

# FALL 2012 VOTING RIGHTS PROGRAM GUIDE

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A record number of Americans voted in the 2008 presidential election. While turnout receded during the 2010 midterm election, that election still witnessed higher voter turnout than any other midterm election over the past decade.<sup>1</sup> Instead of building upon these turnout successes, many states have introduced or enacted initiatives that reverse decades of efforts designed to increase voter participation. Several states now require voters to show a specific form of government-issued photo ID in order to vote. Other states have cut back on early voting and raised barriers to voting registration efforts. Proponents argue these measures combat voter fraud and save cash-strapped states money while critics contend these laws unnecessarily disenfranchise voters—a disproportionate number of whom are young, minority, disabled, or low-income voters.

In addition to new voting restrictions, the future of the Voting Rights Act (VRA) is in question. Since the Supreme Court cautioned that the renewal of Section 5 in the landmark legislation may raise constitutional concerns, the VRA has come under increasing scrutiny.<sup>2</sup> *Shelby County v. Holder* directly challenges the federal government’s power to approve changes to voting procedures prior to their implementation in several states with a history of voting discrimination and will likely be heard by the Supreme Court during its next term.<sup>3</sup>

Section 5, known as the “preclearance” requirement, is also at issue in a challenge to new Texas electoral maps that critics contend ignore the Hispanic population largely responsible for the four additional seats in Congress the state was awarded in the 2010 Census reapportionment. Census redistricting has generated a massive volume of litigation, and legal challenges have been filed in more than half the states as politicians and citizens alike are concerned about excessive gerrymandering and discrimination against growing minority voter groups.

The conflux of new voting regulations, new challenges to voter protection laws, and new controversies that always arise in a presidential election year threatens to reverse the pattern of record voter participation witnessed just four years ago. At the same time, the

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<sup>1</sup> See Justin Levitt, ACS Issue Brief, *The New Wave of Election Regulation: Burden without Benefit* (2012), [http://www.acslaw.org/sites/default/files/Levitt\\_-\\_New\\_Wave\\_of\\_Election\\_Regulation.pdf](http://www.acslaw.org/sites/default/files/Levitt_-_New_Wave_of_Election_Regulation.pdf). For more information on voter turnout, see Michael McDonald, *Voter Turnout in the 2010 Midterm Election*, FORUM 8(4) (2011), available at <http://www.bepress.com/forum/vol8/iss4/art8>.

<sup>2</sup> *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

<sup>3</sup> See, e.g., *Shelby County, Ala. v. Holder*, F.Supp.2d (D.D.C. 2011); Posting of Rick Hasen to Election Law Blog, *Breaking News: Divided D.C. Circuit Panel Upholds Constitutionality of Voting Rights Act, Teeing Up Issue for Supreme Court*, <http://electionlawblog.org/?p=34424> (May 18, 2012, 8:02 EST).

attention a presidential election receives also provides an excellent forum to evaluate the health of our entire system of democratic governance. From legal compacts to change how states appoint presidential electors to comprehensive proposals to modernize our elections, there are many proposals currently before policymakers that could dramatically improve how Americans exercise their right to vote.

In light of this flurry of activity surrounding the looming presidential election, ACS encourages our chapters to host fall events that can illuminate issues impacting our right to vote. Some events can explore issues related to voting regulations, improving access to the ballot, and how best to ensure our elections are conducted fairly and with integrity. Others could examine the role of the Voting Rights Act in our society and the impact of the 2010 Census on our democracy. Several of these issues are outlined below, and ACS believes voting rights programs provide an excellent opportunity to engage with national, state, and local officials, advocates, and policymakers. This brief guide, along with its associated speaker list, has been designed to assist lawyer and student chapters plan voting rights programs in the fall.

## **Program Ideas Related to Voting Rights**

### **Expansion of Voter ID Requirements**

The debate over whether the use of voter ID is an effort to combat voter fraud or a veiled attempt at targeted suppression promises to be a central point of debate this election season.<sup>4</sup> Prior to the 2011 legislative session, only two states (Georgia and Indiana) required voters to show government-issued photo ID in order to vote. Since the last presidential election in 2008, six states now require photo ID, and at least 35 states have introduced legislation requiring photo IDs to vote.<sup>5</sup> Laws requiring photo ID in three other states face legal challenges and have not gone into effect. In South Carolina and Texas, the Justice Department invoked its powers under Section 5 of the VRA to block both state's voter ID laws from going into effect. A state court injunction blocking Wisconsin's photo ID is unlikely to be lifted prior to this fall's election. These laws may have dramatic impact upon who wins or loses this fall: in Pennsylvania, the number of voters who lack a valid photo ID is greater than the margin of votes separating the two presidential candidates in 2008.<sup>6</sup>

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<sup>4</sup> See, e.g., Tom Curry, *As 2012 Turnout Battle Brews, Justice Dept. Eyes Voter ID Laws*, MSNBC, Dec. 5, 2011, [http://nbcpolitics.msnbc.msn.com/\\_news/2011/12/05/9225740-as-2012-turnout-battle-brews-justice-dept-eyes-voter-id-laws](http://nbcpolitics.msnbc.msn.com/_news/2011/12/05/9225740-as-2012-turnout-battle-brews-justice-dept-eyes-voter-id-laws).

<sup>5</sup> Vote Suppression Legislation by State, Lawyers' Committee for Civil Rights Under Law (2012), available at <http://www.lawyerscommittee.org/page?id=0042>.

<sup>6</sup> See, e.g., David Weigel, *9.2 Percent of Pennsylvania Voters Lack Valid ID*, SLATE, July 5, 2012, [http://www.slate.com/blogs/weigel/2012/07/05/\\_9\\_2\\_percent\\_of\\_pennsylvania\\_voters\\_lack\\_valid\\_id.html](http://www.slate.com/blogs/weigel/2012/07/05/_9_2_percent_of_pennsylvania_voters_lack_valid_id.html). Republicans in the state acknowledged the law's implications: "'Voter ID - which is going to allow Gov. Romney to win the state of Pennsylvania - done,' [House Republican leader Mike] Turzai told the crowd, which burst into applause, as he listed legislative accomplishments under GOP control." Bob Warner, *Voter ID*

Additionally, since Arizona's implementation of a proof-of-citizenship law in 2006, Alabama, Kansas, and Tennessee have passed laws whereby voters must provide a birth certificate, passport, or other rare document in order to register to vote.<sup>7</sup> While there is not yet enough hard data to show how these initiatives will impact voter registration and turnout, there is considerable anecdotal evidence that voter ID laws are a tremendous burden.<sup>8</sup> As a practical matter, in Tennessee, a 91-year-old woman could not get an ID because she was physically unable to wait in a lengthy line at the DMV—there were no chairs available.<sup>9</sup> In Wisconsin, a judge found the state's ID law to be unconstitutional after noting that the \$200 in fees Ruthelle Frank would have needed to pay to get an ID far exceeded the \$1.50 the Supreme Court once deemed an unconstitutional poll tax.<sup>10</sup> Many voters have been caught in a document-chasing Catch-22 wherein they need a birth certificate to obtain a valid photo ID and need a valid photo ID to obtain a birth certificate.<sup>11</sup>

In *Crawford v. Marion County Election Board*, the Supreme Court suggested Indiana's voter ID law did not impose sufficient burdens on the right the vote. However, that case addressed the issue prior to an actual election. **Is the Supreme Court likely to revisit the issue of photo ID given the now-apparent complexities of ensuring all eligible voters can easily get one? What restrictions does the Constitution permit on the right the vote? How does this analysis change if these restrictions disproportionately impact members of suspect class? Is voter fraud a real or perceived problem? How should states weigh the benefits of preventing voter fraud against both the fiscal cost of implementing these restrictions and the potential of denying eligible voters their right to vote? Are there any less restrictive ways to protect the integrity of our electoral system? How do voter ID laws impact the ability of military veterans to vote?**

For more information, see the ACS 2012 Convention Panel on [What's at Stake: Examining Voting Rights in the 21<sup>st</sup> Century](#); [The New Wave of Election Regulation: Burden without Benefit](#), an ACS Issue Brief by Justin Levitt; last year's ACS Voting Symposium on [Examining the Impact of State Voting Law Changes for 2012](#); the Brennan Center's report [Voting](#)

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*law may hit more in Pa. than originally estimated*, PHILADELPHIA INQUIRER, July 4, 2012, [http://articles.philly.com/2012-07-04/news/32524446\\_1\\_voter-id-new-voter-id-cards](http://articles.philly.com/2012-07-04/news/32524446_1_voter-id-new-voter-id-cards).

<sup>7</sup> See WENDY R. WEISER & LAWRENCE NORDEN, BRENNAN CTR., *VOTING LAW CHANGES IN 2012* 16-18 (2012).

<sup>8</sup> Compare Corey Dade, *Why New Photo ID Laws Mean Some Won't Vote*, NPR, Jan. 28, 2012, <http://www.npr.org/2012/01/28/146006217/why-new-photo-id-laws-mean-some-wont-vote?sc=tw> (highlighting problems individuals are facing to comply with new laws), with Rick Hasen, *An Incomplete NPR Report on Voter ID*, ELECTION LAW BLOG, Jan. 29, 2012, <http://electionlawblog.org/?p=28855> (noting several analyses of voter data and the need for more hard data).

<sup>9</sup> *91-year-old can't get voter ID because of line*, AP, Oct. 21, 2011, <http://www.knoxnews.com/news/2011/oct/21/91-year-old-cant-get-voter-id-because-of-line/>.

<sup>10</sup> See Order Granting Motion for Temporary Injunction, Milwaukee Branch of the NAACP v. Walker, No. 11-CV-5492 (Wis. Cir. Ct. Dane County Mar. 6, 2012); Robert Mentzer, *Voter ID becomes law of unintended consequences*, WAUSAU DAILY HERALD (Wis.), Dec. 4, 2011, <http://www.wausaudailyherald.com/article/20111204/WDH06/112040373/Voter-ID-becomes-law-unintended-consequences>.

<sup>11</sup> Vergie Redmond, *State Facing Voter ID Hurdles*, JACKSON FREE PRESS (Miss.), July 5, 2012, <http://www.jacksonfreepress.com/news/2012/jul/05/state-facing-voter-id-hurdles/>.

[Changes in 2012](#); “[Voting in Plain Sight](#),” commentary by Linda Greenhouse; and [Voter Identification Requirements](#), a project of the National Conference of State Legislatures.

## **Challenges to the Voting Rights Act**

The Voting Rights Act is widely considered to be one the most effective civil rights laws in eliminating discrimination and granting access to the ballot box for disenfranchised minorities. The VRA prohibits state and local governments from implementing voting laws or procedures which have a discriminatory impact.<sup>12</sup> Section 5 of the VRA bars certain states or portions of states with a history of discrimination from changing their election procedures without seeking “preclearance” or advance approval from the U.S. Department of Justice or the U.S. District Court for the District of Columbia. Though Congress voted in 2006 to reauthorize this provision for an additional twenty-five years, Section 5 is now being subjected to repeated legal challenges.

At issue is whether the legal formula used to identify which areas are covered by Section 5 is constitutional. Currently, the formula is based upon either the presence of restrictive tests or devices, or the levels of voter registration and participation as of November 1972.<sup>13</sup> Critics contend that this formula is rigid and outdated, covering some areas that no longer discriminate while missing others entirely,<sup>14</sup> but this forgets that the formula was designed to specifically target areas that had historically engaged in voter discrimination. Furthermore, the law’s defenders argue that the VRA remedies any possible over inclusiveness by allowing covered jurisdictions to “bailout” from the requirements of Section 5. If any covered area, including cities, counties, or states, can show it has been in compliance with the VRA for the past ten years, that jurisdiction can be relieved from the “preclearance” requirement by the Department of Justice or a federal court. **What is the future of the Voting Rights Act? Is the VRA’s formula for determining jurisdictions covered by Section 5 still appropriate or should it be modified? How can Congress combat new and continuing efforts to discriminate against minority voters? What are the limits on Congress’ power to enforce the Fifteenth Amendment?**

In 2009, the Supreme Court suggested the continuation of Section 5 raises constitutional questions even as the Court sidestepped the issue directly by expanding the ability of local governments to “bailout” of Section 5’s requirements.<sup>15</sup> Encouraged by Chief Justice John Roberts’ dictum that the VRA “must be justified by current needs,” cases challenging Section 5 are now working their way to the Supreme Court, attacking the provision both facially and as applied. While Section 5 is at issue in challenges by South Carolina and Texas to the Department of Justice’s refusal to preclear the states’ voter ID laws,<sup>16</sup> *Shelby*

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<sup>12</sup> 42 U.S.C. § 1973 –1973aa-6 (2006).

<sup>13</sup> Dep’t of Justice, Section 4 of the Voting Rights Act, [http://www.justice.gov/crt/about/vot/misc/sec\\_4.php](http://www.justice.gov/crt/about/vot/misc/sec_4.php) (last visited July 1, 2012). The definition of “test or device” has been expanded to include the practice of providing *any* election information only in English in a jurisdiction where members of a language minority makes up more than 5% of citizens of voting age.

<sup>14</sup> *Shelby County, Ala. v. Holder*, \_\_ F.Supp.2d \_\_ (D.D.C. 2011) (Williams, J., dissenting).

<sup>15</sup> *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

<sup>16</sup> *See, e.g., Meg Kinnard, Feds nix S.C. voter ID law*, AP, July 3, 2012, [http://thetandd.com/news/local/govt-and-politics/feds-nix-s-c-voter-id-law/article\\_73604b6a-c4c4-11e1-b17b-001a4bcf887a.html](http://thetandd.com/news/local/govt-and-politics/feds-nix-s-c-voter-id-law/article_73604b6a-c4c4-11e1-b17b-001a4bcf887a.html).

*County, Ala. v. Holder* presents the most obvious case for the Supreme Court to review the constitutionality of Section 5. In *Shelby County*, the predominantly white Shelby County is arguing that the “preclearance” requirements are broadly unconstitutional.<sup>17</sup> In a 2-1 decision, the D.C. Circuit Court of Appeals upheld the reauthorization of Section 5, finding the “preclearance” requirement to be a “congruent and proportional” response given the record of evidence before Congress. The case now turns to the Supreme Court. For now, Section 5 remains good law. **Do the “bailout” provisions save the constitutionality of Section 5? What have courts meant when they have held that Section 5 is sufficiently “narrowly tailored” and “congruent and proportional” to cure the sorts of discrimination it targets? Will the evidentiary record of discrimination compiled by Congress satisfy the Supreme Court? Do recently enacted photo ID requirements in covered jurisdictions provide an indication of ongoing voter discrimination that might merit the continuation of Section 5 coverage?**

A decade after the VRA first passed, Congress bolstered the law by enacting new provisions to protect single-language minorities that had also been excluded from the electoral process. Section 203 of the VRA provides guidelines for when jurisdictions must provide voting assistance to minorities who are not English-language proficient. Efforts have been made in Congress to repeal these provisions<sup>18</sup>, and the issue has come up again in the context of the presidential campaign.<sup>19</sup> **Are bilingual ballots still necessary? Why or why not? How can election information best be delivered to non-English speakers?**

For more information about the VRA’s most important provisions generally, see the [ACS Program Guide on the Voting Rights Act](#). More information about *Shelby County v. Holder* is available at Election Law @ Moritz. NPR has provided [a legal primer](#) on the future of the Voting Rights Act.

## **2010 Census Redistricting**

The 2010 Census confirmed that the nation’s population is becoming more diverse, even as it moves further south and west.<sup>20</sup> Across the country, new voting districts are being drawn for congressional districts and state and local elections. The way these districts are

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<sup>17</sup> *Shelby County, Ala. v. Holder*, \_\_ F.Supp.2d \_\_ (D.D.C. 2011). A second case, *LaRoque v. Holder*, challenged the Department of Justice’s refusal to allow Kinston County, North Carolina, to switch to non-partisan local elections. The case was subsequently found moot after preclearance was given. *LaRoque v. Holder*, F.Supp.2d (D.D.C. 2011).

<sup>18</sup> Nicole Gaouette, *House GOP Group Targets Bilingual Ballots*, L.A. TIMES, May 6, 2006, <http://articles.latimes.com/2006/may/06/nation/na-bilingual6>.

<sup>19</sup> Adam Serwer, *Gingrich and Romney Want to Say Adios to Bilingual Ballots*, MOTHER JONES, Jan. 30, 2012, <http://motherjones.com/politics/2012/01/gingrich-and-romney-want-say-adios-bilingual-ballots>. See also, *Federal Government Orders Bilingual Ballots in 25 States Ahead of Elections*, AP, Oct. 14, 2011, <http://www.foxnews.com/politics/2011/10/14/federal-government-orders-bilingual-ballots-in-25-states-ahead-elections/>.

<sup>20</sup> See, e.g., Dan Gilgoff, *8 Political Takeaways from the Census*, CNN, Apr. 6, 2011, <http://www.cnn.com/2011/POLITICS/04/05/census.political.takeaways/index.html>. As a result of the census reapportionment, 12 House seats shifted among 18 states. Eight states (Arizona, Florida, Georgia, Nevada, South Carolina, Texas, Utah and Washington) gained seats while ten states in the northern rustbelt lost seats.

crafted can determine who wins an election, whose interests are represented, and which laws get passed. Sections 2 and 5 of the VRA require states to ensure that minority voters are properly protected in the redistricting process. This has increased the level of scrutiny redistricting has received in Texas where lawmakers have drawn a new electoral map which marginalizes the growing Hispanic population largely responsible for the state's four additional seats in Congress. A legal challenge has already reached the Supreme Court, and federal courts will continue to struggle with how best to adjudicate disputes over redistricting maps.<sup>21</sup> Additionally, separate lawsuits challenging redistricting procedures have been filed in 28 states, and after *Bartlett v. Strickland*, there are new questions about using redistricting to craft so-called "coalition" districts where multiple minority groups form a coalition to elect a candidate of their choice.<sup>22</sup> **What is the proper role of the courts in supervising redistricting?**

Partisan politics are often at the heart of many redistricting disputes. In most states, the state legislature is ultimately responsible for establishing district lines. Six states have formed independent or bipartisan commissions to carry out redistricting separate from the legislature,<sup>23</sup> with California's Citizens Redistricting Commission perhaps the most elaborate of them all. Established by voter referenda in 2008 and 2010, the commission ostensibly has no interaction with the state legislature, and while the results of the 2012 election should reveal how successful the commission has been, removing politics from the process has proven difficult.<sup>24</sup> **What are the costs and benefits of establishing independent redistricting bodies? Are these bodies truly independent? How can redistricting best be insulated from partisan politics?**

One comprehensive solution that would afford better representation to all Americans might be to increase the total membership in the U.S. House of Representatives.<sup>25</sup> With 435 members, the House has remained the same size for over a century—even as the country's

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<sup>21</sup> See *Perry v. Perez*, \_\_\_ S. Ct. \_\_\_ (2011).

<sup>22</sup> *Bartlett v. Strickland*, 556 U.S. 1, 13-14 (2009) ("This Court has referred sometimes to crossover districts as "coalitional" districts, in recognition of the necessary coalition between minority and crossover majority voters. But that term risks confusion with coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice. We do not address that type of coalition district here." (citations omitted)). See also Rachel Weiner, *Race and Redistricting: Unholy Alliance Starting to Fray*, WASH. POST, Oct. 24, 2011, [http://www.washingtonpost.com/blogs/the-fix/post/2012-redistricting-alliance-between-black-democrats-and-republicans-may-be-ending/2011/10/21/gIQA0pfBDM\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/2012-redistricting-alliance-between-black-democrats-and-republicans-may-be-ending/2011/10/21/gIQA0pfBDM_blog.html), Michael Cooper & Jennifer Medina, *Battles to Shape Maps, and Congress, Go to Courts*, N.Y. TIMES, Oct. 22, 2011, at A18.

<sup>23</sup> JUSTIN LEVITT, BRENNAN CTR., A CITIZEN'S GUIDE TO REDISTRICTING 22 (2010).

<sup>24</sup> See California Citizens Redistricting Commission, FAQ, <http://wedrawthelines.ca.gov/faq.html> (last visited July 1, 2012). A recent article by *ProPublica* suggests the commission has been largely oblivious to the continued influence of politicians in California's redistricting process. *E.g.*, Olga Pierce & Jeff Larson, *How Democrats Fooled California's Redistricting Commission*, PROPUBLICA, Dec. 21, 2011, <http://www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission>.

<sup>25</sup> See, *e.g.*, Vikram David Amar, *Should the Size of the U.S. House of Representatives Be Doubled, and Other Major Governmental Changes Be Made? A Set of Interesting Proposals From Political Scientist Larry Sabato*, FINDLAW, Apr. 10, 2008, <http://writ.lp.findlaw.com/amar/20080410.html> (reviewing Sabato's proposal to more than double the size of the membership in the U.S. House).

population has grown over threefold.<sup>26</sup> As a result, while each congressional district represented approximately 200,000 Americans in 1912, today each district averages almost 700,000 constituents.<sup>27</sup> In *Clemons v. Department of Commerce*,<sup>28</sup> the Supreme Court refused to address any constitutional challenges to the size of the House, leaving the matter for the political branches to address. **Under what circumstances should the number of seats in the House of Representatives to reflect the population of the United States?**

For more information, see the ACS Voting Symposium on [Redistricting and the 2012 Election](#); the ACS Convention panel on [Redistricting in 2011; Racial Redistricting in a Post-Racial World](#), an article by Professor Gilda Daniels; and an [essay](#) by Professor Samuel Issacharoff. For more information on redistricting, includes proposals for reform, see Professor Michael McDonald's [United States Election Project](#).

### **Early Voting and Absentee Voting**

In an effort to make voting more convenient, numerous states—with bipartisan support—have implemented early voting windows and have increased access to absentee ballots in the past decade. There have also been efforts at the federal level either to make Election Day a national holiday or to move federal elections to the weekend to increase voter participation.<sup>29</sup> However, elections remain primarily a responsibility of the states, and citing cost concerns and administrative burden, a number of states have changed early voting and absentee voting practices. Bills were introduced in at least ten states to limit early and absentee voting, and five states (Florida, Georgia, Maine, Tennessee, and West Virginia) passed laws which shrink early voting windows and add new requirements to absentee voting.<sup>30</sup> Several states have also moved to end early voting on Sundays prior to the election, citing a need not to mix politics and religion on Sundays.<sup>31</sup> **What are the administrative benefits of early voting? What role will absentee ballots play in pivotal swing states? What mechanisms would work best to increase voter turnout?**

For more information on these new restrictions, see the ACS Voting Symposium on [Examining the Impact of State Voting Law Changes for 2012; The New Wave of Election](#)

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<sup>26</sup> Gregory Korte, *Size matters, lawsuit says of U.S. House*, USA TODAY, Dec. 13, 2010, [http://www.usatoday.com/news/washington/2010-12-13-Why435Congress13\\_ST\\_N.htm](http://www.usatoday.com/news/washington/2010-12-13-Why435Congress13_ST_N.htm).

<sup>27</sup> See, e.g., Dalton Conley & Jacqueline Stevenes, Op-Ed, Build a Bigger House, N.Y. Times, Jan. 23, 2011, <http://www.nytimes.com/2011/01/24/opinion/24conley.html> ("The result is that Americans today are numerically the worst-represented group of citizens in the country's history.").

<sup>28</sup> *Clemons v. Department of Commerce*, 131 S. Ct. 821 (2010).

<sup>29</sup> For more information, see the initiative Why Tuesday?, <http://www.whytuesday.org> (last visited July 1, 2012) and a recent study by the Government Accountability Office on the feasibility of weekend elections: U.S. GOV'T ACCOUNTABILITY OFFICE, VIEWS ON IMPLEMENTING FEDERAL ELECTIONS ON A WEEKEND (2012), available at <http://www.gao.gov/assets/590/587621.pdf>.

<sup>30</sup> See WEISNER & NORDIN, *supra* note 7, at 29-33; DEFENDING DEMOCRACY: CONFRONTING MODERN BARRIERS TO VOTING RIGHTS IN AMERICA, NAACP LEGAL DEFENSE AND EDUCATION FUND 29-33 (2011).

<sup>31</sup> Laura Leslie, *Why Ban Sunday Voting?*, WRAL.COM, June 16, 2011, <http://www.wral.com/news/state/nccapitol/blogpost/9737378/>.

[Regulation: Burden without Benefit](#), an ACS Issue Brief by Justin Levitt; and the NAACP's report [Defending Democracy: Confronting Modern Barriers to Voting Rights in America](#).

## **Restricting Felon Enfranchisement**

Felony disenfranchisement takes away the ability to vote for more than five million Americans. While the majority of states prohibit currently-incarcerated felons and those on probation from voting, twenty-three states have relaxed restrictions on the ability of felons to vote after serving their sentences over the past two decades.<sup>32</sup> In 2011, however, executive action by the governors of Iowa and Illinois effectively reinstated permanent disenfranchisement policies, joining Virginia and Kentucky in permanently disenfranchising felons. **What rationale supports requiring felons to “earn” the right the vote after having completed their sentences? What links does felony enfranchisement have with efforts to combat recidivism?**

In *Farrakhan v. Gregoire*, the Ninth Circuit Court of Appeals recently confronted whether felon disenfranchisement violated the VRA. Plaintiffs argued that the racial discrimination within the criminal justice system disproportionately denied the right to vote to minority groups, but the court held that the protections of the VRA would not be triggered absent a showing the criminal justice system is infected by *intentional* discrimination.<sup>33</sup> **When should the protections of the Voting Rights Act apply to felons who have been disenfranchised?**

For more information on felony disenfranchisement, see [The Democracy Restoration Act: Addressing a Centuries-Old Injustice](#), an ACS Issue Brief by Deborah Vagins and Erika Wood; this [opinion piece](#) by Erika Wood; this [video](#) with the Brennan Center's Nicole Austin-Hillery; this [state-by-state map](#) from the Brennan Center; and [an article](#) about *Farrakhan v. Gregoire* by Ryan P. Haygood of the NAACP Legal Defense & Educational Fund.

## **Voter Registration Improvements**

In the 2008 presidential election, an estimated 2.2 million eligible Americans were unable to cast ballots due to problems with their voter registrations.<sup>34</sup> Despite considerable efforts in recent decades to make the registration process less difficult and more accessible to voters, our voter registration process remains plagued with inefficiencies, raising maintenance costs and reducing the accuracy and integrity of our voter rolls.<sup>35</sup> While the National Voter Registration Act (NVRA)<sup>36</sup> expands opportunities for citizens to register to vote, and more recently, the Help America Vote Act of 2002 (HAVA)<sup>37</sup> requires states to

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<sup>32</sup> The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (Dec. 2011), [http://www.sentencingproject.org/doc/publications/fd\\_bs\\_fdlawsinusDec11.pdf](http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinusDec11.pdf).

<sup>33</sup> *Farrakhan v. Gregoire*, 623 F.3d 990, 993-94 (9th Cir. 2010).

<sup>34</sup> PEW CTR. ON THE STATES, *UPGRADING DEMOCRACY: IMPROVING AMERICA'S ELECTIONS BY MODERNIZING STATES' VOTER REGISTRATION SYSTEMS 1* (2010).

<sup>35</sup> PEW CTR. ON THE STATES, *supra* note 30, at 2.

<sup>36</sup> Pub. L. No. 103-31, 107 Stat. 77 (1993).

<sup>37</sup> Pub. L. No. 107-252, 116 Stat. 1666 (2002).



create statewide voter registration databases to ensure updated and accurate registration lists, more can be done to improve how Americans register to vote.

For example, the Election Assistance Commission (EAC) was established to provide guidance on election standards and to modernize our election system to ensure “hanging chads” would be no more. Since its creation in the aftermath of the disputed 2000 presidential election, however, the EAC has not only been chronically underfunded but also largely powerless, as well.<sup>38</sup> It currently lacks a quorum of commissioners necessary to fulfill its responsibilities under HAVA,<sup>39</sup> and there have been calls to abolish the EAC even as election modernization has become more important.<sup>40</sup> Already a number of states have found that modernizing their voter registration systems with the aid of new technologies has led to large increases in registration numbers and voter roll accuracy, while saving states millions of dollars.<sup>41</sup> While the EAC has been constrained in its ability to provide assistance, there has been some movement in Congress to encourage further modernization. Recently introduced in Congress, the Voter Empowerment Act of 2012 aims to improve voter registration rates and enhance accountability and integrity in the conduct of our elections.<sup>42</sup> **What are the best practices to ensure efficient and accurate voter registration? How can voter registration be modernized in a digital age? What role should the Election Assistance Commission or the federal government have in improving voter registration?**

Though states have improved their efforts to register voters, citizen and organization-led voter registration drives have come under new criticism. Opponents have argued that these mass voter registration efforts are especially susceptible to large-scale fraud. In Maine, the state repealed its same-day voter registration law, which was the oldest such law in the country. Before being enjoined by a federal judge, a new law in Florida established “harsh and impractical” limits on the ability of organizations to conduct group registration and imposed heavy civil penalties and fines.<sup>43</sup> **Should states automatically**

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<sup>38</sup> Editorial, *Do You Think It's Because They Liked Florida?*, N.Y. TIMES, Apr. 21, 2011, <http://www.nytimes.com/2011/04/22/opinion/22fri3.html>.

<sup>39</sup> See, e.g., Jeannie Layson, *Work Continues at the EAC*, EAC OFFICIAL BLOG, Dec. 14, 2011, [http://www.eac.gov/blogs/work\\_continues\\_at\\_the\\_eac/](http://www.eac.gov/blogs/work_continues_at_the_eac/); Doug Chapin, Program for Excellence in Election Administration, *Do Nothing 'Til You Hear From Me: EAC Shutdown of HAVA Boards Provokes Resistance from State Election Officials*, Feb. 1, 2012, [http://blog.lib.umn.edu/cspg/peea/2012/02/do\\_nothing\\_til\\_you\\_hear\\_from\\_m.php?utm\\_source=feedburner&utm\\_medium=twitter&utm\\_campaign=Feed%3A+HHHElections+%28Program+for+Excellence+in+Election+Administration%29](http://blog.lib.umn.edu/cspg/peea/2012/02/do_nothing_til_you_hear_from_m.php?utm_source=feedburner&utm_medium=twitter&utm_campaign=Feed%3A+HHHElections+%28Program+for+Excellence+in+Election+Administration%29).

<sup>40</sup> Rep. Gregg Harper (R-Miss.), *It's time for the Election Assistance Commission to go*, THE HILL, June 21, 2011, <http://thehill.com/blogs/congress-blog/campaign/167507-its-time-for-the-election-assistance-commission-to-go>.

<sup>41</sup> E.g., PEW CTR. ON THE STATES, *supra* note 30; CHRISTOPHER PONOROFF, BRENNAN CTR., *VOTER REGISTRATION IN A DIGITAL AGE* (2010).

<sup>42</sup> Voter Empowerment Act of 2012, H.R. 5799, 112th Cong. (2d Sess. 2012), *available at* [http://democrats.cha.house.gov/sites/democrats.cha.house.gov/files/2012omni\\_002\\_xml.pdf](http://democrats.cha.house.gov/sites/democrats.cha.house.gov/files/2012omni_002_xml.pdf).

<sup>43</sup> Karen Gullo, *Florida Voter-Registration Law Partially Blocked By Judge*, BLOOMBERG, June 1, 2012, <http://www.bloomberg.com/news/2012-05-31/florida-voter-registration-law-partially-blocked-by-judge.html>; Steve Bousquet, *Florida's Election Law Draws Scrutiny*, MIAMI HERALD, Jan. 27, 2012, <http://www.miamiherald.com/2012/01/27/2612508/floridas-election-law-draws-scrutiny.html>.

## **register their citizens to vote? How does same-day voter registration affect elections? What role does citizen voter registration drives have in engaging voters?**

For more information, see [The National Voter Registration Act Reconsidered](#), an ACS Issue Brief by Estelle Rogers; the Brennan Center's [Voter Registration Modernization Proposal](#); a Pew Center Report on [Upgrading Democracy: Improving America's Elections by Modernizing States' Voter Registration Systems](#); and [Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws](#), an article by Professor Dan Tokaji.

### **State Innovations in Elections**

Unlike most developed democracies, state and local officials run our elections, leading to what Professor Dan Tokaji has termed “hyper-decentralization.”<sup>44</sup> As a result, the very process of voting varies from state to state, which comes with as many drawbacks as it does opportunities to improve our election system.

Elections in the United States are very much a local affair: there is no provision in the Constitution or federal law that explicitly ensures every citizen the right to vote. While national efforts have been made to guarantee a right to vote, establishing an affirmative right to vote may be easier at the state level.<sup>45</sup> For example, Wisconsin's voter ID law was found to be unconstitutional based upon the state constitution's affirmative right to vote. An affirmative right to vote would likely increase the level of judicial scrutiny voting regulations would receive and require states to show any restriction on voting was narrowly tailored to improving election integrity. **Do Americans need an affirmative right to vote? How do questions of federalism play into the administration of our elections?**

Far from being a model of federalism at work, our decentralized elections also create tangled messes where ballots get discarded, poll workers are poorly trained, long lines discourage people from voting, and voter registration lists and machines break down.<sup>46</sup> In 2007, Professor Heather Gerken proposed the creation of a “Democracy Index,” which could rank states and localities based on how their election systems perform.<sup>47</sup> The goal is that merely by compiling data and ranking polling places akin to *U.S. News* law school rankings would provide election officials with a powerful incentive to improve the electoral system. While a comparative index has yet to gain national traction, the plan was endorsed by then-Senators Obama and Clinton and, in 2009, was included as part of election reform

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<sup>44</sup> Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 7 ELEC. L.J. 118, 121 (2007).

<sup>45</sup> Compare ADVANCEMENT PROJECT, IN PURSUIT OF AN AFFIRMATIVE RIGHT TO VOTE (2008), available at <http://www.advancementproject.org/sites/default/files/publications/RTV-Report-Final-Printed-Version.pdf>, with Elise Helgesen, *Ending Discriminatory Voter ID: Let's Affirm the Right to Vote*, ALTERNET, Mar. 25, 2012, [http://www.alternet.org/story/154673/ending\\_discriminatory\\_voter\\_id%3A\\_let%E2%80%99s\\_affirm\\_the\\_right\\_to\\_vote/](http://www.alternet.org/story/154673/ending_discriminatory_voter_id%3A_let%E2%80%99s_affirm_the_right_to_vote/).

<sup>46</sup> Heather K. Gerken, *Shortcuts to Reform*, 93 MINN. L. REV. 1582 (2009).

<sup>47</sup> Heather Gerken, *How Does Your State Rank on the Democracy Index?*, LEGAL TIMES, Jan. 1, 2007, at 36, available at <http://www.law.yale.edu/news/4044.htm>.

initiative launched by New York Mayor Michael Bloomberg.<sup>48</sup> **How can our electoral system best be modernized to encourage participation, while avoiding high costs and fraud? What criteria should be used to establish “best practices” for elections? What problems have been identified locally in recent elections?**

States also play a large role in picking the President of the United States, the largest federal election of them all. Despite the notion of “one person, one vote,” the Supreme Court has frequently reminded the country that there is no federal constitutional right to vote for presidential electors to our Electoral College.<sup>49</sup> The Electoral College ensures that the president is elected by a system specifically designed to be both anti-democratic and inequitable, and vast majorities of Americans, including the majority of Republicans, continue to question the relevance of the Electoral College.<sup>50</sup>

The Electoral College was established as a compromise between large and small states, but the winner-take-all rules that dominate electoral math have ensured that only a handful of closely-divided political swing states determine presidential elections.<sup>51</sup> While amending the Constitution to abolish the Electoral College presents daunting challenges, states already have plenary power to determine how their electoral votes are allocated—New York could give all its electoral votes to the popular vote winner in Texas or vice versa—and the National Popular Vote Compact proposes to use this power to create a binding agreement among states to award their electoral votes to the winner of the national popular vote instead of the winner of their respective state. In effect, the agreement would achieve a direct popular election of the president while maintaining the formalities of the Electoral College. With California’s adoption of the compact in August 2011, the initiative holds 132 of the 270 electoral votes needed to go into effect.<sup>52</sup> Opponents contend the initiative is both constitutionally and politically problematic, and have proposed options such as a congressional district-based approach to allocating electoral votes.<sup>53</sup> **What purpose does the Electoral College serve in modern America? Can presidential elections be both democratic and balance the interests of urban and rural states? Maine and Nebraska are the only two states not to provide a “winner-take-all” distribution of their electoral votes—what are the benefits of allocating electoral votes by congressional district?**

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<sup>48</sup> *Mayor Bloomberg Announces Election Reform Plan*, WHY TUESDAY?, Sept. 10, 2009, <http://www.whytuesday.org/2009/09/10/nyc-mayor-bloomberg-announces-election-reform-plan/>.

<sup>49</sup> *Compare* Reynolds v. Sims, 377 U.S. 533 (1964), *with* Bush v. Gore, 531 U.S. 98, 104 (2000).

<sup>50</sup> Lydia Saad, *Americans Would Swap Electoral College for Popular Vote*, GALLOP, Oct. 24, 2011, <http://www.gallup.com/poll/150245/americans-swap-electoral-college-popular-vote.aspx>.

<sup>51</sup> Over the course of the past six presidential elections, six of the ten most populous states and twelve of the thirteen least populous states have been uncontested in presidential campaigns. In any given election, two-thirds of the states are non-competitive. EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 8-9 (3d ed. 2011).

<sup>52</sup> Marisa Lagos, *California Joins Move to Revamp Electoral College*, S.F. CHRON., Aug. 8, 2011, <http://www.sfgate.com/politics/article/California-joins-move-to-revamp-Electoral-College-2335781.php>.

<sup>53</sup> Curtis Gans, *Why National Popular Vote Is a Bad Idea*, HUFFINGTONPOST, Jan. 1, 2012, [http://www.huffingtonpost.com/curtis-gans/national-popular-vote\\_b\\_1189390.html](http://www.huffingtonpost.com/curtis-gans/national-popular-vote_b_1189390.html).

For more information, see the ACS 2012 Convention Panel on [What's at Stake: Examining Voting Rights in the 21<sup>st</sup> Century; In Pursuit of an Affirmative Right to Vote](#), a report by the Advancement Project; [How Does Your State Rank on the Democracy Index?](#), an article by Professor Heather Gerken; and [Electing a President](#), a *New York Times* Sunday dialogue begun by Professor Steven Brams.

### **District of Columbia Voting Rights**

The voting rights of the 600,000 citizens who live in Washington, D.C., are fundamentally limited compared to those citizens who hail from one of the fifty states. While the District has been granted three electoral votes toward determining the presidency, it has only minimal representation in the House of Representatives and none in the Senate. The primary constitutional problem is that members of Congress are to be chosen “by the people of the several states,” and the District is not a state but rather a federal territory under the complete control of Congress.<sup>54</sup>

There have been numerous efforts to modify the District's lack of voting representation, including retroceding the District back to Maryland, forming the city into the state of “New Columbia,” and introducing an endless array of legislative and constitutional proposals. However, each suggestion has faced either strong political opposition or has presented difficult constitutional questions. An effort in 2009 that would have granted the District a vote in the House of Representatives in exchange for an added congressional seat in Utah stalled, but not before the proposal itself created sharp legal divides within the Department of Justice.<sup>55</sup> **What are the constitutional concerns with granting additional representation to the District? How does any effort to change the District's status impact the Twenty-Third Amendment's grant of three electoral votes to the city? What are the implications of adding the District as the country's fifty-first state?**

For more information, see “[Progress on Congressional Representation for the District of Columbia](#),” an ACSblog post by Daniel Kotler, and TIME Magazine's [Brief History of DC Voting Rights](#).

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<sup>54</sup> U.S. CONST. art. I, §§ 2, 3, 8. “Taxation Without Representation” is the slogan that appears on license plates issued in the District. “Taxation Without Representation” Tags, D.C. Dep't of Motor Vehicles, <http://dmv.dc.gov/serv/plates/tax.shtm> (last visited July 1, 2012).

<sup>55</sup> Carrie Johnson, *Some in Justice Department See D.C. Vote in House as Unconstitutional*, WASH. POST., Apr. 1, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/31/AR2009033104426.html?hpid=topnews>.