“The intimidation I faced as a lead plaintiff I wouldn’t want to wish it on anybody.”

–Mark Wandering Medicine on the hardships he and his daughter faced as a result of his participation in a voting rights case seeking satellite offices for in-person absentee voting on Indian reservations in Montana.
CHAPTER 6
Access to the Ballot

I. INTRODUCTION

As discussed in Chapter 1, states and their political subdivisions have historically used a variety of tests and devices to prevent minority voters from registering to vote. Since the mid-1990s, a new generation of tactics for limiting minority voters’ access to the ballot has emerged. Though these have replaced poll taxes, literacy tests, and other overt mechanisms of the pre-Voting Rights Act (VRA) era, the practices covered in this chapter demonstrate that minority voters, in numerous respects, still confront barriers when trying to register and cast a ballot throughout the country.

Since the mid-1990s, states have curtailed voter registration opportunities by limiting the registration methods that are most accessible to and popular among minority voters, such as community voter registration drives and registration through public assistance agencies. Other states have focused a great deal of energy on burdensome procedures they claim are needed to prevent noncitizens from registering and voting. Despite scant evidence that this is a problem, these states have adopted heightened requirements for proving citizenship in order to register to vote that can pose obstacles for minority voters in particular.

An additional discriminatory device discussed in this chapter is the disenfranchisement of citizens because at some point in time they were convicted of a felony. While felony disenfranchisement laws date back to the 19th century, their impact has grown substantially in recent decades. As discussed below, these laws now deny the right to vote to 2.2 million African Americans nationwide.

Unfortunately, the post-VRA methods of restricting minority voters’ access to the ballot go beyond the qualification and registration processes. Voters who have successfully registered are now facing an array of practices that may impede their ability to actually cast a ballot and have that ballot counted. Many of these practices have been shown to disproportionately impact minority voters by preventing or simply deterring their participation in elections. Some of the most concerning include new state laws that limit the acceptable types of voter identification (ID) to those types that racial minorities are least likely to possess, substantial cutbacks to the days and hours of early voting periods popular with minority voters, and polling place relocations and closures in heavily-minority communities. Finally, reports of voter intimidation and discriminatory voter challenge efforts indicate that both tactics continue to undermine minority voters’ full and unencumbered access to the ballot.
As demonstrated throughout this chapter, racial discrimination in laws and practices around voting remain a significant concern. Through non-compliance with federal laws, such as the National Voter Registration Act (NVRA), and through troubling legislative and regulatory action, states and local jurisdictions have shown that the threat to minority voters’ access to the ballot continues unabated.

II. COMMUNITY VOTER REGISTRATION DRIVES

Community-based voter registration drives play an essential role in expanding opportunities for participation in the political process. By reaching would-be voters at common community gathering places, such as churches, campuses, festivals, or senior centers, community drives can make it easier for individuals with time, mobility, or language challenges to register and receive assistance with the registration process. Community-based registration has proven effective, with participating groups having registered tens of millions of voters from 2000 to 2008.¹

The available data from surveys conducted by the U.S. Census Bureau in 2010 indicates that minorities rely more heavily on community drives than whites. Latinos reported registering through drives at nearly twice the rate of whites (8.9 percent compared to 4.4 percent), and African Americans also reported registering at a higher rate (7.2 percent).² Given their popularity, limitations on the ability of citizens and grassroots organizations to conduct voter registration drives can significantly impact registration opportunities for minority voters.

Florida has been one of the epicenters of recent efforts to curtail community registration drives. Historically, Florida did not allow private citizens to conduct such drives; it was not until the State began compliance with the NVRA in 1995 that private organizations and individuals were permitted to transmit completed voter registration applications to election officials.³ Ten years later, in 2005, the State enacted a series of restrictions on citizen registration efforts, including imposing large fines on organizations and citizens who failed to submit—or timely return—the applications they collected to election officials. The League of Women Voters and other groups sued, and a federal court enjoined the law, finding that the severity of the fines “chilled Plaintiffs’ First Amendment speech and association rights…”⁴

In 2011, the Florida Legislature again sought to restrict community registration drives, enacting an even more onerous and complex set of requirements. In addition to pre-existing provisions imposing fines for late delivery of completed applications, requiring those conducting drives to pre-register with the State, and requiring them to submit quarterly reports of voter registration activities, the new law added some additional requirements. The new law required voter registration groups to account monthly for all registration forms used and not
used in voter registration drives, return completed forms to election officials within 48 hours of receipt from the voter, and file the names of every officer, employee, or volunteer who solicited or collected voter registration applications.5 The League of Women Voters and other groups again sued and, once again, a federal court in Florida issued an injunction based upon the First Amendment. That court found that the new law, and its accompanying administrative rule,

severely restrict an organization’s ability to [conduct registration drives]. The[y] […] impose a harsh and impractical 48-hour deadline for an organization to deliver applications to a voter-registration office and effectively prohibit an organization from mailing applications in. And the[y] […] impose burdensome record-keeping and reporting requirements that serve little if any purpose…”

Before the 2011 law was enjoined (in significant part) by the court in Florida, the State of Florida filed suit in federal court in Washington D.C. seeking Section 5 preclearance for the new restrictions (necessary because five Florida counties were covered under Section 5 of the VRA). Although there was no finding of discrimination in that case concerning registration drives, the evidence developed in that lawsuit demonstrated the potential impact of community registration drive restrictions on minority voters. In 2008 and 2010, Florida’s African-American and Hispanic voters registered through community drives at higher rates than whites.7 Results from a U.S. Census Bureau survey indicated that, in 2008, 10.9 percent of African Americans and 10.4 percent of Hispanics in Florida registered through community drives. In 2010, the rates were similar at 10.0 percent and 12.0 percent, respectively.8 By comparison, whites reported registering through drives at notably lower rates—5.2 percent in 2008 and 5.3 percent in 2010.9

Civic groups submitted testimony in the case on the burdens the restrictions placed on their ability to register their constituents. The law was described as having a “devastating impact” on the Florida NAACP’s ability to recruit branch units and members to participate in voter registration drives and as “crippling” the organization’s registration efforts in the State.10 National Council of La Raza (NCLR) and the League of Women Voters of Florida imposed moratoriums on their community registration drives. The Supervisor of Elections for Hillsborough County sympathized, adding that some individuals in minority communities “are less prone to view government as being friendly” and may prefer registering with someone of their own race or ethnicity or who speaks their same language.11 Several election supervisors testified that the limitations on community registration drives in formerly covered counties would reduce voter registration opportunities—and registration rates—for minority voters.12
III. FAILURE TO PROVIDE VOTER REGISTRATION AT PUBLIC ASSISTANCE AGENCIES DIMINISHES ACCESS FOR MINORITY VOTERS

Section 7 of the NVRA requires that state public assistance agencies, as well as certain other agencies, offer a comprehensive set of voter registration services to their clients. Public assistance agencies administering benefit programs that fall within the scope of Section 7 are generally required to distribute registration applications with each public assistance application, recertification, renewal, or change of address; provide assistance completing voter registration forms to their clients; and submit completed applications directly to elections officials on a voter’s behalf. There has been significant, widespread noncompliance with Section 7 across the country, which can have serious consequences for minority voters’ access to registration opportunities. Nationally, African Americans disproportionately receive benefits from two of the larger public assistance programs covered under Section 7 of the NVRA—Temporary Assistance for Needy Families (TANF) and Supplemental Nutrition Assistance Program (SNAP). Recent data from each program indicates that African Americans accounted for 31.9 percent of TANF families and 23.6 percent of households on SNAP. Hispanics comprised 30.0 percent of TANF families and 9.1 percent of SNAP households. By comparison, 37.6 percent of SNAP households and 31.8 percent of TANF families are white, a small share relative to their share of the overall population. Census data further shows that minorities tend to register to vote at public assistance agencies more than whites. Latinos register through agencies at four times the rate of whites (2.8 percent versus 0.7 percent), and African Americans at three times the rate (2.5 percent).

The NVRA was designed to expand access to registration opportunities for low-income individuals, and these data demonstrate that states’ full compliance with Section 7 will create significant benefits to minority voters, in particular. The marked increase in new registration following successful enforcement actions or negotiations by public interest groups reinforces this. Since 2008, settlements in private lawsuits and outside of court have been reached with Georgia, Indiana, Missouri, New Mexico, Ohio, Pennsylvania, and Alabama, and since 2002, the Department of Justice (DOJ) settled suits against Rhode Island and Tennessee, and entered into out-of-court settlements with Arizona and Illinois. Efforts of private organizations, such as the Lawyers’ Committee, Demos, and Project Vote, have resulted in nearly 2 million additional low-income citizens who have applied to register to vote at public assistance offices, most of which occurred in the last six years. This surge in registration is also indicative of how significant non-compliance with Section 7 of the NVRA had become; after the first two years of NVRA implementation (1995-1996), when 2.6 million individuals registered at public assistance offices, registration plummeted by almost 80 percent over the next decade,
to just 540,000 during 2005-2006. This steep decline is particularly striking because it oc-
curred during a period when participation in SNAP was increasing substantially.

Continuing noncompliance by state public assistance agencies threatens to foreclose one of
the more convenient and accessible avenues for voter registration available to minority voters.
Case Spotlight
What is Old is New Again: Dual Voter Registration Systems

One method of restricting voting opportunities for minorities has been the implementation of dual voter registration systems, wherein voters who register using certain means of registration are registered for some, but not all, purposes. Alongside poll taxes, literacy tests, and other tactics, such systems were enacted in many Southern states following the Reconstruction era. Once thought to be a thing of the past, the practice has unfortunately enjoyed somewhat of a renaissance in recent years.

Mississippi has one of the worst histories with dual voter registration. The State’s dual registration system was enacted in 1892, along with a number of other provisions designed to exclude African-American citizens from the electoral process. Under the 1892 law, prospective voters were required to register separately for municipal elections, and this posed a particular burden on disproportionately poor African-American voters, for whom the necessity of registering multiple times often prevented participation in municipal elections.23 For much of the next century, Mississippi maintained its dual registration system, becoming the last state to have such a law, and refining it as recently as 1984. Finally, in 1987, a federal court overturned the dual registration system, holding that it was a violation of Section 2 of the VRA.24

“Arizona has recently implemented this dual voter registration system, and I believe it is one of the most complex, confusing, and burdensome voter registration systems in the country. It’s confusing to the county recorders who handle and process the voter registrations. It’s confusing to the organizations conducting voter registration guides, and it’s confusing to our voters who monitor it.” –Patty Hansen, Coconino County Recorder, at the NCVR Arizona state hearing. PHOTO CREDIT: MIKE ELLER (HMA PUBLIC RELATIONS)
In 1995, Mississippi implemented a new dual registration system in response to the NVRA. Pursuant to the NVRA, Mississippi was required to permit voter registration for federal elections through a federal mail-in form, at driver’s license offices, and at public assistance offices. Mississippi’s implementation of the law allowed voters who registered under the NVRA-mandated options to vote in federal elections only. If those voters wanted to vote in state elections, they were required to re-register using state forms. By contrast, every other state implementing the NVRA’s requirements made NVRA registrations effective for all purposes. After DOJ raised concerns, Mississippi refused to submit this system for Section 5 preclearance, and private plaintiffs commenced a Section 5 enforcement action, with the Supreme Court ultimately holding that the State was required to obtain preclearance. When the State did so, DOJ objected, and the State abandoned the dual registration system.

Several years later, dual voter registration has been revived by two states following the Supreme Court’s 2013 decision in Arizona v. ITCA. That ruling held that states are required to “accept and use” the NVRA’s federal mail-in registration forms, even when they are not accompanied by the specific documentary proof of citizenship that state law requires. Adopting a tack similar to Mississippi’s, Arizona and Kansas are in the process of adopting dual voter registration systems. These systems would limit citizens who register to vote using the federal form but who do not satisfy the states’ documentary proof-of-citizenship requirements to voting for federal offices only. The resurrection of dual registration, with its sordid history of suppressing poor and minority voters, is a matter of continuing concern.
CHAPTER 6

IV. PROOF OF CITIZENSHIP

In recent years, a number of states have adopted additional procedures related to confirming the citizenship of registered voters and voter registration applicants. In particular, states have adopted new procedures ostensibly intended to purge noncitizens from registration rolls—which have often led to the improper purge of eligible citizen voters—or have imposed heightened proof-of-citizenship requirements for voter registration. Both types of activity raise concerns about their impact on the ability of eligible citizens, particularly minorities, to participate in the political process.

Citizenship Verification for List Maintenance

Numerous states have adopted citizenship verification procedures to facilitate purges of ineligible voters from their registration lists. As discussed later in this chapter, when conducted properly, purges are an important part of effective election administration. However, problems arise when purge procedures seemingly target minority voters, or impose unreasonable citizenship verification burdens on such voters.

A significant portion of voter purges are aimed at identifying noncitizens. Many states use a computerized matching process—which typically involves cross-checking the statewide voter registration list with citizenship information in the statewide driver’s license database—to identify noncitizen registrants. While there is little dispute that this matching is a useful aid in identifying potentially ineligible voters, high rates of false positives and the potential for discrimination raise serious concerns. The high error rates are usually the result of predictable shortcomings, such as matching errors (i.e., a registrant is matched with the wrong person on the license list) or because the citizenship information in the driver’s license database may not reflect subsequent naturalization (and thus voting eligibility). Because a substantial majority of recently naturalized citizens immigrated from Latin America, sub-Saharan Africa, or Asia, this latter problem particularly impacts minority communities. Accordingly, state officials should be careful not to presume that those identified in the matching are noncitizens.

An example from Georgia is particularly instructive. In 2007, Georgia instituted a computerized citizenship matching procedure to identify and remove noncitizens from its voter rolls. Its procedure involved cross-checking the statewide voter registration list with citizenship information in the state’s driver’s license database. The matching procedure in Georgia had a high rate of error, which disproportionately impacted minority voters, in part because of its systematic failure to update driver’s license records after an individual’s naturalization. After Georgia performed this matching, it provided a computer printout of the potential noncitizens to local election officials with instructions that they use the printout as a means of reviewing voter eligibility, without providing uniform procedures about how to use that information. Local election officials informed thousands of voters by letter that they would
be removed from the voter registration lists unless they appeared and presented proof of their U.S. citizenship, in at least some cases providing a very short time period—as little as a few days—to do so. One voter, Jose Morales, who had obtained his driver’s license in April 2006 and became a citizen in November 2007, received multiple such letters from Cherokee County election officials over the course of several weeks after his registration in September 2008. Mr. Morales was forced to travel 30 minutes to prove his citizenship. Mr. Morales brought a Section 5 enforcement action because the State had failed to submit this procedure for preclearance. Shortly before the November 2008 general election, a federal court in Georgia enjoined the State from using the challenged voter verification process until it obtained preclearance and ordered the State to take steps to remedy its previous unauthorized use of the process.

In May 2009, DOJ interposed a Section 5 objection to the procedure, noting that “[t]his flawed system frequently subjects a disproportionate number of African-American, Asian, and/or Hispanic voters to additional and, more importantly, erroneous burdens on the right to register to vote.” DOJ confirmed the disproportionate impact after conducting its own analysis of new voter registrants during the period May 2008 through March 2009. Over that period, African Americans and whites comprised approximately equal shares of new registrants, yet over 60 percent more African Americans were flagged as potential noncitizens than whites. Similarly, Latino and Asian registrants were more than twice as likely as whites to be flagged as noncitizens. Over one half of the new registrants initially flagged as noncitizens were, in fact, citizens and were forced to take additional steps to prove as much by presenting birth certificates, proof of naturalization, or other documentation.

Georgia filed a lawsuit seeking preclearance from the federal court in Washington D.C. After it filed suit, and at DOJ’s urging, Georgia revised its verification procedure, making it more accurate and less discriminatory. DOJ precleared the amended version, rendering the lawsuit moot.

In 2012, Florida sought to institute a database matching procedure through which it cross-referenced state driver’s license records with its voter registration lists. The Florida Secretary of State identified over 180,000 registrants as potential noncitizens, and ultimately sent a smaller list of approximately 2,700 individuals to local election officials for action. Local officials notified those on the lists that they would be removed from the rolls unless they provided proof of citizenship by the deadline indicated. There were widespread complaints about the list’s inaccuracy and its reliance on outdated immigration status information. The program also had a disparate effect on minority voters: 82 percent of voters on the list sent to local officials were minorities, and the majority were Latino. The Secretary of State temporarily suspended the program.
Shortly before the November 2012 election, the State sought to implement a different list maintenance procedure that relied on a Department of Homeland Security database known as the Systematic Alien Verification for Entitlements Program (SAVE). SAVE provides information related to an individual’s eligibility for public benefits, but may not be an accurate indicator of the person’s current citizenship status or voting eligibility. The implementation of this cross-check was challenged as a violation of the NVRA’s requirement that such systematic purges be completed at least 90 days before any federal election, and, in 2014, a federal court of appeals held that Florida had violated the requirement. A second lawsuit was filed challenging Florida’s failure to submit both purge programs for Section 5 preclearance. The case was stayed pending the Supreme Court’s decision in Shelby County v. Holder, and after that decision, plaintiffs voluntarily dismissed the lawsuit. Florida has continued its voter purge efforts, but additional problems with the information used for matching have forced further delays.

Iowa also sought to implement a similar program in 2012, through a regulation that would have permitted the Secretary of State to cross-reference Iowa’s voter rolls with state and federal databases to identify suspected noncitizens and remove them from the voter rolls if they failed to provide proof of citizenship within 14 days. The American Civil Liberties Union (ACLU) of Iowa and the League of United Latin American Citizens (LULAC) sued in state court. The two groups provided evidence of inaccuracy in the citizenship information being relied upon, and the effect on voter registration among naturalized citizens. The Director of LULAC of Iowa testified that his members were concerned that the State’s program would result in the removal of registered Latino voters from rolls and that many new, eligible U.S. citizens with Latino names would be deterred from even registering to vote in Iowa. Due to the plaintiffs’ efforts, this purge program (as well as a rule expanding the grounds for voter challenges) has yet to be implemented: plaintiffs obtained a temporary injunction against implementation of these rules just before the 2012 election, and the Secretary of State voluntarily rescinded the voter challenge rule. Litigation over the purge process, however, is continuing. The case remains on appeal to the Iowa Supreme Court after a lower court ruled in March 2014 in favor of the plaintiffs’ motion for summary judgment.

Proof of Citizenship for Voter Registration

During the last decade, laws subjecting individuals registering to vote to heightened requirements for proving U.S. citizenship have been passed in several states. A challenge to one such law was recently decided by the U.S. Supreme Court. Since 2004, four states—Arizona, Georgia, Kansas, and Alabama—have passed proof-of-citizenship laws (though only Arizona and Kansas have actually implemented their laws to date).

Under federal law, states must allow individuals to register using the federal mail-in registration form (commonly called the “federal form”), provided for by the NVRA. On the federal
form, a registrant proves his U.S. citizenship by an affirmation made under penalty of perjury. A primary purpose of the NVRA is to increase citizen participation by making voter registration practices for federal elections simple and uniform. The uniform federal mail-in form—which Congress intended to be easily used for community registration drives—supports that goal.

In addition to the federal form, which states must accept and use, states may develop and use their own mail-in registration forms. Those with proof-of-citizenship laws typically require applicants to submit additional documentation beyond the simple affirmation of citizenship. Required documentation may include naturalization certificates, copies of passports, or certified birth certificates, all of which can be difficult for registrants—including those from minority groups—to obtain, copy, and submit with their applications. Like the limitations on community registration drives discussed above, laws heightening requirements for voter registration confront potential voters at their entry point into the political process. Requiring documentary proof of citizenship for voter registration can pose particularly troubling barriers to minority voter participation.

Proponents of such laws contend that requiring additional layers of proof from applicants will help prevent noncitizens from registering to vote and casting ballots. But, as discussed below, available information shows that it is rare for noncitizens to attempt to register to vote, either mistakenly or knowingly.

The Supreme Court Rules on Proof of Citizenship in Arizona v. ITCA

The week before the 2013 Shelby County decision, the Supreme Court weighed in on Arizona’s proof-of-citizenship law. The Court considered whether Arizona could reject voter
registration applications submitted on the federal form that were not accompanied by the additional evidence of citizenship required by the State for its own form. Plaintiffs in Arizona v. Inter Tribal Council of Arizona successfully argued that the NVRA preempted Arizona’s law, and the Court ruled that the State was in violation of the NVRA for attempting to add its additional documentary proof-of-citizenship requirements to applications submitted on the federal form without the approval of the Election Assistance Commission (EAC), the agency designated to monitor NVRA compliance and maintain the federal form. The result is that, for purposes of federal elections, Arizona is required to accept otherwise-complete applications submitted using the federal form that contain the simple attestation of citizenship—without additional proof.

The Aftermath of Arizona v. ITCA

Following the Supreme Court’s ruling, Arizona and Kansas petitioned the EAC to amend the federal form, as used in those states, to incorporate each state’s proof-of-citizenship law. Their requests were denied in January 2014, and the two states sued the EAC in federal court in Kansas seeking to force it to permit their heightened proof requirements to apply to the federal form. Civil rights groups intervened in the case, Kobach v. EAC, joining the EAC as defendants. In March 2014, the district court in Kansas ruled for the two states, requiring the EAC to permit their heightened proof requirements to apply for federal form registration. The decision has been stayed pending an appeal to the Tenth Circuit Court of Appeals, from which a decision is expected in the fall of 2014.

Within days of the district court’s ruling in favor of Arizona and Kansas, Alabama officials announced plans to move forward with implementation of its proof-of-citizenship law. Alabama Secretary of State Jim Bennett stated that the Kobach decision “has given us the confidence that Alabama has strong footing for implementation of the rules regarding proof of citizenship…"

As states with proof-of-citizenship laws on their books anxiously await the Tenth Circuit’s decision in Kobach, it is important to consider the limited benefits and high costs of such laws.

The existing safeguards against noncitizen registration are highly effective. In its decision denying the Arizona and Kansas requests to add their documentary proof-of-citizenship requirements to the federal form, the EAC determined that the federal form already includes ample safeguards against noncitizens registering, and the EAC also determined that registrations by noncitizens are a rare event, representing an “exceedingly small” percentage of all registration applicants (less than one-hundredth of one percent). Elections officials’ experiences from other states have been in line with EAC’s findings. In Georgia, where the proof-of-citizenship law has been inactive since its passage in 2008, respondents to a 2009 Brennan Center survey of elections officials reported that noncitizen registration is rare and, to the extent that it does occur, results from mistake, not fraud: “Of the elections officials who were interviewed,
representing counties that comprised 40 percent of Georgia’s population, none believed that noncitizens had fraudulently registered to vote or voted.” Further, a Supreme Court amicus curiae brief submitted by current and former state and local elections administrators in *Arizona v. ITCA* echoed the survey findings:

> In the more than 150 years that they have collectively spent administering elections, amici have experienced almost no cases of noncitizens registering to vote, let alone actually casting a ballot. In light of this, amici’s view is that the danger of noncitizen registration and voting does not justify the imposition of significant new barriers to registration by eligible individuals.\(^{64}\)

In addition to being an unnecessary response to an exceedingly rare problem, documentary proof-of-citizenship laws risk closing new voters out of the political process. These additional registration requirements have the potential to have the same effect on minority voters as strict photo ID laws, discussed later in this chapter. Minorities may be less likely to possess the required documentation, such as birth certificates, or to have the resources to obtain missing documents.\(^{65}\) Further, a proof-of-citizenship requirement may decrease participation in community registration drives—which, as discussed earlier, minorities rely upon to a greater extent than whites—because potential voters may not carry on their person the documentation needed to register.\(^{66}\)

While Alabama and Georgia have not implemented their laws yet, the evidence discussed herein, as well as the evidence revealed during litigation about the Arizona and Kansas laws, suggests that their heightened requirements for registration are similarly unnecessary and overly burdensome for minority voters.

“There is not an epidemic of non-citizens yearning to stand in long lines to cast votes in Florida. Take it from an organization that dedicates all of its resources trying to get eligible Latinos to the polls. Voter fraud from non-citizens is a nonissue.”

*Ana Della Rosa, Mi Familia Vota Educational Fund, at the NCVR Florida state hearing*
Case Spotlight
Section 5 at Work: Safeguarding Voter Registration at Public Assistance Agencies

A separate proof-of-citizenship issue arose in Texas in 1996. DOJ interposed a Section 5 objection to a Texas law that barred employees of public assistance agencies from offering voter registration to clients, as required by Section 7 of the NVRA, until they first determined the client’s citizenship. Agency employees were to rely solely upon citizenship information contained in agency files, which DOJ determined were unlikely to remain up-to-date, given the rising numbers of new citizens in Texas during the relevant period. 1990 census figures indicated that minorities were 34 percent of the State’s population and 30 percent of its voting age population, and that two-thirds of new citizens in 1993 and 1994 were Hispanic or Asian.

DOJ found that Texas’ procedure lacked safeguards to ensure that agency information was current and accurate. Under the procedures at issue, clients would not be informed that the reason they were not offered voter registration was their alleged noncitizen status, leaving them with no opportunity to update or correct citizenship information in their files. DOJ determined that this flaw was likely to disproportionately affect minorities. Without the Section 5 review process, Texas’ procedures could have foreclosed the opportunity for voter registration for large numbers of minority public assistance clients. As seen in Texas and more recently in Arizona, the potential of voting practices focused on citizenship verification to most heavily burden minority voters remains a serious concern.
V. VOTER PURGES

The maintenance (or purging) of voter registration lists involves removing registrants who are not eligible to vote in the relevant jurisdiction, and is an important part of maintaining the effectiveness and integrity of election administration. In conformity with federal law, voters may be deemed ineligible due to relocation, death, conviction for a disfranchising crime, ineligibility at the time of registration (such as noncitizenship), or other reasons.

If done incorrectly, however, purges can also result in the improper removal and disfranchisement of eligible voters. Thus, Congress, through the NVRA, enacted a variety of safeguards for purging registration lists, including: (1) requiring list maintenance procedures to be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965"; (2) prohibiting a voter from being removed from the rolls solely for failure to vote; (3) mandating that any systematic program to remove registrants (i.e., one that is not based on particularized information about specific voters) be completed at least 90 days before a federal election; and (4) directing that notice be provided to registrants removed based on a change of address to ensure that the change-of-address information received by the registrar is accurate. The NVRA also requires that certain registered voters who have moved, but who have not updated their registration, still be allowed to vote. Despite these safeguards, however, numerous disputes have arisen surrounding voter purges in recent years.

In addition to citizenship-matching (discussed above), other systematic methods are used to execute voter purges, and these have also sometimes affected minority voters disproportionately. Two examples have been seen recently in Florida.

In 2000, Florida improperly purged thousands of voters, a disproportionate number of whom were African Americans, based on a flawed comparison of voter registration files to lists of felony convictions. A vice president of the company that generated the list later testified that the Florida Division of Elections had deliberately chosen a matching technique that would overstate the number of matches between the registration list and lists of convicted individuals. The State also included as disenfranchised felons, for instance, individuals convicted in another state who had regained their right to vote before moving to Florida, where they were not disenfranchised under Florida law. Given the razor-thin margins of the 2000 presidential contest in Florida, these improper purges and the confusion they caused may have had a monumental national impact.

In 2004, Florida planned to remove 48,000 suspected felons from its voter rolls based on a list from the Florida Department of Law Enforcement. One indicator of the list’s inaccuracy was that it employed race as an identifying attribute but relied on one database that included Hispanic as a racial category and one that did not. Nearly half of the people on the flawed list were African American, and thousands of those listed had already had their voting rights
restored under state law. Though the State abandoned this purge under pressure from voting rights groups, county election officials in Florida retain the ability to purge voters based on locally generated lists.74

VI. FELONY DISENFRANCHISEMENT

Over 5 million Americans are banned from voting because they have at some point been convicted of a felony.75 Laws barring citizens with prior felony convictions from voting, sometimes for a lifetime, impact minority voters at a far higher rate than whites. Yet courts have rejected finding such laws unconstitutional or in violation of the VRA.

The rules around felony disenfranchisement vary widely by state. Two states—Maine and Vermont—allow persons in prison to vote. Most other states deny voting rights to persons with felony convictions through the end of their terms of probation and/or parole. A few states make it extremely difficult for a person with certain kinds of prior felony convictions to vote again, leaving the restoration of such rights up to the discretion of the executive. Finally, four states—Florida, Iowa, Kentucky, and Virginia—permanently disenfranchise all persons with a felony conviction absent executive action.

Source: http://www.sentencingproject.org/template/page.cfm?id=133
The difficulty in bringing successful legal challenges to felony disenfranchisement laws is largely due to the Supreme Court’s interpretation of Section 2 of the 14th Amendment. In *Richardson v. Ramirez*, three men from California who had already completed their sentences sued for the right to vote, arguing the State’s felony disenfranchisement law violated the Equal Protection Clause of the 14th Amendment by denying their fundamental right to vote. The Court rejected this argument, and looked to Section 2 of the 14th Amendment, which allows the denial of voting rights “for participation in rebellion, or other crime.” Using that clause, the Court determined that

> the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise…We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment’s applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.  

Largely as a result of this decision, courts have rejected challenges to felony disenfranchisement laws under the discriminatory results standard of Section 2 of the VRA, as discussed below. Evidence of discriminatory intent, on the other hand, may allow for a successful challenge to a felony disenfranchisement law; however, even that has not always been sufficient. The only case that was successful in this regard was *Hunter v. Underwood*, in which the Supreme Court held unconstitutional a provision in the State of Alabama’s 1901 constitution disenfranchising individuals convicted of a crime of “moral turpitude.”

**The Racially Disproportionate Effect of Felony Disenfranchisement**

Felony disenfranchisement laws, and courts’ reluctance to strike them down, have led to millions of Americans without voting rights. Moreover, those laws have had particularly dramatic effects on minority citizens’ ability to participate in elections.

The statistics show the dramatic effect of felony disenfranchisement laws on racial minorities:
There is clear evidence that state felony disenfranchisement laws have a disparate impact on African Americans and other minority groups. At present, 7.7% of the adult African-American population, or one out of every thirteen, is disenfranchised. This rate is four times greater than the non-African-American population rate of 1.8%. In three states, at least one out of every five African-American adults is disenfranchised: Florida (23%), Kentucky (22%), and Virginia (20%). Nationwide, 2.2 million African-Americans are disenfranchised on the basis of involvement with the criminal justice system, more than 40% of whom have completed the terms of their sentences. Information on the disenfranchisement rates of other groups is extremely limited, but the available data suggests felony disenfranchisement laws may also disproportionately impact individuals of Hispanic origin and others. Hispanics are incarcerated in state and federal prisons at higher rates than non-Hispanics: about 2.4 times greater for Hispanic men and 1.5 times for Hispanic women. If current incarceration trends hold, 17% of Hispanic men will be incarcerated during their lifetimes, in contrast to less than 6% of non-Hispanic white men. Given these disparities, it is reasonable to assume that individuals of Hispanic origin are likely to be barred from voting under felony disenfranchisement laws at disproportionate rates.79

This means that, as a result of felony disenfranchisement, there is a structurally imposed subclass of Americans, mostly minority, who are deprived of the most fundamental right, the right to vote. Moreover, scholarly research indicates that in the post-Civil War years, several felony disenfranchisement laws were enacted with the aim of limiting the voting rights of the newly enfranchised African-American population.80

The Lack of Judicial Receptivity to Challenges to Felony Disenfranchisement Claims

As noted above, there have been a number of different legal efforts to challenge the felony disenfranchisement laws of various states.

*Johnson v. Governor of Florida,* ultimately decided in 2005, provides an example of a case in which evidence was presented that the law had originally been enacted in 1868 with a discriminatory purpose, and yet was nonetheless upheld. This case was a class action of 525,000 disenfranchised Florida citizens, in which the plaintiffs claimed that Florida’s law, which permanently bans persons currently or formerly incarcerated for felonies, violates the 14th and 15th Amendments of the Constitution and Section 2 of the VRA.81

The plaintiffs showed that the historical record demonstrated the racial origins of the felony disenfranchisement law in the State. Florida’s first constitution of 1838 authorized felony disenfranchisement laws, and in 1845 Florida’s legislature enacted such a law.
It was just after the Civil War, in 1868, when all states were required to amend their constitutions to comply with the new suffrage requirements, that Florida held a constitutional convention and included mandatory disenfranchisement of all persons with felony convictions in the state constitution. It also added the specific crime of larceny to the list of disenfranchising crimes, which would greatly increase the number of affected citizens. As the plaintiffs explained:

The broad disenfranchisement of every convicted felon in Florida’s 1868 Constitution and the addition of larceny as a disenfranchising crime were enacted with the intention of restricting the voting rights of Florida’s newly freed black population. White Floridians were strongly opposed to black suffrage after the Civil War. Blacks were finally given the right to vote in the 1868 Constitution so that Florida could gain readmission to the Union. However, the 1868 Constitution contained several measures in addition to the felon and specific crime disenfranchisement provisions that were adopted to limit the power of black votes. Further measures to restrict black suffrage were adopted as part of the 1885 Constitution. The discriminatory intent behind the disenfranchisement provisions is demonstrated by the history of the 1865, 1868, and 1885 Constitutions as well as Florida’s use of criminal laws to control former slaves and create a low-wage labor force to replace that lost by the abolition of slavery.82
When the 1968 Florida Constitution was drafted, the larceny provision was removed, but the provision requiring disenfranchisement of all convicted felons was left intact. When challenged in 2000, the district court found, even in awarding summary judgment to the defendants, that “Plaintiffs have presented to this Court an abundance of expert testimony about the historical background of Florida’s felon disenfranchisement scheme as historical evidence that the policy was enacted originally in 1868 with the particular discriminatory purpose of keeping blacks from voting.” Nevertheless, in a ruling of the entire Eleventh Circuit en banc, overturning the decision of a three-judge panel of the same court (which had reversed the district court’s summary judgment ruling on the Section 2 claim) the felony disenfranchisement provision was upheld and ruled not to run afoul of the Equal Protection Clause or Section 2. The en banc court found that, even if there was racial animus behind the provision in 1868, there was no evidence of racial motivation in the drafting of the 1968 version, so the historical evidence of the original discriminatory intent was insufficient to prove a constitutional violation. While acknowledging that typically Section 2 cases are subject to a discriminatory results test, the court cited the Supreme Court’s decision in Richardson in stating that felony disenfranchisement laws are distinct because they “are deeply rooted in this Nation’s history and are a punitive device stemming from criminal law.… Florida’s discretion to deny the vote to convicted felons is fixed by the text of § 2 of the Fourteenth Amendment.” The Supreme Court denied certiorari.

As a result, to this day Florida permanently disenfranchises all individuals with a felony conviction, unless they receive discretionary executive clemency. As of 2010, Florida had disenfranchised 1,541,602 citizens due to a felony conviction. This amounts to the disenfranchisement of 10.4 percent of the State’s voting age population and 23.3 percent of Florida’s African-American voting age population.

In Farrakhan v. Gregoire, several minorities with felony convictions challenged the State of Washington’s felony disenfranchisement law under the VRA’s Section 2 results test. Plaintiffs argued that the discriminatory impact of the felony disenfranchisement law was a result of racial bias throughout the criminal justice system, using extensive data to demonstrate discrimination in all stages of the criminal process. The federal district court granted summary judgment for the State, and several rounds of appeals followed. Ultimately, the case was argued before an en banc panel of eleven judges in the United States Court of Appeals for the Ninth Circuit. The en banc court subsequently upheld the felony disenfranchisement law. It stated that only intent claims could be made against felony disenfranchisement laws, holding that “plaintiffs bringing a section 2 VRA challenge to a felon disenfranchisement law based on the operation of a state’s criminal justice system must at least show that the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent.”
Following the decision in *Farrakhan*, and given the difficulty plaintiffs face in bringing intentional discrimination claims, advocates have abandoned federal challenges to felony disenfranchisement laws for now.

The Effect of Felony Disenfranchisement Laws in Particular States

As discussed above, the rules around restoration of voting rights for persons with prior felony convictions vary widely by state. In the states that make it the most difficult—or nearly impossible—to regain voting rights, a great number of individuals have been disenfranchised. The numbers of African Americans banned from voting in these states is remarkable. The following are a few examples:

Virginia permanently disenfranchises all persons with felony convictions unless they receive clemency. In 2000, the Fourth Circuit rejected a challenge under the VRA to Virginia’s felony disenfranchisement law, holding that the plaintiff had failed to demonstrate that the law was the result of racially discriminatory intent or that there was “any nexus” between the disenfranchisement of felons and race. At least 20 percent of adult African Americans in Virginia are disenfranchised. A July 2013 executive order from Governor Bob McDonnell now allows individuals convicted of certain non-violent felonies to apply to restore their voting rights. According to testimony the National Commission on Voting Rights (NCVR) heard at its Virginia hearing, an estimated 350,000 Virginians are disenfranchised because of the State’s law.

Similarly, Kentucky permanently disenfranchises formerly incarcerated citizens, even after they have completed their sentences. The authority for Kentucky’s lifetime voting ban for persons convicted of a felony is established under the state constitution, and rights may only be restored through an executive pardon by the Governor. The Kentucky Advisory Committee to the U.S. Commission on Civil Rights (USCCR) notes, however, that the pardoning process varies depending on Administration and is not subject to any established law, statute, or regulation. Thus, it is estimated that 243,842 residents in the State of Kentucky were barred from voting in 2010, including approximately 181,000 who had completed their full sentences. The Kentucky Advisory Committee reports that those disenfranchised are disproportionately minorities—at 22 percent, Kentucky has the second highest rate of voter disenfranchisement among African Americans in the country.

According to testimony submitted by the ACLU of Iowa at the NCVR’s Kansas City hearing, in 2005 one of four voting age African Americans were disenfranchised under Iowa’s lifetime voting ban for individuals with felony convictions. That year, the governor issued an executive order automatically restoring the rights of formerly incarcerated persons. In 2011, however, a new governor rescinded the policy and reinstated the process of individual review, under
which formerly incarcerated persons must apply to the governor’s office for restoration of rights. One requirement for restoration is that the individual be up to date on paying fines, fees, and restitution. As a result, in the last year only 40 people applied to have their voting rights restored.100

Thomas Castelli, Legal Director of the ACLU of Tennessee, testified at the NCVR hearing in Nashville about Tennessee’s felony disenfranchisement law. To be eligible for restoration of rights in Tennessee, one with a prior felony conviction must complete his term, and all fines, fees, and restitution must also be paid in full. In addition, as of recently, a citizen must also be current on child support payments. As a result, according to Mr. Castelli, “only 2% of disenfranchised citizens who have completed their sentences, probation and parole have successfully restored their voting rights.”101 He further reported that in Tennessee, 341,815 people are disenfranchised and that one out of every 5.25 African-American adults is disenfranchised.102

Confusion Regarding When and How Rights are Restored Results in Further Disenfranchisement

Another problem arises with respect to notifying persons with prior felony convictions that they have reacquired their voting rights and informing them about the process for re-registering once they become eligible. In many instances these citizens are provided with no such information, or are misinformed by election officials who are unfamiliar with these laws. NCVR heard testimony to this effect, for example, in South Carolina and California,103 and with respect to Minnesota, where one witness cited the governor’s task force finding that “[n]o database exists that can accurately identify when a felon regains the eligibility to vote, and that the question of disenfranchisement creates significant confusion among the public election judges, election administrators and the individual convicted of a felony. There are currently no notification procedures consistently followed” in Minnesota.104

Once individuals are aware of the restoration process, there are the procedural obstacles many persons with former felony convictions must address to regain their rights, which they may or may not know how to navigate. The obstacles can include financial costs and be extremely time consuming to overcome.
The NCVR heard a number of poignant stories related to felony disenfranchisement throughout its proceedings. To provide just one example, at the Commission’s Florida hearing, Desmond Meade, president of the Florida Rights Restoration Coalition, told the NCVR the following:

Not too long ago, August of 2005, I remember standing in front of the railroad tracks in Miami waiting on a train to come so I could jump in front of it to commit suicide because at that time I was recently released from prison, I was addicted to drugs and alcohol, I was homeless and I saw no hope, no future. But by the grace of God the train never came and I crossed those tracks and I entered into the substance abuse treatment facility and after graduating there I went to Miami-Dade College while I was living in a homeless shelter. I enrolled in Miami-Dade College and I was able to complete the paralegal program there. One thing led to another and today I am happy to announce that I am a month away from graduating law school at Florida International University.

While I appreciate the applause, my story does not have a happy ending because I am among the over 1.54 million Floridians who cannot vote as a result of Florida’s policy on felony disenfranchisement. As it stands today an individual will have to wait five to seven years after completion of their sentence before being able to apply to have their rights restored. After they apply, there’s an application process in time of approximately six years.

We recently heard of a story of a gentleman who had been waiting ten years to find out the status of his application. And, therefore, we have a system or policy that would dictate that a person wait anywhere between 11 to 13 years before they see if they have a chance.\textsuperscript{105}
VII. VOTER ID

Introduction

During the last decade, legislators, courts, and the public have grappled with questions of whether, and if so what types of, ID should be required in order for a voter’s vote to be counted. The more restrictive laws—which require voters to produce one of a limited set of government-issued photo IDs—impact minority voters disproportionately, and two federal courts have enjoined these laws because of their racial impact.

Prior to the 2000 election, states generally had ID requirements that most, if not all, voters could satisfy. In most states, voters simply attested to their identity. Most states did not require a form of ID, and even amongst those that did, a document provided by the election authority sufficed (as was the case in South Carolina and Texas). Alternatively, in lieu of providing a document, an individual would be able to vote after signing an affidavit attesting to his or her identity (as was the case in Louisiana).
After the 2000 election, Congress passed the Help America Vote Act, which included a voter ID requirement that applies only to first-time voters who register by mail and allows for a wide range of acceptable identifying documents.\textsuperscript{108}

In 2005, Georgia and Indiana became the first states to require voters to produce one of a short list of government-issued photo IDs before their votes would be counted. As discussed more fully below, these laws were challenged in both states, and the federal court decisions that resulted have framed the parameters of subsequent voter ID laws and litigation. A combination of the Supreme Court’s decision upholding Indiana’s law and political changes arising from the 2010 election resulted in seven states enacting photo ID bills during the 2011-2012 legislative sessions.

The \textit{Shelby County} decision had an immediate impact on voter ID laws in states that were formerly covered by Section 5 of the VRA. On the day of the \textit{Shelby County} decision, Texas announced that it would immediately began to implement its voter ID bill that had been blocked under Section 5 (first by DOJ and then the federal district court). Alabama also announced on the same day that it would begin implementing its government-issued photo ID requirement for voting.\textsuperscript{109} Within a few days, Mississippi made the same announcement with respect to a similar requirement.\textsuperscript{110} Shortly thereafter, as discussed below, North Carolina passed legislation including stringent new voter ID requirements.\textsuperscript{111}

\section*{Justifications for ID Laws and Statistics Regarding ID}

The primary justification given by proponents of ID laws is that they are necessary to prevent fraud. However, as has been demonstrated in repeated academic studies and government investigations, the only form of fraud that would be addressed by voter identification laws—commission of fraud by impersonating a voter—is practically nonexistent.\textsuperscript{112} Of the few election fraud cases brought by DOJ between 2002 and 2005, none appears to be of the type that would have been addressed by a voter ID requirement.\textsuperscript{113} This is particularly striking as we now know that U.S. attorneys were under enormous pressure to pursue these types of cases in the 2000s.\textsuperscript{114} It is also quite telling that in virtually every lawsuit where states have identified prevention of voter fraud as a justification for their voter ID laws, they have been unable to identify any actual examples of voter impersonation in their state.\textsuperscript{115} Indeed, in \textit{Crawford v. Marion County Election Board}, the Supreme Court decision upholding Indiana’s voter identification law, Indiana admitted that it had not identified any examples of such voter fraud and Justice Stevens, in his plurality opinion, could only cite two allegations of voter impersonation fraud from other states: the Boss Tweed regime in New York in the nineteenth century and a single case of possible impersonation in the Washington State gubernatorial election of 2004.\textsuperscript{116} Most recently, a federal judge pointed out in a Wisconsin ID case that the defendants had been unable to provide one instance of fraudulent impersonation in the State.\textsuperscript{117}
Given the lack of evidence of voter impersonation, proponents of ID laws have sought to defend their legitimacy by other means. They claim that voter impersonation is a reality, even though it cannot be proven. They also contend that voter ID laws increase voter confidence in the electoral process because with ID laws in place, voters perceive that there will be less fraud. This unproven assertion ignores the likelihood that voter ID laws may cause some voters—particularly those that lack the required ID—to have less confidence in the electoral process.

While claims that ID laws increase voter confidence remain unverified, it is well-documented that racial minorities are less likely than whites to have the most common forms of government-issued photo ID. While about 11 percent of Americans do not have a driver’s license or non-driver’s government ID, African Americans, Latinos, immigrants, Native Americans, and the poor disproportionately lack the required documentation. Academic study after academic study has shown that these groups are much less likely than whites to have government-issued photo ID, such as a driver’s license. A national survey by the Brennan Center found that Americans earning less than $35,000 are twice as likely to lack ID as Americans who earn more than $35,000, and that African Americans are more than three times as likely as whites to not have ID. Indeed, the survey found that one-fourth of African Americans do not have a government-issued photo ID.

The legal cases discussed below present a multiplicity of state-specific data confirming the fact that minority voters are overrepresented among those who lack ID. To many civil and voting rights advocates, these new voter ID laws are just a more subtle reincarnation of the poll tax.

**The Georgia and Indiana Laws: Setting the Stage**

In 2005, Georgia and Indiana became the first states to significantly restrict the types of government-issued photo ID that would be required from voters. Both laws have been challenged in court, and the outcomes have informed subsequent legislation and litigation around voter ID.

In 2005, the Georgia General Assembly passed its first voter ID law over protests and walkouts by its Black Legislative Caucus. The law required that a voter provide one of six forms of government-issued ID: a Georgia driver’s license; a valid ID card issued by the State of Georgia, by another state, or by the United States; a valid U.S. passport; a valid employee photo ID card issued by the State of Georgia, by one of its subdivisions, or by the United States; a valid U.S. military photo ID card; or a valid tribal photo ID card. The law did not provide for a free means of obtaining ID. In *Common Cause of Georgia v. Billups*, the district court issued a preliminary injunction enjoining the law and finding that the plaintiffs
were likely to prevail on multiple claims, including the claim that failure to provide for free ID constituted a poll tax.

The next year the General Assembly amended the law, and part of the amendment and implementing regulations enabled any voter to obtain a voter ID for free from the county registrar. The registrar could use the signature on the voter’s registration application as a means of verifying the voter’s identity. Plaintiffs challenged the amended law but were unsuccessful: federal courts found that the availability of free IDs that are relatively easy to obtain solved the problem with the earlier law.

The significance of the Georgia case is that subsequent state legislatures have had to be careful to ensure that they make free IDs available when adopting new, restrictive voter ID laws. Not all have made it as easy for voters to obtain the free ID, however, and some states’ procedures for obtaining ID can significantly burden voters.

In *Crawford v. Marion County Election Board*, the U.S. Supreme Court voted 6-3 to uphold Indiana’s voter ID law against a facial challenge that it violated the fundamental right to vote under the 14th Amendment. The law required that voters present a form of ID that was issued by the State of Indiana or by the United States and displayed the voter’s photo, name (which had to conform, but not necessarily be identical, to the name listed on their voter registration card), and an expiration date indicating that the ID was currently valid or had expired after the date of the last General Election.

The plurality opinion balanced the State’s justifications for the law against the burden that the law imposed on voters. Drawing from the district court’s determinations, the Supreme Court found that the burden on voters was “limited” because the evidence in the record was lacking: the record did “not provide us with the number of registered voters without identification[,]” did “not provide any concrete evidence of the burden imposed on voters who currently lack photo identification[,]” and said “virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed.” Accordingly, the Supreme Court upheld the law.

Proponents and opponents of restrictive voter ID laws have interpreted the *Crawford* decision differently. After *Crawford*, some proponents have erroneously interpreted the ruling as a blanket imprimatur of legality to any voter ID law. This is distinctly not the case. For example, Texas has repeatedly made that argument in litigation surrounding its law (see sidebar later in this chapter for details involving the Texas ID law and the litigation). In the initial Section 5 litigation, Texas argued that *Crawford* required the court to uphold its ID requirement, saying that it “controls this case.” In the subsequent post-*Shelby County* Section 2 litigation concerning the Texas law, Texas moved to dismiss the challenge to its ID law, in part on the grounds that “[v]oter-identification laws are constitutional. The Supreme Court so held
in *Crawford v. Marion County Election Board*...”¹³⁶ In denying the motion to dismiss, the Texas district court explicitly rejected this argument: “Defendants overstate the Supreme Court’s approval of voter identification laws... While a photo identification law was squarely at issue in *Crawford*, the terms of that law, the nature of the claims, and the specific holding fail to produce any Supreme Court preclusion of the claims made here.” The judge specifically pointed to the fact that in *Crawford* there was a necessary balancing test under the 14th Amendment, under which the defendants narrowly succeeded; *Crawford* said nothing about claims brought under Section 2 of the VRA or the First, Fifteenth, and Twenty-fourth Amendments against a photo ID law.¹³⁷

The opponents of voter ID have drawn their own lessons from the *Crawford* decision. In order to craft stronger legal challenges, they have placed more emphasis on developing a record that: (1) shows more definitively how many people are affected by the law, (2) demonstrates implementation problems, and (3) includes compelling testimony from individuals affected by the law.

**The VRA at Work: Wisconsin, South Carolina, and Texas**

There are three states where the VRA has affected an enacted voter ID law in recent years: Wisconsin, where the federal district court enjoined the law as a violation of Section 2 of the VRA; South Carolina, where the State significantly modified the law during a Section 5 preclearance lawsuit; and Texas, where the federal district court found that the law violated Section 5, a decision that was vacated after the *Shelby County* case, and is now the subject of multiple Section 2 lawsuits. Wisconsin is discussed below, South Carolina in Chapter 3, and Texas in the sidebar later in this chapter.

In a decision issued on April 29, 2014, a federal district court judge found that Wisconsin’s voter ID law has a racially discriminatory result in violation of Section 2 of the VRA, and that the law violates the fundamental right to vote under the 14th Amendment.¹³⁸ The court found that approximately 300,000 registered voters lacked one of the nine required forms of photo ID.¹³⁹ Drawing from expert and fact witness testimony, the court then found that those without ID, especially those in poverty, faced significant financial, transportation-related, and administrative hurdles in obtaining identification.¹⁴⁰ In addition, the court found that the evidence presented at trial showed that African-American and Latino voters in Wisconsin are far less likely to have an acceptable ID because of socioeconomic disparities traceable to the effects of discrimination.¹⁴¹ In contrast, the court found that the justifications for the law were tenuous at best. It rejected Wisconsin’s voter fraud justification by finding that “there is virtually no voter-impersonation fraud in Wisconsin.”¹⁴² The court also found Wisconsin’s argument that voter ID laws promote public confidence in the electoral process to be unsupported by the social science research and that such laws may tend to undermine confidence in the electoral process as much as they promote it.¹⁴³
At the NCVR hearing in Minneapolis, Karyn Rotker, Senior Staff Attorney at the Wisconsin ACLU, which represented plaintiffs, submitted testimony citing expert statements provided to the court in the case showing that in “Milwaukee County alone—where the vast majority of the State’s entire African-American population and a substantial plurality of its Latino population resides—13.2% of eligible African-American voters and 14.9% of eligible Latino voters lacked accepted ID, compared to 7.3% of eligible white voters.” Moreover, she cited statements demonstrating that “15.3% of registered African-American voters and 11.3% of registered Latino voters lack accepted forms of ID, compared to 6.0% of registered white voters. An analysis of statewide data shows similar disparities.”

Using State Law to Block Voter Identification Provisions: Missouri, Arkansas, and Pennsylvania

Most states have a provision guaranteeing the fundamental right to vote in their state constitutions, and in Missouri, this provision was used successfully to challenge the state’s government-issued photo ID requirement in Weinschenk v. State. In May 2014, a state court found that Arkansas’ 2003 photo ID law violated the state constitution because it impermissibly added a qualification for voting. The Arkansas case remains in litigation.

The most intensively litigated case applying state law to block an ID provision was brought in Pennsylvania. On March 14, 2012, Pennsylvania passed a law requiring voters to show a valid photo ID in order to vote. The ID law was challenged in May 2012 as a violation of Pennsylvania’s fundamental right to vote in Applewhite v. Commonwealth of Pennsylvania. After the trial court denied the plaintiffs’ motion for preliminary relief, plaintiffs successfully appealed to Pennsylvania Supreme Court. The Pennsylvania Supreme Court found the availability of the State’s free voter ID problematic. The ID law had a “liberal access” provision, which allowed voters to obtain a free ID through the Pennsylvania Department of Transportation (PennDOT) by completing an application stating that they did not have an ID that could be used for voting. However, state officials had made it difficult for voters to actually obtain a free ID. The Pennsylvania Supreme Court noted that although the free ID provisions affected “a minority of the population,” those most affected are “members of some of the most vulnerable segments of the society.” The State Supreme Court instructed the trial court to enjoin the voter ID law for the November 2012 election, unless the trial court was “convinced in its predictive judgment that there will be no voter disenfranchisement arising out of the Commonwealth’s implementation of a voter identification requirement for purposes of the upcoming election.”

The trial court subsequently enjoined the law for that election.

The parties tried the case in 2013, and on January 17, 2014, a judge issued an injunction permanently blocking the enforcement of Pennsylvania’s voter ID law on the grounds that it violated the fundamental right to vote. According to the court opinion, the State’s own database comparison showed that 759,000 registered voters did not have a Pennsylvania
ID and another 575,000 did not have an ID that would be valid for the 2012 election. In total, 1.3 million registered voters lacked the ID needed to vote. Moreover, the judge found that “[i]n contrast to the hundreds of thousands who lack compliant photo ID, only 17,000 photo IDs for voting purposes (DOS [Department of State] IDs + PennDOT Voting IDs) have been issued….This includes issuance of less than four thousand DOS IDs.”

The court found that there were a number of impediments to getting a voter ID, including that in many counties the state offices were only open two days a week, state employees had received inadequate training, and inaccurate messages were sent to voters. In addition to finding that the law burdened voters, the court found that the State had failed to provide any evidence supporting the two justifications it offered for the law—preventing voter fraud and promoting public confidence in the electoral system. Thus, the court found the law unconstitutional. On May 8, 2014 the Governor of Pennsylvania announced that he would not appeal the case to the State Supreme Court.

Pending Litigation over North Carolina’s Photo ID Requirement

Less than two months after the Shelby County decision, North Carolina passed a wide-ranging voting law, H.B. 589, that includes a new government-issued photo ID requirement. DOJ and two sets of private plaintiffs have challenged H.B. 589 on a number of grounds. These three different cases challenge the North Carolina law under the VRA and have been consolidated.

DOJ’s complaint included the following allegations regarding the disproportionate impact of the new ID requirements on African Americans. The complaint draws largely from an April 2013 study where North Carolina’s State Board of Elections matched the registered voter list to Department of Motor Vehicles (DMV) records:

Voters who need a special identification card to meet HB 589’s voter photo identification requirement will have to travel to a DMV office to obtain the card. In 10 North Carolina counties, the only DMV office is open only once per month. Four of these counties are among the 10 North Carolina counties that have the highest percentage of African-American voting-age populations in the State, including Bertie County, which has the highest at 60.7 percent. [...] Although African-American voters comprised 22.5 percent of total registered voters in
the State at the time of the analysis, 33.8 percent (107,681) of the registered voters on the no-match list [of those citizens with DMV issued ID] were African-American. In contrast, white voters constituted 71.0 percent of the total registered voter population in the State, but were only 54.2 percent (172,613) of the registered voters on the no-match list. Further, of the 4,562,097 white registered voters in the State, 3.8 percent appeared to not have DMV-issued identification, whereas of the 1,445,799 African-American registered voters, 7.4 percent appeared not to have DMV-issued identification.158

Examples of Poll Workers Improperly Requiring Identification from Minority Voters

“At certain poll sites, poll workers would only ask Asian-American voters for their ID and make it a requirement. We’ve seen that across the country, whether there is a voter ID law or not, poll workers use that as an opportunity to selectively disfranchise certain voters.” Jerry Vattamala (seated far right), Attorney for the Asian American Defense and Educational Fund, at the NCVR Pennsylvania state hearing. PHOTO CREDIT: BEN BOWENS

Another notable problem is poll workers requiring identification from minority voters when it is not legally required. This has not only been documented anecdotally, it has been found to be the case in two major academic studies, one focused on New Mexico and the other on Boston, Massachusetts.159 The studies found that Latinos and African Americans were consistently asked for identification at higher rates, regardless of whether voter ID was actually required by law.160
The NCVR also heard testimony to this effect with respect to Asian Americans. In Pennsylvania, Rahat Babar, the president of the Asian Pacific American Bar Association of Pennsylvania testified that,

Even when the law was subject to a partial preliminary injunction during the 2012 elections [when poll workers were supposed to request ID, but still allow those without ID to vote], we discovered that poll workers applied the voter ID law in a discriminatory way against Asian Americans and other persons of color. Some Asian-American voters were subject to excessive requests to present identification and, in other instances, required to prove citizenship.

Case Spotlight
Voter ID in Texas

Texas’ voter ID requirement perhaps best illustrates the questionable necessity of these laws and their relationship to the VRA.

Prior to 2011, Texas law required that an in-person voter present his or her voter registration certificate in order to vote. Any voter without a certificate had to complete an affidavit stating that he or she did not have a certificate, and the voter would be required to present another form of ID.

Nonetheless, in 2011, Texas enacted what the court in Texas v. Holder would later call the “most stringent” voter ID law in the country. Texas submitted its law, S.B. 14, to DOJ for Section 5 preclearance. DOJ denied preclearance on the grounds that Texas failed to show that the law would not have a retrogressive effect. This was partially based on data from Texas state databases submitted to the DOJ, which revealed that a Latino registered voter was at least 46.5 percent, and potentially 120.0 percent, more likely than a non-Latino registered voter to lack the requisite ID.

Undeterred, Texas next sought preclearance in the U.S. District Court for the District of Columbia. Like DOJ, the federal court denied preclearance on the grounds that Texas failed to show that the law did not have a discriminatory effect. The court noted that not all voter ID laws are alike and laws “might well be precleared if they ensure (1) that all prospective voters can easily obtain free photo ID and (2) that any underlying documents required to obtain that ID were truly free of charge.” The court concluded that:
record evidence suggests that SB 14, if implemented, would in fact have a retrogressive effect on Hispanic and African-American voters. This conclusion flows from three basic facts: (1) a substantial subgroup of Texas voters, many of whom are African-American or Hispanic, lack photo ID; (2) the burdens associated with obtaining ID will weigh most heavily on the poor; and (3) racial minorities in Texas are disproportionately likely to live in poverty.\textsuperscript{168}

Part of this determination was based on evidence that some voters would have to travel more than 200 miles roundtrip to obtain an accepted ID and that they would have to pay at least $22 to obtain a birth certificate that would enable them to obtain an ID.\textsuperscript{169} In addition, the court found it significant that the legislature rejected a number of proposed amendments that would have made identification more accessible for certain groups, stating:

[C]rucially, the Texas legislature defeated several amendments that could have made this a far closer case. Ignoring warnings that SB 14, as written, would disenfranchise minorities and the poor, the legislature tabled or defeated amendments that would have:

- waived all fees for indigent persons who needed the underlying documents to obtain an EIC [Election Identification Certificate];
- reimbursed impoverished Texans for EIC-related travel costs;
- expanded the range of identifications acceptable under SB 14 by allowing voters to present student or Medicare ID cards at the polls;
- required DPS [Department of Public Safety] offices to remain open in the evening and on weekends; and
- allowed indigent persons to cast provisional ballots without photo ID.

“Put another way, if counsel [defending the Texas law] faced an ‘impossible burden,’ it was because of the law Texas enacted—nothing more, nothing less.”\textsuperscript{170}

Texas appealed the district court’s ruling. During the course of the appeal, the Supreme Court decided \textit{Shelby County}, which effectively ended the case because Texas was no longer covered by Section 5.\textsuperscript{171} On the day of the \textit{Shelby County} decision, Texas Attorney General Greg Abbott announced that Texas would begin implementing its voter ID law.\textsuperscript{172} As discussed above, the United States and multiple sets of private plaintiffs have brought challenges to the Texas ID law under Section 2 of the VRA, and the case is pending in federal court.\textsuperscript{173}
VIII. EARLY IN-PERSON VOTING

In recent decades, the option of voting in person on days prior to Election Day has become enormously popular with voters and election administrators. Today, 33 states and the District of Columbia offer some form of early voting. Early voting makes it easier to vote, especially for working people who have multiple commitments and responsibilities. As a federal district court in D.C. noted, African Americans in several Florida counties took advantage of early voting opportunities at a rate nearly double that of white voters in the 2008 election. Inflexible work schedules, limited access to reliable transportation (including lower car-ownership rates), and the focus on early voting by get-out-the-vote efforts in minority communities were cited as factors accounting for African Americans’ higher early voting rate in the State.

Unfortunately, in recent years, several states have significantly cut back on the number of days and hours of early voting. Critically, these reductions have often eliminated voting in the evening and on Saturdays and Sundays, including the Sunday before Election Day. This change has hit African Americans particularly hard because it had become a popular practice in African American churches in some states, including Florida, for congregants to go vote together after Sunday church services.

Florida is one state that has sought to restrict early voting. In advance of the 2012 election, Florida enacted H.B. 1355 which, among other things, reduced the number of days that counties were permitted to offer early voting from 14 to eight, cut in half the number of total hours that counties were required to offer for early voting from 96 to 48, and eliminated in-person voting on the Sunday before Election Day. As a result, early voting turnout dropped by over 225,000 voters from 2008 to 2012. Long lines were prevalent during both the early voting period and on Election Day. Election Day lines were so long that some people only managed to vote after midnight. One study indicated that more than 201,000 voters likely did not vote because of long lines.

Data from previous elections in Florida foreshadowed the disproportionate effect early voting cuts would have on African Americans and other minorities. An analysis of voting data from 2008 found that “not only did African Americans cast more [early in-person] ballots than they cast on Election Day, but also that African Americans accounted for a much greater proportion of the early voting electorate than they did on Election Day, Tuesday, November 4, 2008. Perhaps due to the early voting mobilization efforts by the Obama campaign and their allies which encouraged early voting by African Americans, black voters ended up casting 22 percent of the total EIP [early in-person] votes in the 2008 General Election even though they comprised approximately 13 percent of the State’s total registered electorate.” With respect to the Sunday before Election Day, the findings were especially telling, with African Americans constituting 31 percent of early voters on the final Sunday of voting
before Election Day. White voters, relatively speaking, had the lowest participation rates for Sunday early in-person voting. By comparison, African Americans had the highest rate on the first Sunday of early voting, while Latinos participated at the highest rate on the last Sunday of early voting (followed by African American voters). The differential rates of early voting were part of the basis for the U.S. District Court for D.C.’s denial of preclearance to the five Florida counties that were covered under Section 5 when they attempted to implement the aforementioned statewide changes to early voting. The court recognized the potential for a racially discriminatory effect.

One study conducted after the 2012 election concluded that the “effect of early voting changes reflected in H.B. 1355 was to inconvenience African Americans specifically.” The research found that the cutbacks led to more crowded polling places and that “voters who faced greater congestion, and presumably longer lines… were disproportionately African American.” Notably, beyond Florida, the report highlighted the increasing popularity of early voting among African Americans nationally. In the 2012 general election, the number of African Americans voting early in-person reportedly tripled compared to 2008. Similarly, this same figure doubled in the 2014 midterm election compared to the 2010 midterm.

Notably, African Americans in Southern states continued to vote early in-person at higher rates than other groups: 41 percent of African Americans in the South voted early in-person, compared to 34.8 percent of white voters. Moreover, African-American early in-person voters in the South also outpaced this same group of African-American voters in all other regions of the U.S.

In 2013, North Carolina enacted a law, H.B. 589, that, among other measures, eliminated the first seven days of early voting, reducing the number of days to vote early in person from 17 to 10. In addition, the law eliminated the first Sunday of early voting. A number of civil rights groups, as well as the DOJ, have brought lawsuits challenging H.B. 589.

The data in North Carolina mirrors the findings in Florida regarding early voting:

- In the 2008 general election, African-American voters made up 22 percent of registered voters, but cast about 29 percent of early votes and about 32 percent of votes during the first week of early voting. About 71 percent of African American voters cast their ballot during early voting in the 2008 general election, compared to 51 percent of white voters.

- In the 2012 general election, African-American voters made up an estimated 22 percent of registered voters, but were approximately 29 percent of early voters and 33 percent of voters in first week of early voting. About 71 percent of African American voters cast their ballot during early voting in the 2012 general election, as compared with 52 percent of white voters. Over 36 percent of all North Carolinians who voted during the first week
of early voting in 2012 were African-American. Additionally, there was a notable peak in African-American participation during weekend voting, while weekend early voting for whites declined. African Americans cast 43 percent of all Sunday ballots. The disproportional use of early voting by African Americans in North Carolina has been confirmed by academic research.

Cutbacks to early voting have also disproportionally affected African American voters in Ohio. A Lawyers’ Committee analysis of voting patterns in 2008 in Cuyahoga County, which includes Cleveland, found that African-American voters used early in-person voting at a rate approximately 26.6 times greater than that of whites. Put another way, “African Americans accounted for nearly 78% of all early in person voters, compared to less than 7% for whites.” Similarly, in 2012, African American voters in Cuyahoga County utilized early voting at a rate more than 20 times greater than white voters. About 77.6 percent of early voters in Cuyahoga in 2012 are estimated to have been African American.

In Franklin County, Ohio (which includes Columbus), African Americans represented 21 percent of all ballots cast in 2008, but cast 31 percent of early in-person ballots, while whites made up 74 percent of the electorate but cast only 65 percent of early in-person ballots. Overall, 13.3 percent of all African-American ballots cast in 2008 in Franklin County were done early in-person, as opposed to only 8 percent of white ballots.

Petee Talley, Secretary-Treasurer of the Ohio State AFL-CIO and co-chair of the Ohio Voter Protection Coalition, testified about the need for ongoing community voter education and outreach, at NCVR Columbus regional hearing. PHOTO CREDIT: JIMMEY MCEACHERN
In 2011 and 2012, Ohio enacted legislation that, among other things, changed the last permissible day for early in-person voting by non-uniformed and overseas voters from the Monday before the election to the Friday before the election, thereby eliminating three early vote days. A federal court blocked implementation of the law and ordered the restoration of the three early vote days, however, because the law violated the 14th Amendment’s Equal Protection Clause by treating uniformed and overseas citizens, and other voters, differently. The judge noted:

On balance, the right of Ohio voters to vote in person during the last three days prior to Election Day—a right previously conferred to all voters by the State—outweighs the State’s interest in setting the 6 p.m. Friday deadline. The burden on Ohio voters’ right to participate in the national and statewide election is great, as evidenced by the statistical analysis offered by Plaintiffs and not disputed by Defendants[, and] the State’s interests are insufficiently weighty to justify the injury to Plaintiffs.

Also in 2012, Ohio Secretary of State Husted issued Directive 2012-35, which required all counties in Ohio, regardless of size and other differences, to conduct early voting at a single site following a specific schedule set by the State. Directive 2012-35 eliminated early voting opportunities that African Americans had traditionally taken advantage of, including all weekend hours and certain evening hours.

Subsequently, in late 2013 and early 2014, the Ohio legislature hastily passed S.B. 238, which eliminated the first week of early voting and, because that was the only week during which one could both register and vote, S.B. 238 eliminated the only opportunity for same-day voter registration. Several days later, Secretary of State Husted issued Directive 2014-06, forcing all counties to eliminate all evening early voting hours, all Sunday voting, and early voting on the Monday before Election Day. On May 1, 2014, a coalition of civil rights organizations and churches filed a lawsuit challenging these changes. According to the complaint, 157,000 Ohio citizens voted in 2012 during the periods that S.B. 238 and Directive 2014-06 eliminate for the 2014 election. The plaintiffs’ motion for a preliminary injunction was filed June 30, 2014 and remains pending.

The recent actions that Ohio’s legislators and Secretary of State have taken to restrict early voting were taken in the face of well-publicized data demonstrating that cuts in early voting would disproportionately burden African-Americans. In fact, statements and actions by public officials make clear that the effects of the cutbacks were well understood. For example, in the words of a local newspaper, a member of the Franklin County Board of Elections explained his support for the 2012 cutback like this: “I guess I really actually feel we shouldn’t contort the voting process to accommodate the urban—read African-American—voter turnout machine.”
Finally, in Wisconsin, another state that has seen a number of voting controversies in recent years, Governor Scott Walker has signed a bill that eliminates weekend early voting altogether. Many in the State have expressed concern that the cutback will bear particularly heavily on Milwaukee voters, where a significant proportion of the State’s minority population resides.

“Even with extended hours, we still saw long lines on election days [in 2008 and 2012]… Assembly Bill 54 and Senate Bill 324 in our current legislative session would eliminate any weekend hours for in-person absentee voting and would not allow municipal clerks to offer hours later than 6:00 p.m. during the week. We believe the passage of this bill would absolutely devastate the ability of many voters marginalized in other ways to access their right to vote…” – Analiese Eicher, One Wisconsin Now, at the NCVR Minneapolis regional hearing.

PHOTO CREDIT: TIM RUMMELHOFF

IX. PROBLEMS AT POLLING PLACES

An accessible, fully-equipped, and functioning polling place is, of course, critical to the voting process. The recent history of voting discrimination and restricted ballot access for minority voters, however, contains reports of polling place closures in minority areas and jurisdictions’ refusals to expand voting locations into more remote communities where minority voters reside. The record documented in the 2006 NCVR report also contains numerous examples of how such activities disadvantage minority voters. As is detailed in Chapter 7, implementation of language assistance requirements at the polls continues to be a problem; accessibility of polling places for people with disabilities, a major problem in American elections, will be addressed at length in the forthcoming report on election administration.
One common and well-publicized problem at the polls in recent elections has been long lines. Whether a reflection of inadequate staffing, too few voting locations, or problems with poll books, long lines on Election Day may be more than just an inconvenience; for some, long lines prevent or deter voting. Research on recent elections has shown that African-American and Hispanic voters are likely to experience longer wait times than white voters. One study using 2008 and 2012 post-election survey data concluded that minority voters waited longer than white voters at the polls. The average wait time for African Americans was highest at 24 minutes, followed by an average wait time of 19 minutes for Hispanic voters. By comparison, white voters waited an average of 12 minutes to vote. Notably, the authors point out that these disparities in wait time by race largely remained in place after controlling for state residence and voting mode (Election Day versus early voting). Further, voters in urban areas waited longer to vote than their counterparts in suburban and rural areas.

The experiences with long lines in particular states help illustrate these national findings. A study of precinct-level data, including closing times, in Florida from the November 2012 election found that “precincts with greater proportions of Hispanics—and in several counties, with high proportions of Blacks, as well as younger voters—had later closing times on Election Day relative to precincts with higher concentrations of White and elderly voters.” Long lines in minority communities were also a pressing issue during the 2004 election, as seen in Ohio. An investigation found that the “misallocation of voting machines led to unprecedented long lines[,]” which disenfranchised minority voters disproportionately.

“In 2004, Election Day was a fiasco in many places around Ohio. Local, state, and national media covered the multitude of problems stemming from excessively long lines of voters waiting, many of them for hours on end. These lines led an estimated 130,000 voters to leave their polling locations without casting a ballot. African-American voters waited in line an average of three times longer than their white counterparts.”

Gary Daniels, Associate Director of the Ohio American Civil Liberties Union at the NCVR Columbus regional hearing

Closing and Consolidating Polling Places

Closure of polling places serving minority voters continues to raise concerns about equal access to the ballot. For example, on October 8, 2010, plaintiffs in Spirit Lake Tribe v. Benson County secured a preliminary injunction under Section 2 of the VRA, which curtailed the North Dakota county’s plans to close all but one of the eight voting locations in the county (citing financial reasons) and implement a mail-in ballot program. The tribe was successful in keeping open the two polling places located on its reservation.
Lake Tribe agreed with plaintiffs that the severe reduction in voting locations would risk effectively disenfranchising a portion of the tribe’s voters; noting the well-documented “historic pattern of discrimination suffered by members of [the tribe],” the court considered evidence that closing the voting locations on and near the reservation would likely have a disproportionate impact on tribal members, which supported the decision to require the county to keep open the two on-reservation polling places.\(^{211}\) Tribal members testified that they would not be able to vote at the one proposed voting location because they lacked access to reliable public or private transportation, could not afford to pay for transportation costs, or were concerned about the distance from remote parts of the reservation to the one location.\(^{212}\) In addition, members testified that a mail-in ballot process would be ineffective and undesirable.\(^{213}\) The tribal members and the court were skeptical that the county could ensure that the tribe’s sizable transient population would receive their ballots by mail.\(^{214}\)

In reaching its decision, the court recognized that Spirit Lake’s population was “more economically and educationally challenged” than the rest of the county, and had “staggering problems in areas including economics, education, housing, and employment.”\(^{215}\) The court further observed:

\[T\]here are burdens that fall on the voting process on the Spirit Lake Reservation that simply do not exist elsewhere in Benson County. Thus, a system that might be entirely appropriate for the County as a whole, could well create a significant burden on voting within the confines of the Spirit Lake Reservation.\(^{216}\)

In 2003, Bexar County, Texas announced plans to reduce the number of early voting polling places from 20 to 11, in the process eliminating the five such polling places serving the predominantly-Latino west side of San Antonio.\(^{217}\) Bexar County moved forward with these plans, even though DOJ had yet to make a decision on the County’s request for Section 5 preclearance. This led the Mexican American Legal Defense and Education Fund (MALDEF) to file a Section 5 enforcement action in federal court, which alleged that the county’s changes would infringe on west side residents’ right to vote by forcing them to go far from their homes to cast their ballots. Plaintiffs sought an injunction to prevent the closures.\(^{218}\) The closures were enjoined shortly after MALDEF filed its action.\(^{219}\)

In 2003, Monterey County, California announced plans to, \textit{inter alia}, consolidate precincts and change the locations of polling places in predominantly Latino areas as part of the preparations for a then-upcoming special gubernatorial recall election.\(^{220}\) According to testimony at the NCVR California state hearing from an attorney for the plaintiffs in a case challenging the changes, one consolidation would have moved a polling place nearly five miles away from its previous location in a predominantly Latino community into an area without easy access to public transportation.\(^{221}\) Another would have forced voters residing
in predominantly Latino communities to cast their ballots at the Sheriff’s Posse Club House, a hunting club in a predominantly Anglo neighborhood. Plaintiffs brought suit, seeking to enjoin the recall election on the basis that, inter alia, Monterey County’s plan to consolidate precincts and reduce the number of polling places was legally unenforceable due to the county’s failure to secure preclearance of the proposed changes from the DOJ under Section 5 of the VRA. After the federal trial court entered a limited temporary restraining order and ordered the county to show cause why a preliminary injunction halting any further election preparations should not issue, Monterey County informed the district court that the proposed changes would not occur and withdrew the problematic polling place consolidations from DOJ’s review. While DOJ ultimately approved the voting precinct changes (minus the proposals at issue), it was action taken under Section 5 that led to the withdrawal of the problematic polling place consolidations.

As set forth in testimony submitted at the NCVR hearing in Denver, in 2008 Alaska submitted for Section 5 preclearance a proposal to close polling places in several Native villages. DOJ responded with a More Information Request, at which point the State abruptly withdrew the proposal. The same witness testified that DOJ also blocked efforts to close polling places in Navajo Nation in Arizona.

In 2006, DOJ objected to the reduction in the number of polling places and early voting locations for the North Harris Montgomery Community College District in Texas. Under the proposal, the site with the smallest proportion of minority voters was meant to serve 6,500 voters, while the most heavily minority site (79.2 percent African-American and Latino) would serve over 67,000 voters.

**Inadequate Polling Places**

At the Pennsylvania state hearing, NCVR received testimony about the Lower Oxford East precinct in Pennsylvania, where 61.8 percent of the voting age population was African-American in 2008. According to a complaint filed against Chester County officials under Section 2 of the VRA, the polling place for that jurisdiction could only fit six voting booths and one optical scanner, had only one bathroom, and had no shelter for waiting voters. During the 2008 primary election, it had to remain open until 10:30 p.m. to process all of the waiting voters.

Local election officials, fearing even worse conditions for the general election, requested that the County Board of Elections move the polling place to Lincoln University, a historically black university that was the former, more spacious, site of the precinct’s polling place. The Board refused. According to the lawsuit, so many voters waiting in line needed restroom facilities that a campaign volunteer arranged for the delivery of six portable toilets at his own
Further, plaintiffs alleged that a Republican poll watcher challenged the identities of young African-American voters exclusively, even those with valid registration cards and photo ID, and that an election official dismissed voters’ concerns about this. As a result,

\[\text{the combination of an inadequately-sized polling place, unlawful challenges, failure of Voter Services to provide an up-to-date poll book and lack of other polling place resources created a perfect storm of long lines and disenfranchised voters of color.}\]

One voter reportedly attempted to vote at three times throughout the day, but was unable to do so each time due to the long lines. Others reportedly waited six hours or longer, with many leaving without having the chance to vote; one student was given an estimated wait time of eight hours. In 2009, after receiving complaints about long lines during the 2008 election, the township relocated the polling place to a building that is “even farther away from campus, even less-accessible to African-American voters, and equally small.” The parties later settled the lawsuit, and the Board of Elections agreed to move the polling place back to Lincoln University’s campus.

On the right, Marian Schneider, Senior Attorney at the Advancement Project, testified at the NCVR Pennsylvania state hearing about the failure of a local board of elections to move a polling place in a predominantly African-American community to a larger, central location, resulting in excessively long lines and depressed turnout.

PHOTO CREDIT: BEN BOWENS
Barriers to Exercising Voting Rights for Native Americans

At NCVR’s Denver regional and Arizona state hearings, Native American voting advocates spoke of Native American voters living in very rural areas without cell service, Internet, even roads, electricity, or running water, who had to drive an hour and a half each way to the nearest polling place.239 Witnesses at NCVR’s Rapid City, South Dakota hearing testified that advocates in the State have been working for some time to get election officials to provide satellite offices for registration and in-person absentee voting—South Dakota’s version of early voting—on Indian reservations. Currently, the only place to take advantage of the more than five weeks of early voting in most counties in South Dakota is at the county seat, typically a great distance away from reservation lands. The lack of early voting sites on reservations essentially means that most Native Americans in the county get no early voting and can only vote on Election Day.240 For example, in Dewey County, South Dakota, which has a population that is 74 percent Native American, “over 60 percent of [the] population lives in Eagle Butte, which is 40 miles from the county seat in Timber Lake.” As Julie Garreau, an enrolled member of the Cheyenne River Sioux Tribe, testified, more than 30 percent of the population lives below the poverty line, and “many voters do not own reliable vehicles, or do not have the financial resources to make a trip to early vote.”242 Native Americans were able to work with county officials to set up a satellite office on the reservation.

In Shannon County, however, Native Americans were forced to file suit in 2012 under Sections 2 and 5 of the VRA, among other federal and state laws.243 As the Brooks v. Gant lawsuit progressed, South Dakota officials and the county defendants changed their position, agreeing to provide the early voting at the satellite locations proposed by the plaintiffs through the year 2018. On August 6, 2013, given the resolution of the issue for the time being, the court concluded the plaintiffs could no longer show the required “immediate injury” and dismissed the lawsuit as unripe for consideration; the dismissal was “without prejudice,” so the plaintiffs may file a new lawsuit in the future should the State fail to extend the satellite early voting on the reservation beyond 2018.244 The problems Native Americans in Montana face in using in-person absentee voting are similar. Mark Wandering Medicine, a member of the Northern Cheyenne Tribe, testified at the NCVR Rapid City hearing that poverty and traveling great distances to the county seat create barriers for Native Americans in his tribe to take advantage of in-person absentee voting; it is a two-hour drive one way from his home on the Northern Cheyenne Reservation to Forsyth, the county seat of Rosebud County, Montana.245

On October 10, 2012, Native Americans from Montana’s Fort Belknap, Crow, and Northern Cheyenne Reservations brought suit seeking to open satellite county offices with in-person
absentee voting and late voter registration in Blaine, Rosebud, and Big Horn Counties. After a federal district judge in Missoula refused to dismiss the lawsuit, the case settled out of court on June 10, 2014. Under the terms of the settlement, election officials agreed to open voting sites on reservations for two days a week during the month-long period during which Montana allows in-person absentee voting and late registration.

Native American plaintiffs also achieved a measure of success in challenging Arizona’s 2004 voter ID law. Among other claims in the case, the Navajo Nation challenged the voter ID law based upon evidence that the law had a disproportionate effect on Native American voters. The claim was settled, with the State agreeing to change the types of ID permitted, and the amended list of acceptable IDs was precleared by the DOJ.

X. VOTER INTIMIDATION AND VOTER CHALLENGES

Outright voter intimidation is sadly not a complete vestige of the past.
Although for the most part schemes designed to restrict voting that rely on physical violence have become rare, more sophisticated tactics, relying on the use of intimidating misinformation campaigns, most commonly in the form of flyers and mailings, are still frequent. For example, in 2004 in Milwaukee, a flier purportedly from the “Milwaukee Black Voters League” was distributed in African-American neighborhoods to discourage people from voting.

During the 2012 election, billboards were placed in predominantly minority areas in Cleveland and Cincinnati and later Milwaukee, with menacing warnings about voter fraud and the penalties for violations. The Lawyers’ Committee used census tract population data to demonstrate that the signs were targeted at African-American communities. For example, one billboard was mounted in an area in Cleveland that was 96 percent black. The Lawyers’ Committee sent a letter to Clear Channel, the owner of the billboard spaces, and that organization, along with several others, undertook a campaign to get the signs taken down. In its letter to Clear Channel, the Lawyers’ Committee said the signs, “stigmatize the African-American community by implying that voter fraud is a more significant problem in African American neighborhoods than elsewhere,” and the billboards “attach an implicit threat of criminal prosecution to the civic act of voting.” The company ultimately took down the signs after the client who paid for the billboards would not identify itself publicly.

Section 11(b) of the VRA states that “no person… shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote.” However, since the Act’s initial passage in 1965, DOJ has filed suit for intimidation or deceptive practices under the VRA in only four instances, and only twice in recent years. Though many have argued that 11(b) could be utilized more vigorously and that DOJ has interpreted it too narrowly, the fact that it has not been used more often is mostly the result of the challenges in bringing an intimidation claim. The Federal Prosecution of Election Offenses manual itself describes intimidation as being subjective and often without concrete evidence or witnesses. The perpetrators, particularly of deceptive practices, are often difficult to find. This makes prosecutors reluctant to devote resources to pursuing such cases.
Federal Observers Deter Voter Intimidation

Another reason that DOJ has brought few intimidation cases has been because of its ability to send federal observers to the polls where such activities might take place. Where DOJ was concerned about potential problems on Election Day it frequently sent observers or attorneys, who deterred and at times could address intimidating or discriminatory acts at the time they were occurring. An enforcement lawsuit could also ensue from an observed incident.

Under Section 3(a) of the VRA, a federal court may authorize observers where the court finds it is necessary to enforce the voting guarantees of the 14th and 15th Amendments during the course of a case or after a finding of intentional racial voting discrimination. Prior to Shelby County, the Attorney General could send observers to political subdivisions covered under Section 4(b) of the VRA, if the Attorney General believed it was necessary to prevent constitutional violations regarding racial or ethnic voting discrimination. In order to determine where observers were to be sent, the DOJ Voting Section looked at where it was likely that minority voters would confront barriers or intimidation. Federal observers wrote reports of what they saw, and submitted them to DOJ. The Voting Section reviewed these reports to determine whether further enforcement action should be taken. A total of 153 counties and parishes in 11 states covered by Section 4(b) have been certified by the Attorney General for appointment of federal
observers: Alabama (22 counties), Alaska (1 county), Arizona (4 counties), Georgia (29 counties), Louisiana (12 parishes), Mississippi (51 counties), New York (3 counties), North Carolina (1 county), South Carolina (11 counties), South Dakota (1 county) and Texas (18 counties). Thousands of observers have been deployed in the years since 1995.

Observers deterred election officials and others present at the polls from conducting discriminatory acts or engaging in harassment. Their presence also allowed for problems to be addressed immediately. As testimony given during the 2006 VRA reauthorization hearings by a long-time attorney with the Voting Section indicated,

the existence of Federal observers is crucial, and it’s irreplaceable in the Voting Rights Act. After all, there’s no other way for the law enforcement function of the Justice Department to be able to be performed with regard to harassment and intimidation and disenfranchisement of racial and language minority group members in the polling place on Election Day.

Observers report problems to a Civil Rights Division attorney at DOJ who can immediately discuss the problem with local officials, or if that is not sufficient, the Civil Rights Division may intervene with local officials directly. Reports can also be used for future litigation if necessary.
As Congressman John Conyers described at a hearing regarding the reauthorization of this section of the VRA, “discrimination at the polls remains a problem. Where jurisdictions have a record of discrimination or current threats exist to ballot access, minority voters should not have to wait for federal assistance to come after the fact. Monitors play the important role of addressing concerns about racial discrimination and ensuring compliance, so that voters can rely on a fair process now, rather than waiting for litigation later.”

Unfortunately, at the time of this Report’s publication, it appears that DOJ has suspended sending federal observers into polling stations in Section 4(b) jurisdictions, believing that it no longer has that legal authority under the Supreme Court’s *Shelby County* ruling. However, the jurisdictions covered by Section 3(a) court orders are unaffected.

### Voter Challenges

One of most frequently-used methods of voter intimidation in contemporary times is actually one that has been used quite often throughout the darker side of our voting history: vote challengers at heavily minority polling places. This is a technique by which a group will use voter lists and send volunteers to challenge the eligibility of voters at pre-selected polling places, in numerous instances those that are predominantly African-American, and increasingly, Latino- or student-heavy.

A joint report by Demos and Common Cause reports the following:

> [In 2010] an organized and well-funded Texas-based organization with defined partisan interests, the King Street Patriots, through its project True the Vote, was observed intimidating voters at multiple polling locations serving communities of color during early voting in Harris County [Texas]. [...] In a 2011 special election in Massachusetts, a Tea Party group was reported to have harassed Latino voters and others at the polls in Southbridge, Massachusetts.

A witness at the Texas NCVR hearing noted that True the Vote activists were challenging voters on the basis, for example, that six or more people were living at the same address. Minority citizens are much more likely to live in multiple family and multi-generational homes. Pew studies have found that indeed Hispanics (22 percent), blacks (23 percent) and Asians (25 percent) are all significantly more likely than whites (13 percent) to live in a multi-generational family household.

In 2012, True the Vote announced that it would ramp up its activities, claiming it would recruit one million monitors to man the polls on Election Day. The group’s national recruiter declared at its national summit that “his recruits’ job is chiefly to make voters feel like they’re ‘driving and seeing the police following you.’” Tom Fritton of Judicial Watch has been a featured
At the NCVR Texas state hearing, Maureen Haver, a Common Cause Texas Board Director, testified about voter suppression tactics deployed in Harris County during the 2010 election cycle. PHOTO CREDIT: SAMUEL WASHINGTON

guest at True the Vote events, telling recruits prior to the 2012 election that “[w]e are concerned that Obama’s people want to be able to steal the election in 2012” with the “illegal alien vote” and a “food stamp army.”

In Massachusetts, NCVR heard testimony that local “voter integrity” groups in 2012 had observers challenging the ballots of those who brought someone to the polls to help them vote, anyone who was speaking Spanish, and people with Spanish sounding last names. In addition, according to testimony, “observers were directly confronting and engaging with voters in an intimidating manner, they were photographing their identification when it was presented to poll workers, and they were videotaping people.”

In North Carolina in 2012, the State Board of Elections itself reported a number of complaints about voter challenges and intimidation and issued a directive to county boards on how such activities should be stopped. The Board was compelled to clarify the illegal nature of such acts. The Board reported that campaign and party supporters were breaching the buffer zones of polling places and approaching voters, using aggressive and profane language in some instances. It further reported on a series of deceptive practices, including voters being told that they can vote by phone or online; that if they affiliated with a certain political party that they must vote on Wednesday, November 7, instead of Tuesday, November 6; that if they have an outstanding ticket they cannot vote; and that they are required to re-register in order to vote.

The new all-encompassing election law passed in North Carolina may facilitate large-scale voter challenge efforts because challengers are no longer required to live in the precinct where they issue challenges. At the March 28, 2014 NCVR hearing in North Carolina, the Legal Director of the ACLU of North Carolina related that,
just last night in Buncombe County Voter Integrity Project challenged over 180 voters on the voter rolls in Buncombe County. [T]here are 80 precincts in Buncombe County. […] All of those challenges were to voters living in 11 precincts in the city center of Asheville, which is the only place in Buncombe County that has a sizable African-American population.\textsuperscript{267}

As described in Chapter 7, in Hamtramck, Michigan, DOJ filed a complaint after the November 2, 1999 general election, leading to a consent order.\textsuperscript{268} On Election Day, more than 40 voters who were dark skinned or appeared to be of Arab background had been challenged by a group calling itself “Citizens for a Better Hamtramck” on the basis of citizenship, either before or after they had signed their applications to vote. As a result, election inspectors required those voters to take a citizenship oath as prerequisite to voting.\textsuperscript{269}

Other Recent Forms of Intimidation

While private individuals at the polling place are often a problem, sometimes it is poll workers and other people officially associated with elections operations who engage in intimidating behavior. The district court in Shelby County v. Holder noted that Congress, prior to reauthorizing the VRA, heard testimony that “[i]n Shelby County’s home state of Alabama, there were reports of voting officials closing the doors on African-American voters before the… voting hours were over,” as well as “of white voting officials using racial epithets to describe African-American voters in the presence of federal observers.”\textsuperscript{270} The district court further related that a DOJ official “described the harassment of black voters by white poll officials in Alabama, including one instance in which a local poll official remarked while remarking in the presence of a federal observer,” using a derogatory slur, that African-Americans, “don’t have principle enough to vote and they shouldn’t be allowed.”\textsuperscript{271}

In Iowa, the activities of the Secretary of State appear to have created an intimidating climate. According to testimony from the ACLU of Iowa provided to the NCVR, the Iowa Secretary of State’s long-running and costly investigation into the alleged presence of noncitizens on the voter registration list has had an intimidating effect. The organization recounted having heard from two people that armed investigation agents showed up at their homes—after having questioned their friends, family, and neighbors—and demanded papers proving citizenship. So far only a handful of charges have been brought as a result of this investigation, and according to the ACLU, none of them indicate any intent by the individual to commit fraud.\textsuperscript{272} Secretary of State Matt Schultz ordered a two-year investigation that culminated in a report issued in May, 2014 in which he announced finding a total of 117 possible cases of election misconduct over two election cycles, most of which were unrelated to noncitizens. Only 27 people have been charged with a crime—half of whom were persons with prior felony convictions who had voted but had not applied to the governor to get their voting rights restored—with six convictions, four dismissals, and one trial acquittal at the time of the release.
of the report. Schultz had used federal grant money to hire an investigator to conduct the investigation.

In Tennessee, the NCVR learned of ways in which election officials were actually training poll workers to act in ways that could be intimidating and deter voters. At the Commission’s hearing in Nashville, Eben Cathey from the Tennessee Immigrant and Refugee Rights Coalition testified about the poll worker training that had taken place in Davidson County, Tennessee in 2012. He showed NCVR a slide (shown below) from the training that reminded poll workers that only citizens are allowed to vote, incorrectly implying that to be eligible to vote people must be able to read, write, and speak basic English. The slide also noted that the proper procedure when a voter’s citizenship is questioned is to challenge that voter’s right to vote.

In other cases, state legislatures have passed laws that would require poll workers to act in ways that could be suppressive. In Boustani v. Blackwell, a 2006 case, a federal district court found unconstitutional an Ohio statute allowing any election judge to challenge any voter’s citizenship and requiring any naturalized citizen to produce their naturalization certificate in order to be eligible to cast a regular ballot. The law had also stipulated that those naturalized...
citizens whose eligibility was challenged but who were unable to provide a naturalization certificate would be required to cast a provisional ballot, which would only be counted if the citizen were to submit additional information to the Board of Elections within ten days.277

Noting that the law facially discriminated against naturalized citizens with regard to their right to vote, thereby casting them as second-class citizens, the court in Boustani made clear that for the statute to be valid the State would need to demonstrate a compelling governmental interest requiring the measure. The court found no compelling justification for the distinction drawn by the State between naturalized and native-born citizens.278 The court further found that because replacing a lost or otherwise unavailable certificate of naturalization costs two hundred and twenty dollars, and the ability to pay this price bore “no relation to voting qualifications and burden[ed] a fundamental right of the citizenry,” the requirement to produce a certificate of naturalization could not stand.279 The court concluded by expressing “grave” concern about the effects of implementing the statute as it gave wide latitude to election judges or poll workers to profile voters—using their unbridled discretion to challenge based on “appearance, name, looks, accent or manner”—and found it “offensive to single out a voter in the public polling place, thereby subjecting him to embarrassment or ridicule while attempting to exercise a citizenship privilege.”280

PHOTO CREDIT: ALLISON MEDER

“The truth is that here in North Carolina we are the canaries in the coal mine of a rollback of voting rights. This is the testing ground. This is today’s Selma. This is what people would like, if they pass and get away [with] here, what some would like to see around the country…”

–Dr. Reverend William Barber, President of the NC NAACP State Conference and leader of the State’s Moral Mondays movement.
Case Spotlight

The Long Struggle for Voting Rights at Prairie View A&M University

The longstanding struggle of students at historically-black Prairie View A&M University in Waller County, Texas for full and equal voting opportunities is illustrative of the evolution of tactics aimed at making voting more difficult. Prairie View A&M is located in Waller County, a small rural county outside of Houston. Over the past four decades, county officials have repeatedly taken actions that interfered with the voting rights of students at Prairie View A&M.

In the 1970s, the County required college students wishing to register to vote to complete a “Questionnaire Pertaining to Residence,” which asked students various additional questions not required of other registrants. The questionnaire effectively precluded most students from registering to vote. Several lawsuits were brought challenging the practice. The U.S. District Court for the Southern District of Texas court invalidated the practice as a violation of the 26th Amendment, and the Supreme Court summarily affirmed.

Around the same time, DOJ, relying on Section 5 of the VRA, blocked a 1975 redistricting plan by the Commissioners’ Court of Waller County. The DOJ’s objection was based on the redistricting plan’s failure to include many of the Prairie View A&M students in the population base for the reapportionment of Waller County, resulting in a malapportionment.

In 1992, the local district attorney, Buddy McCraig, indicted 19 Prairie View A&M students for allegedly voting twice, once in their hometown and once at the school. After groups asserted that the indictments were an act of voter intimidation and the district attorney’s actions were scrutinized, all 19 indictments were thrown out due to the lack of evidence. One of the indictments had involved an instance where a father and son with the same name had voted in the different locations.

In 2003, a subsequent district attorney, Oliver Kitzman, also challenged the eligibility of Prairie View A&M students to vote, drafting a letter to the editor of the local paper publicly questioning the eligibility of students and threatening to prosecute students if they registered and voted in Waller County. Civil rights groups sued Kitzman for voter intimidation under Section 11(b) of the VRA, and Kitzman agreed to a consent decree affirming students’ right to vote.

Shortly after the Section 11(b) lawsuit was filed in 2004, and a month before primary elections, the Waller County Commissioners’ Court voted to reduce the availability of early voting at the polling place closest to campus, from 17 hours over two days to six hours in

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one day. This was particularly significant because the primary was scheduled during the students’ spring break, so students would have to vote early if they planned on leaving town for the break. Civil rights groups filed a Section 5 enforcement action seeking to prevent implementation of the change without preclearance, and the County restored the early voting hours. Those restored voting hours appear to have been critical to the outcome of the election, as approximately 300 Prairie View A&M students exercised the early voting option (compared to only 60 on primary day), and a Prairie View A&M student who ran for a seat on the Commissioners’ Court narrowly prevailed.287

In 2006, after more than 700 votes cast at the city of Prairie View polling station were challenged as having been cast without proper voter registration verification, numerous unprocessed voter registration applications were uncovered in the Election Office.288

In 2008, the County initially decided to offer only one early voting site, which was seven miles from campus, for the November general election. Following pressure from activists who sought an on-campus voting location, the County agreed to move the early voting site to a different location one mile from campus, but declined to create an on-campus voting option.289 Even as late as summer 2013, there was still no polling site on the Prairie View A&M campus. In July 2013, students drafted a letter to the Texas Secretary of State complaining of the lack of an on-campus voting option. The letter successfully pressured the Commissioners’ Court, which finally agreed to install a polling site at the campus student center in September 2013.290

Without Section 5’s protections, it may be difficult to respond as effectively to new threats to the voting rights of Prairie View A&M students.
“In 2012 […] less than one-third of eligible youth went out to the polls in Texas. […] And 36 public institutions of higher education […] and dozens of quality private universities are available here in Texas, yet the voices of young people are still not being heard…”

Crystal Sowemimo, an intern for the Texas Public Interest Research Group, speaking on youth voter turnout in Texas. (NCVR Texas Hearing)