

Voting Controversies

Are U.S. elections being conducted fairly?

Election laws and voting procedures have been a major source of controversy in the United States ever since the stunted recount in Florida that determined the outcome of the 2000 presidential contest. Republicans and Democrats have clashed fiercely in state after state over GOP-backed proposals to require government-approved photo IDs for voters to cast ballots. Republicans say the laws prevent fraud; Democrats say the laws are aimed at vote suppression. Court rulings on the laws are mixed. The Supreme Court added to the controversies with a decision in June to disable a major provision of the federal Voting Rights Act that required some states and localities with a history of discrimination to obtain permission from the government before instituting any change in voting procedures. A bill to restore the provision has been introduced in Congress, but no hearings have been scheduled yet. Election officials are also looking at recommendations from a presidential commission for online registration, more early voting and costly replacement of technologically obsolescent voting machinery.



During the 2012 presidential campaign, demonstrators in Philadelphia protest a controversial law pushed through the legislature by Republicans requiring Pennsylvania voters to show a photo ID. The law, one of more than 20 state voter-ID measures passed since 2005, has been blocked by a court challenge, now awaiting an appeal. Similar laws are being challenged in at least four other states; several others are considering tightening voter-identification procedures.

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Voting Controversies

BY KENNETH JOST

THE ISSUES

With the 2012 presidential campaign underway, Republican legislators in the battleground state of Pennsylvania pushed through a new law requiring voters to show a photo ID before casting their ballots. GOP lawmakers minimized the likely impact of the law, approved on a party-line vote, saying that only 90,000 Pennsylvanians lacked the kind of government-issued photo identification required by the law.

In a damning decision two years later, however, a state court judge found that the law — on hold pending a legal challenge — could disenfranchise up to 5 percent of the state's electorate, or as many as 400,000 otherwise qualified voters. In a 103-page ruling issued on Jan. 17, Judge Bernard McGinley faulted state agencies for doing little to tell voters about the new requirement or the procedures for obtaining a qualifying identification.

McGinley also said the state had failed to show the need for the photo-ID procedure, which GOP legislators said would help prevent voter fraud at polling places. The state “wholly failed to show any evidence of in-person voter fraud,” McGinley wrote.¹

The Pennsylvania law is one of more than 20 state measures establishing or tightening voter-ID requirements passed since 2005. (See *map*, p. 172.) The issue has split the two major political parties. In sponsoring these measures, Republicans say they are needed to prevent fraud and protect the



Getty Images/El Nuevo Herald/David Santiago

Voters in Miami wait to cast ballots in the presidential election on Nov. 6, 2012. A bipartisan commission that President Obama created, partly in response to overlong delays at some polling places, recommended on Jan. 22, 2014, that states upgrade voting machines to keep pace with technological change. The commission also wants more states to adopt online voter registration and allow voting before Election Day — either in person or by absentee ballots.

integrity of elections. Democrats say the laws are not needed and are being pushed in order to reduce voting among groups that skew Democratic in elections, especially Latinos and African Americans.²

The two parties are also divided for the most part on a new issue created by the Supreme Court's June 2013 decision to nullify a key provision of the federal Voting Rights Act used to police racially discriminatory election practices in some parts of the country. The decision in *Shelby County v. Holder* effectively nullified a require-

ment that eight states and localities in four others had to obtain “preclearance” from the Justice Department or a federal court in Washington before instituting any change in election law, procedure or practice.

A bipartisan bill cosponsored by Senate Judiciary Committee Chairman Patrick J. Leahy, D-Vt., and former House Judiciary Committee Chairman James Sensenbrenner, R-Wis., would reimpose the preclearance requirement on states or localities with a recent history of racial discrimination in voting procedures. The bill is aimed at meeting the court's objection that the use of a “coverage formula” dating from the 1960s to determine the jurisdictions subject to preclearance was unconstitutional. Voter-ID laws, however, would be exempt from the new preclearance provision.³

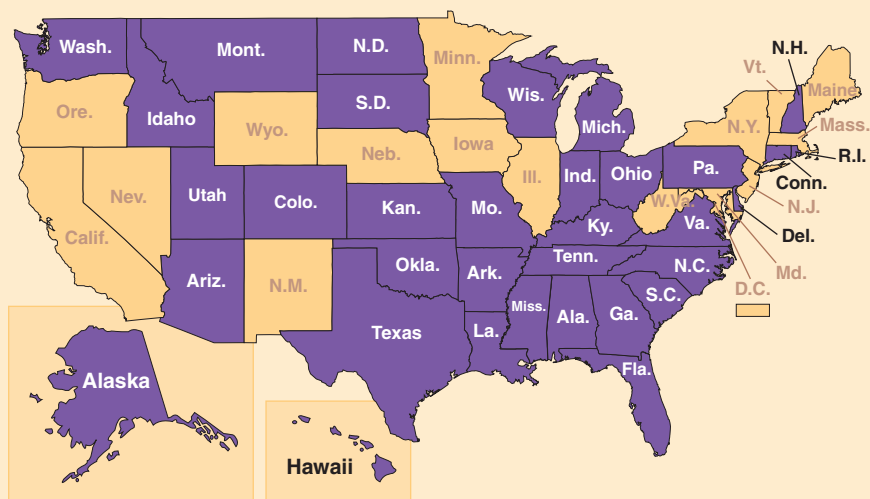
Traditional civil rights and civil liberties groups are strongly supporting the proposed rewrite, as are many Democrats on Capitol Hill. Despite Sensenbrenner's role, some of his leading Republican colleagues oppose the bill, as do some conservative election law experts and advocates. (See “*At Issue*,” p. 185.)

Elections in the United States have been under intense scrutiny ever since the presidency was awarded to George W. Bush in 2000 on the basis of a highly disputed vote count in the pivotal state of Florida. Two years later, Congress passed and Bush signed into law the Help America Vote Act, aimed at helping states upgrade voting machines and improve vote-counting procedures.⁴

Nearly Three Dozen States Have Voter-ID Laws

Thirty-five states have passed voter-ID laws, although some laws are not currently in effect, either because they are too new or because they are being challenged in court. State laws vary widely as to the kinds of identification accepted, with 13 states — since 2005 — requiring photo IDs and others accepting such items as a Social Security card, a birth certificate or a utility bill. State laws also vary as to voters who show up without identification. In some states, for instance, a voter can cast a ballot, but it won't be counted until the voter returns with a qualifying ID.

States That Have Enacted Voter-ID Laws



Source: "Voter Identification Requirements," National Conference of State Legislatures, Feb. 12, 2014, www.ncsl.org/research/elections-and-campaigns/voter-id.aspx#al

A decade later a bipartisan commission that President Obama created in part as a response to reports of overlong delays at some polling places in the 2012 presidential election says states need to upgrade voting machines again to keep pace with technological change. (See sidebar, p. 180.) The Presidential Commission on Election Administration, which released its recommendations on Jan. 22, also wants more states to adopt online voter registration and allow voters to cast ballots before Election Day — either in person or by absentee ballots.

As a new benchmark, the commission recommends that no voter should have to wait in line more than

30 minutes to cast a ballot. The 15-member group was cochaired by experienced election lawyers from both major parties: Democrat Robert Bauer and Republican Benjamin Ginsberg, who served as chief lawyers for the Obama and Romney presidential campaigns, respectively, in 2012.⁵

By deliberately sidestepping the politically contentious issues of voter-ID laws and the Voting Rights Act rewrite, the commission is winning applause for striking a bipartisan chord. "The commission's report is an indication that in a huge core [of election issues] there isn't a split," says David Becker, director of the elections initiative at the Pew Charitable Trusts.

"There's only a split on these highly volatile issues," says Becker, formerly an attorney with the Justice Department's voting rights section. There is "wide agreement," he adds, on "a large core of reform that could have a huge impact on our democracy."

The partisan divide continues, however, in Pennsylvania and other states over voter-ID laws. Pennsylvania's Republican governor, Tom Corbett, who signed the measure into law on March 14, 2012, says the state will appeal McGinley's ruling even as Democrats are urging him not to.

McGinley's ruling cheered opponents of the new crop of voter-ID laws after challenges in several other states had fallen short. The decision may have limited impact, however, because McGinley based it on provisions of Pennsylvania law and the state's constitution guaranteeing equal voting rights.

The judge rejected claims by the plaintiffs, individual voters, the League of Women Voters and the Pennsylvania conference of the NAACP, that the law violated equal-protection clauses in the Pennsylvania and U.S. constitutions. McGinley also found no impermissible partisan motivation in enactment of the law despite the remark by the Republican leader in the Pennsylvania House of Representatives three months after the measure was adopted that it would help Republican Mitt Romney carry the state in November 2012. With the law blocked from taking effect, Obama carried the state with about 52 percent of the vote.

Voting issues are in play in courts and legislatures in several states as well as on Capitol Hill in Washington. Voter ID laws are being challenged in at least four other states — Kansas, North Carolina, Texas and Wisconsin — while legislatures in some states are gearing up to consider tightening voter identification procedures.

"It's definitely an ongoing battle," says Tova Wang, a senior fellow and election reform expert at the liberal

advocacy group Demos headquartered in New York City.

Myrna Pérez, deputy director of election programs at the Brennan Center for Justice, a liberal think tank at New York University School of Law, thinks the wave of new voter ID laws may have crested. “Our hope is that given how much outrage there has been over attempts at voter suppression, some folks will think twice before engaging in such efforts,” she says.

Conservative election law experts bristle at the accusation that new ID laws are aimed at voter suppression. “That’s ridiculous,” says Hans von Spakovsky, a senior fellow at the conservative Heritage Foundation in Washington and a former member of the Federal Election Commission (FEC). “We’ve had election after election” in states with voter ID laws, von Spakovsky says, “and turnout did not go down after those laws went into effect.”

Pérez, one of Obama’s two pending nominees to the U.S. Election Assistance Commission (EAC), the agency created in 2002 to help states upgrade voting machines, also says some state legislatures are likely to move toward easing voting requirements. A new Brennan Center report finds more bills to expand voting rights introduced in state legislatures for 2014 than measures to narrow access to voting.⁶

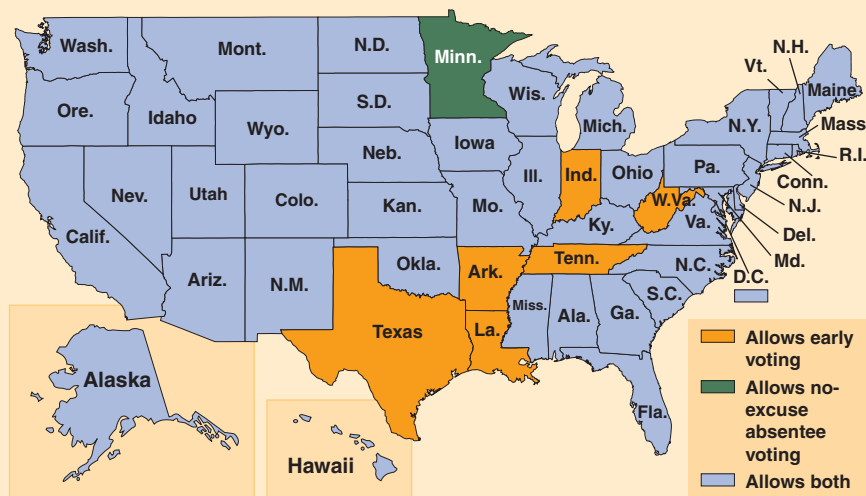
Von Spakovsky, who has criticized Pérez as “a radical, left-wing activist with absolutely no experience in election administration,” says civil rights litigation hampers election officials’ efforts to improve voting procedures. “They are constantly being sued in what I consider to be unwarranted lawsuits, particularly by civil rights organizations,” he says.⁷

Meanwhile, the partisan divide in Washington over election issues is so deep that it threatens the very existence of the EAC. The four-member commission has been short of a quorum — which requires three members — since 2010 and has had no mem-

Most States Have Expanded Voting Laws

Twenty-seven states and the District of Columbia allow voters to cast ballots before Election Day and to get an absentee ballot without giving a reason, called “no-excuse” balloting. Six states, mostly in the South, allow only early voting, and Minnesota has adopted only no-excuse absentee voting.

States with Early Voting and No-Excuse Absentee Voting



Source: “Absentee and Early Voting,” National Conference of State Legislatures, www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#no_excuse

bers at all since 2011. Pérez and a second Obama nominee, Thomas Hicks, appear headed toward likely Senate confirmation after protracted delays, but Republicans are refusing to offer candidates for seats reserved for GOP members because they believe the agency should be abolished. (See sidebar, p. 182.)

As voting and election issues percolate in Washington and around the country, here are some of the questions being debated:

Should Congress revive the Voting Rights Act’s preclearance requirement for some states and localities?

With the Voting Rights Act’s preclearance requirement in effect, Texas was denied permission in 2012 to put into effect its strict photo-ID voting law enacted the year before. Both the

Justice Department and a three-judge federal court said the state had failed to prove that the law would not have a “retrogressive” effect on voting by Latinos and African-Americans.

When the Supreme Court effectively nullified the preclearance requirement in June 2013, however, Texas officials immediately announced they would put the law into effect. The Justice Department responded just two months later with a suit, still pending, seeking to block the law under the Voting Rights Act’s general prohibition — found in Section 2 — against racial discrimination.

Civil rights advocates seeking to reinstate the preclearance requirement say the Supreme Court’s decision has weakened efforts to prevent racial discrimination in voting. The ruling eliminated “a very effective mechanism of preventing states from enacting restrictions

that take away voting rights from minorities,” says Wang, the election law expert at Demos.

The Brennan Center’s Pérez agrees. “Section 2 is an important and helpful tool, but it does not have the scope or the functions of Section 5,” she says, referring to the preclearance provision.

Conservative groups that applauded the Supreme Court’s decision see no need to revive a preclearance process. “There is no need for preclearance because there are powerful

voting change, they have to come into court and prove a civil rights violation, which is the way every other civil rights statute works.”

The Supreme Court decision did not outlaw preclearance; it only invalidated the coverage formula set out in the act’s Section 4, which was based on minority voting turnout during the 1960s. To meet the court’s objections, sponsors of the proposed rewrite crafted a new formula based on recent Voting Rights Act violations.

that formula: Georgia, Louisiana, Mississippi and Texas.

The bill also would continue to allow a court to impose a preclearance requirement on a jurisdiction under the so-called bail-in procedure, but under a relaxed burden of proof. The existing bail-in procedure requires proof of intentional racial discrimination; the bill would allow preclearance to be imposed based on so-called disparate impact on minorities without proof of intentional discrimination.

Supporters of the bill say some form of preclearance is still needed. “We know that there are still efforts to restrict voting rights in our country,” says Pérez.

Conservative groups disagree. “There’s no case to be made that we need Section 5 at all,” says Clegg.

The bill also includes a new provision requiring jurisdictions to disclose, among other items, any changes in voting procedures within 180 days of a federal election. And it retains the attorney general’s existing authority to assign federal observers to elections. But in a concession to political reality sponsors decided to protect photo-ID laws from any need to obtain preclearance.

Civil rights groups supporting the bill regret the exemption for photo-ID laws. “Many of them are clearly discriminatory and do violate the Voting Rights Act and the Constitution for that matter,” says Wang. From the opposite side, Clegg worries that even with a supposed exemption, the Justice Department could go after photo-ID laws by including them along with other election law changes in a Section 2 suit or a bail-in procedure.

Richard Hasen, an election law expert at the University of California-Irvine Law School and publisher of the influential *Election Law Blog*, disagrees with the Supreme Court’s decision and calls the proposed rewrite “sensible.” He also regrets that Congress did not revise the coverage



Getty Images/CO Roll Call/Tom Williams

Experienced election lawyers from both major parties, Republican Benjamin Ginsberg, right, and Democrat Robert Bauer, are co-chairs of the Presidential Commission on Election and Administration. As a new benchmark, the commission recommends that no voter should have to wait in line more than 30 minutes to cast a ballot.

remedies in the rest of the Voting Rights Act that provide remedies for discrimination,” says the Heritage Foundation’s von Spakovsky.

Roger Clegg, president and general counsel of the Center for Equal Opportunity, which opposes racial preferences, agrees. “The only difference between Section 2 and Section 5 is that under Section 5 the defendant has to prove his innocence before he’s allowed to make a voting change,” Clegg says. “Now, if someone doesn’t like a

Under the proposed formula, a state would be subject to preclearance if it had five voting rights violations within the most recent 15-year period, at least one of which was committed by the state itself. A local jurisdiction would be covered if it had three voting rights violations within the most recent 15-year period or one such violation along with “persistent and extremely low minority voter turnout.” Initially, only four states would be covered under

formula after the Supreme Court raised constitutional doubts about the law in an earlier ruling in 2009.

The formula in the new bill might be upheld, Hasen says, but some other parts might not be — specifically, extending the bail-in procedure to unintentional discrimination. And, in any event, Hasen doubts that Congress will approve the bill in the current session.

Should courts strike down voter photo-ID laws?

With Republicans controlling the legislature and governor's office for the first time in years, Indiana became the second state in 2005 (after Georgia) to enact a law requiring virtually all citizens to present a government-approved photo ID to vote. A legal challenge to the law, brought by Democrats and civil liberties advocates, reached the U.S. Supreme Court three years later.

The court's 6-3 decision in April 2008 upheld the law after finding the state's interest in detecting voter fraud to outweigh any burdens on voters. The ruling left the door open, however, to further challenges to the Indiana law.⁸

In the six years since the Supreme Court's decision, the number of states with similarly strict photo-ID voting requirements has grown to 11, according to the National Conference of State Legislatures. Legal challenges have proliferated, but the issues remain much the same. Supporters and opponents disagree sharply on the need for the laws in the first place and the resulting burdens on would-be voters as well as lawmakers' motives in adopting the measures.

Supporters of the laws depict the measures as self-evidently useful in preventing voter fraud at the polling place. To prove the point, the conservative guerrilla filmmaker James O'Keefe had an assistant use a hidden camera to record him posing as

Attorney General Eric Holder at Holder's voting place in Washington, D.C., in April 2012. O'Keefe offered to go get identification, but the election official said there was no need.

O'Keefe stopped before asking for a ballot, but John Fund, a *National Review* columnist and co-author with the Heritage Foundation's von Spakovsky of a book on election fraud, wrote that the episode shows that it is "comically easy to commit voter fraud in person."⁹ Von Spakovsky says voter-ID laws also can prevent other kinds of fraud, including voting by noncitizens, voting under false registration or casting ballots in more than one state.

Opponents of the law repeatedly emphasize the lack of evidence of any measurable amount of voter impersonation fraud. In the Pennsylvania case, lawyers from the office of Democratic Attorney General Kathleen Kane defended the law, but stipulated that there were "no specific incidents of voter ID fraud" leading up to its passage.

"The only fraud uncovered in this case is the ID law itself," Witold Walczak, legal director of the ACLU of Pennsylvania and one of the lawyers for the plaintiffs, said after the decision.¹⁰

Curtis Gans, a longtime U.S. elections expert, faults advocates on both sides. "Those who say there's no fraud are just wrong," says Gans. "Those who say there's huge fraud in elections are also wrong."

Opponents also say the voter-ID laws impose significant burdens on citizens who lack the most common form of government-issued photo identification — a driver's license — and have to obtain an ID specifically for voting. "There's going to be some segment of the population for whom it will be difficult to get the kind of identification they need," says Wang, the election law expert at Demos.

In its decision refusing to preclear the Texas voter-ID law, the three-judge federal court in Washington noted that Texans in some rural counties would have to travel 100 miles or more to obtain a voter ID. Moreover, the court said, the burden "will fall most heavily on the poor."¹¹

Supporters of the law counter with evidence that they say show voter-ID laws have not hurt turnout in states where they have been enacted and that few would-be voters have actually been turned away at the polls. "All the claims that they will suppress votes are just not true," says von Spakovsky. He calls the opponents' arguments "hysterical."

A statistical expert who testified for Texas in the voter-ID case agrees that voter-ID laws are unlikely to significantly affect turnout. "As a practical matter you're very unlikely to see voter-ID have substantive or demonstrable impact on aggregate turnout rates," says Daron Shaw, an associate professor of government at the University of Texas-Austin.

Matt Baretto, an associate professor of political science at the University of Washington in Seattle who has testified for plaintiffs in challenging voter-ID laws, says turnout depends on a host of factors other than identification requirements. But he says the laws definitely have an impact. "There are empirically millions of eligible voters who don't have photo IDs," he says.

Baretto says supporters of voter-ID laws are making "a circular argument" when they point to the low number of would-be voters turned away. "The effect happens before you show up at the polling place," he says. "If you don't have the ID, you don't go to the polling place."

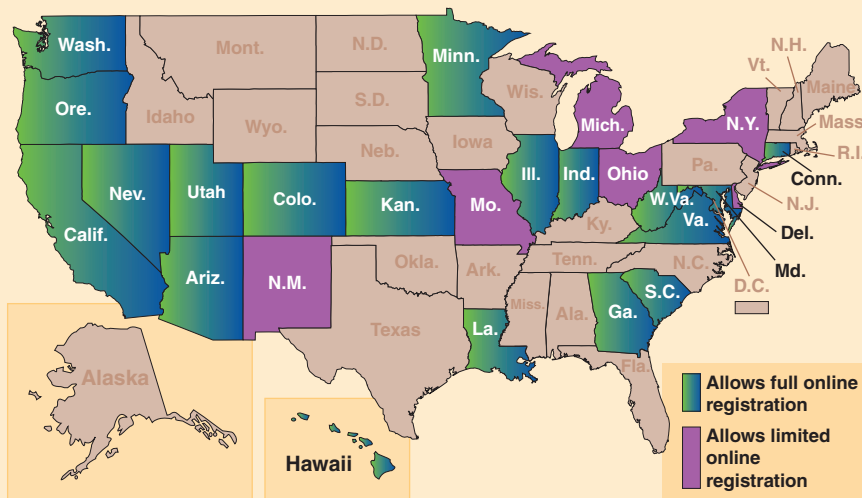
Hasen, the election law expert at UC-Irvine, discounts the claimed rationales for voter-ID laws. "These laws are motivated by an interest in moderately depressing the vote and as a

Online Registration Gains in Popularity

Nineteen states have legislation allowing online voter registration, and six states offer limited online voter registration. For example, registered voters in New Mexico and Ohio can update an existing registration record online, but new applications still must be made on paper.

States That Allow Online or Limited Online Registration

(as of February 2014)



Source: "Online Voter Registration," National Conference of State Legislatures, www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx

means of firing up the base by accusations of fraud," Hasen says. But Hasen, who favors a national voter-identification program, stops short of calling for the current laws to be struck down. "I can't make a blanket normative statement about what courts ought to do," he says.

Should states make registration and voting easier?

Arizona was already a leader among states in using technology to improve government services in 2002 when it became the first state to allow online voter registration. A decade later, about 70 percent of voter registration in the state was done online instead of with paper forms, at a considerably lower cost and with fewer errors.

Experts are enthusiastic about the new procedure, which has now

spread to around 20 states and could gain further ground now that the presidential commission has endorsed it. "Online registration is a no-brainer," says election law expert Hasen. The National Conference of State Legislatures calls online registration "the bipartisan trend in elections."¹²

Even so, some conservatives are raising red flags. The Heritage Foundation's von Spakovsky has no objections to online registration to change a voter's address or other information but opposes the practice for a voter's initial registration. "That is a recipe for voter fraud," von Spakovsky says. "You can't check identity online. You can't verify they are who they really are."

Von Spakovsky is also unenthusiastic about early voting and flatly opposes expanding so-called "no-excuse absentee voting" — two of the other

steps recommended by the presidential commission. "I don't have a problem with more early voting if states want to devote the resources needed to do that, von Spakovsky says. "But you're making campaigns more expensive because campaigns have to mount get-out-the-vote efforts over a longer time."

As for absentee balloting, von Spakovsky again sees the likelihood of increased fraud. "Fraud most often occurs with absentee ballot voting," he says. "They're the easiest ones to steal." In the book he co-authored, von Spakovsky labels absentee ballots the "tool of choice" of vote thieves.¹³

Some of von Spakovsky's concerns are seconded by Gans, the longtime U.S. voting expert. Eased rules for absentee voting are "an enhancement to fraud," Gans says. "You can buy votes and have proof that you bought something. It lends itself to the pressured vote. You can resist the pressure of peers in the voting booth. It's harder to do that in the living room."

Gans sees no risk of increased fraud in early, in-person voting, but he also questions the supposed benefit of increased turnout. "There's no evidence it enhances turnout," Gans says. The experience in states with early voting so far has been mixed, he says. As for eased absentee voting, Gans says the evidence indicates that the practice actually hurts turnout.

Becker, the Pew Trusts election expert, firmly rejects von Spakovsky's fears of fraud from online registration. "There isn't a shred of evidence to support that argument," Becker says.

"Online registration offers something paper registration does not," Becker continues. The process requires personal data from the voter that can be computer-checked against motor vehicle records or other government information. "That's something you can't do with a paper form," Becker says.

Pew has not studied early voting in detail, but Becker sees some benefits.

“The research seems to support the view that early voting can reduce some of the burdens on Election Day,” he says. And he says there is no evidence of increased risk of in-person voter fraud given the use of the same check-in procedure as on Election Day itself.

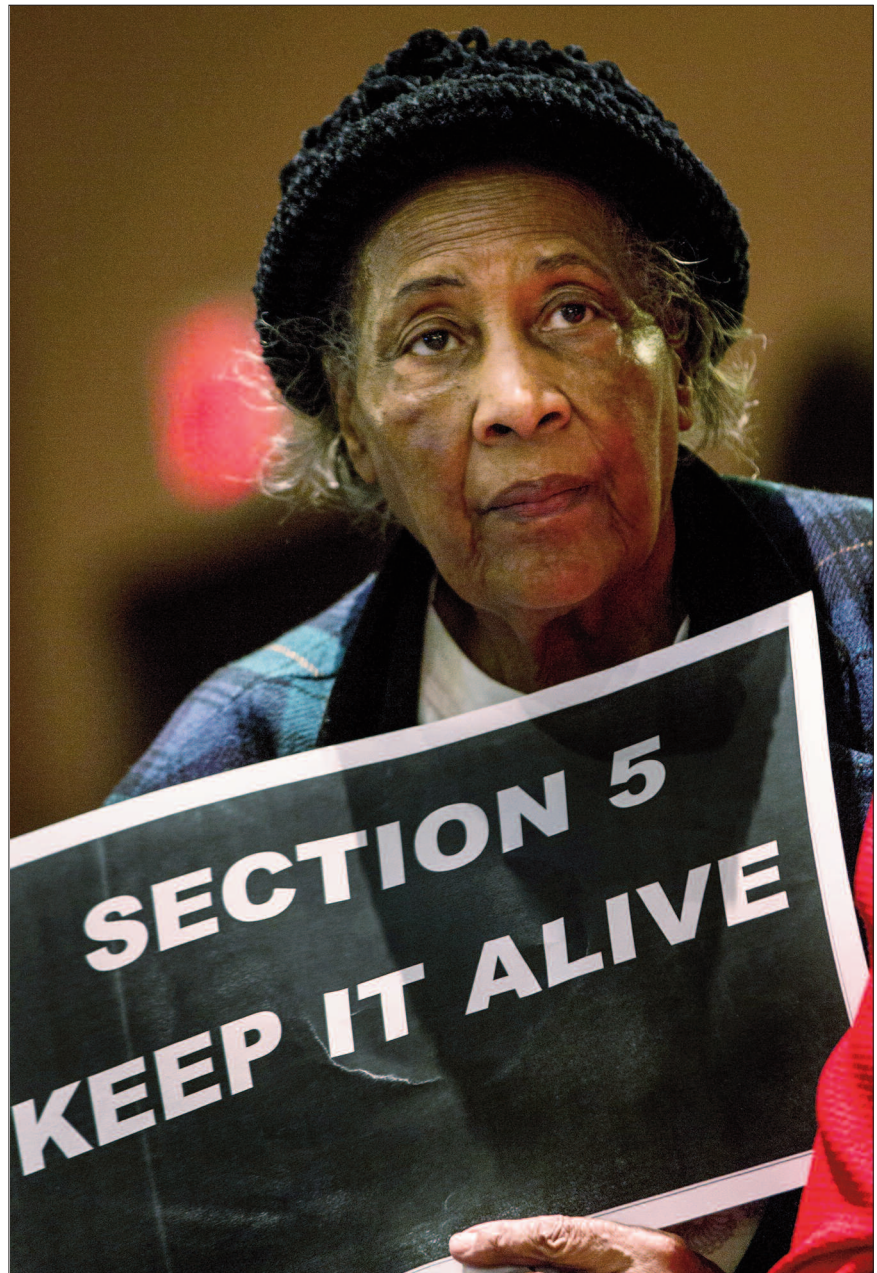
In presenting the commission’s report, co-chairs Bauer and Ginsberg said elections ought to be viewed as a problem of professional administration and voters in effect as the government’s customers. “There are a number of things that go to helping the voter experience and the way that they vote, an issue that both Republicans and Democrats agree on,” Ginsberg said on the “PBS NewsHour,” with Bauer seated beside him.¹⁴

Liberal advocacy groups generally applauded the commission’s recommendations. Michael Waldman, president of the Brennan Center, said in a prepared statement that the commission’s report “marks a significant advance in the way we think about voting.”

Some liberal groups, however, also had reservations. Wang, the reform expert with Demos, is enthusiastic about online registration, but adds, “It’s not going to do very much for the segments of the population who are left out.” Katherine Culliton-Gonzalez, director of voter protection at the New York-based Advancement Project, which is litigating voter-ID law challenges in Pennsylvania and Wisconsin, calls the commission’s report “excellent” but complains it does not address issues of racial discrimination in voting. She favors a national “best practices” law that would prohibit any voting or election procedures shown to have a discriminatory impact on racial or ethnic minorities.

The commission also underscored what it calls the “impending crisis in voting technology.” Voting machines bought 10 years ago are about to reach the end of their useful lives, the report says.

Despite praise for the commission’s report, whether its recommendations



Getty Images/Richard Ellis

A demonstrator in Columbia, S.C., on Feb. 26, 2013, urges the U.S. Supreme Court not to nullify Section 5 of the Voting Rights Act, which requires South Carolina and other states with histories of discriminatory voting practices to get federal preclearance before approving new voting laws. In June 2013, however, the high court effectively nullified the requirement. A bipartisan bill would reimpose preclearance. Civil rights and civil liberties groups strongly support the proposed rewrite; some leading Republicans oppose it, as do some conservative election law experts and advocates.

are adopted depends on the actions of hundreds of state and local election officials. Costs also will be an issue for some of the recommenda-

tions, but Becker is optimistic that election administrators will make sure money is not a problem for some changes.

“I’m already hearing discussions [from officials] trying to find ways to have the best of both worlds,” Becker says. “You can save money and improve performance. It doesn’t have to cost money.” ■

BACKGROUND

‘Forces of Democracy’

Voting rights were very limited when the United States was founded and were determined by individual state governments, which for the most part allowed suffrage only to propertied white men. As states began to loosen wealth and property requirements in the 19th century, the French commentator Alexis de Tocqueville predicted that “forces of democracy” would result inexorably in an expanding suffrage. The further gains in voting rights — for freed slaves, immigrants, women, and young people — were won, however, only after long and hard-fought battles in the courts, Congress, state legislatures and streets.¹⁵

States began to dismantle colonial era property qualifications for voting soon after the Revolution. As the nation’s population grew, states eased or eliminated the laws rapidly in the 19th century, often in response to demands by the new immigrants. Despite the liberalized voting rules, however, 12 states continued to bar “paupers” from voting until the late 1800s.

African-American slaves were not allowed to vote, and so-called freedmen were allowed to vote in only five Northern states: Massachusetts, New Hampshire, New York, Rhode Island and Vermont. New York’s property qualification, however, limited the impact of its provision. The 13th Amendment, ratified in 1865, freed the slaves but did not require

states to grant them the right to vote. Nor did the 15th Amendment, narrowly ratified in 1870, which only prohibited states from using “race, color, or previous condition of servitude” to restrict whatever voting rights they granted in general.

Supreme Court decisions in the 1870s blunted enforcement of the 15th Amendment; a decade later, partisan divisions doomed a Republican-backed bill in Congress to authorize federal monitoring of state elections. Left alone, Southern and border states responded with an array of measures and stratagems to keep African-Americans from voting, including literacy tests and poll taxes. So-called grandfather clauses allowed whites to bypass such requirements if they could show that their grandfathers had voted. In the same era, Northern and Western states threw up barriers to voting to immigrants.

Women’s suffrage, deliberately omitted from both the 14th and 15th Amendments, made little headway until Western territories and states began allowing women to vote in the 1890s and early 1900s. By the 1910s, both parties supported women’s suffrage, but Congress approved the eventual 19th Amendment only after an initial defeat and a special session convened by President Woodrow Wilson in 1919. Ratification was completed on Aug. 18, 1920, on the strength of a single-vote margin in the Tennessee House of Representatives.

Women faced no special barriers to voting after ratification of the 19th Amendment, but blacks continued to be denied voting rights in practice in many Southern and border states. The Supreme Court in 1944 gave blacks an important victory by prohibiting all-white Democratic primaries or conventions in the one-party South. Literacy tests and poll taxes remained in place, however, even as the civil rights movement made progress on other fronts, including racial desegregation in schools and public accommodations.

Physical intimidation and violence also were used in the South to keep blacks from voting, notably on “Bloody Sunday” (March 7, 1965) when police in Selma, Ala., used nightsticks and tear gas to disperse a voting rights march as it set out toward the state capital in Montgomery. National outrage over the incident provided the catalyst for President Lyndon B. Johnson to propose and Congress to pass the strongest federal voting rights law in history. The Voting Rights Act of 1965 prohibited discrimination in voting nationwide and imposed the preclearance requirement on four Deep South states with histories of racial discrimination in voting: Alabama, Georgia, Louisiana and Mississippi. Upheld by the Supreme Court less than a year later, the act helped increase black registration by 1970 to more than 50 percent in all Deep South states.¹⁶

Congress reauthorized the Voting Rights Act in 1970 and included a provision extending the right to vote to 18-year-olds in all federal, state and local elections — a response to Vietnam War-era student activism. A constitutional challenge resulted in a split Supreme Court decision later that year limiting the provision to federal elections. The prospect of different voting rolls for federal versus state elections prompted state election administrators to join in urging adoption of what became the 26th Amendment, setting the minimum voting age at 18 nationwide.¹⁷

Congress reauthorized the act again in 1975 and expanded the preclearance provision to jurisdictions with low voting rates by “language minorities.” The provision generally required bilingual voting materials in jurisdictions with significant language minorities and extended preclearance requirements to Texas and parts of six other states: Alaska and South Dakota (Native Americans) and Arizona, Cali-

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Chronology

1960s-1970s

Voting Rights Act changes election rules in South, elsewhere.

1965-1966

Voting Rights Act passed by Congress, signed by President Lyndon B. Johnson (Aug. 6, 1965); upheld by Supreme Court (March 7, 1966); preclearance provision (section 5) requires four Deep South states to get permission to make any voting, election law changes.

1970

Congress reauthorizes Voting Rights Act, with preclearance provision.

1971

Twenty-Sixth Amendment guarantees 18-year-olds right to vote.

1975

Congress reauthorizes Voting Rights Act; adds provision to protect “language minorities;” extends preclearance provision.

1980s-1990s

Voting Rights Act reauthorized; “motor voter” bill adopted.

1980

Supreme Court limits nationwide Voting Rights Act provision (section 2) to intentional discrimination (April 22).

1982

Voting Rights Act reauthorized for 25 years, amended to prohibit “disparate impact” discrimination (no proof of intent required).

1992

President George H.W. Bush vetoes National Voter Registration Act — the so-called motor voter law — to require states to allow voter

registration at driver’s license offices, welfare agencies (July 2).

1993

With Democrat Bill Clinton in White House, Congress again passes National Voter Registration Act; signed by Clinton (May 20); mandatory provision takes effect 1995.

2000s Voting procedures become partisan battleground.

2000

Supreme Court ends disputed recount of presidential ballots in Florida; ruling in *Bush v. Gore* ensures Electoral College victory for George W. Bush (Dec. 12).

2002

Arizona is first state to allow voter registration online. . . . Help America Vote Act provides federal money, authorizes federal standards for upgrading election technology (signed Oct. 29).

2005

Georgia, Indiana pass new voter-ID laws requiring government-approved photo identification to cast ballots.

2006

Congress reauthorizes Voting Rights Act in near-unanimous votes; preclearance provision extended 25 years (signed July 27). . . . Missouri Supreme Court throws out state voter-ID law (Oct. 16).

2008

Supreme Court upholds Indiana voter photo ID law (April 28). . . . Senate race in Minnesota between Republican incumbent Norm Coleman and Democratic challenger Al Franken goes to recount; after

legal challenge, Franken declared winner in July 2009.

2009

Supreme Court skirts challenge to Voting Rights Act; warns Congress to consider revising preclearance coverage formula (June 22); Congress fails to act.

2011

Eight states adopt or strengthen voter ID laws; five others vetoed by Democratic governors. . . . U.S. Election Assistance Commission is left with no commissioners after remaining two members’ terms expire.

2012

Federal court delays South Carolina voter ID law until after 2012 elections (Oct. 10). . . . Minnesota voters reject voter ID law (Nov. 6).

2013

Supreme Court throws out Voting Rights Act’s coverage formula for preclearance (June 25); Senate, House Judiciary Committees hold hearing on restoring provision (July 17, 18). . . . Texas restores voter ID law; Justice Department sues to block (Aug. 22). . . . Justice Department sues to block North Carolina voter ID law, due to take effect in 2016 (Sept. 30). . . . Tennessee Supreme Court upholds voter ID law (Oct. 17).

2014

Voting Rights Act rewrite introduced; bill would impose preclearance on four states (Jan. 16). . . . State court judge throws out Pennsylvania voter ID law (Jan. 17). . . . Presidential Commission on Election Administration calls for online registration, expanded early voting, election technology upgrades (Jan. 22). . . . Wisconsin Supreme Court to hear arguments on voter-ID law (Feb. 25); ruling in federal court case awaited.

Outmoded Voting Machines Pose ‘Impending Crisis’

Presidential commission says current technology no longer meets election needs.

Barely 10 years ago, state and local election administrators used billions of federal dollars to upgrade the machines used to tabulate election results. But in today’s world of high-tech products, a decade is a lifetime — or maybe two. So the state-of-the-art voting machinery bought before the smartphone and computer tablet era is now sadly out of date.

The situation amounts to an “impending crisis in voting technology,” according to the Presidential Commission on Election Administration. Machines purchased 10 years ago “are now reaching the end of their natural life cycle,” the commission said in its report issued Jan. 22, “and no comparable federal funds are in the pipeline to replace them.” Besides fiscal constraints, election administrators face other obstacles in upgrading vote-counting technology, including out-of-date standards and a relatively small number of manufacturers.¹

“Everything doesn’t last as long as it used to,” says Doug Lewis, executive director of the National Association of Election Officers. “Yet we’ve been locked into this thinking that election equipment should last eight to 10 to 12 years.”

As Lewis recalls, the clunky lever machines that date from the late 19th century and remained in use through the 1950s and ‘60s are now museum pieces — although a few were pulled out of storage in the New York City mayoral primary in September. All but gone as well are the punch-card voting systems of the sort that malfunctioned so critically in Florida’s presidential election in 2000.

The Help America Vote Act, enacted in 2002 in response to the *Bush v. Gore* fiasco, provided federal funds for state and local election agencies to replace the lever and punch-card devices with optical-scan or touch-screen machines. The act also created the Election Assistance Commission (EAC) and authorized it to establish voluntary certification standards for states to use in purchasing voting machines.

In its report, the presidential commission quoted state and local election officials as saying that available machines no longer meet their current needs and that voting machine manufacturers sympathize with the officials’ problems. But manufacturers and election agencies alike are hampered by EAC standards that have not been updated since 2005, in part because of the partisan impasse over the commission’s role that has left the four-member commission without a quorum since 2010. Republicans in Congress want to abolish the EAC and are refusing to designate candidates for the two seats reserved for GOP nominees.

Election technology reformers envision a new world of tablet-like voting machines that 21st century voters will see as thoroughly familiar. “The device on which you record your choice would look like something you use every day,” ex-

plains David Becker, director of the Pew Charitable Trusts’ elections initiative.

The machines could use off-the-shelf software that could be updated without replacing the machines themselves. In addition, the machines could be used for multiple purposes instead of being stored in warehouses in two-year cycles.



AFP/Getty Images/Karen Bleier

A woman votes on Nov. 6, 2012, in Manassas, Va. Voting machines were upgraded nationwide a decade ago, but the Presidential Commission on Election Administration says that they are now out of date and that there are no federal funds designated to replace them.

For now, however, the EAC standards — voluntary but adopted by many states — are designed for the self-contained voting systems brought into service a decade ago. And the presidential commission said concerns about security among the computer science community have slowed manufacturers’ interest in innovation.

Inevitably, cost is also a factor. “These things are not free,” says Becker. Lewis says a new voting system can cost from \$2 million for a small locality to \$240 million for a major metropolitan jurisdiction.

Lewis laments that the United States tends to stay “behind the curve” on voting technology. “In the rest of America, we go for the latest and greatest technology,” he says. “In terms of voting we’re stuck in the past.”

— *Kenneth Jost*

¹ “The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration,” Jan. 22, 2014, pp. 11-13, 62-67, www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf. For coverage, see Martha T. Moore, “Digital voting machines are aging out of use,” *USA Today*, Feb. 3, 2014, p. A4.

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California, Florida and New York (Hispanics). As the decade ended, however, the Supreme Court intervened with a contentious decision that threatened to blunt the usefulness of the act in expanding minorities' rights in voting and elections.

Election Mechanics

Congress and two Republican presidents — Ronald Reagan and George W. Bush — approved long extensions and significant expansions of the Voting Rights Act in 1982 and 2006, respectively. Throughout that period, the Justice Department increasingly used the act's preclearance provision to affect election procedures in covered jurisdictions. Meanwhile, Congress twice turned to improving election mechanics: first with the Democratic-backed 1993 law to facilitate voter registration and then in 2002 with a bipartisan bill enacted after the *Bush v. Gore* controversy to establish and help states meet minimum standards for administration of elections.

Civil rights supporters were disappointed in 1980 when the Supreme Court ruled that the Voting Rights Act's nationwide provision, Section 2, prohibited only intentional racial discrimination.¹⁸ After maneuvering between the Democratic-controlled House and Republican-controlled Senate, Congress expanded the definition of discrimination by prohibiting any voting practice that had the effect of denying a racial, ethnic or language minority an equal opportunity to participate in the political process.

The 1982 reauthorization also extended the preclearance provision, Section 5, for another 25 years. Congress in 1992 extended the bilingual election assistance provisions — due to expire that year — until 2007 as well.

The Supreme Court blessed Section 2's expanded definition of racial discrimination in a 1986 decision that applied the provision to so-called "vote dilution" — defined as any election practice that reduced the ability of a cohesive racial or ethnic minority to elect candidates of their choice.¹⁹ The Justice Department responded by applying this expanded definition to a growing number of election practices, both in suits initiated under Section 2 and in preclearance review under Section 5.

As one important consequence, the Justice Department began pressing states in the South to draw legislative and congressional districts with majority African-American or Latino populations to facilitate election of minority legislators. The Supreme Court in the 1990s cut back on this use of the Voting Rights Act, however, by limiting the extent to which race could be considered in drawing district lines. But the expanded definition of racial discrimination also allowed the Justice Department to require preclearance of seemingly minor ground-level voting changes — such as moving a polling place away from a location convenient to minority voters.

In the meantime, Democrats in Congress had succeeded in enacting the so-called motor voter bill, formally the National Voter Registration Act. The law stemmed from efforts of two liberal college professor activists, Frances Fox Piven and Richard Cloward, who thought it possible to increase voter turnout by allowing registration at motor vehicle departments or other government agencies.

President George H. W. Bush vetoed the Democratic-backed legislation on July 2, 1992. With Democrat Bill Clinton in the White House, however, the Democratic-controlled Congress quickly passed the measure again and Clinton signed it into law on May 20, 1993. About half the states already allowed registration through

motor vehicle departments, but Republicans arguing against the bill warned the measure would be expensive and invite fraud.

Congress's second major initiative on the mechanics of elections followed the embarrassing spectacle of Florida's disputed recount in the *Bush v. Gore* election in 2000.²⁰ Bush's 537-vote victory in the election-deciding state of Florida was certified and then left standing by the U.S. Supreme Court after a month of recounts and litigation that highlighted poorly designed ballots and inconsistent standards for tallying disputed votes. Responding to the controversy, a privately sponsored commission co-chaired by former presidents Jimmy Carter and Gerald R. Ford issued a report in July 2001 calling for, among other changes, creation of a new federal agency to oversee federal responsibilities for nationwide elections.²¹

Republicans and Democrats argued about provisions of the Help America Vote Act for more than a year until finally achieving strong bipartisan majorities for the version that Bush signed into law on Oct. 29, 2002.

As enacted, the law consigned punch card and lever voting machines to the waste heap and authorized \$3.9 billion in federal money to help states and localities replace machinery, train poll workers and computerize registration lists. New identification requirements led major Latino groups and the American Civil Liberties Union (ACLU) to oppose the final bill, but the act required election officials to establish procedures for would-be voters challenged at the polls to cast provisional ballots and to have their votes counted after presenting sufficient evidence later.

Congress returned to the Voting Rights Act in 2005 as the act's preclearance provision was set to expire the next year. Fearing potential review by the Supreme Court, the House and Senate judiciary committees assembled up-to-date evidence on, among other

Leadership Vacuum Stymies Election Agency

Partisan infighting leaves Election Assistance Commission lacking a quorum.

Arizona, Georgia and Kansas faced an unusual problem when they asked the federal Election Assistance Commission (EAC) for permission to revise a federally prescribed voter registration form to include a state law requirement for proof of citizenship. The problem: the EAC had no Senate-confirmed commissioners to act on the request, the result of a partisan impasse that has left the commission without a quorum for nearly four years and with no members at all for two.

When Congress created the four-member panel in 2002, it specified that the House and Senate majority and minority leaders should each nominate a commissioner to be appointed by the president. Republicans have refused to designate candidates since 2010 as commissioners' terms have expired and have been able to thwart Senate confirmation of Democratic nominees.

The Senate is trying to ease the impasse somewhat by getting ready to move the nominations of two Democratic voting-rights advocates toward a floor vote. But even if Thomas Hicks and Myrna Pérez are confirmed, the EAC will still be shy of the three members required for a quorum as long as Republicans refuse to submit candidates for the two seats reserved for GOP nominees.

House Republicans have waged a long campaign to abolish the agency, created in the Help America Vote Act, passed in 2002 after the *Bush v. Gore* presidential election fiasco. GOP lawmakers, led by Rep. Gregg Harper of Mississippi, contend

that the EAC has accomplished its original goal of helping states fund new voting technology. Harper calls the agency, with about 30 employees and an \$11 million operating budget in 2013, a "bloated bureaucracy."¹

Democrats say the commission is still needed. When the House Committee on Administration voted to kill the agency on June 5, the panel's top Democrat, Pennsylvania's Robert Brady, said the commission has "an important, valuable role" and was "worth reauthorizing."

Hicks, senior elections counsel for the House Administration Committee and a former staffer with the public interest group Common Cause, was nominated by President Obama in March 2010 on the recommendation of House Democratic Leader Nancy Pelosi. Pérez, senior counsel at the Brennan Center for Justice at New York University School of Law, was nominated in June 2011 on the recommendation of Senate Democratic Leader Harry Reid.

After his reelection, Obama renominated Hicks and Pérez on June 11, 2013, and they appeared before the Senate Rules Committee for a second confirmation hearing on Dec. 11. As acting chairman, Sen. Angus King, an independent from Maine who caucuses with Democrats, said both were "well qualified." The committee's top Republican, Sen. Pat Roberts of Kansas, also acknowledged the nominees' qualifications, but reiterated the GOP goal of abolishing the agency. "The EAC has fulfilled its purpose and should be eliminated," Roberts said.²

factors, black vs. white turnout and registration in covered and uncovered jurisdictions. The evidence was ambiguous: African American turnout and registration had seemingly increased to comparable levels as whites; and the Justice Department was denying fewer requests to preclear election changes — only 92 objections in the previous 10 years.

Even so, the political difficulties entailed in rewriting the coverage formula led Congress in the end to leave it unchanged and extend the preclearance provision for another 25 years. Lawmakers in both chambers approved the bill by overwhelming margins — 390-33 in the House, 98-0 in the Senate — and President Bush signed it into law in a photo-op ceremony on July 27, 2006.²²

'Voting Wars'

The bipartisan support for extending the Voting Rights Act was not enough to deflect the constitutional challenge to the law or prevent the Supreme Court's eventual decision to neuter the preclearance provision by throwing out the act's coverage formula. In the meantime, voting controversies intensified as Republicans pushed and Democrats resisted new state voter-ID laws, eventually challenging them in court. In addition, some high-profile close elections were settled only after contentious and litigious recounts akin to *Bush v. Gore*. For his book chronicling the decade, election law expert Hasen chose an apt title: *The Voting Wars*.²³

Laws requesting voters to present identification were on the books in 14 states as of 2001 but were lightly enforced, according to the National Conference of State Legislatures.²⁴ Would-be voters without identification were allowed to cast ballots after signing an affidavit or having an election official or other voter vouch for their identity. The strict laws pioneered by Georgia and Indiana in 2005 demanded a photo ID and required anyone without one to cast a provisional ballot that would be counted only if the citizen returned to the elections office with proper identification within a matter of days.

Indiana's law survived a legal challenge intact, but Georgia eased its enforcement provisions a bit to win preclearance from the Justice Department

The EAC rankled Republicans when a draft staff report prepared in 2006 cast doubt on allegations from GOP lawmakers about voting place fraud, which GOP lawmakers cite as the reason for stricter voter photo-ID laws. The draft report stated that there was “widespread but not unanimous agreement that there is little polling place fraud.” The commission revised the final report, however, to state, in its executive summary, that “there is a great deal of debate on the pervasiveness of fraud.”³

Election law watchers say the lack of leadership at the top has combined with turnovers in the major staff positions of executive director and general counsel to bring the EAC to a virtual standstill. Among other issues, the lack of a quorum is preventing the adoption of new certification standards for voting machines; the new standards are needed, according to the just-released report by the Presidential Commission on Election Administration, to allow replacement of technologically obsolescent equipment.⁴

Arizona, Georgia and Kansas encountered the agency’s leadership vacuum when they asked for permission to revise the federally prescribed voter registration form for federal elections to include instructions to provide proof of U.S. citizenship to vote in state elections. The commission’s 46-page memorandum rejecting the request, issued on Jan. 17, was signed by Alice Miller as chief operating officer and acting executive director.⁵

The leadership vacuum will continue for at least a little while. The Senate Rules Committee was due to vote on the Hicks and Pérez nominations on Feb. 12, but had to put off the action because of the lack of a quorum until after the Senate’s Presidents Day recess. With a Democratic majority, the committee is certain to approve the nominations, but Republicans could use a number of parliamentary maneuvers to delay or possibly prevent a floor vote.

— *Kenneth Jost*

¹ See Deborah Barfield Berry, “House panel OKs ending Election Assistance Commission,” *USA Today*, June 5, 2013, www.usatoday.com/story/news/politics/2013/06/04/house-panel-approves-eliminating-election-commission/2389737/; other background drawn from story. See also U.S. Election Assistance Commission, “2013 Activities Report,” www.eac.gov/assets/1/Documents/2013%20Activities_Report%20_FINAL%20website%20version,%201-31-14.pdf.

² The 59-minute hearing can be viewed at <http://tinyurl.com/19b8pfj>.

³ See Ian Urbina, “U.S. Panel Is Said to Alter Finding on Voter Fraud,” *The New York Times*, April 11, 2007, p. A6.

⁴ See “The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration,” Jan. 9, 2014, pp. 62-66, www.youtube.com/watch?v=xCUMXpU6N3k.

⁵ “Memorandum of Decision Concerning State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form,” U.S. Election Assistance Commission, Jan. 17, 2014, EAC-2013-0004, www.eac.gov/assets/1/Documents/20140117%20EAC%20Final%20Decision%20on%20Proof%20of%20Citizenship%20Requests%20-%20FINAL.pdf.

and eventually a favorable ruling in federal court. Meanwhile, however, the Missouri Supreme Court struck down a photo-ID law just as it was about to take effect for the November 2006 election.

Legislative activity spiked again in 2011 as eight states adopted new or strengthened identification requirements. In five other states, however, Democratic governors vetoed photo-ID bills. And in November 2012 Minnesota voters rejected a proposed constitutional amendment that would have required a photo ID to cast a ballot; the measure failed by about 100,000 votes out of nearly 3 million cast.

In the meantime, Minnesota had provided the country a rerun of sorts of the *Bush v. Gore* battle with its November 2008 contest between incum-

bent Republican Sen. Norm Coleman and his Democratic challenger, former television comedian Al Franken. As Hasen relates the story, Coleman held a 725-vote lead after an initial Election Night tabulation. The margin fell to 215 votes after a statewide canvass completed on Nov. 18 — so narrow as to trigger a mandatory recount under state law. After counting more than 900 wrongly rejected absentee ballots, the state’s canvassing board certified Franken the winner by 225 votes, but Coleman contested the election in state court.

The Minnesota Supreme Court ruled for Franken, allowing him to be sworn in on July 2009. Hasen comments that the Minnesota rivals appeared to change positions as the vote count shifted. Coleman initially called for “a heal-

ing process” after the close vote before launching his court challenge once Franken was certified the winner. For his part, Franken switched from a “count every vote” position while he was behind to a “strict compliance” stance once he had gained the lead.²⁵

By Franken’s swearing in, the Supreme Court had added to election-related issues by sending a strong signal to Congress that the Voting Rights Act might be constitutionally defective. The court’s June 22, 2009, decision in *Northwest Austin Municipal Utility District No. 1 v. Holder* stemmed from a challenge brought by a local utility district in suburban Austin, Texas, that chafed under the Justice Department’s preclearance review of the relocation of a polling place. The utility district argued that Congress was wrong to

subject Texas and other Southern states to preclearance requirements long after they had dropped the blatantly discriminatory practices in effect before 1965.

and local jurisdictions to preclearance based on 40-year-old statistics.

With no coverage formula, the preclearance provision was reduced to a dead letter. Vermont's Sen. Leahy among

state voter-ID laws, but supporters of the measures believe they will survive court tests.

With legal challenges pending in five states, opponents of photo-ID laws won the most recent round in Pennsylvania and are hopeful as suits in Wisconsin reach critical stages. Judges have yet to rule on pending suits in Texas and North Carolina brought separately by civil rights groups and the U.S. Justice Department or in a recently filed private suit in Kansas.

In Wisconsin, a federal judge is expected to rule soon on a challenge to the state's photo-ID law after presiding over a two-week trial in November. In the meantime, the Wisconsin Supreme Court decided to hear consolidated cases brought by the League of Women Voters and the state NAACP on Feb. 25 after a state appellate court upheld the law in one of the suits.

In Pennsylvania, lawyers for Gov. Corbett filed a motion before Judge McGinley on Jan. 27 urging him to reconsider his decision ruling the state's law unconstitutional. The lawyers argued that problems in making voter-ID cards available did not require the law to be struck down. But they also said that if McGinley does not change his mind, the law should be put on hold to avoid confusion in this year's primary and general elections.

The Justice Department and civil rights groups are separately challenging photo-ID requirements in both North Carolina and Texas. The Texas law will be in effect in the March 4 statewide party primaries because the Supreme Court's decision on the Voting Rights Act lifted the need for federal preclearance. The NAACP and Mexican American Legislative Caucus sued the state in federal court in Corpus Christi challenging the photo-ID requirement in September, the month after the Justice Department had filed its similar suit in the same court.

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Getty Images/Bloomberg/Paul Morris

Voters fill out ballots at a polling station in San Francisco on Nov. 6, 2012. Douglas Lewis, executive director of the National Association of Election Officials, sees a trend toward liberalizing voter access through online registration and early voting. Online registration "is coming one way or another," he says. Giving voters more opportunities to cast ballots early is "also of value."

Conservative justices appeared sympathetic to the position in oral arguments, but the court skirted the issue in an 8-1 decision written by Chief Justice John G. Roberts Jr. The ruling merely gave local jurisdictions a greater opportunity to "bail out" of the preclearance provision. Roberts added, however, that the preclearance requirement raised "serious constitutional questions."²⁶

Congress's failure to rewrite the coverage formula set the stage for a new challenge, this one by Shelby County, Ala., a predominantly white county in the Birmingham metropolitan area. As in the earlier case, a three-judge federal district court upheld the constitutionality of the preclearance requirement, but the Supreme Court's 5-4 decision on June 26, 2013 — again written by Roberts — faulted Congress for an "irrational" decision to subject states

others vowed to revive the provision, and committee hearings were held within the month in both the House and Senate. By the end of the year, however, lawmakers working on the issue were still talking behind the scenes about how to fashion a bill that might command bipartisan support in the Republican-controlled House and Democratic-controlled Senate. ■

CURRENT SITUATION

Court Cases

Civil rights groups are voicing optimism about legal challenges to

At Issue:

Should Congress pass the proposed Voting Rights Act rewrite?



SEN. CHRIS COONS, D-DEL.
MEMBER, SENATE JUDICIARY COMMITTEE

WRITTEN FOR *CQ RESEARCHER*, FEBRUARY 2014

We've come a long way since the Voting Rights Act was adopted in 1965, but we're not yet where we need to be. Discrimination still exists, and we'll never stop it by pretending it doesn't.

The Supreme Court's *Shelby County v. Holder* decision last June left a dangerous gap in our voter protections by gutting the preclearance system that allowed the Department of Justice to stop proposed discriminatory voting changes before they take effect. Since then, numerous jurisdictions have implemented voting changes that the preclearance system would have blocked. More are on the way, and together these changes serve as a sad reminder that Voting Rights Act protections are still critically necessary.

The Voting Rights Amendments Act of 2014 will restore the vitality of the law in jurisdictions where aggressive voting rights enforcement is still needed. The Supreme Court threw out the old formula for deciding which jurisdictions were subject to preclearance because it was based on 50-year-old data. This bill would base preclearance on a formula that looks clearly and soberly at the modern challenges facing voters.

Detractors criticized the old preclearance formula for applying only to the old South — even jurisdictions that no longer discriminate — while not covering states and counties in which race- or language-based discrimination has emerged over the past 50 years. This bill responds to those charges, as well. Jurisdictions with a history of discrimination but that no longer propose and enforce discriminatory practices will now no longer be subject to preclearance. Jurisdictions that enact new, discriminatory voting laws will be eligible for preclearance, whether or not they have been subject to preclearance in the past.

This bill also makes voting rights and elections more transparent, ensuring the public has access to basic information about polling places, election law changes and redistricting, so voters can feel confident elections are fair.

Under the leadership of Judiciary Chairman Patrick Leahy, Sen. Dick Durbin and Reps. James Sensenbrenner, John Conyers and John Lewis, we've crafted a bipartisan bill designed to be both effective and able to pass this Congress. It's practical, can become law and would survive future legal scrutiny.

It is a modern voting rights bill to confront modern voting rights challenges. It's time for Congress to pass this legislation and restore our democracy's fundamental promise of free and fair access to the ballot box.



REP. LYNN WESTMORELAND, R-GA.
MEMBER, COMMITTEE ON FINANCIAL SERVICES, TEA PARTY CAUCUS

WRITTEN FOR *CQ RESEARCHER*, FEBRUARY 2014

Everyone agrees that the significant burdens imposed by preclearance under the Voting Rights Act were desperately needed when they were passed in 1965. But that was nearly 50 years ago. Since its passage, we have seen dramatic changes across the country, especially in the South, that point to the fact that the law needed updating. Georgia has four African-American members of Congress and some of the highest minority voter turnout in the country. In fact, in November 2012, a higher percentage of registered African-American women turned out to vote than registered white women or men.

Because of the major changes since the dark days of the 1960s, the Supreme Court's ruling in *Shelby County v. Holder* last year that the preclearance formula used under Section 5 of the Voting Rights Act was unconstitutional should not have come as a surprise. This law used outdated information to set the formula for preclearance and punished certain areas of the country for the sins of their fathers and grandfathers. To put it in perspective, a person who became eligible to vote the year the law was adopted became eligible for Medicare last year.

I pushed hard to update the coverage formula — the portion the court struck down — when the law was reauthorized in 2006. Unfortunately, my pleas fell on deaf ears. I applauded my colleague from Wisconsin Rep. Jim Sensenbrenner for attempting to update the law, but unfortunately cannot agree with his method.

First and foremost, the proposed update doesn't change the scope of preclearance, which is a huge burden to jurisdictions and was a major consideration in the Supreme Court's decision on the old formula. Second, it continues to punish entire states for the actions of counties — even if the state government has no control over its counties, as is the case in Georgia. Third, it backdates coverage to include any election changes made since the formula was overturned last year, punishing states at a time when they didn't realize they would be punished. Fourth, it defines which races will be the "majority" and "minority" for all time, even if that is not true in a particular state or jurisdiction, making the law less able to account for changing conditions. Finally, it disproportionately punishes states that were under the unconstitutional formula because all existing objections raised under the old preclearance system still count toward coverage — something that is not true for other states.

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The department also filed suit in September challenging North Carolina's new voting law, shortly after the state's Republican governor, Pat McCrory, signed it into law. The government's suit challenges not only the photo-ID requirement, but also other provisions that reduce early voting by one week, limit same-day registration and tighten procedures for counting provisional ballots. The League of Women Voters and the North Carolina branch of the A. Philip Randolph Institute had filed a comparable suit in state court just days after McCrory signed the bill.

In Kansas, Topeka attorney Jim Lawing is representing two voters who are challenging the photo-ID requirement in state court after being prevented from casting ballots in 2012. Secretary of State Kris Kobach, a Republican known for promoting measures to require proof of citizenship for voting, moved to have the case tried in federal court instead. Lawing is opposing the move; the issue is pending.

In all of the cases, state officials are defending the laws, with the Wisconsin suits closest to resolution pending a possible appeal to the U.S. Supreme Court. In Wisconsin, as in Indiana in 2005, the photo-ID law was adopted in 2011 shortly after Republicans gained control of both legislative chambers and the governor's office. The law requires specified forms of government-issued photo IDs; a voter without qualifying identification may cast a provisional ballot, but must provide the right kind of identification by the end of the week for the vote to be counted.

The NAACP and League of Women Voters filed separate suits challenging the law and won rulings to strike it down. In the league's case, however, an intermediate appellate court upheld the law in March 2013. With the NAACP case pending at a different appellate court, the state's Supreme Court de-

cidated to hear both cases on Feb. 25. In the meantime, U.S. District Court Judge Lynn Adelman has under advisement a comparable suit, filed by the League of United Latin American Citizens, among other groups, after a two-week trial in November and filing of briefs in December.²⁷

The Advancement Project is providing lawyers in the Pennsylvania case and the federal case in Wisconsin. Culliton-Gonzalez calls the ruling in Pennsylvania "a great victory" and feels optimistic about Wisconsin. "I feel like the tide has turned," she says.

The Heritage Foundation's von Spakovsky, however, feels the challengers will come up short. "We're going to have years and years of experience with states, which will show that claims against [photo-ID laws] are hot air," he says.

Shift in Legislation?

State lawmakers are throwing more bills into the hopper this legislative season to ease access to voting than measures to make it harder to participate in elections, according to a compilation by the Brennan Center for Justice.

The center, which strongly backs moves to increase access to voting, counts 190 bills introduced in 31 states in that direction so far in 2014, nearly four times greater than the 49 bills to restrict access to voting introduced or carried over from the previous year.

The trend is less pronounced, however, when counting only bills that the center considers "active" — based on hearings or other action. The center counts 12 "expansive" bills active in seven states on such topics as modernizing voter registration and increasing early voting opportunities. The center counts five "restrictive" bills active in four states, primarily bills to establish or tighten photo-ID requirements.²⁸

"The beginning of 2014 shows real momentum toward improving our elections, both in the states and nationally," the center says in introducing the report. At the federal level, the report notes the introduction of the bipartisan Leahy-Sensenbrenner measure in the House and the Senate to revive the Voting Rights Act provision requiring some states and localities to obtain preclearance before any voting or election law change.

Using the Brennan Center's terminology, however, the proposed rewrite of the Voting Rights Act was not "active" as of early February. Despite the photo-op introduction of the bill in January, neither the House nor Senate Judiciary panel has scheduled hearings on the bill.

The Heritage Foundation's von Spakovsky discounts the center's reading of the political climate on the issues. "They're declaring victory before they've achieved victory," he says after quickly reviewing the center's report. "I actually don't think that they're winning momentum."

The apparent trend toward liberalizing voting laws comes after a year when the opposing election-law camps swapped victories, according to the National Conference of State Legislatures. In its report for 2013, the group noted the enactment of strict photo-ID laws in Arkansas and North Carolina offset by adoption of online registration in Illinois and West Virginia. Virginia enacted laws adopting both practices.

Same-day registration was adopted in Colorado, the conference reports, but eliminated as part of North Carolina's omnibus election law overhaul. Colorado also moved toward all-mail elections, while Florida restored early-voting opportunities to what had been available before a restrictive 2010 enactment.

The head of the organization for local election administrators also sees a trend toward liberalizing voter ac-

cess through online registration and early voting, as recommended by the Bauer-Ginsberg election law reform commission. Online registration “is coming one way or another,” says Doug Lewis, executive director of the National Association of Election Officials. Giving voters more opportunities to cast ballots early is “also of value,” he says.

In addition to online registration and early voting, the Brennan Center favorably notes bills introduced in 11 states to allow students under age 18 to preregister so they are registered as soon as they reach voting age. The center also applauds introduction of bills in seven states to make it easier for felons to regain voting rights.

The center’s list of restrictive bills include proposals to require proof of citizenship for voting, to limit voter registration mobilization drives and to make it easier to remove voters from registration rolls.

Lewis applauds the presidential commission for “a credible job of looking at a limited number of issues” in its report. Like the commission, Lewis says long wait times are a problem for some voters—though he says 97 percent of voters cast ballots within 14 minutes. He says the commission’s recommendation that no voter should wait more than 30 minutes to cast a ballot is “not a bad goal,” but says election administrators think a one-hour limit is more achievable.

Like the commission, Lewis sees a “looming crisis” in voting technology. “The biggest danger to American elections today is state and local governments trying to force equipment to be used longer than it was designed for,” Lewis says. But he fears that fiscally strapped state and local governments may continue to defer needed replacement of outdated equipment. ■

OUTLOOK

Continuing Debates

When Texans go to the polls in party primaries on March 4 to choose candidates for congressional and state offices, it will be the biggest test to date of a strict voter photo-ID law. And Republicans and Democrats in Texas are differing on the likely impact of the law just as the two major parties disagree nationwide on the need for such measures.

Texas, second in population to California, is the nation’s biggest state to require voters to present a government-approved photo identification before casting a ballot. Democrats in Texas are warning the law will confuse voters and dampen turnout, while Republicans are discounting the fears.

As evidence, GOP leaders, including Greg Abbott, state attorney general and leading contender for the party’s gubernatorial nomination, point to the turnout in the November 2013 statewide balloting on constitutional amendments. With the ID law in effect, turnout averaged about 1.1 million votes on nine measures, around 50 percent higher than the average turnout of 672,000 in a comparable election two years earlier with 11 amendments to be voted on.

Still, the Democratic majority on the Dallas County Commissioners Court was concerned enough about voter turnout to approve \$145,000 in October for an informational mailing to explain the new law. The court was debating a second appropriation of \$165,000 in February as the primaries approached. The court’s lone Republican opposed the expenditures.

Whatever the turnout may be in the March 4 races, the arguments over the impact of voter-ID laws in Texas and

elsewhere appear likely to continue, unresolved. Shaw, the University of Texas political scientist, notes that turnout can be affected by any number of factors — from the level of interest in the contests themselves to Election Day weather and transportation conditions. “It’s hard to disentangle” the effect of any single factor, Shaw says.

The parties are also likely to continue to fight over proposals to enact or to tighten ID requirements, according to election law expert Hasen. “There are fundamental disputes over whether to make voting easier,” he says. “Democrats want to make voting easier. They see voting as about the allocation of power among equals. Republicans see voting more as a test to determine the best candidate — in which case imposing hurdles weeds out voters who are least informed.”

The opposing camps also differ on the likely course of court rulings on voter-ID laws. Supporters, such as the Heritage Foundation’s von Spakovsky, predict most laws will be upheld, while the Advancement Project’s Culliton-Gonzalez and other opponents expect more victories like the one in Pennsylvania.

The Pennsylvania ruling, however, gives the state government a chance to revive the law if sufficient resources are provided to help voters obtain qualifying identification. For his part, Baretto, the University of Washington professor who testified for the plaintiffs in the Pennsylvania case, expects courts to examine ID laws with “more scrutiny,” even in cases where the laws are not struck down.

In Washington, supporters of the proposed rewrite of the federal Voting Rights Act are working behind the scenes to try to muster Republican support that the bill will need to advance in the GOP-controlled House. Without referring specifically to the bill, Vice President Joe Biden used a Martin Luther King Day appearance to

call for reviving the Voting Rights Act in the wake of the Supreme Court's decision last year. For his part, Attorney General Holder went before a criminal justice reform symposium at Georgetown Law School in Washington to call for restoring voting rights for felons.²⁹

As for the rest of the nation's election machinery and procedures, more attention is on the agenda, but the prospects for concrete action are cloudy. Online registration may advance, given its claimed advantages of greater accuracy at less expense. But the parties' opposing views on whether to make voting easier raise doubts about the presidential commission's recommendations for more early and no-excuse absentee voting. And fiscal realities threaten the commission's urgent recommendation to upgrade vote-counting technology.

The nation got a wake-up call on the problems of administering elections in 2000, according to Becker, head of the Pew elections initiative. Despite the mixed forecast for changes, he sees the past decade-plus of debates as necessary and useful.

"America should be a model for the world in democracy," Becker says, "and that means harnessing technology to build an election system that is as accurate, convenient, cost-effective and efficient as possible." ■

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About the Author



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FOR MORE INFORMATION

Advancement Project, 1220 L St., N.W., Suite 850, Washington, DC 20005; 202-728-9557; www.advancementproject.org. The multiracial civil rights organization works with community organizations on election reform and other issues.

American Civil Liberties Union, 125 Broad St., New York, NY 10004; 212-549-2500; www.aclu.org/voting-rights. The ACLU's Voting Rights Project participates in litigation against photo-ID laws and other election issues; also provides news, analysis and research reports.

Brennan Center for Justice at New York University School of Law, 161 Avenue of the Americas, New York, NY 10013; 646-292-8310; www.brennancenter.org. The nonpartisan law and policy institute publishes research, analysis and litigation documents on major election law issues.

Election Assistance Commission, 1335 East West Highway, Suite 4300, Silver Spring, MD 20910; 301-563-3919; www.eac.gov. The federal agency is an independent bipartisan commission established in 2002 to assist states and localities in improving election administration and implementing provisions of the Help America Vote Act.

Fair Elections Legal Network, 1825 K St., N.W., Suite 450, Washington, DC 20006; 202-331-0114; <http://fairelectionsnetwork.com>. The network of lawyers works to remove barriers to voting and improve election administration across the United States.

Heritage Foundation, 214 Massachusetts Ave., N.E., Washington, DC 20002; 202-546-4999; www.heritage.org/issues/legal. The conservative think tank advocates stricter ID requirements for voting.

Mexican American Legal Defense and Educational Fund (MALDEF), 634 S. Spring St., Los Angeles, CA 90014; 213-629-2512; www.maldef.org. The longtime civil rights organization works on voting rights issues affecting Latinos.

NAACP, 4805 Mt. Hope Drive, Baltimore, MD 21215; 877-622-2798; www.naacp.org. The longtime civil rights organization participates in voting rights advocacy at the federal, state and local levels.

NAACP Legal Defense and Educational Fund, 99 Hudson St., 16th floor, New York, NY 10013; 212-219-1900; www.naacpldf.org. The organization — separate from the NAACP — litigates on voting rights issues in federal and state courts.

National Association of Election Officials, 21946 Royal Montreal Drive, Suite 100, Katy, TX 77450; 281-396-4309; <http://electioncenter.org>. The professional association represents government employees who serve in voter registration and elections administration.

National Association of Secretaries of State, 444 North Capitol St., N.W., Suite 401, Washington, DC 20001; 202-624-3525; www.nass.org. The association represents secretaries of state from the 50 states, the District of Columbia, Puerto Rico and American Samoa, most of whose offices have responsibility for administering elections in their jurisdictions.

National Conference of State Legislatures, 7700 East First Pl., Denver, CO 80230; 303-364-7700; www.ncsl.org. The nonpartisan organization furnishes the most complete and up-to-date information on states' voter-ID laws and other election-related measures.

Project on Fair Representation, c/o Project Liberty, 109 N. Henry St., Alexandria, VA 22314; 703-505-1922; www.projectonfairrepresentation.org/. The project sponsored the litigation that resulted in the Supreme Court's decision to invalidate the Voting Rights Act's preclearance coverage formula.

True the Vote, P.O. Box 27368, Houston, TX 77227; <http://truethevote.org>. The Web-based organization supports photo-ID laws and organizes a nationwide network of election-watchers.

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Additional Articles from Current Periodicals

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