

# NOTES

## THE NEW VOTER SUPPRESSION: WHY THE VOTING RIGHTS ACT STILL MATTERS

MICHAEL ELLEMENT\*

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Few legislative enactments have so utterly transformed an entire segment of the American population as the Voting Rights Act of 1965 (VRA).<sup>1</sup> The VRA ushered in a new wave of political participation

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\* J.D. Candidate, The Catholic University of America, Class of 2013. The author would like to thank his friends and family for their continued support. Their constant encouragement was critical not only to the development of this piece, but also to my education as an attorney. Additionally, the author especially thanks the staff at *The Scholar: St. Mary's Law Review on Race and Social Justice*, whose editing and source checking greatly improved the final product.

1. 42 U.S.C. § 1973 (2006). See generally *The Voting Rights Act: Protecting Minority Voting Rights*, ACLU, <http://www.aclu.org/voting-rights/voting-rights-act-0> (last visited Sept. 15, 2012).

throughout the country and drastically transformed the ability of African Americans to exercise their right to vote in the South.<sup>2</sup> The VRA's success has been immense.<sup>3</sup>

Pursuant to the Fifteenth Amendment,<sup>4</sup> Congress enacted federal regulations through the VRA to enfranchised African-Americans.<sup>5</sup> The most influential policy under the Act was Section 5, which instituted a new system of review for voting procedure changes in states with a history of racial discrimination.<sup>6</sup> States subject to Section 5 are required to submit any changes made to their voting laws to the U.S. Department of Justice or the Federal District Court for the District of Columbia for "preclearance."<sup>7</sup> If a law is not cleared in advance, it may not go into effect.<sup>8</sup>

Section 5 is not immune from criticism. Opponents contend that the preclearance system conflicts with values of federalism and is no longer necessary to ensure voter nondiscrimination.<sup>9</sup> In 2009, the Supreme Court heard *Northwest Austin Municipal Utility District Number One v. Holder (NAMUDO)*<sup>10</sup>—which presented a facial challenge to the constitutionality of Section 5.<sup>11</sup> The Court decided the case on alternative grounds, and refused to answer the question of Section 5's

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2. 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, 577 ("Significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965.").

3. See *The Voting Rights Act: Protecting Minority Voting Rights*, ACLU, <http://www.aclu.org/voting-rights/voting-rights-act-0> (last visited Sept. 15, 2012).

4. U.S. CONST. amend. XV, § 2 ("The Congress shall have the power to enforce this article by appropriate legislation.").

5. 42 U.S.C. § 1973c.

6. *Id.*

7. *Id.* See also *Beer v. United States*, 425 U.S. 130, 138, 151–52 (1976) (using the term "preclearance" to describe the process laid out in 42 U.S.C. 1973c (2006)).

8. 42 U.S.C. § 1973c(a). A state "may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure." *Id.*

9. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 201, 216 (2009) (concluding in dicta that §5 is unconstitutional).

10. 557 U.S. 193, 193 (2009), *Prob. juris. noted*, 573 F.Supp.2d 221 (2008).

11. *Id.*

constitutionality.<sup>12</sup> However, the language in Chief Justice Roberts' opinion for the Court strongly questioned the constitutionality of Section 5.<sup>13</sup> Justice Thomas, who concurred in part and dissented in part, would have found Section 5 unconstitutional.<sup>14</sup> Both the majority and Justice Thomas recognized Section 5's importance when it was first enacted, but both questioned the continuing need for Section 5 in modern America.<sup>15</sup> The two opinions suggested that Section 5 outlived its usefulness, and was no longer necessary to prevent voter discrimination.<sup>16</sup>

By 2011 and 2012, legislatures across the country made substantive modifications to voting procedures and regulations.<sup>17</sup> Changes ranged

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12. *Nw. Austin*, 557 U.S. at 196 (finding that the jurisdiction was eligible to file a "bailout suit", thus holding in the district's favor and making it unnecessary to rule on the constitutional issue).

13. *See id.* (holding: that (1) Supreme Court would apply principle of constitutional avoidance to refrain from deciding whether preclearance requirements were unconstitutional, and (2) that a utility district was a "political subdivision" eligible to file suit to bail out of preclearance requirements).

14. *Id.* at 212 (holding that Section 5 exceeds Congress' power to enforce the Fifteenth Amendment).

15. *Id.* at 222–25.

16. *See id.* at 201, 216 (concluding in dicta that Section 5 was probably unconstitutional).

17. *See, e.g.*, H.B. 56, 2012 Leg., 83d Sess. (Ala. 2012) (extending the prohibition period before an election in which a voter may be registered); H.B. 19, 2010 Leg., 82d Sess. (Ala. 2011) (requiring photo ID to be presented to an election official prior to voting); H.B. 1355, 2011 Leg., Reg. Sess. (Fla. 2011) (making eighty changes to the state's voting procedures, including changes to state's voter registration procedures and limits on early voting); H.B. 92, 151st Gen. Assemb., Reg. Sess. (Ga. 2011) (reducing the number of days available for early voting); S.B. 1586, 97th Gen. Assemb., Reg. Sess. (Ill. 2011) (changing regulations relating to voter registration organizations); H.B. 2067, 2011 Leg., 84th Sess. (Kan. 2011) (requiring a non-expired photo ID in order to vote on election day and requiring proof of U.S. citizenship prior to registering to vote); Leg. 1376, 125th Sess., 1st Reg. Sess. (Me. 2011) (ending election day registration in the state) (subsequently repealed by citizen initiative); H.F. 2738, 2012 Leg., 87th Sess. (Minn. 2012) (passing of constitutional amendment by state legislature requiring photo ID, must be additionally passed by voter referendum); S. J. Res. 2, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011) (placing an initiative on the November 2012 ballot to amend the state constitution and give the state legislature the authority to implement a photo ID law) (amendment subsequently prohibited from being placed on ballot by court order); Assemb. B. 82, 2011 Leg., 76th Sess. (Nev. 2011) (prohibiting a government voter registration agency from employing any person whose duties will include the registration of voters if the person has been convicted of a felony involving theft or fraud); H.R. 194, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (shortening the early voting period in state); H.R. 934, 195th Gen. Assemb., Reg. Sess. (Pa. 2012) (requiring photo ID to be presented prior to casting a ballot); S. 400, 2011 Gen. Assemb., Reg. Sess. (R.I. 2011) (requiring photo ID in order to cast an election ballot); H.R. 3003, 2011 Gen. Assemb., 119th Sess. (S.C. 2011) (requiring voters to produce a valid and current form of photo ID before being allowed to vote on election day); H.R. 1247, 2012 Leg. Assemb., 87th Sess. (S.D. 2012) (denying the right to vote to any individual with

from new registration requirements, reductions in the number of days available for early voting, new identification requirements, and more.<sup>18</sup> A number of these changes were made in states subject to the preclearance requirement of the VRA.<sup>19</sup>

This Note will analyze the purpose and history of the VRA. It will analyze Congress' authority to enact legislation in the area of voting rights. Furthermore, this Note discusses the Court's decision in *NAMUDO* and Chief Justice Roberts' and Justice Thomas' contention that Section 5 was rendered obsolete by the lack of recent laws aimed at voter suppression.<sup>20</sup> Additionally, this Note will discuss the various changes in voting procedures enacted between 2011 and 2012 while analyzing the effect changes may have on minority voter participation. The Note will further examine Chief Justice Roberts' and Justice Thomas' arguments that voter suppression does not occur in modern day

a criminal conviction who is currently on probation); S. 16, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011) (requiring photo ID in order to cast a ballot on election day); S. 352, 106th Gen. Assemb., Reg. Sess. (Tenn. 2011) (requiring proof of U.S citizenship if the coordinator of elections finds that a registered voter is not a U.S. citizen); S. 923, 106th Gen. Assemb., Reg. Sess. (Tenn. 2011) (reducing the early voting period in a presidential primary from 5 to 7 days before the election); S.B. 14, 82d Leg., Reg. Sess. (Tex. 2011) (requiring a non-expired photo ID when voting); H.R. 1570, 82d Leg., Reg. Sess. (Tex. 2011) (forbidding the registrar of voters from assisting in the registration of voters until he or she has completed a training program required under the law); S. 1ER2, 2012 Gen. Assemb., Reconvened Sess. (Va. 2012) (eliminating provision that previously allowed a voter to sign a sworn statement in lieu of showing a photo ID in order to vote); S. 581, 2011 Leg., Reg. Sess. (W. Va. 2011) (reducing early voting period from 17 days to 10 days); Assemb. B. 7, 2011 Assemb., Reg. Sess. (Wis. 2011) (requiring voters to show photo ID and also making changes to party line voting) (held permanently enjoined by court order). See also Eric Russell, *Mainers Vote to Continue Election Day Registration*, BANGOR DAILY NEWS (Nov. 8, 2011, 9:46 PM), <http://bangordailynews.com/2011/11/08/politics/early-results-indicate-election-day-voter-registration-restored/>; Delbert Hosemann, Miss. Sec'y of State, *Initiative #27, VOTER IDENTIFICATION*, <http://www.sos.ms.gov/page.aspx?s=7&s1=1&s2=84> (last visited Sep. 3, 2012) (requiring a government issued photo ID to be presented before an elector is permitted to vote).

18. See sources cited *supra* note 17 (listing voting law changes). See also *Florida Voting Law's Bad Effects*, TAMPA BAY TIMES (Mar. 29, 2012), <http://www.tampabay.com/opinion/editorials/article1222350.ece>; see also Press Release, Congresswoman Corrine Brown, Congresswoman Brown Asks Court to Prevent Suppression of Minority Vote, Expand Early Voting (Aug. 29, 2012) (discussing the effects of eliminating early voting days); Ethan Bronner, *Legal Battles Erupt Over Tough Voter ID Laws*, N.Y. TIMES, July 20, 2012, <http://www.nytimes.com/2012/07/20/us/politics/tougher-voter-id-laws-set-off-court-battles.html?pagewanted=all> (discussing the effects of strict photo identification requirements).

19. See sources cited *supra* note 17 (listing the changes in states subject to the preclearance requirement).

20. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 201, 216 (2009).

America.<sup>21</sup> This Note will dispute that premise. Rather, evidence demonstrates that continued enforcement of Section 5 is necessary to prohibit states from denying minority citizens the ability to access the ballot box.

### I. CONGRESSIONAL ACTION IN THE AREA OF VOTING—FROM COMPLACENCY TO THE VRA

The Fifteenth Amendment<sup>22</sup>—originally intended to give freed male slaves the right to vote—not only prohibits states from denying citizens a right to vote based on their race but also grants Congress the “power to enforce this article by appropriate legislation.”<sup>23</sup> This enforcement authority grants Congress the ability to remedy the wrongs of the slavery era by taking affirmative actions towards creating a fair voting structure.<sup>24</sup>

Following the Fifteenth Amendment’s passage, Congress did little to effectuate its authority to enforce voting rights.<sup>25</sup> Instead, Congress remained complacent on issues of voting rights for newly freed slaves.<sup>26</sup> Despite Congressional inaction, voting by African-American men in the South was widespread in the immediate aftermath of the Civil War,<sup>27</sup> and remained high through the end of the nineteenth century.<sup>28</sup>

During President Andrew Johnson’s term, Blacks were excluded from southern politics and state legislatures were allowed to pass “[B]lack

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21. See *id.* (concluding in dicta that § 5 was probably unconstitutional).

22. U.S. CONST. amend. XV, § 1.

23. See *id.* § 2. See generally Julien C. Monnet, *The Latest Phase of Negro Disfranchisement*, 62 OKLA. L. REV. 407 (2010) (discussing the history of the 15th Amendment).

24. See Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1801 (2010).

25. See *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966).

26. See CHARLES S. BULLOCK, III & RONALD KEITH GADDIE, *THE TRIUMPH OF VOTING RIGHTS IN THE SOUTH* 7–8 (2009) (referencing over almost ninety years of inaction by Congress in passing civil rights legislation).

27. See *id.* at 6–7 (citing J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910* (1974)).

28. *Id.* African Americans not only participated in the voting process, but also were elected to office in high numbers in Mississippi, Louisiana, and South Carolina. See Michael J. Klarman, *The Supreme Court and Black Disenfranchisement*, in *THE VOTING RIGHTS ACT: SECURING THE BALLOT* 37 (2006) (noting that at times during the reconstruction period, African-Americans made up nearly half the lower-house delegates in Mississippi and Louisiana as well as a majority of the lower-house delegates in South Carolina. During the same time, sixteen African-Americans were also elected to Congress).

codes” which regulated the lives of free men and women.<sup>29</sup> Southern states used the lack of federal enforcement of voting rights to actively exclude African-Americans from the polls.<sup>30</sup> Georgia and Mississippi were the first states to implement what later became known as literacy tests and poll taxes, in an effort to limit opportunities for African-Americans to access the ballot.<sup>31</sup> The Federal Government failed to intervene, and other states soon followed.<sup>32</sup> The effect was to drastically reduce African-Americans’ voter participation in the South.<sup>33</sup> The Supreme Court routinely upheld these discriminatory methods as a valid exercise of state interest in the voting process.<sup>34</sup> It was clear to those in the Civil Rights Movement that African-American voter participation would remain suppressed at the state level without serious intervention from the federal government.<sup>35</sup>

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29. A&E Television Networks, *Black Codes*, HISTORY, <http://www.history.com/topics/black-codes> (last visited Sept. 16, 2012).

30. See H.R. REP. NO. 89-439, at 6, 14–16 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2443, 2451–52 (discussing the use of literacy tests and poll taxes to limit voting opportunities of African-Americans).

31. BULLOCK, *supra* note 26, at 7.

32. *Id.*; see also H.R. REP. NO. 89-439, at 6, 14–16 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2443, 2451–52 (discussing the use of literacy tests and poll taxes to limit voting opportunities of African Americans).

33. BULLOCK, *supra* note 26, at 6–7; see also STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969*, at 55 (Lexington Books 1999) (1976) (describing the use of poll taxes, literacy tests, and registration requirements to decrease voter turnout and discourage political party opposition).

34. See *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 53–54 (1959) (upholding use of a literacy test); *Giles v. Harris*, 189 U.S. 475, 486–87 (1903) (denying relief from a race-based voter registration scheme albeit by identifying a supposed inconsistency in the plaintiff’s argument, i.e., that the Court cannot require the state to register the plaintiff as a qualified voter under the voter registration provisions of the Alabama Constitution because the basis of the plaintiff’s bill of equity is that those provisions are unconstitutional and so are, themselves, void); *Williams v. Mississippi*, 170 U.S. 213, 221–22, 225 (1898) (upholding the use of a poll tax and literacy tests). The Court eventually invalidated some of the more egregious state-level restrictions, while continuing to allow other restrictions to remain in common use. See *Louisiana v. United States*, 380 U.S. 145, 153 (1965) (holding unconstitutional those provisions requiring voters “to satisfy registrars of their ability to understand and give a reasonable interpretation of any section of the Federal or State Constitutions.”); *Smith v. Allwright*, 321 U.S. 649, 662–66 (1944) (holding unconstitutional a party-primary system that discriminated against voters on the basis of race); *Guinn v. United States*, 238 U.S. 347, 365–67 (1915) (upholding the use of literacy tests but striking down as unconstitutional the so-called “grandfather clause”).

35. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 259 (2000). As one author points out, the story of African-American voting rights is unique—at no other time in American history has one group been granted a right to enter the electorate, only to later be excluded and forced to begin a new crusade for suffrage. RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 1–2 (2004).

Activists achieved their first major victory for African-American voting rights with the passage of the Civil Rights Act of 1957.<sup>36</sup> The Act authorized the Attorney General to seek injunctions against those who interfered with an individual's right to vote on the basis of their race.<sup>37</sup> The Civil Rights Acts of 1960<sup>38</sup> and 1964<sup>39</sup> followed, but had little impact on the overall status of minorities in the electoral process.<sup>40</sup> It was against this backdrop that President Lyndon Johnson introduced the Voting Rights Act of 1965 while addressing a joint session of Congress.<sup>41</sup> The Act sought to strike down restrictions on voter access, provide for the registration of individuals by federal government agents, and ensure that properly registered citizens were not prohibited from voting.<sup>42</sup> Detractors of the bill warned of the breadth of the changes, specifically raising concerns of overreaching by the federal government.<sup>43</sup> However, the bill was eventually approved in the House of Representatives by a vote of 328-74, and the Senate by a vote of 79-18.<sup>44</sup>

The VRA, in its final form, sought to “banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of [the] country for nearly a century.”<sup>45</sup> The Act gave the federal govern-

36. Civil Rights Act of 1957, Pub. L. No. 83-315, 71 Stat. 634 (codified at 42 U.S.C. § 1971 (2006)). While the Federal Government made some attempts in the early 1900s to criminalize private interferences with the voting rights of African-Americans, these efforts were struck down by the Supreme Court as exceeding Congress' authority under the Fifteenth Amendment. *James v. Bowman*, 190 U.S. 127, 139 (1903). In the period from the 1890s to the early 1900s, enthusiasm for Black suffrage dissipated and efforts to achieve voting rights were diminished compared to efforts during the Reconstruction Era. Michael J. Klarman, *The Supreme Court and Black Disenfranchisement*, in *THE VOTING RIGHTS ACT: SECURING THE BALLOT* 37, 40–41 (2006).

37. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, 637 (codified at 42 U.S.C. § 1971 (2006)).

38. Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (1960).

39. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

40. *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966) (noting that despite new laws, little changed in the area of voting discrimination); *see also* H.R. REP. NO. 89-439, at 3 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2440–41 (describing the enforcement of the 1957, 1960, and 1964 voting rights statutes as encountering serious obstacles and progressing at a “painfully slow” rate).

41. Special Message to the Congress: The American Promise, 1 PUB. PAPERS 281 (March 15, 1965).

42. H.R. 6400, 89th Cong. §§ 2, 5, 10 (1965).

43. *See* H.R. REP. NO. 89-439, at 37 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2491 (describing the Act as “in contravention of time-honored constitutional principles” and stating that “the right to vote is not absolute and the [s]tates under our system of government have the exclusive power to fix and determine qualifications. The Federal Government has no power to bestow upon any person the right to vote in any [s]tate.”).

44. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973).

45. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

ment several new tools to combat racial discrimination in voting. Section 2 of the Act, for example, prohibited the implementation of any “voting qualification or prerequisite to voting” that denied a citizen the right to vote on account of their race.<sup>46</sup> Other sections specifically suspended the use of literacy tests, and authorized the appointment of federal registrars to take an active role in state voter registration.<sup>47</sup> Following the VRA’s enactment, the percentage of eligible African-American voters registered increased dramatically.<sup>48</sup>

Likely the most controversial provision at the time of the VRA’s passage, and still today,<sup>49</sup> is the mandate that jurisdictions obtain preclearance before enforcing changes to their election laws or voting procedures.<sup>50</sup> The requirement was designed as a response to the “common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down.”<sup>51</sup>

A covered jurisdiction may submit changes for preclearance in one of two forms: (1) an action in the U.S. District Court for the District of Columbia for a declaratory judgment or (2) submission to the Attorney General for review.<sup>52</sup> A jurisdiction is covered by the preclearance re-

46. 42 U.S.C. § 1973a(c) (2006).

47. *Id.* §1973b(a)(1)(A–F) (2006).

48. HELEN E. TEIR ET AL., U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1970, WHITE AND NEGRO VOTER REGISTRATION IN 11 SOUTHERN STATES: 1964 AND 1969, at 369 (1970).

49. *See* *Shelby Cnty., Ala. v. Holder*, 811 F.Supp.2d 424, 431 (D.D.C. 2011), *aff’d*, 679 F.3d 848 (D.C. Cir. 2012) (describing preclearance requirement as the most controversial aspect of the VRA’s temporary provisions).

50. 42 U.S.C § 1973c(a) (2006) (requiring states to obtain a declaratory judgment stating “such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color . . .”).

51. *Beer v. United States*, 425 U.S. 130, 140 (1976).

52. *See* 42 U.S.C § 1973c(a) (2006) (specifying that changes to voting procedures be enforced only through declaratory judgment or by approval of the Attorney General); *see also* 28 C.F.R. § 51.11 (2011) (stating that “[s]ubmission to the Attorney General does not affect the right of the submitting authority to bring an action in the U.S. District Court for the District of Columbia for a declaratory judgment . . .”); *see also* *Shelby Cnty.*, 811 at 431 (noting that if the Attorney General submits an objection to the change, the jurisdiction may seek reconsideration, or it may seek de novo review by the District Court); *see also* *Cnty. Council of Sumter Cnty., S.C. v. United States*, 555 F. Supp. 694, 700 (D.D.C. 1983) (describing the only alternative for preclearance when the Attorney General has rejected the position, is to obtain a declaratory judgment); *see also* *City of Rome v. United States*, 450 F. Supp. 378, 381–82 (D.D.C. 1978) (explaining that while the District Court is permitted to make a decision regarding preclearance, regardless of whether the Attorney General has imposed an objection, the court is prohibited from reviewing “the Attorney General’s application of the [S]ection 5 standards in deciding whether to interpose an ob-



quirement if it meets certain criteria.<sup>53</sup> The coverage formula is meant to subject those jurisdictions with a history of racial discrimination to the strictures of the preclearance requirement.<sup>54</sup>

The preclearance requirement was a highly debated issue when the VRA was first introduced.<sup>55</sup> Much of the debate centered on the extraordinary nature of allowing the federal government to deny implementation of a duly enacted state law, as well as the VRA's preference for the District Court for the District of Columbia as the sole forum for settling preclearance disputes between the Attorney General and a state.<sup>56</sup> Due to the controversial nature of Section 5, the preclearance requirement was originally set to expire five years after its enactment.<sup>57</sup> However, Congress has since found continuing need for the preclearance requirement and renewed the provision on four occasions, most recently in 2006.<sup>58</sup>

The 2006 reauthorization included an extensive legislative record.<sup>59</sup> The Congressional findings were telling. Congress found widespread evi-

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jection within the sixty-day period." (quoting *Harris v. Bell*, 562 F.2d 772, 774 (D.C. Cir. 1977)). See generally *Morris v. Gressette*, 432 U.S. 491 (1977) (stating that judicial review of the Attorney General's objections or failure to object under Section 5 is improper); See generally Jocelyn F. Benson, *A Shared Existence: The Current Compatibility of the Equal Protection Clause and Section 5 of the Voting Rights Act*, 88 NEB. L. REV. 124, 129 (2009) (recognizing that submission to the Justice Department is far more common, for reasons of efficiency and cost to the jurisdiction).

53. 42 U.S.C. § 1973b(b) (2006).

54. See *id.* (stating that preclearance applies if the jurisdiction maintained a literacy requirement or other "test or device" as a prerequisite to voting, and fewer than 50% of its voting-age citizens were registered to vote or voted in that year's presidential election).

55. See H.R. REP. NO. 89-439, at 23-34 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2470-71 (arguing that the Voting Rights Act "attempts to remedy discrimination by discriminatory means" and that it suspends state sovereignty and disqualifies federal courts).

56. See 111 CONG. REC. 8293-94 (1965) (debating the constitutionality of the VRA's preclearance requirements).

57. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 438 (codified as amended at 42 U.S.C. § 1973).

58. See, e.g., 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, 577 (citing "evidence of continued discrimination" as the basis for the extension of various provisions of the Voting Rights Act of 1965, including the preclearance requirement); See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 141-42 (observing amendments to the Voting Rights Act of 1965, including extension of the preclearance requirement); See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400, 400 (amending the VRA to include dissemination of information about voting in languages other than English, and extending the preclearance requirement); Voting Rights Act Amendments of 1970, Pub. L. No. 91-275, 84 Stat. 314, 315 (amending the VRA to extend the preclearance requirement).

59. H.R. REP. NO. 109-478, at 2 (2006).

dence of racial discrimination in voting at the state level.<sup>60</sup> Specifically, the House Report detailed the high number of objections the Department of Justice (DOJ) imposed on jurisdictions since 1982 indicating the DOJ's continued finding that the VRA is necessary to prevent discriminatory voting practices.<sup>61</sup> The House Report discussed a specific instance in 2001, where the city of Kilmichael, Mississippi saw an unprecedented number of African-Americans running for local office.<sup>62</sup> Three weeks before the election, and following census data which revealed that African-Americans had become a majority in the town, the town's mayor and the all-White Board of Alderman canceled the election.<sup>63</sup> No plans were made to reschedule the election.<sup>64</sup> The DOJ, utilizing its authority under the VRA, forced the town to hold an election in 2003.<sup>65</sup> The town's first African-American mayor and three African-American aldermen were elected.<sup>66</sup> Based on such evidence, Congress overwhelmingly passed the reauthorization of the VRA in 2006 by a vote of 390-33 in the House<sup>67</sup> and 98-0 in the Senate.<sup>68</sup>

## II. *NAMUDO*—THE SUPREME COURT QUESTIONS SECTION 5

In *Northwest Austin Municipal Utility District Number One v. Holder*, the Supreme Court considered the issue of whether the preclearance authority of the VRA was constitutionally permissible.<sup>69</sup> The Court avoided deciding the issue by resolving the case on other grounds.<sup>70</sup> Nevertheless, the Court made clear that it had reservations regarding the current legality of Section 5.<sup>71</sup> Both the majority opinion, written by Chief Justice Roberts and the solo dissent by Justice Thomas, signaled that Section 5's enforcement authority presented substantial costs to the goals of

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60. *Id.*

61. *Id.* at 36 (noting “the increased number of objections, revised submissions, and withdrawals over the last [twenty-five] years are strong indices of continued efforts to discriminate.”).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 37.

66. *Id.* at 37.

67. 152 CONG. REC. H5207 (daily ed. July 13, 2006).

68. 152 CONG. REC. S8012 (daily ed. July 20, 2006).

69. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 553 U.S. 193, 198 (2009).

70. *Id.* at 211 (finding that the jurisdiction was eligible to file a “bailout suit,” thus holding in the district's favor and making it unnecessary to rule on the constitutional issue).

71. *See id.* at 202–03, 212 (holding that Section 5 exceeds Congress' power to enforce the Fifteenth Amendment).

federalism, which are less justifiable in a modern America with improved race relations.<sup>72</sup>

This was not the first challenge the Court heard regarding Section 5's constitutionality. However, each of the previous challenges was strongly rejected. In *South Carolina v. Katzenbach*, the Court held that "Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."<sup>73</sup> In *City of Rome v. United States*,<sup>74</sup> the Court found the reauthorization and extension of the VRA to be "plainly a constitutional method of enforcing the Fifteenth Amendment."<sup>75</sup>

Notably, the Justices' opinions in *NAMUDO* did not take issue with the clearly established precedent upholding the constitutionality of Section 5. Rather, the Court seemed to suggest that the VRA had accomplished its goals.<sup>76</sup> That is, according to the Court, voter discrimination in states historically known for minority underrepresentation was diminished.<sup>77</sup> State governments no longer had the means or intention to implement voting changes that would disparage or inhibit the ability of minorities to cast their ballot.<sup>78</sup>

Chief Justice Roberts, writing for the majority, began his opinion by describing the state of voting rights for freed slaves prior to the passage of the VRA.<sup>79</sup> The situation was dire as African-Americans were routinely

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72. See *id.* at 203, 212–13 (Thomas, J., concurring in the judgment in part and dissenting in part) (stating that the Voting Rights Act differentiates between states despite the States enjoyment of equal sovereignty).

73. 383 U.S. 301, 326 (1966).

74. *City of Rome v. United States*, 446 U.S. 156, 182 (1980).

75. *Id.*

76. See *Nw. Austin*, 557 U.S. at 196–99 (articulating that the Court continued to uphold the challenges to the VRA because the circumstances surrounding the Act "continued to justify the provisions").

77. See *id.* at 201 (stating that in some states "[B]lacks now register and vote at higher rates than [W]hites"); LEADERSHIP CONF. ON CIV. RTS. EDUC. FUND, LONG ROAD TO JUSTICE: THE CIVIL RIGHTS DIVISION AT 50, THE LEADERSHIP CONF. 10 (Sept. 2007), available at <http://www.protectcivilrights.org/pdf/reports/long-road/long-road-to-justice.pdf>. "Following both the 1980 Census and the 1990 Census. *Id.* Division efforts yielded remarkable gains in the ability of minority voters to participate in the political process." *Id.*

78. See *Nw. Austin*, 557 U.S. at 196–99 (explaining that the VRA "empowered federal examiners to override state determinations about who was eligible to vote."). See also Charlie Savage & Manny Fernandez, *Court Blocks Texas Voter ID Law, Citing Racial Impact*, N.Y. TIMES, Aug. 30, 2012, <http://www.nytimes.com/2012/08/31/us/court-blocks-tough-voter-id-law-in-texas.html?pagewanted=all> (discussing a Federal Court's ruling that Texas' voter identification law would reduce turnout by minority voters and the poor, calling it the strictest law of its kind in the United States).

79. *Nw. Austin*, 557 U.S. at 194–97. See generally STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at vii–x (Lexington Books 1999) (1976)

denied their right to vote because of state action.<sup>80</sup> The opinion noted that the federal government did little to cure these denials and allowed states to continue to violate the Fifteenth Amendment guarantees.<sup>81</sup>

The opinion went on to discuss the innovative remedies instituted by the VRA.<sup>82</sup> Rather than continue to rely on individualized litigation in order to assert voting rights, “the Act directly pre-empted the most powerful tools of [B]lack disenfranchisement in the covered areas.”<sup>83</sup> These tools of disenfranchisement included literacy tests and other qualifications that placed barriers in the way of voting, and fell disproportionately on Black voters.<sup>84</sup> The Court additionally spoke in approving terms of Section 5. While noting that members of the Court had previously expressed “serious misgivings about the constitutionality of [Section] 5,”<sup>85</sup> Chief Justice Roberts stated in unequivocal terms that “[t]he historic accomplishments of the [VRA] are undeniable.”<sup>86</sup> Despite this, the Court went on to suggest that Section 5 might be a victim of its own success.<sup>87</sup>

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(presenting an in-depth look at suffrage expansion in the South from World War II through the Johnson administration).

80. *Nw. Austin*, 557 U.S. at 194–97. See David Barton, *A History of Black Voting Rights*, THE WALLBUILDER RPT., Mar. 2003, available at <http://www.wallbuilders.com/libissuesarticles.asp?id=134> (explaining that Democrats began to repeal state civil rights protections in Southern States); See R. VOLNEY RISER, *DEFYING DISENFRANCHISEMENT: BLACK VOTING RIGHTS ACTIVISM IN THE JIM CROW SOUTH, 1890–1908*, at 4, 10 (2010) (documenting several lawsuits challenging restrictive voting requirements).

81. *Nw. Austin*, 557 U.S. at 194–97.

82. See *id.* at 198 (explaining two of the remedies the Act sought to address).

83. *Id.* See generally DVD: *Eyes on the Prize: America’s Civil Rights Years 1954–1965* (Blackside 2009) (telling the story of the Civil Rights era from the point of view of the ordinary men and women whose actions launched the Civil Rights movement).

84. See *Nw. Austin*, 557 U.S. at 198 (stating that tactics such as literacy tests were “easily manipulated to keep [B]lacks from voting”); Steven Mintz, *Winning the Vote: A History of Voting Rights*, THE GILDER LEHMAN INSTITUTE OF AMERICAN HISTORY (Sep. 1, 2012, 5:32 PM), <http://www.gilderlehrman.org/history-by-era/government-and-civics/essays/winning-vote-history-voting-rights> (providing examples of property qualification laws, gerrymandering, fraud and even murder as tactics Southern Whites used to limit African-Americans from voting).

85. *Nw. Austin*, 557 U.S. at 202 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 358–362 (1966) (Black, J., concurring and dissenting); *Lopez v. Monterey Cnty.*, 525 U.S. 266, 288–89 (1999) (Thomas, J., dissenting); *City of Rome v. United States*, 446 U.S. 156, 209–221 (1980) (Rehnquist, J., dissenting); *Georgia v. United States*, 411 U.S. 526, 545 (1973) (Powell, J., dissenting); *Allen v. State Bd. of Elections*, 393 U.S. 544, 586, n.4 (1969) (Harlan, J., concurring in part and dissenting in part)).

86. *Nw. Austin*, 557 U.S. at 201.

87. See *id.* at 202–03 (citing Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004) (questioning the continued utility of Section 5 and administrative preclearance, and stating that Section 5 has “served its purposes” and may be impeding political development)).

The opinion discussed the change of demographics in voter representation and the increased number of minority voters casting a ballot.<sup>88</sup> It stated “[b]latantly discriminatory evasions of federal decrees are rare”<sup>89</sup> and determined that the conditions that led the Court to finding a need for Section 5 in previous cases were no longer present.<sup>90</sup> Chief Justice Roberts concluded the opinion of the Court by stating:

More than 40 years ago, this Court concluded that ‘exceptional conditions’ prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today.<sup>91</sup>

Justice Thomas concurred in the judgment, but dissented from the Court’s unwillingness to answer the constitutional question presented by Section 5.<sup>92</sup> He would have answered the question and found Section 5’s preclearance requirement unconstitutional.<sup>93</sup>

Justice Thomas’ opinion began by noting the Court has consistently recognized the Constitution as giving states primary authority in conducting elections.<sup>94</sup> He went on to discuss the unique circumstances that led to the passage of the VRA and the Court’s initial rejection of constitutional challenges to the law.<sup>95</sup> In Justice Thomas’ view, these circumstances no longer exist.<sup>96</sup> According to his opinion, there is a “lack of current evidence of intentional discrimination with respect to voting.”<sup>97</sup>

Like the majority opinion, Justice Thomas did not quibble with the Court’s prior holding that Section 5 could be a valid exercise of Congress’s authority under the Fifteenth Amendment.<sup>98</sup> Rather, his view was that Section 5 had outlived its effectiveness.<sup>99</sup> Justice Thomas’ opinion would seem to suggest that—had he been on the Court at a time when

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88. *Id.* at 201-02 (citing H.R. REP. NO. 109-478, at 12-13, 18-90 (1996); *Bartlett v. Strickland*, 556 U.S. 1, 9-12, 18-20, 25-26, 33-34 (2009)).

89. *Id.* at 202.

90. *Id.* at 201.

91. *Id.* at 211.

92. *Id.* at 212.

93. *Id.*

94. *Id.* at 216.

95. *Id.* at 222 (noting that the Court has previously made clear that Section 5 is an “uncommon exercise of congressional power” that would not have been ‘appropriate’ absent the ‘exceptional conditions’ and ‘unique circumstances’ present in the targeted jurisdictions at that particular time.).

96. *Id.* at 216.

97. *Id.*

98. *Id.* at 226.

99. *Id.*

widespread voter discrimination was in existence—the federal government would retain the authority to review state laws which would have a likely effect on the ability to exercise the right to vote. But, since Justice Thomas found “[t]he extensive pattern of discrimination that led the Court to previously uphold [Section] 5 as enforcing the Fifteenth Amendment no longer exists,”<sup>100</sup> his determination was that Section 5 was no longer proper.

### III. 2011–2012: THE NEW VOTER SUPPRESSION

In the 2011–2012 legislative cycle at least forty-one states considered a total of 180 laws containing provisions that would make voting more burdensome.<sup>101</sup> Nineteen states were successful in passing such laws.<sup>102</sup> Nine of these states are subject, in whole or in part, to the Section 5 preclearance requirement based on their history of racial discrimination regarding voting rights.<sup>103</sup> The changes primarily affect three stages of the voting process—(1) registration;<sup>104</sup> (2) early voting;<sup>105</sup> and (3) Elec-

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100. *Id.*

101. See *2012 Summary of Voting Law Changes*, BRENNAN CTR. FOR JUST., (August 3, 2012), [http://www.brennancenter.org/contant/resourc/2012\\_summary\\_of\\_voting\\_law\\_changes/](http://www.brennancenter.org/contant/resourc/2012_summary_of_voting_law_changes/) (analyzing how states across the nation vary on the type and degree of restrictive measures being considered in the 2011–2012 legislative sessions).

102. See *id.* (listing the nineteen states as Alabama, Florida, Georgia, Illinois, Iowa, Kansas, Maine, Mississippi, New Hampshire, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin).

103. See Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965) (listing Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia as having less than 50% of eligible voters participating in the presidential election); see *Sales of Certain Commodities*, 39 Fed. Reg. 16912 (May 10, 1974) (noting multiple counties in New Hampshire with less than 50% of eligible voters participating in the presidential election); see *Voting Rights Act Amendments of 1975*, 40 Fed. Reg. 43746 (Sept. 23, 1975) (describing the areas of Texas and Arizona statewide, and counties in the states of California, Colorado, Florida, and New York as having a large population speaking Spanish-only but yet are required to vote with English-only ballots); *William Gruenerwald & Associates, Inc.* 41 Fed. Reg. 784 (Jan. 5, 1976) (listing counties in New Mexico, Oklahoma, and South Dakota where more than 5% of people of voting age speak the language of their American Indian ancestry and cannot read a ballot written in English only); *DDR&E High Energy Laser Review Group, Vulnerability, Effects and Hardening Panel*, 41 Fed. Reg. 34329 (Aug. 13, 1976) (reporting the counties of Collier and Hendry in the state of Florida as having Spanish heritage people of voting age that cannot participate in the electoral process with English-only ballots given the language barrier);

104. See *Subcomm. on the Constitution Judiciary Comm.* (2012) (statement of Wendy R. Weiser, Director, Democracy Program Brennan Ctr. For Justice at NYU School of Law) (listing the sixteen states that enacted new voter registration requirements including those that ended same day-voter registration).

105. See *id.* (reporting that nine states passed legislation that limited early voting).

tion Day voting.<sup>106</sup> This Note proceeds by analyzing the 2011–2012 changes in these three stages. While information is included from several states, primary attention is given to states subject to the VRA Section 5 preclearance requirement.

### A. Registration

Voter registration processes underwent broad changes in a number of states in 2011.<sup>107</sup> These changes can be categorized into two groups: (1) new requirements placed on individuals seeking to register to vote; (2) new requirements placed on groups seeking to register voters.<sup>108</sup>

#### 1. New Voter Registration Requirements

While federal law has been the primary source of authority for voter registration procedures since Congress passed the National Voter Registration Act of 1993,<sup>109</sup> state laws passed in 2011–2012 sought to reverse this trend. Rather than conform to existing federal regulations, states placed additional requirements in the path of those seeking to register.<sup>110</sup> The new registration requirements go beyond those already in place by federal law.<sup>111</sup>

The most prevalent changes were new requirements for establishing citizenship.<sup>112</sup> Currently, federal law permits states to require an individ-

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106. *See id.* (stating that many states saw bills restricting Election Day voting).

107. *See id.* (describing the various changes to the voting requirements passed by different state legislatures).

108. *See id.* (stating that voter registration drives and community programs in Florida, Illinois, and Texas have seen changes that make registering voters more difficult and explaining that the new state voting restrictions make registering to vote much more challenging).

109. *See* National Voter Registration Act of 1993, Pub. L. No. 103-31, § 2 (a) (2)–(3), 107 Stat. 77 (codified as amended at 42 U.S.C. § 1973gg (2006)) (affirming that the NVRA was passed to remedy “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.”).

110. *See Subcomm. on the Constitution Judiciary Comm.* (2012) (statement of Wendy R. Weiser, Director, Democracy Program Brennan Ctr. For Justice at NYU School of Law) (arguing that in the last two years, election restrictions by the states have increased significantly, specifically “from eliminating election-day registration, to restricting voter registration drives by community groups, to reducing the number of days for early voting and limiting the number of days for voter registration.”).

111. *See id.* (focusing on the states’ implementation of new voting restrictions and the Department of Justice’s attempt to enforce the federal voting laws).

112. *See id.* (detailing the proof of citizenship requirements and saying, “[a]t least seventeen (17) states saw legislation introduced that would require documentary proof of citizenship in order to register or vote.”).

ual registering to vote to attest to their citizenship by signing a registration form, under penalty of perjury, indicating they are an eligible voter.<sup>113</sup> Persons registering must additionally submit either their driver's license number, social security number, or, in the case that they have neither, apply to be assigned a unique number by the state to be used to identify the applicant for registration purposes.<sup>114</sup> Those persons registering by mail are further asked on the federal registration form if they are an American citizen, and must answer in the affirmative in order to be registered.<sup>115</sup> Moreover, any person registering for the first time by mail must submit a copy of a state issued identification card or another official document indicating their address.<sup>116</sup> Prior to 2004, these were the only requirements one had to meet in order to register to vote.<sup>117</sup> In 2004, Arizona became the first state to pass a law requiring additional proof of United States citizenship.<sup>118</sup> That law was later held to be preempted by the National Voter Registration Act.<sup>119</sup>

In 2011, three states passed new laws requiring persons registering to vote to provide evidence that they are United States citizens.<sup>120</sup> At least nine other states considered similar legislation.<sup>121</sup> These states now require documentary evidence of United States citizenship—such as a birth certificate, passport, or a driver's license that contains a notation the individual provided proof of citizenship.<sup>122</sup>

Critics of the new laws point to evidence that a number of eligible voters lack access to the necessary documentation required under the new laws.<sup>123</sup> With these restrictions in place, voters who would otherwise be eligible to vote, but lack the necessary documentation, will be prohibited

113. 42 U.S.C. § 1973gg-7(b)(2)(A)-(C) (2006).

114. 42 U.S.C. § 15483(A)(5)(A)(i)-(iii) (2006).

115. 42 U.S.C. § 15483(B)(4)(A)(i) (2006).

116. 42 U.S.C. § 15483(B)(3)(A)(ii) (2006).

117. WENDY R. WEISER & LAWRENCE NORDEN, *VOTING LAW CHANGES IN 2012*, BRENNAN CENTER FOR JUSTICE 16 (2011), available at [http://brennan.3cdn.net/92635ddafb09e8d88\\_i3m6bjdeh.pdf](http://brennan.3cdn.net/92635ddafb09e8d88_i3m6bjdeh.pdf).

118. See ARIZ. REV. STAT. ANN. § 16-152 (LexisNexis 2004) (outlining the provisions of registering to vote in the State of Arizona).

119. *Gonzalez v. Arizona*, 677 F.3d 383, 398 (9th Cir. 2012); see WEISER, *supra* note 117 (“In 2004, however, as part of a broad-ranging ballot initiative called Proposition 200, regulating the treatment of immigrants, Arizona for the first time passed a law requiring prospective voters to present documentary proof of citizenship to vote.”).

120. See H.R. 56, 2011 Leg., (Ala. 2011) (requiring proof of citizenship before voting); see H.R. 2067, 2011 Leg., (Kan. 2011) (outlining how one can prove their U.S. citizenship before registering to vote); see S. 352, 107th, Gen. Assemb., Reg. Sess., (Tenn. 2011) (stating that proof of U.S. citizenship is required to vote).

121. WEISER, *supra* note 117, at 17.

122. H.R. 56, 2011 Leg., (Ala. 2011); H.R. 2067, 2011 Leg., (Kan. 2011).

123. WEISER, *supra* note 117, at 18.



from voting.<sup>124</sup> Further, these requirements make it more strenuous to register to vote in some states when compared to others, or when compared to federal law.<sup>125</sup>

## 2. New Restrictions on Voter Registration Organizations

The second large change to the registration process in 2011–2012 came in the form of regulations on voter registration organizations. Voter registration groups have existed for decades and are established to encourage greater voter participation.<sup>126</sup> Their main function is to assist individuals in accessing the necessary paperwork needed to register to vote.<sup>127</sup> Because the United States does not have automatic voter registration of its citizens, “[c]ommunity-based voter registration drives play an important role in encouraging and assisting other citizens to register to vote.”<sup>128</sup> Consequently, “[r]estrictions on voter registration drive activity have a direct impact on who has access to voter registration and who gets registered to vote.”<sup>129</sup> Evidence additionally suggests that voter registration organizations are particularly important in increasing voter registration of minority voters.<sup>130</sup> Florida, Nevada, and Texas each passed new laws aimed at voter registration groups in 2011.<sup>131</sup> Texas, which already maintained some of the strictest voter registration laws in the country,<sup>132</sup> enacted Texas HB 1570, which places new restrictions on registration or-

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124. *See id.* (reporting that 7% of citizens do not have the proof of citizenship that is required by certain states).

125. *Id.*

126. *See id.* (asserting that in democracies where there is a lower voting turnout, community voter registration groups are significant).

127. *See id.* (stating that these community-based groups have a direct impact on the voting registration).

128. *Id.*

129. *Id.*

130. *See Voting and Registration in the Election of November 2008: Detailed Tables*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html> (last revised Nov. 9, 2010) (finding that 5.4% of non-Hispanic Whites registered at private voter registration drives, compared to 11.1% of African-Americans and 9.6% of Hispanics).

131. H.R. 1355, 2011 Leg. 113th Sess. (Fla. 2011); A.B. 82, 76th Leg., Reg. Sess. (Nev. 2011); H.R. 1570, 82nd Leg., Reg. Sess. (Tex. 2011).

132. *See* TEX. ELEC. CODE § 13.031 (Supp. 2012) (explaining that existing Texas law requires persons registering voters, known as “Volunteer Deputy Registrars” or “VDRs,” to be appointed by the county in which the registration would take place); *see also* TEX. ELEC. CODE ANN. § 13.033(d) (West 2010) (stating VDRs must additionally carry with them their signed certificates of appointment while conducting registrations); *See* TEX. ELEC. CODE § 13.039(a)–(b) (West 2010) (asserting that after a prospective voter fills out one of the voter registration forms the VDR must review the form for completeness and return the form if it is incomplete); TEX. ELEC. CODE § 13.042(a)–(b) (West 2010) (articulating that VDRs must personally deliver completed applications to the county registrar

ganizations.<sup>133</sup> Texas law now requires any person registering voters in the state to be Texas citizens.<sup>134</sup> Furthermore, persons interested in registering or assisting voters in the registration process must complete a government-run training program.<sup>135</sup> Lastly, the new law enacts criminal penalties for any person registering voters who is compensated based on the number of voters registered.<sup>136</sup>

HB 1570's changes to voter registration efforts brought criticism from several organizations,<sup>137</sup> and legal action challenging the law under the First and Fourteenth Amendments was quickly instituted.<sup>138</sup> A Texas court granted a preliminary injunction against the law, noting the state's voter registration regime restricted voter registration organizations from registering eligible voters.<sup>139</sup> The court criticized both the requirements to register voters prior to, and after, the 2011 changes—determining that the scheme as a whole presented barriers to eligible voters.<sup>140</sup> Specifically, the court compared Texas laws regarding voter registration organizations to that of other states and concluded no other state “has gone as far as Texas in creating a regulatory web that controls so many aspects of third-party voter registration activity.”<sup>141</sup>

Florida's HB 1355, like Texas' HB 1570, places new barriers in the path of persons seeking to register new voters.<sup>142</sup> The new law requires non-profit organizations that seek to register voters in the state to first register with the Florida Division of Elections.<sup>143</sup> Additionally, HB 1355 requires

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within five days of receipt); See TEX. ELEC. CODE § 13.043(a) (West 2010) (stating VDRs who fail to comply with these standards may be subject to criminal penalties).

133. TEX. ELEC. CODE § 12.006 (West 2012).

134. TEX. ELEC. CODE §§ 11.002(a)(5), 13.031(d)(3) (Supp. 2012).

135. TEX. ELEC. CODE §§ 13.031(e), 13.047(a)(1)–(3) (Supp. 2012).

136. TEX. ELEC. CODE § 13.008(a)(1) (Supp. 2012).

137. See Christy Hoppe, *Texas Leads States in Enacting Voting Restrictions*, THE DALLAS MORNING NEWS, Sept. 22, 2012, <http://www.dallasnews.com/news/politics/headlines/20120922-texas-leads-states-in-enacting-voting-restrictions.ece> (citing Sarah Massey of the nonpartisan Project Vote as stating the new registration rules in Texas “are the most burdensome in the nation.”). See also Julián Aguilar, *Will New Voter Registrar Rules Decrease Turnout?*, THE TEXAS TRIBUNE, Oct. 25, 2011, <http://www.texastribune.org/texas-legislature/82nd-legislative-session/groups-say-id-isnt-only-hurdle-minority-voters/> (stating that “the citizenship requirement, coupled with HB 1570 . . . will deter potential registrars from participating in such drives.”).

138. *Voting for America v. Andrade*, 2012 WL 3155566, at \*1 (S.D. Tex. Aug. 2, 2012).

139. *Id.*

140. See Op. and Order Granting in Part and Den. in Part Pls.' Mot. For a Prelim. Inj. at 13-15, *Voting for America v. Andrade*, No. G-12-44 (S.D. Tex. Aug. 2, 2012) (outlining the duties of voting registrar deputies and the process of how they register individuals to vote).

141. *Voting for America v. Andrade*, 2012 WL 3155566, at \*7 (S.D. Tex. Aug. 2, 2012).

142. H.R. 1355, 2011 Leg., 113th Sess. (Fla. 2011).

143. *Id.*

completed voter registration applications to be submitted to the Division of Elections within forty-eight hours of receipt.<sup>144</sup> If a group fails to meet the deadline, they may be assessed penalties of \$50 per application, per late day.<sup>145</sup> The Division of Elections must maintain a database of forms issued to third-party voter registration groups, even if the forms are never completed.<sup>146</sup>

The new Florida regulations, like the ones in Texas, were met with immediate criticism. The League of Women Voters—who has been registering voters in Florida and other areas of the country for decades—determined it could not comply with the new law.<sup>147</sup> The group noted that a simple mistake by a register could result in debilitating fines being levied against the organization.<sup>148</sup> Ultimately, the group made the decision to forgo further registration efforts in the state.<sup>149</sup> Litigation was immediately instituted, and a preliminary injunction was issued—prohibiting the implementation of the registration changes from taking effect until the case could be heard on the merits.<sup>150</sup>

While constitutional challenges to both the Texas and Florida registration schemes are under way, the 2011 changes to both state’s laws are also subject to the preclearance requirement of the VRA.<sup>151</sup> Both Florida and Texas initially submitted the changes to the DOJ for preclearance.<sup>152</sup> In both cases, the DOJ requested additional information from the two

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144. *Id.*

145. *Id.*

146. *Id.*

147. *Voting Rights (Registration and Requirements)*, N.Y. TIMES (Sept. 13, 2012), [http://topics.nytimes.com/top/reference/timestopics/subjects/v/voter\\_registration\\_and\\_requirements/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/v/voter_registration_and_requirements/index.html).

148. Mark Schlieb, *Election-Law Changes Suppress Voters, Activists Say*, PICO NAT’L NETWORK, (Jan. 26, 2012), <http://www.piconetwork.org/news-media/coverage/2012-media-coverage/election-law-changes-suppress-voters-activists-say>.

149. *Id.*

150. *League of Women Voters of Fl. v. Browning*, 2012 WL 1957793 at \*11 (N.D. Fla. May 31, 2012) (finding that plaintiffs “easily meet” requirements for a preliminary injunction).

151. See Enbar Toledano, *Section 5 of the Voting Rights Act and its Place in “Post-Racial” America*, 61 EMORY L.J. 390, 391 (2011) (explaining that the VRA requires states with a history of discrimination to get preclearance for proposed changes to voting laws).

152. See Nicole Flatow, *On Voting Rights Act Anniversary, Threats to Landmark Law Both Direct and Symbolic*, ACS BLOG (Aug. 6, 2012), <http://www.acslaw.org/acsblog/all/section-5> (contending that “new voting restrictions in states [that] [are] subject to preclearance . . . [are] Texas . . . and Florida.”). See generally *Section 5 of the Voting Rights Act*, U.S. DEP’T OF JUST., [http://www.justice.gov/crt/about/vot/sec\\_5/about.php](http://www.justice.gov/crt/about/vot/sec_5/about.php) (last visited on Sept. 16, 2012), (saying that the Texas and Florida must fall under the third formula because of past discrimination toward large groups of minorities).

states.<sup>153</sup> Rather than provide the additional information, both states instituted actions for declaratory judgment in the District Court for the District of Columbia.<sup>154</sup>

### B. *Early Voting*

Early voting laws—which are included in election codes in many states—allow registered voters to go to a polling site days, in some cases weeks, prior to election day to cast their ballot.<sup>155</sup> Early voting opportunities give voters flexibility in when to cast their ballot. They also allow voters in rural locations an opportunity to travel to hard to reach polling locations over a period of time, rather than on a single day.<sup>156</sup>

Early voting began to take shape in the 1990s, and increased heavily after 2000, as many states made changes to their election laws following the Bush-Gore election debacle.<sup>157</sup> Early voting is now available in at least thirty-two states and the District of Columbia.<sup>158</sup> The time period

153. See Chris Kromm, *What is the Justice Department doing about Southern voting rights?*, THE INSTITUTE FOR SOUTHERN STUDIES (Nov. 3, 2011, 12:37 PM), <http://www.southernstudies.org/2011/11/what-is-the-justice-department-doing-about-southern-voting-rights.html> (“DOJ asked Texas to provide more detailed information about the impact of ID law on disenfranchised groups.”); see Brentin Mock, *The Bizarre and Confusing Stand-off Between Florida and DOJ Over Voter Purging*, THE NATION (June 7, 2012, 12:26 PM), <http://www.thenation.com/blog/168285/bizarre-and-confusing-standoff-between-florida-and-doj-over-voter-purging#> (discussing the power struggle between Florida and U.S. Departments of Justice and Homeland Security in Florida’s management of their voting system, including both parties rejecting each other’s information requests); See Erin Ferns Lee, *Texas SOS Responds to DOJ on Voter ID*, PROJECT VOTE, <http://www.projectvote.org/blog/2011/10/texas-sos-responds-to-doj-on-voter-id/> (last visited Sept. 16, 2012) (stating that the Texas Secretary of State responded to the DOJ with additional information about the racial breakdown of registered voters without photo identification).

154. See Ian Millhiser, *GOP Attorneys General: Voting Rights Should Be Struck Down To Boost Laws Suppressing Minority Vote*, THINK PROGRESS: JUSTICE (Aug. 24, 2012, 11:20 AM), <http://thinkprogress.org/justice/2012/08/24/740401/gop-attorneys-general-voting-rights-act-should-be-struck-down-to-boost-laws-suppressing-minority-vote/> (“Texas opted to file a declaratory judgment seeking preclearance.”); see Complaint for Declaratory Judgment at 1, *Florida v. United States*, No. 1:11-cv-01428-CKK-MG-ESH (D.D.C. Aug. 15, 2012) (“The State of Florida . . . seeks a declaratory judgment that recently-enacted changes in the Florida Election Code are entitled to preclearance under Section 5 of the Voting Rights Act . . . .”); see *Texas v. U.S.*, 831 F. Supp. 2d 244, 244 (D.D.C. 2011) (denying the state’s motion for summary judgment for the declaratory action); see also *Florida v. U.S.*, Civil Action No. 11-1428 (D.D.C. 2012) (explaining the history of VRA requirements and Florida’s reasons for filing a declaratory judgment).

155. JOHN C. FORTIER, *ABSENTEE AND EARLY VOTING: TRENDS, PROMISES, AND PERILS* 15 (2006).

156. *Id.*

157. *Id.*

158. *Absentee and Early Voting*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=16604#early> (last updated July 22, 2011).

for early voting varies from state to state—the average is twenty-two days before the election; however, it may begin as early as forty-five days before the election or as late as the Friday before the election.<sup>159</sup> Because more early voting opportunities have been provided by states, the popularity of voting early has increased.<sup>160</sup> According to one survey, in presidential elections early voting totals nationwide have risen from 14% in 2000 to 20% in 2004.<sup>161</sup> While early voting opportunities do not appear to have a large impact on overall voter participation, the option of early voting may increase vote totals in a given election.<sup>162</sup> In 2008, increased opportunities for early voting allowed for a dramatic increase in early voting participation.<sup>163</sup> In states that permitted early voting, nearly 50% of voters choose to vote early.<sup>164</sup> Nationwide, 40 million, or 30% of all votes, were cast prior to Election Day in the 2008 presidential election.<sup>165</sup> Interestingly, in 2011, five states passed legislation to limit early voting.<sup>166</sup> Opportunities to vote early were drastically cut—despite the increased level of participation in the early voting process in several of these states.

In Florida, early voting increased exponentially during the 2008 presidential contest, with 32% of voters casting their vote via early in-person voting.<sup>167</sup> This represented a 13% increase in the number of early voters

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159. *Id.*

160. Michael P. McDonald, *The Return of the Voter: Voter Turnout in the 2008 Presidential Election*, 6 FORUM, no. 4, 4, (2008).

161. Press Release, National Annenberg Election Survey, Early Voting Reaches Record Levels in 2004 (Mar. 24, 2005).

162. See COMM. FOR THE STUDY OF THE AMERICAN ELECTORATE, TURNOUT EXCEEDS OPTIMISTIC PREDICTIONS: MORE THAN 122 MILLION VOTE 5 (2005), available at <http://www1.american.edu/ia/cdem/csae/pdfs/csae050114.pdf> (stating that in the 2004 general election turnout increased by an average of 7.2% in early voting states, compared to 6.2% in states without early voting, marking the second consecutive election where early voting opportunities showed a small but positive impact on turnout).

163. KATE KENSKI, BRUCE W. HARDY & KATHLEEN HALL JAMIESON, *THE OBAMA VICTORY: HOW MEDIA, MONEY, AND MESSAGE SHAPED THE 2008 ELECTION* 258 (2010).

164. *Id.*

165. McDonald, *supra* note 160.

166. See H.R. 1355 2011 Leg., Reg. Sess. (Fla. 2011) (reducing early voting from fourteen days to eight days prior to elections); H.R. 194, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (shortening early voting from thirty-five to twenty-one days before elections); H.R. 92 2011 Leg., (Ga. 2011) (reducing number of early voting days in the state); S. 923, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011) (limiting early voting period prior to elections); S. 581 (W. Va. 2011) (reducing early voting period before elections).

167. See COMM. ON ETHICS AND ELECTIONS, *THE EFFECT OF EARLY VOTING ON VOTER TURNOUT IN FLORIDA ELECTIONS*, S. 2011-118, 2010 Sess., at 3 (Fla. 2010) (reporting voting totals in the state increased overall, with over one million additional votes cast in the 2008 presidential contest compared to the number cast in 2004). Compare FLA. DEP'T OF STATE, DIV. OF STATE ELECTIONS: NOV. 2004 GEN. ELECTION BALLOTS CAST, at 2

in the state compared with 2004.<sup>168</sup> Nowhere were gains more evident than in African-American communities within the state.<sup>169</sup> More than half of the African-American votes in Florida's portion of the 2008 presidential election were cast during the early voting period,<sup>170</sup> specifically during the first week of early voting.<sup>171</sup>

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(2005), available at <http://election.dos.state.fl.us/reports/pdf/BallotsCast04.pdf> (finding early voting ballots accounted for roughly 18% of all ballots cast) with FLA. DEP'T OF STATE, DIV. OF STATE ELECTIONS: NOV. 2008 GEN. ELECTION BALLOTS CAST, at 2 (2009), available at <http://election.dos.state.fl.us/reports/pdf/2008BallotsCast.pdf> (reporting that approximately 32% of all ballots cast in the 2008 election were done so through the use of early voting).

168. FLA. DEP'T OF STATE, DIV. OF STATE ELECTIONS: NOV. 2004 GEN. ELECTION BALLOTS CAST, at 2 (2005), available at <http://election.dos.state.fl.us/reports/pdf/BallotsCast04.pdf>. Thus, early voting has increased in popularity among electors since it was first introduced in 2004. This trend continued at the county level." COMM. ON ETHICS AND ELECTIONS, *supra* note 167. See *Election 2008 in Review*, THE PEW CTR. ON THE STATES, ELECTIONLINE.ORG BRIEFING, 2 (2008), available at [http://www.pewtrusts.org/uploaded/Files/wwwpewtrustsorg/Reports/Election\\_reform/Election-Review-2008.pdf](http://www.pewtrusts.org/uploaded/Files/wwwpewtrustsorg/Reports/Election_reform/Election-Review-2008.pdf) (noting that reports indicated the high early voting interest took some voting sites by surprise, leading to ballot printers being unable to keep up with voter demand); see also Matthew Bigg, *Early Voting in State of Georgia Breaks Record*, REUTERS (Nov. 1, 2008, 3:20 PM) <http://www.reuters.com/article/2008/11/01/us-usa-politics-georgia-idUSTRE4A01LS20081101?rpc=81> (commenting that voters waited up to eight hours in some locations to cast their ballot).

169. Lauren Burke, *Black Vote: Federal Court Reinstates 4 Early Voting Days in 5 Florida Counties*, POLITICS365 (Aug. 17, 2012), <http://politic365.com/2012/08/17/black-vote-federal-court-reinstates-4-early-voting-days-in-5-florida-counties>. "In the 2008 elections, African[-]Americans cast 22% of the total early vote, even though Blacks are just 13% of Florida's registered voters. More Blacks vote during the early voting period than on Election Day or via absentee ballot combined." *Id.* See Brentin Mock, *Florida to People of Color: Don't Vote Here*, COLORLINES (June 29, 2012, 9:38 AM), [http://colorlines.com/archives/2012/06/florida\\_to\\_people\\_of\\_color\\_dont\\_vote\\_here.html](http://colorlines.com/archives/2012/06/florida_to_people_of_color_dont_vote_here.html) ("Souls to the Polls—an early voting event led by [B]lack churches [sic]—turned voting into a cultural, even spiritual experience for many [B]lack voters. Almost 54% of [B]lack Floridians voted early in 2008. A third of all early voters on the Sunday before election day were African-Americans . . .").

170. *New Election Law May Disparately Affect Black Voters*, OCALA.COM (June 14, 2011), <http://www.ocala.com/article/20110614/wire/110619889?tc=ar>.

171. See Letter from NAACP Legal Def. & Educ. Fund, Fla. Conference of Black State Legislatures, & Fla. State Conference NAACP, to Chris Herren, Civil Rights Div. Chief, U.S. Dep't of Justice (June 17, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (identifying 54% of African-American voters in Florida took advantage of early voting in 2008 and those African-American voters were more likely than [W]hite voters to utilize the first week of early voting); see also Aaron Deslatte & Vicki McClure, *Battle for Florida: Blacks Turn out in Drove, but Few Young People Have Voted*, ORLANDO SENTINEL (Oct. 30, 2008), [http://articles.orlandosentinel.com/2008-10-30/news/earlyvote30\\_1\\_early-voting-voters-in-florida-black-voters](http://articles.orlandosentinel.com/2008-10-30/news/earlyvote30_1_early-voting-voters-in-florida-black-voters) (revealing that during the first week of early voting in the 2008 general election, 22% of the votes cast were from African-Americans, despite only constituting 13% of the Florida electorate).

In addition, high African-American early-voting totals were reported on the Sunday before Election Day.<sup>172</sup> One explanation for this increase is that African-American ministers encouraged their congregations to vote early.<sup>173</sup> As one Florida State Representative put it, “[o]n that Sunday before the election, they told their congregation members we’re going to leave church when church is over and we’re going to the polls.”<sup>174</sup> African-Americans represented 31% of the total voters on the Sunday prior to Election Day in Florida, even though they represented only 13% of the electorate.<sup>175</sup> Similarly, Hispanic voters represented 11% of the electorate, but were 22% of the total voters on the Sunday prior to Election Day.<sup>176</sup>

Despite this, Florida’s House Bill 1355 reduced early voting from fourteen to eight days.<sup>177</sup> While disparagers of HB 1355 noted that the reduction in early voting would make voting more difficult for the working class, one state representative responded:

Do you read the stories about the people in Africa? The people in the desert, who literally walk two and three hundred miles so they can have the opportunity to [vote], and we want to make it more convenient? . . . Why would we make it any easier? I want ‘em to fight for it. I want ‘em to know what it’s like. I want them to go down there, and have to walk across town to go over and vote.<sup>178</sup>

Others echoed the sentiment, arguing that some had not proven themselves worthy enough to cast a ballot.<sup>179</sup>

172. *See New State Voting Laws: Barriers to the Ballot?: Hearing Before the Subcomm. on the Constitution, Civil Rights, & Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 7 (2011) (testimony of Justin Levitt, Assoc. Professor, Loyola Law Sch.) (stating that African-Americans represented 31% of the total Floridian voters on the last Sunday before Election Day).

173. *See id.* (“[M]any houses of worship, particularly in minority communities, encourage their congregations in nonpartisan fashion to discharge their civic obligations after fulfilling their spiritual ones.”).

174. *Voting Law’s Sunday Punch*, HERALD-TRIBUNE (June 15, 2011, 1:00 AM), <http://www.heraldtribune.com/article/20110615/OPINION/110619722>.

175. *New State Voting Laws*, *supra* note 172.

176. *Id.* Similarly, in 2010, African-Americans represented 12% of votes cast and 23% of the voters on the Sunday before Election Day. *Id.* The same year, Hispanics represented 9% of the total voters and 16% of the voters on the Sunday before Election Day. *Id.*

177. H.R. 1355, 2011 Leg, 113th Sess. (Fla. 2011).

178. Aaron Sharockman, *Voting Should Be Tough, Lawmaker Says – Just Like in Africa*, POLITIFACT (May 6, 2011, 4:35 PM), <http://www.politifact.com/florida/article/2011/may/06/voting-should-be-tough-gop-senator-says-africa/>.

179. Troy Kinsey & Mike Vasilinda, *New Twist in Voting Battle Could Change Trip to Polls*, WCTV.TV, <http://www.wctv.tv/news/floridanews/headlines/Early-Voting-Ruling-166619546.html> (last updated Aug. 18, 2012) (quoting Florida State Representative Mat-

Florida was not atypical in its early voting experience. African-Americans across the country voted early in high numbers during the 2008 election.<sup>180</sup> Minorities in other states mimicked Florida by turning out in large number to make use of the Sunday before Election Day in order to vote early.<sup>181</sup> This did not prevent other states, like Florida, from drastically reducing the number of early voting days available.<sup>182</sup> Georgia and Ohio subsequently followed Florida's lead and eliminated the Sunday prior to Election Day as an early voting option.<sup>183</sup>

### C. Election Day

The most prevalent election law change made by states in 2011–2012 were new laws requiring voters to present photo identification to an election official on election day.<sup>184</sup> Eight states passed and enacted such laws.<sup>185</sup> Twenty-one other states considered similar legislation.<sup>186</sup>

Regulations requiring voters to present photo identification at the polls prior to voting are relatively new. Indiana passed the first such law in 2006.<sup>187</sup> Since then, the debate over whether the photo identification requirements are necessary to prevent voter fraud,<sup>188</sup> or instead, whether

thew Caldwell as saying: “The person that doesn’t take the time to vote in one of those two weeks, to order an absentee ballot, to go and vote on election day, frankly, I don’t think they care enough.”)

180. McDonald, *supra* note 160 (citing United States Census Bureau’s Current Population Survey showing that the large number of early in-person votes by African-Americans was a reversal from previous election years).

181. See WEISER, *supra* note 117, at 33 (stating that African-Americans commonly use early voting after church on Sundays and that some African-American churches organize “Souls to the Polls” voting drives).

182. See *id.* (listing the numerous other states that reduced their early voting days, including: Florida, Georgia, Maryland, Nevada, New Mexico, North Carolina, Ohio, Tennessee, and West Virginia).

183. H.R. 92, 2011 Leg., Reg. Sess. (Ga. 2011) (amending GA. CODE ANN. § 21-2-385(d)); H.B. 194, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (amending OHIO REV. CODE ANN. § 3509.01(B)(3)).

184. See *Voter Identification Requirements*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last updated Sept. 5, 2012) (explaining that voter ID requirements became the most popular topic among state legislatures in the field of elections in 2011).

185. See *id.* (including states such as: Georgia, Indiana, Kansas, Pennsylvania, Tennessee, Florida, Hawaii, Idaho, Louisiana, Michigan, and South Dakota).

186. See *id.* (mentioning the states which have considered photo ID legislation and rejected it or have not yet implemented the new laws).

187. See S.R. 483, 114th Gen. Assemb., Reg. Sess. (Ind. 2005); see *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (upholding the law against constitutional challenge).

188. See, e.g., Complaint for Declaratory Judgment at 4, *South Carolina v. United States*, No. 12-203 (D.D.C. Apr. 4, 2012) (stating that South Carolina adopted a photo



the laws have an adverse impact on those seeking to cast a ballot, has only intensified. Notably, critics of photo identification laws point to statistics suggesting that the effects of such laws fall disproportionately on the poor and on minority voters.<sup>189</sup> This Note does not seek to resolve that debate. Rather, this Note aims to demonstrate that the voter identification laws passed in 2011–2012 were more restrictive, and further reaching, than the 2006 Indiana law or other voter identification laws passed to date.<sup>190</sup>

As the Brennan Center for Justice stated, the voter identification laws passed in 2011–2012, “include[d] fewer forms of acceptable IDs, fewer exemptions, or fewer alternative mechanisms for eligible voters without the specified IDs to vote.”<sup>191</sup> Each of the new state laws, with the exception of Rhode Island, require government-issued photo identification.<sup>192</sup> Other government forms of identification without a photograph, such as a social security card or birth certificate, have become excluded as acceptable forms of identification under some states’ laws.<sup>193</sup> This reversed long-standing practices in several states, which previously allowed voters to present alternative government documents, or even utility bills, to establish their identity.<sup>194</sup>

Additionally, in contrast to previous voter identification laws, several of the laws passed in 2011–2012 contain no option to cast a provisional ballot if the voter went to the poll on Election Day without a valid form of identification.<sup>195</sup> The option to cast a provisional ballot allows a voter to make their selection for a candidate on Election Day and, unless it can be established that the voter was not eligible at the time the vote was cast, the voter’s provisional ballot is presumed valid and counted.<sup>196</sup> States that enact laws that prevent the use of provisional ballots prevent validly registered voters from casting any vote whatsoever.<sup>197</sup>

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identification law to “prevent[ ] instances of voting fraud . . . and enhanc[e] public confidence in the integrity of the electoral process in [the state]”).

189. See, e.g., CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS’ POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION, BRENNAN CTR. FOR JUSTICE, 3 (2006), available at [http://www.brennancenter.org/page/-/d/download\\_file\\_39242.pdf](http://www.brennancenter.org/page/-/d/download_file_39242.pdf).

190. WEISER, *supra* note 117, at 5.

191. *Id.*

192. *Id.*

193. *Id.* at 4.

194. See, e.g., TEX. ELEC. CODE ANN. § 63.0101(7) (West 2010) (illustrating that non-photo forms of identification were permissible for voting).

195. See WEISER, *supra* note 117, at 6.

196. See, e.g., MARYLAND STATE BOARD OF ELECTIONS, PROVISIONAL VOTING (2012) available at [http://www.elections.state.md.us/voting/provisional\\_voting.html](http://www.elections.state.md.us/voting/provisional_voting.html).

197. WEISER, *supra* note 117, at 6.

Moreover, many of the new laws are structured so that certain groups are impacted more harshly. For example, new laws in Tennessee and Wisconsin accept most forms of government issued identification, but do not accept student IDs issued by state run universities—increasing the difficulty for students to cast a ballot.<sup>198</sup>

The DOJ objected to two voter identification laws passed in states—South Carolina and Texas—subject to the preclearance requirement of Section 5.<sup>199</sup> In the case of Texas, the state originally submitted the changes to the DOJ for preclearance.<sup>200</sup> The DOJ requested further information from Texas regarding the potential impact of the changes on minority participation in the electoral process.<sup>201</sup> Instead of complying with the request, Texas sued the DOJ, seeking a declaratory judgment that the change satisfied the preclearance requirement.<sup>202</sup>

Like Texas, South Carolina originally submitted its voter identification changes to the DOJ for preclearance.<sup>203</sup> The DOJ subsequently re-

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198. TENN. CODE ANN. § 2-7-112(c) (Supp. 2011); WIS. STAT. ANN. § 5.02(6m) (Supp. 2011). The Wisconsin law technically allows a student identification card to be used as a form of voter identification. However, the ID must be issued by an accredited university or college in Wisconsin, contain the date of issuance, the signature of the individual to whom it was issued, and contain an expiration date that is no later than 2 years after the date of the election for which it is presented. WIS. STAT. ANN. § 5.02(6m) (Supp. 2011). Few, if any, colleges or universities in the state of Wisconsin currently issue ID cards that would meet the requirements of the new law. WEISER, *supra* note 117, at 6. It should also be noted that the requirements in some states are more stringent for student IDs when compared to the requirements placed on other forms of identification, such as military IDs or concealed handgun licenses. Alison Bauter, *Tweaked Wisconsin Voter ID Bill Still Draws Flak for Impact on Students*, DAILY PAGE (May 4, 2011, 11:21 AM), <http://www.thedailypage.com/isthmus/aaartic.php?article=33379>.

199. Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, to C. Havird Jones, Assistant Deputy Att’y Gen. (Dec. 23, 2011), *available at* [http://brennan.3cdn.net/594b9cf4396be7ebc8\\_0pm6i2fx6.pdf](http://brennan.3cdn.net/594b9cf4396be7ebc8_0pm6i2fx6.pdf); Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, to Keith Ingram, Dir. of Elections, Elections Div., Office of the Tex. Sec’y of State (Mar. 12, 2012), *available at* [http://www.brennancenter.org/content/pages/voter\\_id\\_and\\_the\\_voting\\_rights\\_act](http://www.brennancenter.org/content/pages/voter_id_and_the_voting_rights_act).

200. Letter from Ann McGeehan, Sec’y of State, to T. Christian Herren, Chief, Voting Section, U.S. Dep’t of Justice (July 25, 2011), *available at* <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2012cv00128/152404/1/3.pdf?ts=1341873196>.

201. Letter from T. Christian Herren, Chief, Voting Section, U.S. Dep’t of Justice, to Ann McGeehan, Dir. of Elections (Sept. 23, 2011), *available at* [http://brennan.3cdn.net/605e4ef6b1842ab7e7\\_t8m6bpr50.pdf](http://brennan.3cdn.net/605e4ef6b1842ab7e7_t8m6bpr50.pdf).

202. Chuck Lindell, *Texas Sues Feds Over Voter ID Law*, STATEMEN.COM, <http://www.statesman.com/news/texas-politics/texas-sues-feds-over-voter-id-law-2121002.html> (last updated Jan. 24, 2012, 12:24 PM).

203. Letter from C. Havird Jones, Assistant Deputy Att’y Gen., to Chief, Voting Section, U.S. Dep’t of Justice (June 28, 2011), *available at* [http://www.brennancenter.org/content/pages/voter\\_id\\_and\\_the\\_voting\\_rights\\_act](http://www.brennancenter.org/content/pages/voter_id_and_the_voting_rights_act).

requested further information from South Carolina, regarding the effect of the changes on minority voting.<sup>204</sup> Although South Carolina complied with the request and provided the supplementary information,<sup>205</sup> the DOJ refused to pre-clear the changes; the DOJ determined that the South Carolina had not met its burden in establishing that the changes would not have a retrogressive effect on minority electoral participation.<sup>206</sup> In refusing to clear the changes, the DOJ noted that initial evidence suggested that minority registered voters were 20% more likely than other voters to lack the necessary identification needed to vote.<sup>207</sup> The state then filed for declaratory judgment in the District Court for the District of Columbia.<sup>208</sup>

#### IV. VOTER SUPPRESSION IS HERE TO STAY—WHY THE *NAMUDO* COURT WAS WRONG TO SUGGEST SECTION 5 IS NO LONGER NECESSARY

In *NAMUDO*, both the majority and dissent were in agreement that Section 5 of the VRA was near the point of irrelevancy—based on the presumption that the preclearance authority granted by the Act is no longer necessary to prevent discrimination in the area of voting.<sup>209</sup> The Court concluded that states no longer take action to suppress minority voter turnout, and therefore federal government review of state election changes was no longer necessary.

Although the Court may have been correct that laws aimed at limiting voter turnout were rare in 2009—when the Court decided *NAMUDO*—the Court would be incorrect to hold that such laws were rare, if not common, in 2011–2012. The 2011–2012 legislative cycle marked unprecedented changes in the area of voting laws. The sheer volume of legislation considered by states across the country is staggering, while the number of bills adopted by state legislatures is unlike another time in

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204. Letter from T. Christian Herren, Chief, Voting Section, U.S. Dep't of Justice, to C. Havird Jones, Assistant Deputy Att'y Gen. (Aug. 29, 2011), *available at* [http://brennan.3cdn.net/cdfbfac22b4a3e84f4\\_4km6b9cb3.pdf](http://brennan.3cdn.net/cdfbfac22b4a3e84f4_4km6b9cb3.pdf).

205. Letter from Marci Andino, Exec. Dir., S.C. Election Comm'n, to C. Havird Jones, Assistant Deputy Att'y Gen. (Sept. 13, 2011), *available at* [http://brennan.3cdn.net/d1e0496e17a180b1d9\\_r8m6vui8e.pdf](http://brennan.3cdn.net/d1e0496e17a180b1d9_r8m6vui8e.pdf).

206. Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to C. Havird Jones, Assistant Deputy Att'y Gen. (Dec. 23, 2011), *available at* [http://brennan.3cdn.net/594b9cf4396be7ebc8\\_0pm6i2fx6.pdf](http://brennan.3cdn.net/594b9cf4396be7ebc8_0pm6i2fx6.pdf).

207. *Id.*

208. *See generally* Complaint for Declaratory Judgment, *South Carolina v. United States*, No. 12-203 (D.D.C. Apr. 4, 2012).

209. *See* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) (finding that the preclearance requirement applies broadly); *see also id.* at 212 (holding that Section 5 exceeds Congress' power to enforce the Fifteenth Amendment).

recent memory. The sudden attempt by states to alter their voting laws in manners that make it more difficult to cast a ballot can only be explained by a concerted effort to determine who ought to vote in a given election. This is exactly the type of discrimination Section 5 was intended to prevent. The use of the preclearance authority to review election laws that may have a discriminatory motive is as relevant today as when the VRA was passed in 1965.

In 2011–2012, nineteen states passed laws that will have a direct impact on the ability of voters to access the polls.<sup>210</sup> The laws affect every stage of the voting process—from registration to casting a ballot on Election Day.<sup>211</sup> The fact that such laws were passed throughout the country, after high minority turnout led to the election of the first African-American president, demonstrates the continued ability of states to pass legislation in response to high minority participation.<sup>212</sup> This is not foreign to our nation's history. Following the passage of the Fifteenth Amendment, African-Americans voted in high numbers in many southern states.<sup>213</sup> States subsequently implemented restrictions aimed at suppressing minority participation.<sup>214</sup> It was not until the VRA was implemented, and the Section 5 preclearance requirement was used to deny voter suppression laws from going into effect, that minority voter participation was reinvigorated.<sup>215</sup> While the laws passed in 2011 pale in comparison to the harshness of the poll tax and literacy tests used in the early 1900's, the 2011 laws illustrate the importance of continuing to permit the federal government to exercise its enforcement authority under the Fifteenth Amendment to deny states from enacting laws likely to limit minority participation in elections.

Florida's HB 1355 likely provides the most comprehensive example of the type of voter suppression legislation passed in 2011–2012. The bill made a total of eighty changes to Florida election law and procedure.<sup>216</sup>

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210. WEISER, *supra* note 117, at 2.

211. See 42 U.S.C. § 1973 (2006) (listing the rights of voters and the responsibilities of the government the voting process).

212. See Mark Hugo Lopez & Paul Taylor, *Dissecting the 2008 Election: Most Diverse in U.S. History*, PEW RESEARCH CENTER (Apr. 30, 2009), <http://pewresearch.org/pubs/1209/racial-ethnic-voters-presidential-election> (discussing the unique nature of the 2008 presidential election in regards to minority turnout); see AFRICAN-AMERICANS, ANGER, FEAR AND YOUTH PROPEL TURNOUT TO HIGHEST LEVEL SINCE 1964, AMERICAN UNIVERSITY NEWS 1 (2008) (stating “it is virtually certain that African-Americans were a major factor in Democratic turnout increase . . .”).

213. See *supra* Part II.

214. *Id.*

215. *Id.*

216. See generally H.R. 1355, 2011 Leg., Reg. Sess. (Fla. 2011) (*codified at* FLA. STAT. §§ 101.045, 101.657(d) (2011) (illustrating the changes in voter rights articulated by the

These changes came in variety of areas including new limitations on early voting,<sup>217</sup> rules affecting third-party voter registration groups,<sup>218</sup> alterations laws regulating change of address by voters at the polls,<sup>219</sup> amending absentee ballot procedures,<sup>220</sup> changes to regulations effecting poll watchers,<sup>221</sup> and limitations on the amount of time a citizen petition for a constitutional amendment is valid.<sup>222</sup>

The effects of the new regulations relating to third party registration groups can already be felt. The League of Women Voters, which has registered voters in Florida and across the country for decades, determined the penalties for failure to comply with Florida's new restrictions are too severe to risk continuing voter registration efforts in the state.<sup>223</sup> The residual effects of one of the largest voter registration groups in the country eliminating their registration program in one of the most populated states should alarm those committed to seeking greater electoral participation. Although a preliminary injunction has since issued—temporarily preventing the registration changes from taking effect—it is yet undecided whether the changes may be enforced at a later date.<sup>224</sup>

The potential effect of the new restrictions on early voting is less clear. However, the Florida legislature's choice to limit early voting and to eliminate the Sunday-before-election-day option—following high numbers of African-American turnout during the early voting period in 2008—should appear highly suspect.<sup>225</sup> The justification for these changes additionally raises suspicion as to the purpose of the reduction in early voting—namely, the claim by members of the Florida legislature that voting should be more difficult and that a convenient form of voting rewards the politically inept.<sup>226</sup> The goal of making voting a demanding

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Florida House); *see also* Florida v. United States, 2012 WL 3538298 at \*3 (D.D.C. Aug. 16, 2012) (stating that including in the omnibus bill were “apparently 80 sets of changes to Florida’s election procedures”).

217. FLA. STAT. ANN. § 101.657 (Supp. 2012).

218. FLA. STAT. ANN. § 97.0575 (Supp. 2012).

219. FLA. STAT. ANN. § 101.045(2)(a), (c) (West 2008) (providing that “[a]n elector who moves from the precinct in which the elector is registered may be permitted to vote in the precinct to which he or she has moved his or her legal residence . . . provided such elector completes an affirmation . . .”).

220. FLA. STAT. ANN. § 101.62 (West 2008).

221. FLA. STAT. ANN. § 101.131 (West 2008).

222. FLA. STAT. ANN. § 100.371 (West 2008).

223. Mark Schlueb, *Election-Law Changes Suppress Voters, Activists Say*, ORLANDO SENTINEL (Jan. 28, 2012), <http://www.piconetwork.org/news-media/coverage/2012-media-coverage/election-law-changes-suppress-voters-activists-say>; *see supra* Part III(A)(2).

224. League of Women Voters of Florida v. Browning, 2012 WL 1957793 at \*11 (N.D. Fla. May 31, 2012).

225. *See supra* Part III(B).

226. *New State Voting Laws*, *supra* note 172.

process, so as to exclude voters based on a perception that they do not pay enough attention to political affairs, demeans the purpose of the Fifteenth Amendment, which demands that every eligible voter should be permitted to cast a ballot without impediment from private or state actors.<sup>227</sup>

Florida's example alone should suffice to demonstrate the continuing need for Congress to exercise its authority under the Fifteenth Amendment to reject state laws that suppress votes.<sup>228</sup> But, Florida is not alone. The combination of state laws across the country in 2011–2012 demonstrates overwhelming evidence that state legislatures continue to present a threat to voting rights. The fact that the changes are similar from jurisdiction to jurisdiction is not a mere coincidence.<sup>229</sup> Rather, states have deliberately decided to enact election law changes that regulate particular parts of the electoral process. Given that many of these alternations have adverse effects on voter participation, it is apparent that a federal review of the laws is necessary to prevent eligible voters from being denied access to the ballot.

The path some of the states subject to the preclearance requirement took to obtain preclearance is additionally suspect. Florida, Texas, and South Carolina all initially submitted their changes to the DOJ for preclearance.<sup>230</sup> When the DOJ sought more information regarding the changes, Florida and Texas withdrew their request for preclearance, instead insisting on court intervention.<sup>231</sup> South Carolina submitted the requested information—which established that the voter identification requirements enacted by the state required documentation, which minority voters were 20% less likely to possess.<sup>232</sup>

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227. U.S. CONST. amend. XV.

228. *Id.* § 2.

229. See David Firestone, Editorial, *Avoiding Confusion at the Polls*, N.Y. TIMES TAKING NOTE BLOG (July 3, 2012, 5:37 PM), <http://takingnote.blogs.nytimes.com/2012/07/03/avoiding-confusion-at-the-polls/> (implying that a specific class of legislation is particularly appealing to the Republican Party).

230. See Flatow, *supra* note 152. (contending that “new voting restrictions in states [that] [are] subject to preclearance . . . [are] Texas . . . and Florida.”). Letter from C. Havird Jones, Assistant Deputy Att’y Gen., to Chief, Voting Section, U.S. Dep’t of Justice (June 28, 2011), available at [http://www.brennancenter.org/content/pages/voter\\_id\\_and\\_the\\_voting\\_rights\\_act](http://www.brennancenter.org/content/pages/voter_id_and_the_voting_rights_act).

231. Millhisser, *supra* note 154 (“Texas opted to file a declaratory judgment seeking preclearance.”). Complaint for Declaratory Judgment at 1, *Florida v. United States*, No. 1:11-cv-01428-CKK-MG-ESH (D.D.C. Aug. 15, 2012) (“The State of Florida . . . seeks a declaratory judgment that recently-enacted changes in the Florida Election Code are entitled to preclearance under Section 5 of the Voting Rights Act . . .”).

232. Ryan J. Reilly, *Voter ID: South Carolina Says Law Will Keep Whites From Voting, Too*, TPM (Aug. 27, 2012, 2:40 PM), [http://tpmmuckraker.talkingpointsmemo.com/2012/08/south\\_carolina\\_voter\\_id\\_trial.php](http://tpmmuckraker.talkingpointsmemo.com/2012/08/south_carolina_voter_id_trial.php).

The process of requesting preclearance, only to retract the request and institute an action for declaratory judgment, was a process that disturbed Congress when it held a hearing on the reauthorization of the VRA in 2006.<sup>233</sup> Congress specifically noted that the tactic could be used to enact voting changes without a full inquiry into its effect.<sup>234</sup> The fact that two jurisdictions followed the exact process that Congress found troublesome in 2006, while another submitted information establishing that their election law changes would present a burden for minority voters, demonstrates that (1) jurisdictions continue to engage in practices historically used to suppress minority turnout; and (2) the preclearance process is effectively preventing election laws that have a retrogressive result on minority electoral participation from taking effect without a full review of the law taking place.

Although it may be true that a number of the laws passed in 2011–2012 were enacted with a legitimate government interest, the VRA was enacted to ensure that jurisdictions that have historically trampled on the voting rights of minorities be required to prove, before a neutral arbiter, that changes to their election laws do not have a retrogressive effect on minority participation in elections. Section 5 follows in that purpose. The process established by Section 5 should be respected; so long as states continue to enact legislation that may affect minority participation. While we should all join Chief Justice Roberts and Justice Thomas in hoping that the day will come soon where the federal government need not review state election law changes, the 2011–2012 voting laws demonstrate that day has not yet arrived.

## V. CONCLUSION

Given the Court's in *NAMUDO*, it seems likely that the Court will soon confront head-on the question of Section 5's constitutionality. When it does, it would do well to remember the substantive modifications to voting procedures and regulations enacted in 2011–2012. The Court should recognize that voter suppression is alive and well, and affirm Congress' authority to remedy state action aimed at hindering voter participation.

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233. H.R. REP. NO. 109-478, at 65–72 (2006).

234. *Id.* at 93.