

“The **right** to  
**vote** is precious,  
almost **sacred.**”

U.S. Representative John Lewis  
Georgia's 5th Congressional District

## EXECUTIVE SUMMARY

There are many reasons to celebrate the 49th anniversary of the Voting Rights Act of 1965 (VRA). We have made enormous progress since the turbulent and momentous years that preceded the enactment of the VRA. The VRA ended the virtual total exclusion of minority voter participation in areas of the country with the worst voting discrimination. It has also removed from use, or blocked implementation, of thousands of discriminatory voting practices. This law and others, as well as social and cultural advances, have resulted in increased minority registration and turnout and the election of thousands of minority elected officials at the federal, state, and local levels, including an African-American President.

But to congratulate ourselves for ending racial voting discrimination would be both premature and unwise. Most minority elected officials come from majority-minority single-member districts in which minority citizens have a fair opportunity to elect candidates of their choice despite lack of support from white voters; minority candidates elected from outside such districts remain the rare exception. Courts are hearing new legal challenges and are continuing to make findings of voting discrimination. A number of states have enacted laws that seem intended only to restrict access to the franchise, especially in ways that impact minority voters more than white. Participation for most minority groups still lags far behind that of white voters (for purposes of this report “white” means “white, non-Hispanic”).

Shortcomings in election administration and burdensome voting procedures also remain widespread. The symptoms of these problems took the national stage in the 2000 election, and prompted the enactment of Help America Vote Act and the creation of the U.S. Election Assistance Commission (EAC). But the 2012 election—with embarrassing election administration failures in some jurisdictions, hours-long lines of voters, protracted litigation and the EAC sidelined by partisan infighting—showed that the cure continues to elude us.

Given this landscape, many Americans were shocked and perplexed in June 2013 when the U.S. Supreme Court held, in *Shelby County v. Holder*, that the 2006 reauthorization of key provisions of the Voting Rights Act was unconstitutional. This decision effectively killed Section 5 of the VRA—surely one of the most effective antidiscrimination laws ever enacted. Section 5 provided for federal screening of all new voting practices in nine states and in parts of six others, where there had been a history of discrimination. After going into effect, Section 5 blocked thousands of racially discriminatory voting changes from being implemented, and deterred countless others. It had been reauthorized by a unanimous vote in the Senate and by a virtually unanimous vote in the House in 2006. Why did the Supreme Court do this?

In *Shelby County*, Chief Justice Roberts wrote that “voting discrimination still exists; no one doubts that.” However, that important concession was lost in the Court’s focus on progress since 1965 in minority participation and election to public office and in the Court’s use of a

legal analysis that avoided the extensive record that Congress compiled of voting discrimination in the Section 5 covered jurisdictions between 1982 and 2005.

Whether you agree with the Court or not, the *Shelby County v. Holder* decision demands a nationwide assessment of recent racial voting discrimination. We need to know how much voting discrimination is still occurring, who it is affecting and where it is occurring.

This report—issued by the **National Commission on Voting Rights**—is intended to help answer those questions. We conclude that:

- *Voting discrimination is a frequent and ongoing problem in the United States.* There were 332 successful voting rights lawsuits and denials of Section 5 preclearance from 1995 through 2013 and another ten non-litigation settlements.
- *Some areas of the country have far worse records of voting discrimination than others.* Texas stands out as having a remarkably high level of documented voting discrimination, including multiple state-level violations. Georgia, Louisiana, Mississippi and South Carolina each had far higher levels of problems than average. Overall, the Section 4(b) jurisdictions with approximately 25 percent of the nation's population had more than 70 percent of the successful Section 2 cases.
- *Voting discrimination takes a variety of forms.* Discriminatory redistricting plans and at-large elections continue to prompt the most successful lawsuits. However, there were also 48 successful lawsuits and ten non-litigation settlements relating to language translation and assistance.
- *Voting discrimination has significantly affected African Americans, Latinos, Native Americans, and Asian Americans.* Each of these minority groups suffered extensive official voting discrimination in the past. Since 1995, successful lawsuits have been brought on behalf of each group to remedy voting discrimination and to provide equal electoral opportunities.
- *New problems with voting discrimination are arising even as the old ones persist.* Courts continue to find that at-large election systems and gerrymandered redistricting plans dilute minority voting strength. At the same time, new laws have been enacted, making it more difficult to register and cast a ballot, which is especially problematic for minority citizens.

## THE NATIONAL COMMISSION ON VOTING RIGHTS

The Lawyers' Committee for Civil Rights Under Law along with more than a dozen partners organized the nonpartisan National Commission on Voting Rights (NCVR), which conducted 25 regional and state-based hearings between June 2013 and May 2014. The Commission is a successor to the National Commission on the Voting Rights Act, which released an extensive report in 2006 on the record of voting discrimination after 1982.

The NCVR was overseen by a distinguished panel of national commissioners and additional panels of guest commissioners at the state and regional hearings covering 48 states. Testimony and research from Hawaii and Alaska were submitted separately. 494 witnesses testified at the hearings.

The NCVR set out to learn about both racial voting discrimination and election administration issues in its hearings. A report devoted to election administration barriers and reform efforts will be issued at a later date.

This Report, *Protecting Minority Voters: Our Work Is Not Done*, documents the national record of voting discrimination since 1995. The Report examines the nationwide incidence of successful litigation under Section 2 of the VRA, objections under Section 5, and successful language minority litigation, together with testimony, demographic analysis, and in-depth discussions of important issues. The commission testimony was especially helpful in illuminating those areas where litigation is ongoing and highlighting those areas where litigation under current laws has been unable to resolve grave problems.

## OVERVIEW OF CHAPTERS

This Report provides a look in the mirror as our country nears the half-century mark after passage of the Voting Rights Act. There is no doubt that the VRA, including the Section 5 preclearance provision, has been extraordinarily effective in combating voting discrimination. Nor is there any doubt that certain state and local jurisdictions continue to enact discriminatory voting laws.

Thus, the loss of federal review of voting changes in certain states makes it essential to closely examine the record of recent voting discrimination. The voting rights of minority citizens are too fundamental, and have been denied too often in the past, to accept the assumption that the Supreme Court merely did away with an unnecessary vestige of a bygone era. Section 5 in fact was targeting the states with the worst records of recent, repeated voting discrimination when it was neutralized by the *Shelby County* decision.

## **Chapter 1 provides the background on the VRA; a discussion relevant to the debate of whether some of its provisions are still necessary.**

The VRA was Congress' response to persistent voting discrimination. Congress acted under its powers to enforce the constitutional protections under the Fourteenth and Fifteenth Amendments for citizens to vote free from racial discrimination. When the VRA was originally enacted, the predominant focus was on eliminating discrimination against African Americans, but beginning in 1975 and based on extensive testimony, Congress added voting protections for language minorities—Latinos, Native Americans, and Asian Americans.

There are two primary forms of discrimination—limitations on ballot access and vote dilution—and the Act addresses both at least in part. The category of limitations on ballot access consists of laws and practices that disproportionately prevent or make it more difficult for minorities to cast a ballot, such as literacy tests. Minority vote dilution consists of electoral systems—such as a redistricting plan that divides a minority community or the use at-large (jurisdiction-wide) elections—that, combined with white voters voting as a bloc and other factors, prevents a sizable minority community from electing its candidates of choice.

The Act, prior to its major modification in *Shelby County*, consisted of a system of permanent and temporary provisions. Chief among the permanent provisions is Section 2, which enables the federal government and private parties to sue to stop a voting practice or procedure that was enacted or has been maintained with a racially discriminatory intent or result. Section 2 cases are notably complex and resource-intensive.

The primary other types of provisions—minority language, preclearance, and observer provisions—have all been temporary in nature because they place affirmative burdens on jurisdictions where voters need the particular protections. Congress most recently reauthorized these temporary provisions in 2006. Section 203 is the primary minority language provision. Jurisdictions are covered where five percent or (in the case of a political subdivision), ten thousand of their voting age citizens have limited English proficiency and are members of a single language minority group and where the English illiteracy rate of those citizens is greater than the national illiteracy rate. Where a Native American reservation meets this five percent threshold and the illiteracy standard is also satisfied, any jurisdiction containing part or all of that reservation is also covered by Section 203. Covered political subdivision must provide citizens who need it with language assistance in all stages of the electoral process.

Section 5 preclearance required covered jurisdictions to demonstrate to the Department of Justice (DOJ) or a federal district court in Washington D.C. that a proposed change in voting did not have a discriminatory purpose or effect before the jurisdiction could implement the change. The observer provision under Section 8 enabled the U.S. Attorney General to send

federal observers to monitor polling places and the vote-counting process in a covered jurisdiction when DOJ believed it was necessary to prevent discrimination. The determination of which jurisdictions were subject to Section 5 and Section 8 was based on the formula contained in Section 4(b) of the Act. The formula—which was based on a jurisdiction’s low voter participation in the 1964, 1968, or 1972 Presidential elections and the use of a discriminatory test or device in the same election—had not changed since 1975 because Congress had found in subsequent reauthorizations in 1982 and 2006 that these jurisdictions continued to have significant records of discrimination. The covered states under the Section 4(b) formula were primarily in the South and Southwest, as well as Alaska.

In the challenge before the Supreme Court, Shelby County argued that Congress acted beyond its constitutional powers when it reauthorized Section 5 and did not update the formula determining which states and jurisdictions were subject to Section 5. The Supreme Court ruled that the existing formula was unconstitutional. Without a formula, Section 5 cannot be used. Unless and until Congress acts in response to *Shelby County*, Section 5 is essentially dead.

## **Chapter 2 presents a national analysis from 1995 to the present of successful enforcement of the Voting Rights Act (Section 2 litigation, Section 5 litigation and preclearance denials, and litigation against English-only elections.)**

The findings include:

- Racial voting discrimination remains an ongoing problem, with about 332 successful Voting Rights Act lawsuits or denials of Section 5 preclearance since 1995.
- This includes at least 171 successful Section 2 lawsuits (not including minority language cases), 113 Section 5 preclearance denials, and 48 successful lawsuits raising language assistance claims. There were also ten pre-litigation settlements regarding minority language cases.
- The voting discrimination documented in Section 2 lawsuits is not evenly dispersed around the country. It is geographically concentrated, most heavily in Texas, but also in Florida, Georgia, Louisiana, Mississippi, and South Dakota. Each of these states was fully or partially covered under Section 4(b) of the VRA when the Supreme Court decided in *Shelby County v. Holder* that Section 4(b) was too outdated to target present-day discrimination.
- Louisiana led the way in Section 5 preclearance denials with Texas, South Carolina, Mississippi, and Georgia not far behind. These numbers, combined with the Section 2 data,

made these five states are the worst performers when it comes to discrimination cases outside of those involving language assistance.

- New York, Texas, and California were the states with the most successful minority language assistance cases or pre-litigation settlements. Each had at least ten.

### **Chapter 3 describes what has been lost as a result of the *Shelby County* decision.**

First, Section 5 prevented discriminatory voting changes from being put into use before they underwent federal review. More than 3,000 voting changes in over 1,000 separate objection letters and court judgments were denied Section 5 preclearance between 1965 and 2013.

Second, Section 5 deterred the enactment of discriminatory laws. For example, it was not until after the *Shelby County* decision that the North Carolina legislature amended a photo ID bill to add numerous other voting restrictions; that law is the subject of three pending federal lawsuits.

Third, the Section 5 process promoted transparency because DOJ and minority citizens or organizations (after DOJ contacted them) would know about voting changes before they would be implemented.

Fourth, jurisdictions are now implementing voting changes that had been blocked by DOJ or federal courts under Section 5.

Fifth, Section 2 is not an adequate substitute for Section 5 for several reasons. Under Section 5 the review of a voting change occurred before the change was implemented, whereas under Section 2, the change gets implemented and is in effect while litigation is ongoing unless and until a court stops it—and this takes years except in the simplest cases. In addition, under Section 2, the minority plaintiffs or DOJ have the burden of proof; under Section 5, the jurisdiction had the burden of proof. Moreover, Section 2 cases tend to be complex, time-consuming, and expensive as compared to the 60-day administrative review process under Section 5.

Sixth, DOJ appears to have interpreted *Shelby County* to also prevent it from sending observers to the jurisdictions covered previously for federal review.

## **Chapter 4 discusses the different historical contexts and geographic areas in which African Americans, Latinos, Native Americans, and Asian Americans have been affected by voting discrimination.**

### **African-American Citizens**

African Americans were subjected to pervasive and longstanding voting discrimination preventing them from voting until Congress passed the VRA in 1965. After the passage of the VRA, there have been repeated efforts to undo gains in minority voter registration and turnout, particularly in the form of election methods that systematically diluted and negated African American voting strength.

Today African Americans comprise approximately 14 percent of the United States' population with 55 percent of the country's African-American population living in the South. This has particular meaning in light of the *Shelby County* decision. National registration and turnout rates for whites and African Americans have been similar in the last two presidential elections (when an African-American candidate was running for President from a major party for the first time) but African-American participation remains lower for midterm elections. Though there are a significant number of African-American elected officials, this is largely a function of the number of majority-minority districts that exist because of both VRA protections and residential segregation.

African Americans are particularly hard-hit by the *Shelby County* decision. The overwhelming majority of voting changes stopped by Section 5 between 1995 and 2014 (101 of 113, or approximately 90 percent) involved a discriminatory purpose or effect with respect to African-American voters.

In addition, African-American plaintiffs and DOJ on behalf of African Americans brought approximately 36 percent of the successful Section 2 cases nationwide between 1995 and 2014, and more than 60 percent of those cases were brought in the jurisdictions formerly covered by Section 5.

### **Latino Citizens**

Latinos have faced a long history of electoral exclusion and discrimination in the United States that included the use of literacy tests, intimidation, and English-only elections. When the VRA was amended in 1975 and 1982, Congress recognized not only that English-only elections led to pervasive discrimination against Latino citizens, but also that many of the methods being used to dilute the voting strength of African-American citizens were also being used against Latino citizens.

Latinos have grown to be the largest minority group in the United States (17 percent) and though about three quarters of the Latino population resides in eight states, the population lives throughout the country so that 23 states have at least one jurisdiction that is covered for Spanish-language voting assistance under Section 203 of the VRA.

Voter participation rates for Latino citizens lag behind the participation rates for white citizens. For example, in the 2012 presidential election among voting age citizens, white registration was 14 percentage points higher than Latino registration, and the turnout disparity was 18 percentage points. The number of Latino elected officials has increased markedly in recent years but this success is closely tied to majority-minority election districts and the opportunities that they provide for Latinos to elect the candidates of their choice.

Approximately 56 percent of the successful Section 2 cases (96 of 172) brought between 1995 and 2014 involved Latino plaintiffs or were brought by DOJ on behalf of Latino citizens; most of these involved the use of at-large election systems or racially gerrymandered election districts. Between 1995 and 2013, 29 of the Section 5 preclearance denials involved voting changes that had a discriminatory purpose or effect with respect to Latino voters.

Compliance with the language assistance provisions of the VRA is critically important for Latino citizens to fully engage in the electoral process, but noncompliance is widespread. Of the 58 successful language assistance cases or pre-litigation settlements between 1995 and 2014, 46 (79 percent) involved claims on behalf of Latinos.

### **Native American citizens (American Indians and Alaska Natives)**

Native Americans have been subjected to blatant discrimination for centuries that, among other things, affected their right to vote. They were granted citizenship in 1924 but it was not until their designation by Congress as a language minority group subject to protection under the VRA in 1975 that many Native American citizens were able to exercise their right to vote.

Native Americans comprise less than one percent of the total U.S. population, but because they are concentrated primarily in portions of Oklahoma, Arizona, New Mexico, North and South Dakota, Montana, and Alaska, Native Americans in certain counties comprise a significant portion—if not a majority—of the population. Voter turnout by Native American voting age citizens continues to lag far behind that of white voting age citizens (an estimated 17-18 percentage point disparity in the November 2012 election). There are only 64 Native American state legislators across the entire country and 2 federal legislators.

Between 1995 and 2014 there were at least 18 successful challenges to discriminatory voting practices brought on behalf of Native American citizens under Section 2 of the VRA (not including bilingual assistance claims). Most of these involved vote dilution challenges to at-large election systems. There were five successful language assistance lawsuits and

pre-litigation settlements. Because relatively few jurisdictions with concentrated Native American populations were covered under Section 5, there was only one Section 5 objection regarding discrimination against Native Americans, as well as one objection involving a jurisdiction covered under Section 3(c).

### **Asian American Citizens**

Asian Americans historically were denied U.S. citizenship under discriminatory immigration laws, leaving them unable to vote, and both Asian immigrants and native-born Asian Americans have been targeted by other discriminatory laws and practices. A 1965 change to the immigration laws led to a dramatic increase in Asian immigration. In 1975 Congress recognized the history of exclusion and voting discrimination against Asian American citizens in the form of English-only elections when it reauthorized and amended the VRA to include new language minority provisions, and specified Asian Americans as a language minority group.

Asian Americans comprise approximately five percent of the total population of the United States. The Asian American population grew by 46 percent between 2000 and 2010, and much of that increase was due to immigration. Asian American voting age citizens participate in elections at rates significantly lower than white voting age citizens; in the 2012 election, there was a 17 percentage point disparity in registration and a 19 percentage point disparity in turnout. Studies have found that at least some part of those disparities is due to language accessibility issues and other forms of voting discrimination. The Asian American population resides primarily in heavily populated urban areas and so there are relatively few electoral districts with Asian American voting majorities. There are currently 11 Asian American members of Congress, 98 Asian American members of state legislatures, and two Asian American governors.

Asian American citizens benefit greatly from bilingual election assistance in areas covered by the language minority provisions of the VRA. From 1995 to 2014, ten successful language assistance lawsuits and non-litigation settlements involved Asian languages. Because the jurisdictions covered under Section 4(b) of the VRA at the time of the *Shelby County* decision had relatively low concentrations of Asian American citizens, only three preclearance denials between 1995 and 2013 have involved the effect of the proposed voting changes on Asian American citizens. In large part because of the dearth of jurisdictions where Asian Americans are large enough to comprise a majority in a single-member district, there were no successful vote dilution cases brought on behalf of Asians.

### **Chapter 5 discusses the problem of minority vote dilution since 1995.**

Minority vote dilution involves electoral systems that devalue, negate or diminish the voting strength of racial minority groups by unnecessarily putting them in majority-white jurisdictions

where they usually cannot elect their preferred candidates because most voters vote along racial lines. The two principal forms of minority vote dilution are the use of at-large elections and racially gerrymandered election districts. The majority of successful Section 2 cases between 1995 and 2014 were minority vote dilution claims, and the majority of Section 5 objections since 1995 were based upon minority vote dilution.

### **Racially Polarized Voting**

The presence of racially polarized voting is a necessary element of minority vote dilution claims. Racially polarized voting is defined as “a pattern of voting along racial lines where voters of the same race support the same candidate who is different from the candidate supported by voters of a different race.” Racially polarized voting is not assumed to exist; its presence must be proven as a matter of fact. Racially polarized voting typically is proven by a statistical analysis that estimates group voting preferences based upon precinct-level vote totals and demographic data.

Racially polarized voting continues to be widespread. Since 1995 federal courts made findings of racially polarized voting in challenges to statewide redistricting plans in Colorado, Massachusetts, Montana, South Carolina, South Dakota, Tennessee, Texas, and Wisconsin. Experts retained for purposes of statewide redistricting also reported racially polarized voting patterns in Alaska, Arizona, California and Kansas. DOJ noted racially polarized voting as a factor in denying Section 5 preclearance to statewide redistricting plans in Arizona, Florida, Louisiana, South Carolina, and Texas. More generally, any judicial finding of a Section 2 vote dilution violation, and any Section 5 preclearance denial based upon vote dilution, reflects a determination that racially polarized voting is present.

Studies have shown more severe racially polarized voting in the states that were covered under Section 4(b) of the VRA. For example, a Supreme Court brief submitted by prominent academic experts in the *Northwest Austin v. Holder* lawsuit showed that, according to exit polls taken during the 2008 Presidential election, Barack Obama was supported by 26 percent of white voters in the states covered by Section 4(b) versus 48 percent in the non-covered states. The six states with the lowest rates of white support for Obama were all fully covered under Section 4(b): Alabama, Mississippi, Louisiana, Georgia, South Carolina, and Texas.

### **Racially Discriminatory Methods of Election**

Over 70 percent of successful cases brought under Section 2 between 1995 and 2014 raised claims against methods of election. These cases were brought in 21 states, of which 18 had between one and four cases; Texas had 78 cases, Mississippi had seven and Georgia had six.

Changes to methods of election accounted for 19 Section 5 preclearance denials in nine different states between 1995 and 2013. These included one state-level objection in Mississippi, with a total of five in Texas and four in South Carolina.

### **Racially Discriminatory Redistricting Plans**

Racially discriminatory redistricting plans accounted for the second principal category of successful Section 2 vote dilution cases and Section 5 preclearance denials. Redistricting plans that dilute minority voting strength typically submerge minority voters in overpopulated districts, divide minority population concentrations to prevent them from comprising the majority of a fairly-drawn district (“fragmentation” or “cracking”), or unnecessarily overconcentrate them in a minimal number of districts (“packing”).

Redistricting changes accounted for more than half (58 of 113) of the Section 5 preclearance denials between 1995 and 2013. These included denials of statewide redistricting plans in Arizona, Florida, Louisiana, South Carolina, and Texas (four statewide preclearance denials).

Between 1995 and 2013, there were successful Section 2 challenges to 30 redistricting plans, including statewide plans in Colorado, Massachusetts, Rhode Island, South Dakota, Tennessee, Texas, and Wisconsin.

## **Chapter 6 discusses a variety of state laws and practices that can restrict or interfere with access to the ballot for minority citizens to a greater extent than white voters.**

Far too many states and jurisdictions have enacted laws or adopted practices that have created unnecessary barriers to the ballot. These include restrictions on community voter registration drives, proof-of-citizenship requirements, the failure to provide voter registration at public assistance agencies, felony disenfranchisement laws, dual voter registration systems, flawed voter purging, voter identification requirements, cutbacks on early in-person voting, problems with access to polling places, special barriers affecting Native Americans, and voter intimidation. These problems were the subject of extensive testimony at NCVR hearings, and some of them are the subject of heated public debate and current litigation.

### **Community Voter Registration Drives**

Community-based registration drives are effective and especially benefit minority citizens. According to 2010 Census Bureau data, African Americans (7.2 percent) and Latinos (8.9 percent) report having registered to vote at voter registration drives at significantly higher rates than white voters (4.4 percent). Therefore, restrictions on voter registration drives raise serious concerns about limiting minority voter participation. There have been repeated efforts in Florida to restrict community voter registration drives. Florida historically did not permit voter registration drives before passage of the NVRA and has attempted to limit their

availability on repeated occasions despite the National Voter Registration Act of 1993 (NVRA). Two recent federal court judgments based on non-racial theories found that the State was imposing unconstitutional restrictions on voter registration drives.

### **Proof of Citizenship**

Several states in recent years have adopted voter registration procedures that require providing documentary proof of U.S. citizenship in order to register to vote or in response to voter challenges brought by election officials. For example, the State of Georgia in 2008 attempted to use administrative record-matching between driver's license data and voter registration files to purge registered voters, unless the voters provided proof of U.S. citizenship to election officials. After a three-judge court issued a preliminary injunction against Georgia, which required the State to submit its procedure for administrative preclearance under Section 5 of the VRA, DOJ denied preclearance to the program, noting its unreliability and impact on minority voters. After filing a Section 5 declaratory judgment action seeking judicial preclearance, Georgia modified its procedure, which DOJ administratively precleared.

Proof of citizenship for voter registration has been a highly contentious issue. Arizona and Kansas have put these requirements into effect, while Alabama and Georgia have enacted these requirements but not yet implemented them. In 2013 the U.S. Supreme Court held in *Arizona v. ITCA* that Arizona must accept and use "federal forms" for voter registration under the NVRA, even if the applicants do not provide the proof of citizenship required by Arizona state law. The federal form establishes proof of U.S. citizenship via an attestation under oath, as do the vast majority of state forms. After the *Arizona v. ITCA* decision, Kansas and Arizona filed a lawsuit in Kansas seeking to compel the U.S. Election Assistance Commission to modify the federal form instructions for those states. This case remains in litigation.

### **Voter Registration at Public Assistance Agencies**

Section 7 of the NVRA requires public assistance agencies to offer voter registration in conjunction with applications for benefits, renewals of benefits, and changes of address. Because minorities are a relatively larger share of the client population for the two largest public assistance programs, the failure to provide voter registration opportunities during covered agency transactions has a disproportionately negative impact on minority citizens. Since 2006, a concerted effort by voting rights organizations to remedy widespread noncompliance with Section 7 has involved extensive outreach to state officials and a series of successful lawsuits. This has resulted in the submission of more than two million voter registration applications above the preexisting levels.

### **Felony Disenfranchisement**

Nearly 6 million Americans are banned from voting because, at some point, they were convicted of a felony offense. These laws affect minority citizens at a substantially higher rates than white citizens overall. In three states (Florida, Kentucky, and Virginia) at least one in five

African-American adults is disenfranchised. This is a major issue without a litigation solution because federal courts will only accept a challenge to a felony disenfranchisement law if the plaintiffs can prove that the law was enacted with a racially discriminatory purpose. Federal courts have uniformly rejected challenges to felony disenfranchisement laws based upon other constitutional theories or the Section 2 results test.

### **Voter Identification**

The increased enactment by states of laws requiring registered voters to provide government-issued photo identification (ID) before their votes are counted may be the most contentious voting-related issue of the last decade. Several of these laws have been subject to legal challenge. Georgia and Indiana passed the first two of these laws in 2005, and the ensuing federal legal challenges have provided proponents and opponents of these laws with a number of lessons, including the following:

- A state with a photo ID requirement must provide an effective method for citizens to obtain a free ID. The first Georgia law did not and was found to be an unconstitutional poll tax. Georgia revised its law to enable a registered voter to obtain a free qualifying ID at the county registrar's office. The second law was upheld against a challenge that included a variety of legal theories.
- After the Supreme Court upheld Indiana's law against a right-to-vote challenge, certain state legislators and proponents interpreted the decision as providing legal immunity to any kind of voter identification law.
- Conversely, opponents of the photo ID laws who are bringing legal challenges read the Indiana decision as requiring them to show more definitively the number of people negatively affected by the law, demonstrate implementation problems, and provide compelling testimony from individuals burdened by the law.

The end result has been that new restrictive laws have passed and there have been additional legal challenges. The more recent cases, such as the federal cases involving laws in Wisconsin, South Carolina, and Texas and the state case involving the Pennsylvania law, have shown the following trends, though it is important to note that the jurisprudence is still evolving.

- There is now a wealth of statistical data allowing opponents of the laws to show the real impact of these laws on voters, and in the cases in Wisconsin, South Carolina, and Texas, the disproportionate impact on minority voters. The cases have also provided compelling testimony from witnesses and other evidence demonstrating implementation issues that affected voters. This was particularly true in Pennsylvania.

- The courts in Wisconsin and Pennsylvania were skeptical about the stated rationale for these laws because of a dearth of proof that the primary rationale—the prevention of voter fraud—is advanced by the law.
- Courts have been hesitant to accept a law that does not enable any, or virtually any, voter to easily obtain a free ID or provide another alternative, such as signing an affidavit at the polling place, for any voter to vote without an ID.

### **Early In-Person Voting**

Early in-person voting has proven to be increasingly popular over the last several years, as currently 33 states and the District of Columbia provide for some form of early voting. African Americans in particular favor early in-person voting; a 2008 statistical analysis of election data in Cuyahoga County in 2008 showed that African Americans voted early at a rate of 26 to 1 as compared to whites and studies from other jurisdictions, while not showing that degree of disparity, consistently show that African Americans employ early voting much more often. In spite, or perhaps because, of the popularity of early voting amongst African Americans, states such as Florida, North Carolina, Ohio, and Wisconsin have recently scaled back the availability of early voting.

### **Problems at Polling Places**

There have been several instances where the closing or consolidation of polling places has been blocked by a court or DOJ because of concerns about its discriminatory impact on minority voters, including in Benson County, North Dakota; Bexar County, Texas; Monterey County, California; and Alaska. In addition, the refusal of certain officials in jurisdictions containing Native American reservations to provide satellite registration offices or voting sites on reservations has only been overcome where litigation was filed or threatened.

### **Voter Intimidation and Voter Challenges**

DOJ has been reluctant to bring voter intimidation cases because, according to DOJ's Federal Prosecution of Election Offenses manual, intimidation is "subjective" and often there is not concrete evidence or witnesses. DOJ's previous means of preventing voter intimidation was through the use of federal observers. It remains to be seen whether DOJ's decision to terminate its observer coverage in the formerly covered jurisdictions after the *Shelby County* decision will result in a substantial increase in voter intimidation.

Voter intimidation-type tactics may be employed by election officials or by private parties. A particularly egregious recent example from the 2012 election was the placement of billboards in predominantly minority communities in Ohio and Wisconsin "notifying" voters that voter fraud was a felony subject to prison terms or fines. Only after significant pressure and media attention did Clear Channel, the owner of the billboards, take them down because its client

would not divulge its identity. Concerns about voter challenges and voter deception and challenges before the November 2012 election led the North Carolina State Board of Elections to issue a directive to the county boards of elections on how to deal with these issues.

## **Chapter 7 reviews the record of violations and enforcement of the language minority provisions of the VRA.**

As discussed above, Section 203, the chief language assistance provision, was enacted in 1975 to address the exclusionary and discriminatory effect of English-only elections on Latino, Native American, and Asian voting age citizens with limited English proficiency in jurisdictions where they comprise more than five percent of the citizen voting age population or number more than 10,000 people. Other provisions specifically address the right of Puerto Rican voters to vote free from discrimination based on their limited English proficiency and the right of a voter who cannot read the ballot to have an assistor of his or her choice. In addition, minority language cases have occasionally been brought under the general Section 2 non-discrimination provision.

Voter participation has improved for all three sets of language minorities in recent years but continues to lag significantly behind whites, making non-compliance with these provisions a particular reason for concern. From 1995 to 2014, there have been 48 successful cases and ten non-litigation settlements involving the minority language protections. These cases demonstrate several trends, including the long-standing refusal of certain jurisdictions to provide assistance prior to litigation, that effective language assistance leads to electoral success for the language minority group, and the interconnection between the lack of minority language assistance and racial hostility.

## **Chapter 8 includes some brief concluding thoughts. This is followed by an Appendix that contains maps and details with some of the key metrics discussed in the report.**

In addition to this report, the NCVR's website, [votingrightstoday.org](http://votingrightstoday.org), includes additional information, including state-level analyses and photos, quotes, and pictures from the 25 Commission hearings.

The foregoing briefly summarizes the NCVR's first report. This report and its Appendices provide detailed discussions of the preceding summary.