

# THE CONSTITUTIONALITY AND LEGALITY OF INTERNET VOTING POST- *SHELBY COUNTY*

LOGAN T. MOHS<sup>†</sup>

## ABSTRACT

*The technological and electoral landscapes have changed drastically since the turn of the century. While it once might have made sense to view voting online as unconstitutional, as opposed to merely impractical, the expanded range of Internet access for minority communities has made that argument tenuous at best. While there still may exist practical and political reasons to avoid Internet voting, the Constitution no longer stands as an effective wall against the practice. Furthermore, the primary statutory obstacle to the implementation of Internet voting on a local level, the Voting Rights Act, has been greatly weakened by the recent Supreme Court decision in Shelby County. As such, now is the perfect time for state-level experimentation in the field of Internet voting.*

## INTRODUCTION

Voting in the United States overwhelmingly takes place at physical polling locations where voters assemble, in person, to choose their leaders and representatives. Some states, however, have moved away from the prototypical election structure by introducing alternative means for voters to cast their ballots. All states do this to a minor extent through mail-in absentee voting,<sup>1</sup> but some have gone even further to allow so-called “one-stop” absentee voting.<sup>2</sup> The process of one-stop voting is remarkably similar to traditional Election-Day voting, but the legal structure surrounding the casting of the ballots is entirely different. In North Carolina, for example, one-stop voting is viewed more similarly to mail-in absentee voting than it is to Election-Day voting—this is why the number and operational hours of

---

<sup>†</sup> J.D. candidate at Duke University School of Law; B.A. in Philosophy from Yale University. The opinions contained in this Issue Brief are solely those of the author and are not the opinions of any of the author’s current or former employers, including, but not limited to, the North Carolina State Board of Elections.

<sup>1</sup> See, e.g., N.C. STATE BD. OF ELECTIONS, STATE ABSENTEE BALLOT REQUEST FORM (2013), available at <http://www.ncsbe.gov/ncsbe/Portals/0/FilesP/AbsBallotReqFormv112013.pdf>.

<sup>2</sup> See, e.g., N.C. GEN. STAT. § 163-227.2 (2013) (describing and mandating the process for “one-stop” voting in North Carolina).

polling places do not need to be uniform throughout the state.<sup>3</sup> Other states, such as Washington, have completely eliminated Election-Day voting, replacing it with mail-in ballots for every qualified voter.<sup>4</sup> Rather than assembling at a single location on Election Day, or even over a series of days as with North Carolina's one-stop system, Washington voters are able to make their decisions at their leisure and without the pressure of time-constraints or the worry of being bullied or harassed by others.<sup>5</sup> A voter in Washington has approximately eighteen days in which to vote, and every voter has an equal opportunity to do so.<sup>6</sup>

Internet voting takes the idea of one-stop absentee voting and universal mail-in voting a step further. Rather than relying on the archaic systems of physical presence and physically-transported paper documents, both of which are time-consuming and costly, Internet voting relies on the most efficient communications network ever designed. Voters in a state that had instituted Internet voting would be able to have the same sort of unhurried and thoughtful decision-making opportunity as Washington voters currently enjoy; and election officials would be able to avoid much of the hassle of printing, distributing, collecting, and tabulating paper ballots.<sup>7</sup>

But Internet voting arguably faces three major hurdles before it could be implemented. First, one must consider whether or not Internet voting is constitutional. The Constitution of course does not discuss Internet voting in as many words, but the Twenty-Fourth Amendment's prohibition of poll taxes may stand in the way of a state trying to implement Internet voting. Second, the Voting Rights Act<sup>8</sup> might prohibit a state or locality from implementing Internet voting. While Section Four of the Voting

---

<sup>3</sup> See *id.* § 163-227.2(g) (requiring uniformity within a particular county, but remaining silent on state uniformity).

<sup>4</sup> See *Vote by Mail*, OFFICE OF THE SECRETARY OF STATE: ELECTIONS & VOTING, [https://wei.sos.wa.gov/agency/osos/en/voters/Pages/vote\\_by\\_mail.aspx](https://wei.sos.wa.gov/agency/osos/en/voters/Pages/vote_by_mail.aspx) (last visited Apr. 13, 2014) ("Washington State votes by mail.").

<sup>5</sup> See *id.* ("Vote by mail is convenient and gives you extra time to learn about the ballot measures and candidates before casting your vote.").

<sup>6</sup> See *id.* (explaining that ballots are distributed at least eighteen days before an election and must be returned or postmarked by Election Day).

<sup>7</sup> Although this author believes that mandatory voting is unlikely to be a reality in the near future, President Obama's recent statements indicating his support of mandatory voting make this an especially beneficial outcome of Internet voting. See Holly Yan, *Obama: Maybe It's Time for Mandatory Voting*, CNN (Mar. 19, 2015), <http://www.cnn.com/2015/03/19/politics/obama-mandatory-voting/> (describing President Obama's stance). The costs savings from eliminating all paper requirements for approximately 250 million ballots would be far greater than eliminating those for the smaller percentage of that number that currently vote.

<sup>8</sup> 52 U.S.C.A. §§ 10101–10702 (West Supp. 2014) (originally codified at 42 U.S.C. §§ 1973–1973bb-1 (2012)).

Rights Act was recently struck down as unconstitutional in *Shelby County v. Holder*,<sup>9</sup> Section Two, which allows for suits brought after a denial of equal access to voting, remains. Furthermore, Section Five, requiring preclearance of election law changes for certain areas of the country, also could prevent the implementation of Internet voting, but that would require a new coverage formula to be developed to replace Section Four.

Finally, there are practical and political concerns with Internet voting. Chief among these is the very real possibility that the system could be hacked, crashed, or otherwise rendered inoperable or untrustworthy, as well as doubts over the political feasibility of passing legislation implementing Internet voting. Concerns over trustworthiness have been leveled against electronic voting machines at in-person voting locations,<sup>10</sup> and at least in some instances technical errors have actually led to inaccurate results.<sup>11</sup> Additionally, the recent failed rollout of healthcare.gov raises serious concerns about whether or not the government can effectively manage a large online system like would be required here.<sup>12</sup>

This Issue Brief will focus on the first and second of these issues. While practical and political concerns are important for any serious proponent of Internet voting to confront, the purpose of this Brief is simply to argue that there is no legal barrier to Internet voting. Whether or not Internet voting is a good idea, or one which would even be feasible, is outside the scope of this Brief.

## I. THE CONSTITUTION DOES NOT PROHIBIT INTERNET VOTING

The most fundamental obstacle to Internet voting, as with any change in law, is the United States Constitution.<sup>13</sup> But despite what others have argued,<sup>14</sup> Internet voting would not violate the Twenty-Fourth

---

<sup>9</sup> 133 S. Ct. 2612, 2631 (2013).

<sup>10</sup> *Editorial: Electronic Voting Is the Real Threat to Elections*, USA TODAY (Sep. 19, 2012), <http://usatoday30.usatoday.com/news/opinion/editorials/story/2012-09-19/electronic-voting-fraud-security/57809062/1>.

<sup>11</sup> Zachary Roth, *Machine Turns Vote for Obama into One for Romney*, MSNBC (Nov. 7, 2013), <http://www.msnbc.com/politicsnation/machine-turns-vote-obama-one-rom>.

<sup>12</sup> See Shoshanna Weissmann, *Why Healthcare.gov Failed in One Flow Chart*, POLICYMIC (Dec. 5, 2013), <http://www.policymic.com/articles/75683/why-healthcare-gov-failed-in-one-flow-chart> (“While appalling and inexcusable, healthcare.gov’s failures are part of the larger norm of failing governmental technology initiatives.”).

<sup>13</sup> U.S. CONST. art. VI, cl. 2.

<sup>14</sup> Brett Stohs, *Is I-Voting I-Llegal?*, 2003 Duke L. & Tech. Rev. 0013 ¶ 13 & n.25. This article was published while Professor Stohs was a student at Duke University and may or may not reflect his current scholarly views. Professor Stohs’s

Amendment or any other constitutional provision. Professor Brett Stohs believes it would, although his argument is not fully developed.<sup>15</sup> The purpose of this section is to explain and counter that claim. While an incredibly strict understanding and implementation of Internet voting would admittedly push up against the constitutional line, a well-designed system could avoid the constitutional challenge.<sup>16</sup>

*A. How a Strict Implementation of Internet Voting Would Run Afoul of the Twenty-Fourth Amendment*

The Twenty-Fourth Amendment states:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.<sup>17</sup>

This absolute right to vote without paying a tax also applies to the election of state officials.<sup>18</sup> In *Harper v. Virginia State Board of Elections*, the Supreme Court held that “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”<sup>19</sup>

From the text of the Twenty-Fourth Amendment and the holding of *Harper*, it is clear that any payment or wealth status required to be eligible to vote is unconstitutional. Thus, if Internet voting were to fall under this category, it would be unconstitutional.

---

conclusions may also have been correct at the time of his writing, but modern trends have called his arguments into doubt. While both of these considerations are important to bear in mind, the argument presented in *Is I-Voting I-Llegal?* serves as a useful launching point for the argument presented here, especially considering the relative dearth of scholarship on this topic.

<sup>15</sup> See *id.* ¶ 13 (stating simply: “[a]t present, such a scheme would certainly violate the Twenty-Fourth Amendment.”).

<sup>16</sup> There may of course be other elements of an Internet voting system that would render it unconstitutional, but those have little to do with the Internet element explored here. For example, one could conceive of an Internet voting system that would violate one-person-one-vote or some other constitutional voting requirement. Such a system would be unconstitutional, but not because it is online. The claim made throughout, that Internet voting is constitutional, should therefore be viewed as a more concise phrasing of the idea that voting over the Internet does not present any constitutional challenges unique to that method.

<sup>17</sup> U.S. CONST. amend. XXIV, § 1.

<sup>18</sup> 383 U.S. 663, 670 (1966).

<sup>19</sup> *Id.* at 666.

Internet voting would almost certainly count as a wealth status requirement for voting if individual Internet access was absolutely required in order to vote. Paying for an Internet connection of any form—high-speed, dial-up, even mobile—requires some non-zero amount of disposable income.<sup>20</sup> While this payment would not necessarily be made to the government (and therefore might not properly be characterized as a tax), it would seem to fit under *Harper*'s prohibition of making the “affluence of the voter . . . an electoral standard.”<sup>21</sup>

However, any way around paying for a personal Internet connection would weaken the argument that Internet voting requires a certain level of affluence. Therefore, in order to be clearly unconstitutional, a scheme of Internet voting would have to require individually purchased or controlled Internet access that has a non-zero cost. The availability of free Internet access would negate the constitutional challenge.

Internet voting would therefore be prohibited by the Twenty-Fourth Amendment only if it were to be implemented in an extremely strict manner: the only way one can vote is by Internet, and the only Internet connection one can use is one that the individual pays for in some way. Such a system would be more extreme than the similar Washington state system, because that allows for returns of ballots by hand rather than by any means requiring payment.

#### *B. The Twenty-Fourth Amendment Does Not Prohibit Internet Voting*

While the preceding section described how Internet voting could possibly violate the Twenty-Fourth Amendment, it is unlikely that any scheme developed would actually do so. Remember that two criteria must exist for Internet voting to be unconstitutional:

1. Internet voting must be the only method of voting available.
2. The only Internet connection one can use to vote is one that the individual pays for, either through purchase or rent.

Because the primary purpose of this section is to argue against the claim put forward by Professor Stohs in his article, which itself was limited to situations where Internet voting was the only available method of voting,<sup>22</sup> this Brief will assume the truth of the first criterion. If Internet

---

<sup>20</sup> See, e.g., *Dial-Up Internet Plans*, NETZERO, <http://www.netzero.net/dialup> (last visited Apr. 13, 2014) (offering “Basic Dial-Up” Internet service for \$9.95 per month).

<sup>21</sup> *Harper*, 383 U.S. at 666.

<sup>22</sup> Stohs, *supra* note 14.

voting were simply implemented as an additional method of voting, alongside traditional Election-Day physical voting, there would be no issue. But, while this Brief will accept the first criterion, and in fact the author would actually prefer this criterion to be met for the sake of simplicity in the system, it is worth noting what this criterion does *not* require.

Internet voting could be the only method of voting available in two possible ways. The first would be if there were no way to walk, drive, or ride to any other location, such as to the Board of Elections or similar governmental organization, to cast a vote in person. This is the obvious inference one could draw from the concept of Internet voting. But remember that Internet voting is useful for two broad reasons:

1. Internet voting is more convenient for the voter.
2. Internet voting is more convenient for election officials.

A system designed so that some individuals could vote from home on their computers and others could vote from a centralized polling location might therefore seem to simply be the either-or, additional-method, system dismissed earlier. But if the centralized locations are tied into the same system as the cast-from-home online votes are (for example, if the centralized location used the same website as was available from home, rather than a different website that then required data to be moved over), then the benefits to the election officials still manifest, even if there is no added convenience for any particular voter.

These benefits to election officials should be viewed relative to the present system. Setting up a centralized location for voting would lower the total cost of administering an election.<sup>23</sup> This is because fewer centralized locations would be required than are needed for mandatory in-person voting. When that benefit is viewed alongside the savings in tabulation costs because of the automated nature of the online system, the end result is a large increase in both convenience and efficiency for the election officials.

A key aspect of this system would be that the voter at the centralized location would be using the same interface as someone voting from home. Their votes would not be differentiated in any way, except for perhaps by IP address (but only if the IP address were tracked for every voter, which would raise its own issues related to voter privacy).

---

<sup>23</sup> See *Benefits of the Vote Center Model*, LARIMER COUNTY, [http://www.co.larimer.co.us/elections/votecenter/votecenters\\_benefits.htm](http://www.co.larimer.co.us/elections/votecenter/votecenters_benefits.htm) (last visited Apr. 13, 2014) (noting that there are “cost savings in many areas including requiring fewer election workers and fewer election supplies” from establishing Vote Centers, larger and more centralizing voting locations distinct from traditional precincts).

What this centralized location would amount to, then, would be a glorified Internet café with only one website available. But the key criterion—that Internet voting be the only voting available—would still be met.

This second way of looking at the first criterion, that a centralized location does not negate it because the practical benefits for the election officials still exist, leads directly into solving the problem implicated by the second criterion. Because this Brief accepts the premise that Internet voting is the only form of voting in this hypothetical scenario, if voting cannot be performed for free, then the entire scheme is unconstitutional.<sup>24</sup> Even Washington has apparently recognized this fact in allowing their mailed ballots to be hand-returned, rather than requiring the purchase of a stamp.<sup>25</sup>

But, as described above, establishing a central location from which people can vote using the online system does not make Internet voting any less universal. So long as this centralized location is free to use, the second criterion is not met and Internet voting is constitutional (at least as far as the Twenty-Fourth Amendment is concerned).

Even if, however, a particular state decided not to have a free, state-run election location from which voters without personal Internet connections could vote, an Internet voting scheme might still be able to survive a constitutional attack. Public libraries offer Internet access on their computers for free.<sup>26</sup> Many locations, such as coffee shops, offer free Internet access so long as an individual uses their own device.<sup>27</sup> And others, such as big-box stores, might be able to convert their existing public computers (demonstration floor models, employment application terminals, and the like) to allow access to a voting website, especially if there is some governmentally-provided incentive for doing so.

Some of these options, such as libraries or incentivized big-box stores, are absolutely free for the voter. Others, such as coffee shops, require some level of personal wealth, but in a more abstract context with which we are already familiar, like requiring a small purchase to remain in the space. While owning an Internet-capable device might require being affluent, it is

---

<sup>24</sup> See *supra* Part I.A.

<sup>25</sup> OFFICE OF THE SECRETARY OF STATE: ELECTIONS & VOTING, *supra* note 4.

<sup>26</sup> See, e.g., *Acceptable Use of the Internet and Library Public Computers*, MULTNOMAH COUNTY LIBRARY, <https://multcolib.org/policies-manuals/acceptable-use-internet-and-library-public-computers> (last modified Feb. 6, 2012) (“A visitor who does not have a library card may receive an Internet guest pass by signing up and showing current, valid photo identification.”).

<sup>27</sup> See, e.g., *Wi-Fi (United States)*, STARBUCKS, <http://www.starbucks.com/coffeehouse/wireless-internet> (last visited Apr. 13, 2014) (“Starbucks offers free, one-click, unlimited Wi-Fi at all company-owned stores in the United States . . .”).

important to keep in mind, too, that despite the exact wording of *Harper*, some level of wealth is required to vote under the current system—transportation to the voting location will not necessarily be free.<sup>28</sup>

Thus, there are a number of free options available for voters in an Internet voting regime. These options range from completely government funded and operated centralized locations such as public libraries to government- or market-incentivized private businesses. Additionally, Internet access is available for free provided the voter already owns or can obtain an Internet-accessible device (similar to the current requirement that the voter owns or can obtain a means of transportation to the physical polls) at a number of locations that may be easier to access than a public library.

Because these options would be available under an Internet voting scheme, the second criterion of unconstitutionality is not met. Internet voting could be implemented without running up against the prohibition on poll taxes in the Twenty-Fourth Amendment.

## II. THE VOTING RIGHTS ACT DOES NOT PROHIBIT INTERNET VOTING

Clearing the constitutional hurdle of the Twenty-Fourth Amendment is not enough, on its own, to make Internet voting legal. Internet voting must, in addition to being available at no charge to voters, avoid running afoul of the statutory prohibitions on election laws established in the Voting Rights Act.<sup>29</sup> The Voting Rights Act deals with racial discrimination in voting, and has two main operative sections that will be discussed in this Brief. The first is Section Two, which makes it illegal for a state to dilute the vote of a racial group or to deny equal access to voting to a specific racial group.<sup>30</sup> The second is Section Five, which requires certain jurisdictions to clear any changes in election law with the Department of Justice before those changes take effect.<sup>31</sup> However, as this Brief will explain in more detail below, neither of these sections would serve as much of a barrier against Internet voting today, even though they would have just a short time ago.

---

<sup>28</sup> See *USA National Gas Price Heat Map*, GASBUDDY.COM, [http://www.gasbuddy.com/gb\\_gastemperaturemap.aspx](http://www.gasbuddy.com/gb_gastemperaturemap.aspx) (last visited Feb. 7, 2015) (displaying current gas prices throughout the country, with many locations having an average price of over \$2.08 per gallon).

<sup>29</sup> 52 U.S.C.A. §§ 10101–10702 (West Supp. 2014) (originally codified at 42 U.S.C. §§ 1973–1973bb-1 (2012)).

<sup>30</sup> *Id.* § 10301; see also *Voting Rights Act*, LEGAL INFO. INST., [http://www.law.cornell.edu/wex/voting\\_rights\\_act](http://www.law.cornell.edu/wex/voting_rights_act) (last visited Apr. 13, 2014) (explaining the vote-dilution aspect of Section Two).

<sup>31</sup> 52 U.S.C.A. § 10304 (West Supp. 2014); see also LEGAL INFO. INST., *supra* note 30 (explaining how Section Five operates).

### A. Section Two Does Not Prohibit Internet Voting

Whether or not Section Two of the Voting Rights Act prohibits Internet voting depends on whether or not the vote of a specific racial group is diluted and whether or not a specific racial group is denied equal access to voting. Neither of these, however, is true of Internet voting.

#### 1. Internet voting does not dilute the voting power of any racial group

In order for a challenge under Section Two of the Voting Rights Act to succeed on vote dilution grounds, the plaintiffs must show that three elements have been met:

1. “[T]he minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.”<sup>32</sup>
2. “[T]he minority group must be able to show that it is politically cohesive.”<sup>33</sup> That is, members of the minority racial group must vote similarly to one another, so that they can be said to have a preferred group candidate. Additionally, members of the white majority must vote similarly to one another, so that their candidate usually defeats the minority’s candidate.<sup>34</sup>
3. The challenged procedure must have racially discriminatory effects when viewed under the totality of the circumstances.<sup>35</sup>

It is highly unlikely that these three elements would be able to be proven about an Internet voting procedure. Internet voting does not affect the organization of districts, which makes the first two elements incredibly difficult to prove. Even if they could be proven, however, showing that Internet voting has racially discriminatory effects would be difficult.

#### 2. Internet voting does not deny any racial group equal access to voting

Similarly, Internet voting does not deny any racial group equal access to voting. At its core, this test under Section Two makes Internet voting illegal if a racial group’s “members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>36</sup> This test is one of results, not of intent; a discriminatory effect is enough to render Internet voting illegal even if it

---

<sup>32</sup> Thornburg v. Gingles, 478 U.S. 30, 50 (1986).

<sup>33</sup> *Id.* at 51.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 46; *see also* Stohs, *supra* note 14, ¶ 18.

<sup>36</sup> 52 U.S.C.A. § 10301 (West Supp. 2014).

was not implemented with the intent to discriminate.<sup>37</sup> However, as detailed below, the data does not support the claim that Internet voting would deny any racial group equal access to voting.

The question here is whether or not Internet voting would have a discriminatory effect on any protected class of citizens. The answer to that question is no, for two reasons. First, because of the ability for individuals to still vote, as usual, at outside-the-home physical locations; and second, because the racial digital divide is shrinking incredibly fast and should no longer generate the same amount of concern it once did.

The first of these reasons has already been addressed.<sup>38</sup> Outside-of-the-home physical locations could be made available for individuals, and doing so would be at least as effective as the current system requiring in-person voting. If an individual cannot make it to the latter location, they would be similarly unable to make it to the former, and vice-versa.

But looking beyond the basic nature of these locations, the money saved by a switch to Internet voting (by removing the need to have as many in-person locations open<sup>39</sup>) can be redirected to having more voter outreach and voting locations for racial groups who may be disproportionately affected by the switch. In fact, if that transition were to occur, it would likely actually *increase* the percentage of racial minorities who vote, rather than decrease it. Racial groups with Internet access would see an increase due to convenience, but so would racial minorities without Internet access.

The second reason itself can be looked at from two perspectives: current statistics and trend lines toward the future. Simply looking at current statistics, there may exist some level of concern about discriminatory racial effects from a transition to Internet voting. But when one looks at where the lines are pointing and what is likely to occur by the time any government makes a full transition, the discriminatory effects are likely to be highly mitigated, if not eliminated.

For example, in 2012, a larger percentage of Hispanic and black individuals owned smartphones than did white individuals.<sup>40</sup> And looking at

---

<sup>37</sup> *Gingles*, 478 U.S. at 35 (noting that Congress revised Section Two “to make clear that a violation could be proved by showing discriminatory effect alone”).

<sup>38</sup> *See supra* Part I.B.

<sup>39</sup> *See LARIMER COUNTY, supra* note 23 (noting that there are “cost savings in many areas including requiring fewer election workers and fewer election supplies” from establishing Vote Centers, larger and more centralizing voting locations distinct from traditional precincts).

<sup>40</sup> Mark Hugo Lopez, et al., *Closing the Digital Divide: Latinos and Technology Adoption*, PEWRESEARCHCENTER HISPANIC TRENDS PROJECT (Mar. 7, 2013), <http://www.pewhispanic.org/2013/03/07/closing-the-digital-divide-latinos-and-technology-adoption/>.

who goes online from a mobile device, Hispanic and black individuals far surpass white individuals: seventy-six percent for Hispanic individuals, seventy-three percent for black individuals, and sixty percent for white individuals.<sup>41</sup> Overall, white individuals use the Internet more often than black or Hispanic individuals, but the latter groups still use the Internet far more often than not: seventy-eight percent of both groups answer affirmatively to questions about basic Internet usage.<sup>42</sup>

Looking beyond the simple statistics, the trend seems to be moving toward members of racial minorities having greater access to smartphones and home Internet than white individuals. “Although disparities in Internet use for households persisted across race and Hispanic origin groups in 2011, they appear to be shrinking.”<sup>43</sup> While the difference in how racial groups access the Internet may persist, long-term demographic shifts will likely lead to increased smartphone use across racial lines.<sup>44</sup>

This data does not necessarily point towards there being no Section Two problem with Internet voting if it were somehow implemented swiftly and immediately. But the world is certainly better off than it was in 2003, when only 61.8 percent of the overall population had a computer in the home,<sup>45</sup> and the racial divide appears to be closing. If Internet voting were phased in over a five-year period, these numbers would likely have converged much more closely and made the racially discriminatory effects claim far less likely to succeed.

Age also plays a role in election discrimination, although it is not explicitly contemplated by the Voting Rights Act. America is moving in the direction of becoming a majority-minority country, with minority birth rates outnumbering white birth rates.<sup>46</sup> One implication of this is that younger

---

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* White individuals answer with an eighty-seven percent affirmative to the same questions. *Id.*

<sup>43</sup> *Census Bureau Report Details Rising Internet Use and Shows Impact of Smartphones on Digital Divide*, U.S. CENSUS BUREAU (June 10, 2013), <http://www.census.gov/newsroom/press-releases/2013/cb13-111.html>.

<sup>44</sup> See Will Oremus, *New Digital Divide: Whites Less Likely to Own Smartphones*, SLATE (Aug. 7, 2012), [http://www.slate.com/blogs/future\\_tense/2012/08/07/digital\\_divide\\_minorities\\_more\\_likely\\_than\\_whites\\_to\\_own\\_smartphones.html](http://www.slate.com/blogs/future_tense/2012/08/07/digital_divide_minorities_more_likely_than_whites_to_own_smartphones.html) (noting both that the elderly are less likely than the young to use smartphones, which would mean that smartphone use should increase over time, and that white individuals are less likely than other major ethnic groups to use smartphones).

<sup>45</sup> THOM FILE, U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: POPULATION CHARACTERISTICS 1 (2013), available at <http://www.census.gov/prod/2013pubs/p20-569.pdf>.

<sup>46</sup> Jeffrey S. Passel, et al., *Explaining Why Minority Births Now Outnumber White Births*, PEWRESEARCHCENTER SOCIAL & DEMOGRAPHIC TRENDS (May 17, 2012),

voters are more likely to be racial minorities than older voters. Current voting trends arguably make it more difficult for these younger voters, especially those who are members of racial minorities, to vote.<sup>47</sup>

Internet voting could be the solution to this problem. Current voting laws have a disparate impact on racial minorities because they prevent young, and therefore disproportionately minority, individuals from voting. However, these young individuals make up the same group that would likely benefit most from Internet voting. Young individuals use the Internet more often than older individuals.<sup>48</sup> Therefore, by implementing Internet voting, a jurisdiction would be making it easier for young members of racial minorities to vote, countering current legislative trends against youth voting.

Therefore, because Internet voting would not dilute the voting power of any racial group; because it may actually work to counter current racially discriminatory policies based on age; and because it would not, at least if implemented gradually, have a racially discriminatory effect, it does not violate Section Two of the Voting Rights Act.

### *B. Section Five Does Not Prohibit Internet Voting*

Section Five of the Voting Rights Act is a complicated area of law at this time. The Supreme Court has effectively rendered Section Five inoperable as a result of its decision in *Shelby County*,<sup>49</sup> which held that the coverage formula contained in Section Four was unconstitutional.<sup>50</sup> However, there is still the possibility that Section Five will have fresh teeth if Congress enacts a new coverage formula, and therefore it is worth discussing.

The first notable point with regards to Section Five is that it is unlikely to have any real effect if Section Two is not implicated. Section Five is meant to *preclear* certain jurisdictions—to prevent them from

---

<http://www.pewsocialtrends.org/2012/05/17/explaining-why-minority-births-now-outnumber-white-births/>.

<sup>47</sup> See Josh Israel, *STUDY: Voter ID Laws Affect Young Minorities Most*, THINKPROGRESS (Mar. 13, 2013), <http://thinkprogress.org/justice/2013/03/13/1710351/study-voter-id-laws-affect-young-minorities-most/> (describing how the “strict voter ID laws being pushed by Republican state legislators around the country most impact young people, especially young minorities”).

<sup>48</sup> See U.S. CENSUS BUREAU, *supra* note 43, at 5 (showing that eighty-two percent of people ages eighteen through thirty-four report accessing the Internet from some location, while only forty-five and a half percent of those ages sixty-five and older reported the same).

<sup>49</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>50</sup> *Id.* at 2631. The coverage formula used 40-year-old data that did not reflect what current statistical evidence would have. *Id.*

implementing a law before its constitutionality is checked.<sup>51</sup> Therefore, the entire preceding argument related to Section Two applies equally well here, because if Internet voting does not violate Section Two then it is unlikely to be denied under a Section Five preclearance evaluation. The most that would be expected is the requirement for some further hard data, meaning a jurisdiction not subject to preclearance would have to implement Internet voting first in order to generate numbers which would then be used to evaluate the potential racially discriminatory effect in a jurisdiction subject to preclearance.

Even beyond this, however, the key thing to examine is not merely how Internet voting would treat racial minorities, but how Internet voting would treat racial minorities *compared to the current system*. This requires looking at how members of racial minorities currently vote (by travelling to the polling location) and comparing that to how they could potentially vote in an Internet voting system (from home, or from a nearby location).

Public transportation is primarily used by people of color.<sup>52</sup> In the nine states covered as a whole by the old formula of Section Four,<sup>53</sup> only one city—Arlington, Virginia—scored over a 50 on a 100-point Transit Score scale by Walk Score.<sup>54</sup> These numbers indicate that physical access to a polling place is already difficult for racial minorities in the areas that were covered by the Voting Rights Act. A change to Internet voting might have a similar impact on individuals within those groups, but it would not likely be enough to lead to denial of the change, especially if another state had already tried the new system.

Therefore, because Section Five only prohibits voting schemes which Section Two would also prohibit, and because a comparative view of

---

<sup>51</sup> 52 U.S.C.A. § 10304 (West Supp. 2014); *see also* *Shelby Cnty.*, 133 S. Ct. at 2620 (explaining the operation of Section Five).

<sup>52</sup> Amanda Hess, *Race, Class, and the Stigma of Riding the Bus in America*, THE ATLANTIC CITIES (Jul. 10, 2012), <http://www.theatlanticcities.com/commute/2012/07/race-class-and-stigma-riding-bus-america/2510/> (describing the history of the interaction between race and public transportation, and noting that seventy-eight percent of bus riders in Atlanta are black). For comparison, only fifty-four percent of Atlanta's total population was black in 2010. *State & County QuickFacts: Atlanta (city), Georgia*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/13/1304000.html> (last visited Apr. 13, 2014). This indicates that, at least in one city previously covered by Section Five of the Voting Rights Act, *Jurisdictions Previously Covered by Section 5*, U.S. DEPARTMENT JUST., [http://www.justice.gov/crt/about/vot/sec\\_5/covered.php](http://www.justice.gov/crt/about/vot/sec_5/covered.php) (last visited Apr. 13, 2014), black individuals use one method of public transportation at a greater overall rate, and a greater relative rate, than white individuals.

<sup>53</sup> U.S. DEPARTMENT JUST., *supra* note 52.

<sup>54</sup> *Cities & Neighborhoods*, WALK SCORE, <http://www.walkscore.com/cities-and-neighborhoods/> (last visited Apr. 13, 2014).

current mass-transit availability with Internet access ability shows that a switch would not have any more of a discriminatory effect on racial minorities than the current system does, Section Five of the Voting Rights Act is unlikely to prevent the adoption of an Internet voting scheme.

#### CONCLUSION

Internet voting is the future of electoral politics in this country. While there may be political and policy reasons why Internet voting will be delayed in coming to fruition, it faces no legal obstacles, either constitutional or statutory. The constitutional prohibition on poll taxes does not apply to Internet voting because of the wide range of alternative and free opportunities to vote that could, and likely would, be implemented. The statutory Voting Rights Act does not prohibit Internet voting through either Section Two or Section Five, because Internet voting would not have racially discriminatory effects. Furthermore, it is not prohibited by Section Five because it would be no worse than the current racially discriminatory system, which requires the use of public transportation. And because Section Five has been rendered inoperable by *Shelby Cnty.*, now is the perfect time for those states that previously would have had to have faced that hurdle to experiment. Internet voting is therefore perfectly legal, and should be implemented, barring political and policy concerns.