burdened for the most vulnerable voters.

B. Congressional Authority to Regulate Elections

1. Congress's Elections Clause and Spending Power

Congress has the power to regulate elections under the Elections Clause of the United States Constitution.²¹⁰ Notwithstanding the states' authority to develop election administration laws governing "[t]he times, places and manner" of elections, Congress maintains authority to "make or alter" the states' regulations for the election of federal offices.²¹¹

²⁰⁹ The Section 5 memorandum provides a thorough analysis of the jurisdiction's submission and includes protected information and analysis that is neither reviewable nor released to the submitting authority or the public. "Where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation. But it cannot be questioned in a suit seeking judicial review of the Attorney General's exercise of discretion under § 5, or his failure to object within the statutory period." *Morris v. Gressette*, 432 U.S. 491, 507 (1977).

²¹⁰ U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

²¹¹ *Id.* Congress can regulate the elections of representatives and senators. *United States v. Gradwell*, 243 U.S. 476, 482 (1917); *Ex parte Siebold*, 100 U.S. 371, 383-84 (1879); *United*

Recent cases under the Elections Clause reinforce Congress's broad authority to regulate all aspects of elections.²¹² The Elections Clause grants Congress the power to alter HAVA and require jurisdictions to prepare a VIS for all major election administration changes.

Courts have construed the phrase "manner of holding elections" as congressional authority to regulate the entire election process, including voter registration and ballot counting.²¹³ In 1879, the Supreme Court found that Congress's power to regulate congressional elections "may be exercised as and when Congress sees fit to exercise it," and "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to 'make or alter.'"²¹⁴ Accordingly, Congress has the power to develop and supersede state election regulations.

Additionally, in *Smiley v. Holm*,²¹⁵ the Court noted that Congress's Elections Clause power allows it to "supplement . . . state regulations or . . . substitute its own."²¹⁶ Chief Justice Hughes wrote:

It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.²¹⁷

States v. Manning, 215 F. Supp. 272, 287 (W.D. La. 1963); Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 694 (Ky. 1944).

²¹² Cook v. Gralike, 531 U.S. 510, 523-24 (2001) (finding that the Elections Clause "encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'" (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932))).

²¹³ *Id.*; Foster v. Love, 522 U.S. 67, 69 (1997) (finding Congress's Elections Clause authority "well settled . . . to override state regulations" involving federal election administration matters); see also *Manning*, 215 F. Supp. at 283, 285; *Ex parte Coy*, 127 U.S. 731, 753-55 (1888).

²¹⁴ *Siebold*, 100 U.S. at 371.

²¹⁵ 285 U.S. at 355.

²¹⁶ *Id.* at 366-67.

²¹⁷ *Id.* at 366.

In *Vieth v. Jubelirer*,²¹⁸ the Supreme Court recognized that the Elections Clause gave Congress the power to regulate partisan gerrymanders.²¹⁹

Congress utilized its Elections Clause authority when it enacted the NVRA²²⁰ and HAVA.²²¹ In enacting NVRA, Congress sought to increase voter registration and participation.²²² The NVRA requires states to register voters for federal elections through mail registration and when citizens apply for a driver's license or seek services from certain state agencies that receive federal funds, such as public assistance offices providing welfare and Medicaid, veteran's affairs offices, and libraries.²²³ A few states challenged the NVRA's constitutionality, and as such, Congress's authority to regulate federal elections.²²⁴ Some states argued that the NVRA served as an unfunded mandate and that it federalized state offices.²²⁵ In all of the challenges to the NVRA's constitutionality, the courts found it well within congressional authority.²²⁶

Congress may also exercise its Spending Power and attach conditions for receiving federal funds, as it did in HAVA.²²⁷ HAVA allows jurisdictions to petition the EAC for HAVA funds for a myriad of election administration

²¹⁸ 541 U.S. 267 (2004). For an extensive discussion on the Framers' intent and Supreme Court interpretation of the Elections Clause, see Jamal Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021 (2005).

²¹⁹ *Vieth*, 541 U.S. at 276 (plurality opinion).

²²⁰ See *supra* notes 161, 163 and accompanying text.

²²¹ See *supra* Part II.A.

²²² 42 U.S.C. § 1973gg (2000).

²²³ 42 U.S.C. §§ 1973gg-2, 1973gg-5.

²²⁴ See *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Miller*, 129 F.3d 833 (6th Cir. 1997) (Michigan); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411 (9th Cir. 1995) (California); *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995); *Condon v. Reno*, 913 F. Supp. 946 (D.S.C. 1995) (South Carolina).

²²⁵ See *Miller*, 129 F.3d at 836; *Edgar*, 56 F.3d at 793.

²²⁶ *Miller*, 129 F.3d at 838; *Wilson*, 60 F.3d at 1415; *Edgar*, 56 F.3d at 798; *Condon*, 913 F. Supp. at 967. In *Wilson*, the court stated that "the Supreme Court has read the grant of power to Congress in Article I, section 4, as quite broad" and that the NVRA, "on its face, fits comfortably within its grasp." 60 F.3d at 1413-14. Regarding the unfunded mandate, the court in *Miller* held that Congress' Elections Clause authority was not "condition[ed] . . . on federal reimbursement." 129 F.3d at 837.

²²⁷ In HAVA, Congress conditioned the receipt of funds on the states' compliance with the Act. 42 U.S.C. § 15301(c)(1) (Supp. III 2003).

programs, including voter education and poll worker training.²²⁸ Congress's power of the purse under HAVA serves as a legitimate exercise of congressional authority to facilitate a nondiscriminatory operation of elections and an increase in voter confidence that would require jurisdictions to prepare Voter Impact Statements when seeking funds from the EAC.

Congress's Elections Clause and Spending Powers are needed to provide a prophylactic for unwanted voters' ability to access the ballot. Requiring jurisdictions to submit a detailed and researched VIS to receive HAVA funding is constitutional and needed to ensure that election administration legislation does not disparately impact eligible voters' ability to access the ballot.

2. *The Voting Rights Act Is Not Enough*

a. *Limitations of Section 2*

Under Section 2 of the Voting Rights Act, jurisdictions are prohibited from conducting discriminatory voting practices or procedures.²²⁹ This structure, however, will not effectively prevent the passage of election administration legislation with potentially devastating effects on the unwanted voter. Although Section 2 has nationwide coverage, it places the burden on the voter to prove the existence of discrimination.²³⁰ Under the VIS approach, much like under Section 5 of the Voting Rights Act, the burden shifts to the jurisdiction to justify the legislation and demonstrate its lack of discrimination.²³¹

However, Section 2's prohibition is retrospective. Jurisdictions must be required to evaluate the election proposal prior to implementation, as in Section 5, not after the proposal is implemented. Utilizing this preemptive approach as a requirement to receive HAVA funds will ensure that jurisdictions thoroughly evaluate their election reform proposals prior to implementation, thus relieving the affected voters of the burden of marshalling the economic and litigative resources to challenge an overly burdensome and arguably disenfranchising election reform proposal.

²²⁸ 42 U.S.C. § 15301(b)(1)(A)-(H). States may use HAVA funds for improving election administration for federal offices, voter education, training election officials and improving polling place accessibility.

²²⁹ See *supra* Part I.B.1.

²³⁰ *Id.*

²³¹ *Id.*

While in the most restrictive sense, voter ID laws and voter purges can discriminate against or, at a minimum, disadvantage racial and language minorities as well as poor, elderly, and disabled voters, Section 2 cases challenging the proposed legislation strangle the judicial system and place implementation of laws at a snail's pace.

Although Section 2 serves as a nationwide prohibition against discrimination in voting, it is retrospective. As described in Part I.B.1 of this Article, courts consider a challenge against election administration legislation, such as voter ID or voter purges, as a Section 2 vote denial claim. Section 2 litigation is costly, time-consuming, and requires the plaintiff to demonstrate the discriminatory nature of the voting procedure.²³² A VIS would require the potential defendant to provide the information to the EAC prior to implementation, which would result in minimal costs to the state and could ultimately avoid litigation costs. Any citizen or organization within the affected area could provide comments endorsing or attacking the proposal. A VIS would provide protection for affected groups prior to implementation.

b. Limitations of Section 5

Section 5's preventative approach can serve as a model for regulation of election administration laws and a mechanism to thwart disenfranchisement of eligible voters.²³³ It performs four primary functions: (1) a "blocking" function that prohibits covered jurisdictions from implementing a change without Department of Justice (DOJ) or district court approval, (2) a "deterrent" function that cautions jurisdictions against seeking preclearance for questionable measures, (3) a "bargaining chip" that allows minorities and their lawyers to negotiate alternatives, and (4) a "political cover" that allows a jurisdiction to claim the Attorney General forced it to adopt the contested practice.²³⁴ These functions are also attributable to the VIS. Requiring jurisdictions to explain the purpose and need for legislation, providing alternatives, and involving the community could deter legislation that would adversely affect unwanted voters.

²³² See *supra* Part I.B.1.

²³³ See *supra* Part I.B.2.

²³⁴ Pamela S. Karlan, *Congressional Power to Extend Preclearance Under the Voting Rights Act*, AM. CONST. SOC'Y L. & POL'Y (2006), available at <http://www.acslaw.org/node/2964>.

Section 5 is a temporary provision of the VRA that requires periodic reauthorization.²³⁵ Because of this reauthorization requirement,²³⁶ opponents have repeatedly challenged the section's validity.²³⁷ Scholars continue to question the viability of Section 5 and maintain that it has lost its effectiveness, arguing, *inter alia*, that Congress lacked the proper evidentiary basis to continue its requirements imposed on covered jurisdictions.²³⁸ Shortly after the

²³⁵ See 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). The Voting Rights Act's most prominent temporary provisions include Sections 5 and 203, which govern which jurisdictions must report all voting changes to the Attorney General and designate those jurisdictions required to provide election materials in certain minority languages. 42 U.S.C. § 1973(c) (2006) (Section 5); 42 U.S.C. § 1973aa-1a (2006) (Section 203).

²³⁶ See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982); Voting Rights Act Reauthorization and Amendments Act of 2006; see also *Nw. Austin Mun. Util. Dist. No. One (NAMUD) v. Gonzales*, 557 F. Supp. 2d 9, 14 (D.D.C. 2008). Initially enacted for a five-year period, the Section 5 preclearance requirements have been extended on four occasions—1970, 1975, 1982 and 2006. *NAMUD*, 557 F. Supp. at 14. In previous extensions, Congress added jurisdictions and provided triggers for minority language projections, which added states such as Texas, Arizona, Alaska, and parts of California, Florida and South Dakota. See *id.* In 1982, Congress included a mechanism that would allow “covered jurisdictions” to “bail out” of the Section 5 requirements. *Id.* at 15. In 2006, Congress voted to extend the “temporary provisions,” such as Section 5, for an additional twenty-five years. *Id.* at 18.

²³⁷ Opponents have continually challenged Congress's ability to impose preclearance requirements on covered jurisdictions. *City of Rome v. United States*, 446 U.S. 156, 173 (1980) (upholding pre-1982 amendment version of Section 5 as constitutional); *South Carolina v. Katzenbach*, 383 U.S. 301, 329-30 (1966) (upholding Section 5 and finding the coverage formula “rational”); *County Council of Sumter County, S.C. v. United States*, 555 F. Supp. 694, 707 (D.D.C. 1983) (upholding statute and rejecting the challenge to the coverage formula because jurisdictions argued that more than fifty percent of its citizens were registered to vote). The most recent attack was filed in the U.S. District Court for the District of Columbia. *NAMUD*, 557 F. Supp. 2d at 9 (challenging the constitutionality of Section 5 as violating *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

²³⁸ See, e.g., Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 180 (2005) (discussing Congress's authority to extend Section 5 of the Voting Rights Act); Samuel Issacharoff, *Is Section 5 a Victim of Its Own Success?* 104 COLUM. L. REV. 1710, 1710 (2004). But see Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 727 (1998); Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2346-47 (2003); Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 629 (2005); Victor Andres

2006 reauthorization of the VRA, the Section 5 preclearance provision was challenged in *Northwest Austin Municipal Utility District Number One v. Mukasey (NAMUD)*.²³⁹ The *NAMUD* plaintiff sought to “bail out” of its Section 5 obligations and argued that Congress’s extension of the preclearance provision was unconstitutional.²⁴⁰ *NAMUD* argued that Congress lacked sufficient evidentiary basis to support the reauthorization of Section 5.²⁴¹ Moreover, it argued that Section 5’s reauthorization did not meet the congruence and proportionality test set forth in *City of Boerne v. Flores*.²⁴²

The United States District Court for the District of Columbia disagreed.²⁴³ It held that *NAMUD* did not meet the qualifications for “bailout” under Section 5.²⁴⁴ The court found that Congress had an extensive evidentiary record demonstrating continued racial discrimination in voting in covered jurisdictions and held the decision to extend the provisions was constitutional under the rational basis standard and under the stricter *City of Boerne* standard.²⁴⁵

A recent criticism of Section 5 argues that the Attorney General can manipulate the law to achieve political outcomes. The former chief of the DOJ, Civil Rights Division, Voting Section, appeared at congressional hearings and wrote op-eds criticizing the Bush administration’s lack of enforcement and perceived partisan decision making.²⁴⁶ The Attorney General was criticized for appearing less than impartial in rendering Section 5 decisions and basing decisions on partisanship instead of principle.²⁴⁷ Commentators have expressed grave concern regarding the perceived partisan application of Section 5.²⁴⁸

Rodriguez, Comment, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?* 91 CAL. L. REV. 769, 806-11 (2003).

²³⁹ 557 F. Supp. 2d at 18. In *NAMUD*, a small Austin, Texas utility district filed a lawsuit challenging Section 5’s preclearance provision a few days after the 2006 reauthorization.

²⁴⁰ *Id.* at 19.

²⁴¹ *Id.* at 11.

²⁴² 521 U.S. at 525; *NAMUD*, 557 F. Supp. 2d at 65-66.

²⁴³ *Id.* at 11.

²⁴⁴ *Id.* at 24.

²⁴⁵ *Id.* at 11-12. A “covered jurisdiction” may seek bailout pursuant to Section 4(a) of the Voting Rights Act to terminate its obligation to submit all voting changes to the United States Attorney General. 42 U.S.C. § 1973b(a) (2006).

²⁴⁶ Joseph D. Rich, Op-Ed., *Playing Politics with Justice*, L.A. TIMES, Mar. 29, 2007, at A22. Rich highlights that the first six years of the Bush administration “notably shirked its legal responsibility to protect voting rights” and charges that the administration not only politicized its choices to enforce the Voting Rights Act, but also “politicized” the Voting Section staff.

²⁴⁷ The entire Department of Justice has undergone an extreme amount of scrutiny regarding its partisan applications and selections of United States Attorneys. See, e.g., Dan Eggen & Amy Goldstein, *Voter Fraud Complaints by GOP Drove Dismissals*, WASH. POST,

Although these criticisms are cause for concern, they are not limited to this administration, nor are they reason enough to reject the legitimacy of Section 5.²⁴⁹

Despite allegations of political collusion and questions regarding its constitutional credibility, Section 5 is a valuable component in ensuring that unwanted voters are not subjected to practices, procedures or legislation that would disenfranchise them further. The critique of partisan intrusion does not displace the vast majority of preclearance pronouncements correctly decided.

Other commentators have recognized the difficulty in ferreting out the partisan intrusions.²⁵⁰ Instead of scrapping Section 5 and government oversight

May 14, 2007, at A04. For a continuous list of stories concerning the U.S. Attorney firings see Marisa Taylor, *Prosecutor to Probe White House Role in Attorney Firings*, MCCLATCHY WASH. BUREAU (Sept. 29, 2008), <http://www.mcclatchydc.com/reports/usattorneys/> (last visited Oct. 24, 2008).

²⁴⁸ Mark A. Posner, *The Politicization of Justice Department Decisionmaking Under Section 5 of the Voting Rights Act: Is It a Problem and What Should Congress Do?* AM. CONST. SOC'Y L. & POL'Y (2006), available at <http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf>; see also *On the Reauthorization of Section 5 of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 3 (2006) (statement of Samuel Issacharoff, Professor, New York University School of Law) (“Unfortunately, the emergence of real bipartisan competition in covered jurisdictions has brought with it concerns of preclearance objections motivated by political gain, particularly in the highly contested area of redistricting.”); David Epstein & Sharyn O’Halloran, *A Strategic Dominance Argument for Retaining Section 5 of the VRA*, 5 ELECTION L.J. 283, 292 (2006) (“partisanship may taint the administration of Section 5”); Issacharoff, *supra* note 238, at 1714 (discussing “charges of partisan misuse of the preclearance provisions of the VRA”); Mark A. Posner, *The Real Story Behind the Justice Department’s Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 DUKE J. CONST. L. & PUB. POL’Y 79, 150 (2006) (suggesting that the Texas mid-year redistricting and Georgia voter ID submissions “apparently were precleared as a result of partisan political concerns within the Justice Department”) (emphasis added); Daniel P. Tokaji, *If It’s Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 787 (2006) (discussing the possibility of “partisan manipulation”).

²⁴⁹ See, e.g., *Miller v. Johnson*, 515 U.S. 900, 924-27 (1995) (discussing the DOJ “policy of maximizing majority-black districts”). Prior administrations have been accused of enforcing Section 5 in a partisan manner. Indeed, in the 1990s redistricting cycle, the Department of Justice was criticized as having a “max-black” policy that required jurisdictions to maximize the number of predominately African-American districts it included in a redistricting submission. See *id.*

²⁵⁰ See Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 676 (2002) (finding that “nonpartisanship or political disinterestedness is difficult to define”); Michael Pitts, *Defining “Partisan” Law Enforcement*, 18 STAN. L. & POL’Y REV. 324, 328-30 (2007) (attempting to define “partisan” intervention).

for voting changes, a more transparent process that involves government and the people would better serve the goal of ensuring some semblance of just and fair behavior. Section 5 only applies to covered jurisdictions, and its continued existence is a subject of constant debate.²⁵¹ A more effective and comprehensive preventative method would require all states to prepare Voter Impact Statements using Section 5 as a model.

c. More Protection Is Needed

Sections 2 and 5 are not enough to protect America's unwanted voters from manipulation of the political system that eliminates or hinders voters' access to the electoral process. The problem with Section 5 is that it is not a nationwide prohibition; while Section 2 does apply nationwide, the money and time spent to challenge legislation is effective only retrospectively and has little deterrent effect. Section 5 does provide a deterrent for those jurisdictions that are required to submit voting changes. That proposed legislation is thoroughly vetted through an administrative system by which the most discriminatory submissions are thwarted. In this imperfect system, political bias cannot be eliminated entirely, but it can be exposed. The VIS approach would not carry the constitutional impediments of Section 5 because it is grounded in the Elections Clause and powers, not the Fourteenth Amendment.

C. Components of a Voter Impact Statement

The guidelines for making a Section 5 submission require that the submitting jurisdiction include information regarding the nature of the change (i.e., the statutory or judicial authority for the change, copies of the previous ordinance or change, a statement explaining the reason for the change, and an explanation of the anticipated effect on racial or language minorities in the jurisdiction).²⁵² The HAVA requirement that jurisdictions prepare a VIS prior to implementation of a new election administration proposal could be patterned after the Section 5 guidelines. Legislators contemplating submitting election administration changes, such as voter ID laws, voter purges, or other matters, would have to alert the Secretary of State's office. The Secretary of State's office would review the draft legislation and prepare a VIS outlining the previous practice, the proposed practice, any alternatives considered, and any

²⁵¹ See *supra* Part I.B.2.

²⁵² 28 C.F.R. § 51.27 (2008). The guidelines further suggest that demographic information and evidence of publicizing the change to the community will assist in its review.

evidence of public involvement, including comments from minority, disabled, and other underserved communities. The Secretary of State's office would then certify that the proposed legislation does not violate any of the voting rights laws listed in HAVA.

For ease of implementation, Congress could pattern the VIS after the Environmental Impact Statement that includes information similar to a Section 5 memorandum that DOJ civil rights analysts prepare. The VIS, however, would require the jurisdiction to prepare the document for the government's review prior to implementation and with more scrutiny and analysis than utilized currently. The VIS would therefore provide a more thorough application than a Section 5 submission.

1. Purpose and Need

A key provision of the EIS is the "purpose and need"²⁵³ section, which explains the underlying purpose for the proposal. For instance, a legislature proposing new voter ID requirements would have to establish the extent of the fraud underlying the proposal and how the legislation would combat fraud without impinging on voters' rights or access to the polls. Under this approach, legislators would be forced to consider the disparities in the number of persons with driver's licenses and other government-issued IDs and the costs involved.²⁵⁴

In considering the first Georgia voter ID bill, the state legislature looked at the number of driver's licenses issued and found it was comparable to the number of persons who were of voting age.²⁵⁵ It did not consider the potential burden or impact of obtaining the underlying documentation for the acceptable forms of ID or the hardship in finding a registration location. Analysts who recommended that the Attorney General object to this submission found that the legislature "intentionally adopted the voter identification restrictions for the purpose of disenfranchising black voters."²⁵⁶ If the jurisdiction had been required to undergo its own thorough analysis instead of relying on conjecture and anecdotes, a more complete submission and governmental and public

²⁵³ 40 C.F.R. § 1502.13 (2008).

²⁵⁴ See *infra* Part II.D (article indicating disparities in driver's license possession).

²⁵⁵ See BERMAN, *supra* note 9, at 14.

²⁵⁶ *Id.* at 38. ("Save for Rep. Burmeister's inflammatory statement that blacks in her district vote only because they are paid, we have found no evidence to suggest that proponents had data pointing to the retrogressive effect of the legislation and nevertheless intentionally adopted the voter identification restrictions for the purpose of disenfranchising black voters.").

examination could have illustrated the need for further review prior to approval. Under the VIS system, the EAC would opt not to issue the funds for a program that was not supported with the appropriate data or that suggested a possible violation of existing voting laws.

As an example, proponents of stricter voter ID requirements would argue that stricter laws are needed to prevent voter fraud. In a VIS, the legislators would be compelled to discuss the extent to which voter fraud is an issue in the state and how voter ID could limit voter fraud. If the purpose of the voter ID legislation is to prevent voter fraud, then the legislator should begin a searching and thorough analysis of whether voter ID indeed lessens or eliminates such occurrences.²⁵⁷ Likewise, to the extent that jurisdictions' voter purges remove eligible citizens from the voter rolls, government officials should engage in developing a VIS and explain the purpose and need for the proposed action. List maintenance and removal of ineligible persons from the voter rolls is laudable and necessary. When the voting-age population is far smaller than the number of persons on the voter rolls, there is a need for election officials to purge the list. Clearly, election officials have the authority, as well as the need, to ensure that only eligible voters are included on a voter list. In a VIS, election officials would describe the need to clean the voter lists and describe how the proposed legislation would accomplish that task. The VIS must also disclose, pursuant to the NVRA, how the task can be accomplished in a nondiscriminatory manner.²⁵⁸

2. Alternatives

Another crucial component of the EIS is alternatives to the proposal,²⁵⁹ which the Section 5 process does not require but which are crucial for a thorough analysis.²⁶⁰ NEPA requires that agencies "objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from

²⁵⁷ See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1618 (2008). In *Crawford*, the Supreme Court did not require the state to prove the existence of voter fraud but did require the opponents of the bill to prove injury before awarding relief. See *id.*

²⁵⁸ 42 U.S.C. § 1973gg-6(b)(1) (2000). The NVRA includes list maintenance requirements that instruct states on how to conduct voter purges. *Id.* These requirements, however, have been manipulated, as well as ignored, in some instances to remove eligible citizens from the rolls. See *supra* Part II.C. A VIS would require a state to ensure that its purge procedures do not conflict with the NVRA or disproportionately affect minority and other voters.

²⁵⁹ 40 C.F.R. § 1502.14 (2008).

²⁶⁰ Generally, in the Section 5 process, a jurisdiction would not provide this information until the Attorney General requested it in a "more info" letter. See 28 C.F.R. § 51.37 (2008).

detailed study, briefly discuss the reasons for their having been eliminated.”²⁶¹ Thus, a VIS would require a reporting of options considered and a description of the type of study the jurisdiction undertook in arriving at the proposal and an explanation for eliminated plans. This would provide the public and the EAC with the options that were considered prior to settling on the final proposal.

In the voter ID context, election officials could argue that they included the use of provisional ballots and absentee ballots as a means for addressing voter fraud. They could explain why they rejected other proposals and discuss alternatives that could increase voter access, such as providing free photo identification,²⁶² providing mobile units to distribute voter IDs,²⁶³ election-day registration, allowance of signature verification, and other methods.²⁶⁴

In the voter purge context, the same is true. Election officials could discuss methods that provide notice and an opportunity to be heard prior to removal. Jurisdictions could demonstrate their willingness to consider the practice of issuing provisional ballots for those persons who contest removal on Election Day as a means of ensuring that all eligible voters are provided an opportunity to participate in the franchise. Jurisdictions could also disclose other methods they considered in determining the timing of a voter purge and how to notify affected persons, as well as their coordination with other state agencies such as the Department of Motor Vehicles and Department of Vital Statistics.²⁶⁵ Alternatives in the voter purge context would include proposals to gather the information and ensure that persons received the requisite notice prior to removal.

3. *Community Involvement*

Although Section 5 allows public comment once legislation has been submitted, a VIS would allow the community to comment on and participate in the formulation of the legislation. The EAC should make Voter Impact Statements accessible to the public to assist states in analyzing proposals to effectuate informed decisions. The EAC can also use the VIS to develop

²⁶¹ 40 C.F.R. § 1502.14 (2008).

²⁶² COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS iv (2005), available at <http://www.american.edu/ia/cfer/>.

²⁶⁴ *Id.*

²⁶⁴ Overton, *supra* note 78, at 674-81.

²⁶⁵ Under the Real ID Act, jurisdictions are required to provide cross communication between states and exchange information regarding driver’s license renewals and other pertinent information. Real ID Act of 2005, Pub. L. No. 109-113, 119 Stat. 231, 314 (2005).

minimum requirements based on what it deems are the most effective practices from other states. The state agency should post the VIS for comment on its website and in its local paper and develop a list of minority, disabled, elderly, and civic organizations to whom it should distribute the VIS through direct mailings. The state should submit proposed legislation to the EAC, just as agencies must submit a “Notice of Intent” to prepare an EIS.

The state should submit the proposed legislation and the draft VIS to the EAC for comment. The comment period should last thirty to forty-five days. The chief election official²⁶⁶ and the EAC should place the proposed legislation and the draft EIS on their websites with instructions regarding public comment. Additionally, agencies should be required to hold hearings and public meetings and solicit comments from groups that could be adversely affected. Comments and hearings held as part of the consideration of the pending bill should be included in the legislative record. The public comment period should help modify or diminish the adverse impact on a particular group or interest.

Community efforts would foster political participation, provide for crucial input at the outset of the legislative process, and limit costly litigation after implementation. Requiring election officials to engage constituents would ensure a well-informed electorate. Political participation involves more than casting a ballot. It also involves lobbying, registering others to vote, contacting elected officials, and speaking out on issues. Unlike receiving an invitation to speak before a congressional or state legislative committee, which would foreclose many from participating, the proverbial town hall meeting would allow interested individuals to have their voices heard and concerns about proposed legislation addressed prior to passage.

4. *Enforcement*

Many states have specific offices that prepare Environmental Impact Statements to ensure compliance with NEPA.²⁶⁷ In many respects, the organization needed to prepare Voter Impact Statements already exists. Under the NVRA, each state must designate a chief election official (CEO), who in most instances is the Secretary of State or a designated officer responsible for

²⁶⁶ The NVRA requires each state to designate a chief election official. 42 U.S.C. § 1973gg-8 (2000).

²⁶⁷ See, e.g., INDOT: Office of Environmental Services, <http://www.in.gov/indot/7287.htm> (last visited Oct. 24, 2008).

election administration.²⁶⁸ Under the proposed VIS, legislators would contact the CEO with copies of the proposed election administration legislation. The CEO or a designee currently holds the responsibility of overseeing all election administration matters. Requiring the CEO to coordinate with legislators in drafting election laws and the VIS would assist in the smoother administration of elections and assist the legislature in avoiding legislation that would inadvertently or purposefully eliminate particular voting groups.

On the federal level, just as multiple agencies have NEPA responsibilities,²⁶⁹ so too should the EAC and DOJ have responsibilities with regard to Voter Impact Statements. These agencies should be responsible for reviewing and enforcing the compilation of a VIS, similar to their current responsibilities.²⁷⁰ Coordination of the agencies in reviewing and enforcing VIS compliance would remain the same as the coordination for other HAVA compliance areas.²⁷¹ Generally, the EAC gathers information from the jurisdictions and serves as a “clearinghouse” for information on “best practices” in election administration.²⁷² Enforcement of HAVA rests with the Department of Justice.²⁷³ Under HAVA, the EAC is also responsible for the distribution of requested funds.²⁷⁴ In instances where the EAC does not receive the required information about an election administration change and determines that the jurisdiction is not in compliance with the VIS, it should provide that information to the DOJ for enforcement. The EAC should also provide a forum for conflict resolution between citizens and state, local, and tribal governments, as well as businesses and private organizations.

The EAC can also determine that a jurisdiction is not eligible for distribution of requested funds. Should a jurisdiction disagree with the EAC’s assessment, it can, as under Section 5, file a declaratory judgment action in the federal courts.

²⁶⁸ For a list of designated chief election officials for each state, see DEMOS, YOUR STATE’S CHIEF ELECTION OFFICIAL, available at <http://www.demos-usa.org/pubs/Chief%20Elections%20Officials.pdf>.

²⁶⁹ See 40 C.F.R. § 1507.1 (2008).

²⁷⁰ Under HAVA, the Election Assistance Commission (EAC) serves as the administrative body that oversees the implementation of HAVA initiatives, and the Attorney General has enforcement authority. See *supra* Part II.A.

²⁷¹ See *supra* Part II.A. The EAC and DOJ have coordinated with other required compliance under HAVA such as statewide databases and compliance with the minority language and disability standards.

²⁷² See 42 U.S.C. § 15322 (Supp. III 2003); see also *supra* Part II.A.

²⁷³ See *supra* Part II.A.

²⁷⁴ 42 U.S.C. § 15401 (Supp. III 2003).

5. *Goals/Benefits*

The adoption of Voter Impact Statements could eliminate, or at least diminish, disparate impact on America's unwanted voters. It would also increase voter confidence and participation in the political process. The crucial component of the VIS system is that scrutiny occurs before the legislation is adopted and after it has been thoroughly vetted. The VIS fosters inclusion in the political process. It also rightfully places the burden of proving the necessity for the legislation with the politically empowered.

An additional benefit of requiring a VIS under HAVA is the ability to potentially reduce litigation costs. In the last three years, the country has engaged in several lawsuits concerning voter ID legislation, with one case pending in the United States Supreme Court.²⁷⁵ The ability to provide public comment gives an appearance of a transparent process. Additionally, well-developed election administration legislation that seriously considers the purpose of and need for the legislation and viable alternatives and includes community involvement strengthens our democracy. This could serve as the American dream or a legislature's biggest nightmare: a participatory body politic voicing its opinion regarding the efficacies of fundamental democratic tenets, such as voter access.

The VIS is a workable undertaking for state legislatures and the public to facilitate the necessary process of reviewing election administration changes through the lens of fairness and often race, age, disability, and language. The VIS would encourage a thorough examination of the impact of legislation in "major" state actions affecting the right to vote in federal elections.

CONCLUSION

The American political system is at odds with itself, struggling with issues of improving and easing access to the ballot while ensuring the integrity of our democracy. On one hand, we want and welcome free and fair elections. On the other hand, we want assurances that only those who are eligible to cast a ballot do so. The friction between the two ideals creates an environment that is less concerned with equal access than with an opportunity to exclude those voters who could adversely affect a political objective.

At a time in our history when record numbers of citizens register and vote and when presidential elections are decided within historically close margins,

²⁷⁵ See *supra* Part II.B.

the democratic clock is turning back to a time when it was extremely difficult, if not impossible, for African-American, poor, and elderly citizens to vote and have those votes counted.

A Voter Impact Statement would protect voters from nefarious legislation, regardless of where they live, before implementation, before the harm can occur, and before costly litigation. As noted in *South Carolina v. Katzenbach*, Section 5 “shift[s] the advantage of time and inertia from the perpetrators of the evil to its victims.”²⁷⁶ A further shift must take place to protect our most vulnerable voters outside Section 5 covered jurisdictions, with the prophylactic measures that lie at the heart of voting rights protections.

²⁷⁶ 83 U.S. 301, 328 (1966).