

7-1-2014

Introduction to the Northern Illinois College of Law 2014 Symposium Shelby County v. Holder: A New Perspective on Voting Rights

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Suggested Citation

Marissa Liebling, Introduction to the Northern Illinois College of Law 2014 Symposium Shelby County v. Holder: A New Perspective on Voting Rights, 34 N. Ill. U. L. Rev. 507 (2014).

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Introduction to the Northern Illinois College of Law 2014 Symposium

Shelby County v. Holder: A New Perspective on Voting Rights

MARISSA LIEBLING¹

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I. INTRODUCTION

The Northern Illinois University Law Review's selection of voting rights for their 2014 symposium could not be timelier. The Supreme Court's highly contentious decision in *Shelby County v. Holder*² has deservedly received much analysis, media attention, and scrutiny. But *Shelby County*'s direct impact on the Voting Rights Act is best understood in the context of other recent activity in the election arena. The introduction of state level voting laws in recent years is arguably unprecedented in both number and content, at least since the turn of the last century.³ This brief introduction merely skims the surface of the many complex voting rights issues subject to both debate and litigation throughout our nation. It is intended to provide an overall context to the thoughtful articles in this issue that provide legal analyses of *Shelby County* and contemplate the impact of the Court's decision.

Further, the focus of public attention has primarily centered on those states previously covered under the Voting Rights Act's section 4 prior to *Shelby County v. Holder* and other often "battleground" states that have passed restrictive legislation. States like Illinois are not, however, isolated

1. Marissa Liebling is the Supervising Staff Attorney of the Voting Rights Project at the Chicago Lawyers' Committee for Civil Rights Under Law. She would like to thank Aditi Singh, Kristiane Stapleton, Ruth Greenwood, Ghirlandi Guidetti, and Debra DeOrsey Liebling for their helpful suggestions and editorial assistance. She would also like to acknowledge her husband, Colin, for his constant support and love.

2. *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted in part*, 133 S. Ct. 594 (2012), *rev'd*, 133 S. Ct. 2612 (2013).

3. Sarah Childress, "Unprecedented" Number of Restrictive Voting Laws Being Introduced, FRONTLINE (May 31, 2012), <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/unprecedented-number-of-restrictive-voting-laws-being-introduced/>.

from the general problems with voter participation, minority representation, and election administration. However, many states, including Illinois, have recently passed election legislation that epitomizes the opportunity to leverage the increased attention on voting rights, as well as technological advances, to make improvements to the electoral process and democratic participation.

I continuously confront these issues and ponder the fundamental questions surrounding voter access in my role as the supervisor of the Chicago Lawyers' Committee for Civil Rights' Voting Rights Project. As I believe passionately in our mission to protect voting rights and encourage democratic participation, particularly in traditionally underrepresented communities, my work tends to focus on decreasing barriers to ballot access and increasing voter participation. Thus, while I have included some of the common arguments on both sides of these important and complex issues, I must concede the inherent bias I have as I present the issues herein. However, I welcome debate and recognize the competing concerns and diverse viewpoints in the field of election law, as demonstrated by the differing perspectives offered in this issue's articles.

In the first Article, Aderson Francois argues that while Shelby County entrenches the narrative that federal oversight is an affront to state sovereignty, it is but the most recent in a long line of decisions weary of federal intervention. In his view, this narrative ignores the need for these protections and overlooks the true purpose of federalism to protect human freedom and personal dignity. He advances an alternative narrative and gives voice to the very men and women who were instrumental in passing the Voting Rights Act. Similarly, in the second Article, Samuel Spital describes Shelby County as a major setback to civil rights. Like Mr. Francois, Mr. Spital critiques the Court's application of federalism, but he contends that the decision presents a radical departure from precedent in the area of federalism, as well as separation of powers doctrine and the rules of adjudication for facial challenges. Finally, Joshua Thompson argues that new efforts to revive section 5 of the Voting Rights Act immediately followed *Shelby County* in the form of calls for a legislative "fix" to the decision and new federal lawsuits. Mr. Thompson focuses on the section 5 effects test, which looks at whether a law or practice will have an unequal impact on racial groups. Questioning the constitutionality of the effects test, Mr. Thompson argues that it is not a congruent and proportional means of enforcing the Fifteenth Amendment and that it violates the Equal Protection Clause.

These Articles provide a fascinating analysis of the *Shelby County* decision, reflective of the larger ongoing debate on the complex and intertwined issues of race, discrimination, civil rights, politics, and state sovereignty in our modern era. Given the landscape, election-related legislation and resultant disputes about voting rights will continue to proliferate. Thus, this NIU Law Review issue provides important insights on the role of the

courts and the federal government in voting rights. An understanding of the current election and voting legislative and legal landscape is imperative to contemplate the fundamental questions at heart: “What are the primary problems facing our democracy in the twenty-first Century?” and “What is it that we, as a society, want our election laws to resolve, promote, or protect?”

II. RESTRICTIVE LEGISLATION IN THE TWENTY-FIRST CENTURY

Laws that may serve as a barrier to voting for some eligible citizens are often referred to as “restrictive” legislation.⁴ In 2013 alone, ninety-two restrictive voting laws were introduced in thirty-three states; eight of these states successfully passed measures, with a total of nine new restrictive voting laws added to the books.⁵ The *Shelby County v. Holder* decision made it easier to pass such laws in some states—those previously required to submit any election law changes to the Department of Justice or the Federal Court of Appeals for approval before implementation—but it neither started, nor will it end, the trend towards an increasing number of restrictive laws proposed and passed. Since 2001, nearly one thousand bills related to voter identification alone have been introduced in forty-six states.⁶ According to a study conducted by the University of Massachusetts Boston, during the five-year period preceding the November 2012 general election, nearly every state proposed a restrictive voting law, with these laws passing in almost half of the states.⁷ It is worth noting restrictive voting bills were

4. Supporters often refer to the same laws as “election integrity” measures and the like. Arguably, however, even supporters of these laws would have to concede that these measures restrict or limit the right to vote for at least some voters.

5. Successfully passed recent measures include S.B. 2, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (enacted); S.B. 385, 118th Gen. Assemb., Reg. Sess. (Ind. 2014); S.B. 405, 63d Gen. Assemb., Reg. Sess. (Mont. 2013) (enacted) (voters have option of repealing SDR on 2014 ballot); L.B. 271, 103d Gen. Assemb., Reg. Sess. (Neb. 2013) (enacted); H.B. 589, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013) (enacted); H.B. 1332, 63d Gen. Assemb., Reg. Sess. (N.D. 2013) (enacted); S.B. 125, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013) (enacted); H.B. 125, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013) (the senate bill was substituted for this bill and the senate bill passed); H.B. 1337, 2013 Gen. Assemb., Reg. Sess. (Va. 2013) (enacted); S.B. 1256, 2013 Gen. Assemb., Reg. Sess. (Va. 2013) (enacted); H.B. 572, 188th Gen. Assemb., Reg. Sess. (Mass. 2013); H.B. 589, 188th Gen. Assemb., Reg. Sess. (Mass. 2013); H.B. 592, 188th Reg. Sess. (Mass. 2013); H.B. 250, 130th Gen. Assemb., Reg. Sess. (Ohio 2013); H.B. 266, 130th Gen. Assemb., Reg. Sess. (Ohio 2013); H.B. 269, 130th Gen. Assemb., Reg. Sess. (Ohio 2013).

6. Wendy Underhill, *Voter Identification Requirements*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx#Legislation> (last visited Mar. 3, 2014).

7. Akilah Johnson, *Half of States OK’d Restrictive Voting Laws*, THE BOSTON GLOBE (Jan. 9, 2014), <http://www.bostonglobe.com/metro/2014/01/08/study-finds-half>

“substantially more likely to be introduced in states with larger African-American and non-citizen populations and higher minority turnout, as well as in states where both minority and low-income turnout recently increased.”⁸ Restrictive voting laws have targeted every part of the voting process.

First, there are laws about eligibility to vote: who is eligible and what eligible voters must prove to register. Felons are banned from voting while serving prison sentences in forty-eight states.⁹ Several states permanently ban anyone who has been convicted of a felony from voting.¹⁰ An estimated six million people cannot vote because of felon disenfranchisement laws, regardless of the nature of the underlying offense.¹¹ The Supreme Court has upheld felon disenfranchisement laws,¹² but there is increased scrutiny surrounding these laws, raising questions about the purpose, propriety, and inherent inequality in permanently banning voting or making it harder for the previously incarcerated to restore their voting rights.¹³ The intrinsic question is whether those who have served their debt to society in the form

country-states-passed-restrictive-voting-laws-from/NReLu735iBNKxUIQk6YZO/story.html#skip-target.

8. Keith Gunnar Bentele & Erin E. O’Brien, *Convincing Evidence that States Aim to Suppress Minority Voting*, SCHOLARS STRATEGY NETWORK, http://www.scholarsstrategynetwork.org/sites/default/files/ssn_key_findings_bentele_and_o_brien_on_jim_crow_2.0.pdf (last visited Mar. 3, 2014).

9. *Felony Disenfranchisement Laws in the United States*, THE SENT’G PROJECT: RES. & ADVOC. FOR REFORM, http://sentencingproject.org/doc/publications/fd_bs_fdlawsinus_Jun2013.pdf (last visited Mar. 3, 2014).

10. *Id.* Four states deny the right to vote to all persons with felony convictions, even after they have completed their sentences. Seven others disenfranchise certain categories of ex-offenders and/or permit application for restoration of rights for specified offenses after a waiting period (e.g., five years in Wyoming and two years in Nebraska).

11. Jotaka L. Eaddy, *Our Nation Has a Secret: Felony Disenfranchisement in America*, HUFF POST BLACK VOICES: THE BLOG (Dec. 10, 2013, 9:54 AM), http://www.huffingtonpost.com/jotaka-l-eaddy/america-has-a-secret_b_4415993.html.

12. *See Richardson v. Ramirez*, 418 U.S. 24 (1974).

13. While “[e]ven states have now amended lifetime bans on voting by ex-felons, or expanded voting access to ex-felons still on parole or probation . . . ([o]nly two states, Florida and Iowa, have tightened similar restrictions.)” Ari Melber, *Presumed Guilty: Ex-Felons Face Barriers to Voting Rights*, MSNBC (Nov. 4, 2014, 1:05 PM), <http://www.msnbc.com/msnbc/presumed-guilty-ex-felons-face-barriers-to-voting-rights>; Press Release, Amy Graham, Governor Scott and Florida Cabinet Discuss Amended Rules of Executive Clemency (Mar. 9, 2011), *available at* http://felonvoting.procon.org/sourcefiles/florida_clemency_press_release.pdf; Exec. Order No. 70 (2005), *available at* http://felonvoting.procon.org/sourcefiles/Exec_Order_70_Iowa_voting.pdf; Maine and H.B. 589, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013) (enacted), introduced legislation that would further restrict the right to vote to persons with criminal convictions.

of prison time should regain the full rights of citizenship including the right to vote, and, if so, when their voting rights should be restored.

Another eligibility issue subject to recent legal challenge is proof of citizenship requirements. Citizenship is a qualification to vote in every federal and state-level election.¹⁴ Voter registration forms require each applicant to swear upon penalty of perjury that he or she is a citizen of the United States.¹⁵ But some states have added requirements that voter registration applicants verify their citizenship status by providing proof of citizenship documentation like naturalization papers or a birth certificate. Proof of citizenship laws have been enacted in several states.¹⁶ The Arizona law was struck down in *Arizona v. The Inter Tribal Council of Arizona, Inc.*¹⁷ The case addressed interesting questions about federalism and preemption but paved the way for states to petition the United States Election Assistance Commission to add proof of citizenship requirements. Kansas, Arizona, and Georgia proceeded with such a petition, recently denied by the commission.¹⁸ This issue will almost certainly face further litigation and potentially wind back up in the high court. But more fundamentally, this issue raises the following question: should eligible potential voters be required to submit citizenship documentation? On one hand, it prevents non-citizens from voting in our elections.¹⁹ On the other hand, a 2006 Brennan Center for

14. See, e.g., Stanley Renshon, *The Debate Over Non-Citizen Voting: A Primer*, CENTER FOR IMMIGR. STUD. (Apr. 2008), https://cis.org/noncitizen_voting_primer.html.

15. See REGISTER TO VOTE IN YOUR STATE BY USING THIS POSTCARD FORM AND GUIDE (2006), available at <http://www.eac.gov/assets/1/Documents/national%20mail%20voter%20registration%20form%20english%20February%2015%202011.pdf>.

16. See, e.g., *Voting Law Roundup 2013*, BRENNAN CENTER FOR JUST., Dec. 19, 2013, <http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup#4> (listing states with new citizenship requirements in 2013—Massachusetts, Missouri, Nevada, Oklahoma, Oregon, South Carolina, Texas, and Virginia). See also, e.g., H.B. 56, 2011 Gen. Assemb., Reg. Sess. (Ala. 2011); H.B. 2067, 2011 Sess. (Kan. 2011); S.B. 352, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011).

17. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 476 (2012).

18. Stephan Dinan, *Power Play: Federal Ruling Forbids States from Checking Voters' Citizenship*, THE WASHINGTON TIMES (Jan. 18, 2014), <http://www.washingtontimes.com/news/2014/jan/18/new-federal-ruling-forbids-states-checking-voters/>. Kansas and Arizona also responded by creating “two-tier” election systems, requiring additional documentation to register and vote in state elections. Fernanda Santo & John Eligon, *2 States Plan 2-Tier System for Balloting*, N.Y. TIMES (Oct. 11, 2013), http://www.nytimes.com/2013/10/12/us/2-states-plan-2-tier-system-for-balloting.html?_r=0. Legal action is pending. *ACLU Challenges Kansas' Two-Tiered Voter Registration System*, AM. CIV. LIBERTIES UNION (Nov. 21, 2013), <https://www.aclu.org/voting-rights/aclu-challenges-kansas-two-tiered-voter-registration-system>. *Belenky v. Kobach*, No. 13-4150, 2014 WL 1374048 (D. Kan. Apr. 8, 2014).

19. See, e.g., Hans A. von Spankovsky, *The Threat of Non-Citizen Voting*, THE HERITAGE FOUNDATION (July 10, 2008),

Justice survey found that nearly seven percent of respondents—all U.S. citizens—did not have ready access to citizenship documentation.²⁰ Seven percent, they argue, equates to more than 13 million citizens of voting age.²¹ Moreover, low-income citizens are almost twice as likely to lack proof of citizenship documentation.²² There are burdensome, if not insurmountable, costs to obtaining citizenship documentation. For example, replacing a naturalization certificate costs over \$300 and may take months to process.²³ This issue disproportionately affects women as well. Out of voting age women with access to their birth certificate, 52% reported that their birth certificate did not reflect their current legal names, while 34% of women with access to citizenship documentation reported that all of their citizenship documentation lacked their current legal name.²⁴

Next, there are laws impacting voter registration. Several states have enacted laws targeted at non-governmental third parties conducting voter registration drives.²⁵ One of the most restrictive of such laws was enacted in 2011 in Florida. This law reduced the number of days a third party registrar was granted to return completed voter registration forms and imposed heavy potential fines for any noncompliance.²⁶ Organizations traditionally involved in significant registration drives decreased or entirely suspended

<http://www.heritage.org/research/reports/2008/07/the-threat-of-non-citizen-voting>. *But see Alleged Voting by Noncitizens*, BRENNAN CENTER FOR JUST. (Nov. 10, 2007), <http://www.brennancenter.org/analysis/alleged-voting-noncitizens> (analyzing incidents of alleged noncitizen voting, including an instance when “[s]tate officials reportedly found that one independent nonprofit group in particular registered 632 noncitizens . . . [who] were proceeding through the naturalization process; many were registered immediately after passing the INS citizenship interview and receiving INS letters stating, ‘Congratulations, your application for citizenship has been approved’ – though the actual swearing-in ceremony did not take place for several months. Assuming that 624 individuals were in fact noncitizens when they cast their votes, the overall noncitizen voting rate would have been **0.6%**”).

20. BRENNAN CTR. FOR JUSTICE, *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS’ POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 2* (2006), available at http://www.brennancenter.org/page/-/d/download_file_39242.pdf.

21. *See id.*

22. *See id.*

23. Fatma Marouf, *The Hunt for Noncitizen Voters*, 65 STAN. L. REV. ONLINE 66 (2012), http://www.stanfordlawreview.org/sites/default/files/online/articles/Marouf_-_65_Stan_L_Rev_Online_66.pdf.

24. CITIZENS WITHOUT PROOF, *supra* note 20, at 2.

25. *See, e.g.*, S.B. 1008, 2013 Gen. Assemb., Reg. Sess. (Va. 2013) (enacted) (limiting the number of days a third party has to send in completed registration forms). S.B. 1586, 97th Gen. Assemb., Reg. Sess. (Ill. 2011) (enacted) (amending 10 ILL. COMP. STAT. 5/4-6.2 by reducing the number of days to return by mail from seven to two).

26. FLA. STAT. ANN. § 97.0575(3)(a) (West 2011).

registration activities.²⁷ A federal lawsuit resulted in a preliminary injunction²⁸ followed by a settlement agreement and permanent injunction.²⁹ Between the time of the bill's enactment and the injunction, voter registration rates dropped in the state.³⁰ There is certainly an argument to be made that states have an interest in ensuring voter registration materials are properly handled,³¹ but serious questions are raised when laws are so restrictive that they reduce or eliminate organizations' ability to conduct nonpartisan voter registration activities.

Other recent laws have impacted voter registration as well. Ohio law prohibits all government entities, except the secretary of state, from mailing unsolicited voter registration forms. A sweeping North Carolina law eliminated the ability of students as young as sixteen from preregistering to vote, eliminated Same Day Voter Registration (SDR), and eliminated an annual statewide registration drive initiated by the State Board of Elections.³² In addition to preventing voter fraud, these restrictions are sometimes deemed necessary because of a lack of resources for local election administrators. Indeed, in our current economy, entities from the federal government to local municipalities face hard choices about the allocation of resources, but the cost benefit analysis of these measures should be probed³³ and may ultimately call the underlying purpose for these laws into question.

27. *New State Voting Laws II: Protecting the Right to Vote in the Sunshine State*, BRENNAN CENTER FOR JUST. (Jan. 27, 2012), http://www.brennancenter.org/analysis/new-state-voting-laws-ii-protecting-right-vote-sunshine-state#_ftn8.

28. *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155 (N.D. Fla. 2012).

29. *League of Women Voters of Fla. v. Detzner*, 283 F.R.D. 687 (N.D. Fla. 2012).

30. Michael C. Herron & Daniel A. Smith, *House Bill 1355 and Voter Registration in Florida*, DARTMOUTH.EDU (Sept. 12, 2012), <http://www.dartmouth.edu/~herron/FloridaVoterRegistrationsHB1355.pdf>.

31. Other laws have also targeted registration drives by third parties. For example, the new election law in North Carolina bans paying registrars based on the number of registrations turned in. This may be a more sensible voter registration limitation. There have been documented instances of fictitious people on voter rolls, which may be largely related to this practice. See Jim Avila & Reynolds Holding, *Mickey Mouse Is Registered to Vote? Former ACORN Employees Speak Out on Accusations of Fraud*, ABC NEWS (Oct. 10, 2008), <http://abcnews.go.com/TheLaw/story?id=6074157>. It seems unlikely that these registrants ever intended for a person to fraudulently vote as "Mickey Mouse." However, it does highlight the need for sensible regulations, like restrictions on paying per registration, that provide important limitations without burdening the ability to conduct registration drives. See *id.*

32. See H.B. 589, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013) (enacted). See also Reid Wilson, *27 Other Things the North Carolina Voting Law Changes*, WASH. POST, Sept. 8, 2013, <http://www.washingtonpost.com/blogs/govbeat/wp/2013/09/08/27-other-things-the-north-carolina-voting-law-changes/>.

33. Early voting may actually have "flat or slightly positive" cost savings. Moreover, it is clear that it can help reduce long lines and ease administrative burdens on Election

Finally, there are those laws directly impacting the ability to cast a ballot. Some states have passed laws restricting early voting and voting by mail, otherwise called absentee voting. A Florida law enacted in 2011 cut in half the number of days early in-person voting was available and eliminated early voting on the Sunday prior to Election Day. A study found that in 2008 African Americans in Florida accounted for twenty-two percent of the early in-person votes and thirty-one percent of the early voters the Sunday before the election, although they comprised only thirteen percent of the electorate.³⁴ Because of the potential impact on minority voters, the District Court of the District of Columbia blocked the law in the five Florida counties subject to the pre-*Shelby* section 5 preclearance requirements of the Voting Rights Act. However, the law was enacted in the other counties. Ohio passed a similar law reducing the number of early voting days just prior to the election, with an exception made for members of the military, but was enjoined from implementing the law.³⁵ The justification for this and similar reductions in early voting again tends to involve limited resources for election administration. In the Ohio case, however, the Sixth Circuit ruled that early voting opportunities offered to military personnel must be offered to all citizens.³⁶ The Court also rejected the limited resources argument and observed that early voting was not problematic in previous elections. In the last year alone, eight states introduced bills to reduce early voting.³⁷ Since 2011, similar laws reducing early voting opportunities also passed in Georgia, West Virginia, and North Carolina.³⁸ If the Sixth Circuit “got it right” in holding that a supposed lack of resources or extra time

Day. However, even when there are costs associated with election modernization and ballot expansion, one might ask how much is “too much” to invest in ensuring fair political participation given that our society holds itself as a beacon of true democracy? Is good election administration something for which we, as a society and as *taxpayers*, are willing to pay?

34. Michael C. Herron & Daniel A. Smith, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 ELECTION L.J. 331, 346 (2012), <https://www.supportthevoter.gov/files/2013/07/Election-Law-Journal-Souls-to-the-Polls-Early-Voting-in-Florida-in-Shadow-of-House-Bill-1355.pdf>.

35. *Obama For Am. v. Husted*, 697 F.3d 423, 423 (6th Cir. 2012).

36. *See id.*

37. H.B. 2305, 51st Gen. Assemb., Reg. Sess. (Ariz. 2013) (enacted); S.B. 467, 118th Gen. Assemb., Reg. Sess. (Ind. 2013); L.B. 271, 103d Gen. Assemb., Reg. Sess. (Neb. 2013) (enacted); H.B. 451, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013); S.B. 666, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013); S.B. 238, 130th Gen. Assemb., Reg. Sess. (Ohio 2013); H.B. 2093, 83d Gen. Assemb., Reg. Sess. (Tex. 2013); A.B. 54, 2013 Gen. Assemb., Reg. Sess. (Wis. 2013).

38. H.B. 92, 2011-2012 Gen. Assemb., Reg. Sess. (Ga. 2012); GA. CODE ANN. § 21-2-385 (2011); H.B. 589, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013) (enacted); W.VA. CODE ANN. § 3-3-3 (West 2011); *Election 2012: Voting Laws Roundup*, BRENNAN CENTER FOR JUST. (Oct. 11, 2012), http://www.brennancenter.org/analysis/election-2012-voting-laws-roundup#_edn4.

needed to prepare for Election Day is an insufficient reason for early voting restrictions,³⁹ is there a justification for these laws?

The most controversial and publicized of these measures are identification requirements. Some states require the person to prove they are who they purport to be by showing items like a utility bill, a government check, or a credit card.⁴⁰ Others require photo identification but allow student identification or veteran identification cards.⁴¹ Others are more restrictive yet, with much of the new legislation trending this way.⁴² In Wisconsin, for example, identification for the purpose of voting must have an expiration date; the state's student identification cards and veteran's identification cards lack this and would not be accepted.⁴³ As referenced above, voter identification bills have been proposed at a staggering rate in recent years, with dozens of states newly requiring identification as a requirement to vote or making pre-existing voter ID requirements more stringent.⁴⁴ Voter identification proponents argue that the integrity of our elections is dependent upon these laws to prevent voter fraud, presumably in the form of voter impersonation.⁴⁵ Some proponents argue that the extent of voter fraud is irrelevant; these laws are designed to prevent a crime—and a threat to our democracy—even if that crime is rare.⁴⁶ They also note that not every case of voter fraud can possibly be detected, so estimating the extent of the problem is nearly impossible.⁴⁷

39. See *Obama*, 697 F.3d at 433-36.

40. Justin Levitt, *Voter ID Update: The Diversity in the Details*, CONST. DAILY (Oct. 30, 2013), <http://blog.constitutioncenter.org/2013/10/voter-id-update-the-diversity-in-the-details/>.

41. See *id.*

42. See *id.*

43. WIS. STAT. ANN. §§ 5.02(6m), 6.79(2)(a) (West, Westlaw through 2013 Act 336). But note that Wisconsin's voter ID law is not currently in effect due to a pending court case.

44. Thirty-four states that have enacted voter ID laws that require some kind of identification include: Georgia, Indiana, Kansas, Tennessee, Texas, Florida, Hawaii, Idaho, Louisiana, Michigan, New Hampshire, South Dakota, Arizona, Ohio, Virginia, Alabama, Arkansas, Alaska, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, North Dakota, Oklahoma, Rhode Island, South Carolina, Utah, Washington, Mississippi, North Carolina, Pennsylvania, Virginia, and Wisconsin. *Voter Identification Requirements*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 17, 2013), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

45. See, e.g., Hans A. von Spakovsky, *Stolen Identities, Stolen Votes: A Case Study in Voter Impersonation*, THE HERITAGE FOUND. (Mar. 10, 2008), <http://www.heritage.org/research/reports/2008/03/stolen-identities-stolen-votes-a-case-study-in-voter-impersonation>.

46. Carl Bialik, *Counting Voter Fraud*, WSJ BLOGS (Sept. 1, 2012, 12:19 AM), <http://blogs.wsj.com/numbersguy/counting-voter-fraud-1165>.

47. See, e.g., *id.*

However, opponents claim that voter fraud is exceedingly rare and disenfranchises citizens who lack identification. To highlight the rarity of voter fraud, they point to the Department of Justice study that showed only forty indictments and twenty-six convictions or guilty pleas between 2002 and 2005 (these twenty-six incidents of voter fraud equate to .00000013 fraudulent votes out of the total number of votes cast).⁴⁸ A study undertaken by News21, a national investigative reporting project headquartered at the Arizona State University, analyzed over two thousand election fraud cases reported between 2000 and 2012 and uncovered only ten cases of voter impersonation.⁴⁹ That very study demonstrates that while our election system is not entirely immune from fraud, virtually none of this fraud is the type to be prevented by voter identification laws.⁵⁰ One state, in the course of defending its voter identification law in court, even stipulated that “[t]he parties are not aware of any incidents of in-person voter fraud”⁵¹

Advocates in favor of voter identification laws also argue that opponents’ claims about lack of access to identification are overblown. Indeed, for many of us in this modern society, proper identification is a necessity in daily life, and access to identification is a foregone conclusion. We must show ID to enter buildings, apply for credit, write checks, rent a hotel room, travel by air,⁵² and so forth. However, research has shown that 11% of U.S. citizens, accounting for over 21 million citizens, lack government-issued photo identification.⁵³ The impact is more pronounced in certain communities: for example, up to 25% of African American citizens (compared to 8% of white citizens) and 18% of citizens over the age of sixty-five do not have

48. Amy Bigham, *Voter Fraud: Non-Existent Problem or Election-Threatening Epidemic?*, ABC NEWS (Sept. 12, 2013), <http://abcnews.go.com/Politics/OTUS/voter-fraud-real-rare/story?id=17213376>. Likewise, in a ten-year period, there have been fifty prosecutions for voter fraud in Texas, which recently implemented strict ID laws, but only four cases involved voter fraud. *Id.*

49. Natasha Khan & Corbin Carson, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence that Photo ID Is Needed*, NEWS21 (Aug. 12, 2012, 10:39 AM), <http://votingrights.news21.com/article/election-fraud/>.

50. *See id.* The Republican National Lawyers’ Association also tracks reported incidents of voter fraud. Indeed, the website contains some allegations regarding voter fraud, but most involve double voting (in one’s own name and frequently by absentee ballot), impropriety by election officials with increased access to the voter rolls and ballots or votes by those who may not have been aware of ineligibility, including noncitizens and felons.

51. Stipulation, *Applewhite v. Pennsylvania*, No. 330-MD-12 (Pa. Commw. Ct. 2012), available at <http://action.naacp.org/page/-/Applewhite%20PA%20Stipulation.pdf>.

52. However, the Transportation Security Administration’s list of acceptable identification is more expansive than that in many voter ID statutes and those without ID still may fly, subject to additional screening once matched in publicly available databases. *Acceptable IDs*, TRANSP. SECURITY ADMIN., <http://www.tsa.gov/traveler-information/acceptable-ids> (last visited Mar. 6, 2014).

53. *Oppose Voter ID Legislation – Fact Sheet*, AM. CIV. LIBERTIES UNION (July 21, 2011), <https://www.aclu.org/voting-rights/oppose-voter-id-legislation-fact-sheet>.

government-issued photo identification.⁵⁴ The impact on voter participation rates, however, is far from clear.⁵⁵ A recent decision noted that there was “overwhelming evidence . . . that . . . hundreds of thousands of qualified voters . . . lack compliant ID . . . [and] the number of *qualified* electors who lack compliant photo IDs is likely greater.”⁵⁶ Moreover, even in states that offer free identification, qualified electors must still overcome the very real barriers of transport and transit to limited offices that offer identification, which is further complicated by the limited hours of these offices.⁵⁷ Further, even when states provide free identification, qualified electors may still lack the underlying documentation required to obtain the identification, such as a birth certificate from a different state with replacement fees that present a significant barrier to low income persons.⁵⁸ Of course, the nar-

54. AM. CIV. LIBERTIES UNION, OPPOSE VOTER ID LEGISLATION (2011), available at https://www.aclu.org/files/assets/aclu_factsheet_on_voter_id_legislation_7_2011.pdf.

55. Marjorie Randon Hershey, *What We Know About Voter-ID Laws, Registration, and Turnout*, 2009 SYMP. 87, <http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Hershey.pdf>. See also Jon C. Rogowski & Cathy J. Cohen, *Black and Latino Youth Disproportionately Affected by Voter Identification Law in the 2012 Election*, BLACK YOUTH PROJECT, <http://research.blackyouthproject.com/files/2013/03/voter-ID-laws-feb28.pdf> (last visited Mar. 4, 2014) (noting that over 17% of young African American voters reported that they did not vote because they lacked proper ID compared to just below 5% of young white voters); Nate Silver, *Turnout Steady in Swing States and Down in Others, but Many Votes Remain Uncounted*, N.Y. TIMES (Nov. 12, 2012), http://fivethirtyeight.blogs.nytimes.com/2012/11/12/turnout-steady-in-swing-states-and-down-in-others-but-many-votes-remain-uncounted/?utm_source=twitterfeed&utm_medium=twitter (showing voter turnout decreasing in some states with voter ID, but remaining stable or increasing in other states). But see Faith Braverman, *Voter Turnout in Texas Nearly Doubles Under New ID Law*, DAILYCALLER.COM (Nov. 13, 2013), <http://dailycaller.com/2013/11/13/voter-turnout-in-texas-nearly-doubles-under-new-id-law/> (demonstrating that voter turnout increased after the enactment of voter ID in Texas and that it is hard to draw conclusions based on turnout in any one election compared to previous elections, given the myriad of reasons (including the candidates and ballot issues) voters may have been mobilized to turnout or disengaged from the process).

56. *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014).

57. See, e.g., *id.* at 27-28 (“Requiring electors who lack compliant photo ID, (and thus have no driver’s license), to get to a [Department of Transportation office] that may not be in their county, and may be several miles away and unreachable by public transport, is untenable.”).

58. For instance, a plaintiff in a case challenging the voter identification law in Wisconsin testified about the difficulties of obtaining compliant photo identification because his birth certificate and driver’s license do not have the same name: one reads “Eddie Lee Holloway Jr.,” while the other reads “Eddie Junior Holloway.” Patrick Marley, *Federal Trial Challenging Wisconsin’s Voter ID Law Underway*, JOURNAL SENTINEL (Nov. 4, 2013), <http://www.jsonline.com/news/watch/federal-trial-challenging-wisconsin-voter-id-law-begins-b99134477z1-230511991.html#ixzz2rg1MePE0>

rower the list of acceptable forms of identification, the more likely it is that they may prevent some people from voting.⁵⁹

Challenges launched in state and federal courts under a variety of legal theories have been both victorious and unsuccessful.⁶⁰ The Supreme Court in *Crawford v. Marion* upheld a prima facie challenge to the state's photo ID law.⁶¹ Since then, state and federal decisions have been all over the map.⁶² This leaves the question for us—and likely for the Supreme Court in an upcoming term—does potential voter fraud, namely voter impersonation, pose enough of a threat to our elections to warrant measures that keep at least some eligible citizens from voting? If not, are there other justifications, including preserving Americans' confidence that the electoral system is free from fraud, simply out of principle but absent compelling evidence of in-person voter fraud, that should or will allow these laws to stand?

The partisan and politically charged nature of restrictive measures is undeniable. According to a poll, nearly two-thirds of Republicans see voter fraud as a bigger problem than voter suppression while a near equal number of Democrats reported voter suppression as the greater threat.⁶³ These bills were almost exclusively introduced and supported by Republicans. Republican figures in recent years have sometimes admitted that these laws are

(reporting that Mr. Holloway tried to amend his birth certificate in order to get a new Illinois license so he could then apply for a Wisconsin license, “but his efforts were unsuccessful after multiple trips to Decatur and Springfield, Ill. He spent \$180 for a bus ticket to Decatur; the trip took seven hours one way”).

59. Justin Levitt, *Voter ID Update: The Diversity in the Details*, CONST. DAILY (Oct. 30, 2013), <http://blog.constitutioncenter.org/2013/10/voter-id-update-the-diversity-in-the-details/>.

60. Challenges Under Equal Protection: Unduly burdensome: *See, e.g.*, *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006) (“Common Cause I”); *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006) (finding that the law was not unduly burdensome). *But see*, *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006) (concluding that Missouri's voter ID law violated EPC); *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014) (finding law burdensome given lack of evidence of voter fraud). Challenges Under the Twenty-Fourth Amendment: Voter ID Laws as Imposing a Cost: *See, e.g.*, *Common Cause I*, 439 F. Supp. 2d 1294 (finding the voter ID law as imposing a cost). *But see* *Common Cause II/ Ga. v. Billups*, 439 F. Supp. 2d 1294 (finding that costs in acquiring identifying documents for an ID card did not impose an invalid poll tax). *State voter ID Laws: Lake v. Perdue*, 2006CV119207 (Sept. 19, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/StateInjunction.pdf>.

61. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

62. *Voter ID: State Requirements*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 17, 2013), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

63. Michael Brandon & Jon Cohen, *Poll: Voter ID Laws Have Support of a Majority of Americans*, WASH. POST (Aug. 11, 2012), http://www.washingtonpost.com/politics/poll-concerns-about-voter-fraud-spur-broad-support-for-voter-id-laws/2012/08/11/40db3aba-e2fb-11e1-ae7f-d2a13e249eb2_story.html.

intended to help the Republican Party.⁶⁴ However, the clearest recent evidence of partisanship arose in Texas where the state used partisanship to refute that its restrictions targeted minority voters, stating “[i]t is perfectly constitutional for a Republican-controlled legislature to make partisan districting decisions, even if there are incidental effects on minority voters who support Democratic candidates.”⁶⁵ Certainly, there is partisanship underlying support for measures like voter identification, but a recent poll found that while 99% of Republicans thought voter identification requirements were a “good thing,” 72% of Democratic respondents also supported voter identification requirements.⁶⁶

Some may argue that these laws are motivated by racism. Others are quick to point out that, at the very least, the impact on minority voter turnout is intentional as supported by statements like that of an Ohio county Republican chairman who wrote, “I guess I really actually feel we shouldn’t contort the voting process to accommodate the urban—read African-American—voter-turnout machine.”⁶⁷ Whatever the reason, racial animus, bald partisanship, or a good faith effort to protect election integrity, it is well documented that these laws have a disparate impact on low income and minority communities.⁶⁸ Whether reasons for restrictive voting laws

64. Pennsylvania House Majority Leader Mike Turzai told a gathering of Republicans that their voter identification law would “allow Governor Romney to win the state of Pennsylvania.” Aaron Blake, *Everything You Need to Know about the Pennsylvania Voter ID Fight*, WASH. POST, Oct. 2, 2012, <http://www.washingtonpost.com/blogs/the-fix/wp/2012/10/02/the-pennsylvania-voter-id-fight-explained/>.

65. Defendants’ Response to Plaintiffs and the United States Regarding section 3(C) of the Voting Rights Act, *Perez v. Perry*, No. 5:11-cv-00360-OLG-JES-XR, available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/08/Texas-reply-on-Sec.-3-of-VRA-8-5-13.pdf>.

66. *McClatchy-Marist Poll*, MARIST POLL (July 2013), <http://s3.documentcloud.org/documents/740010/complete-july-2013-usa-mcclatchy-marist-poll.pdf> (showing that support among all adults was 83%).

67. Darrell Rowland, *Voting in Ohio | Fight over Poll Hours Isn’t Just Political*, THE COLUMBUS DISPATCH (Aug. 19, 2012), <http://www.dispatch.com/content/stories/local/2012/08/19/fight-over-poll-hours-isnt-just-political.html>. See also, e.g., Dara Kam & John Lantigua, *Former Florida GOP Leaders Say Voter Suppression Was Reason they Pushed New Election Law*, THE PALM BEACH POST, Nov. 25, 2012, <http://www.palmbeachpost.com/news/news/state-regional-govt-politics/early-voting-curbs-called-power-play/nTFDy/>.

68. Hershey, *supra* note 55. Additionally, voter identification supporters point to elections that have seen gains in voter turnout after implementing voter identification laws, while opponents point to elections where turnout has decreased after implementation. However, caution should be exercised before drawing conclusions: “After lots of elections have been held in lots of states, it may be possible to use advanced statistical tools to filter the turnout effects of strict ID rules from all of the other impacts going on. But we don’t have enough information to draw these conclusions yet.” Justin Levitt, *Facile Turnout Stats on Voter ID: Wrong, the First Time*, HUFF POST (Oct. 25, 2013, 5:06 PM),

based on partisanship or even election integrity can or should justify these measures, particularly given the disparate impact they have on discrete communities like minorities, the elderly, women, and low-income persons, will continue to be a legal question for the courts and a moral question for our society as a whole.

While this introduction has set forth some of the common restrictive voter laws emerging in the last decade, it does not possibly address all of the laws, policies, or procedures that might have a negative impact on voter registration, participation, and political representation. There are also redistricting practices, challenges to which are also greatly affected by the *Shelby County* ruling. Redistricting can influence the ability of communities, including communities of color, to elect a candidate of their choice and can thus reduce minority representation. Likewise, the election systems used in local elections can have this effect. For example, at-large districts allow voters throughout the jurisdiction to vote for all open seats. As such, vote dilution might prevent minority representation in jurisdictions with a substantial, but not a majority, community of color. Voter purges are another election administration practice designed to ensure that those who are no longer eligible to vote in a particular jurisdiction because they have moved, passed away, or become ineligible due to a felony conviction are removed from that jurisdiction's voter rolls. However, voter purges may also be conducted in a manner that disenfranchises eligible voters by accidentally removing them from the poll books. Indeed, nearly every phase of the electoral process, from compliance with the National Voter Registration Act,⁶⁹ to rules about counting provisional ballots, has been the subject of legislation or litigation.

While there has been a flurry of activity around voter restriction laws, recent years have seen a rise in laws designed to increase ballot access, sometimes referred to as "expansive" voting laws. Perhaps because of the controversial nature of restrictive voter laws and the resultant legal challenges, expansive laws often garner less public attention. However, in 2013, more laws aimed at expanding opportunities to vote were both proposed and passed than those that could potentially restrict ballot access. Last year

http://www.huffingtonpost.com/justin-levitt/facile-turnout-stats-on-voter-id_b_4158939.html.

69. The National Voter Registration Act (NVRA) is known as the Motor Voter Law. The law contains provisions that place a requirement on the government agencies to offer voter registration to those who interacted with the government through DMVs and public welfare agencies. However, agencies' compliance with the law has been mixed and resulted in investigations and litigation. *See, e.g.*, U.S. Dep't of Justice, *Cases Raising Claims Under the National Voter Registration Act*, JUSTICE.GOV, http://www.justice.gov/crt/about/vot/litigation/caselist.php#nvra_cases (last visited Mar. 5, 2014).

alone, ten states passed thirteen bills designed to make registering to vote and voting easier.⁷⁰ Colorado's election reform law includes provisions like Same Day Voter Registration, portable registration that ensures that voters can still cast a ballot even if they move within the state, increasing early voting opportunities and allowing voters to vote in any precinct within their county.⁷¹ Maryland also enacted Same Day Voter Registration and expanded early voting.⁷² Two states made photo ID requirements less restrictive.⁷³ Another automated voter registration at DMV offices.⁷⁴ Three states passed online voter registration.⁷⁵ Moreover, the recent introduction of the bipartisan Voting Rights Amendment Act of 2014 represents the promise of congressional action to restore certain voting rights protections and fill some of the gaps left in the wake of *Shelby County*.⁷⁶

Many expansive voter laws take advantage of available technologies to modernize our elections. The Presidential Commission on Election Administration recently issued a report urging the adoption of measures that improve access to the polls and strongly supports modernization including online voter registration and inter-state data sharing systems.⁷⁷ These laws hold promise to not only increase voter access and participation, but to also make election administration processes more efficient, cost effective, and

70. H.B. 13-1303, 69th Gen. Assemb., (Colo. 2013); H.B. 10, 147th Gen. Assemb. (Del. 2013); H.B. 7013, Reg. Sess. (Fla. 2013) (amending Florida Election Code); H.B. 2418, 98th Gen. Assem. (Ill. 2013) (amending Illinois Election Code); H.B. 224, 433d Leg. (Md. 2013); S.B. 595, Reg. Sess. (N.H. 2013); H.B. 497, 51st Leg., 1st Sess. (N.M. 2013); H.B. 225, 51st Leg., 1st Sess. (N.M. 2013); H.B. 282, 54th Leg., 1st Sess. (Ok. 2013) (amending 26 O.S. 2011, Sections 4-117 and 7-114 -voting-proof of identity); H.B. 2341, 2013 Reg. Sess. (Va. 2013) (amending Virginia Election Code); H.B. 2865, 81st Leg., 1st Sess. (W.V. 2013); S.B. 477, 81st Leg., 1st Sess. (W.V. 2013).

71. *Voting Laws Roundup 2013*, BRENNAN CENTER FOR JUST. (Dec. 19, 2013), <http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup#expansive>.

72. H.B. 13-1303, 2013 Gen. Assemb. (Colo. 2013).

73. S.B. 595, 2013 Reg. Sess. (N.H. 2013); HB 282, 54th Leg., 1st Sess. (Okla. 2013).

74. H.B. 497, 51st Leg., 1st Sess. (N.M. 2013); H.B. 225, 51st Leg., 1st Sess. (N.M. 2013).

75. H.B. 2418, 98th Gen. Assem. (Ill. 2013); H.B. 2341, 2013 Reg. Sess. (Va. 2013); H.B. 2865, 81st Legis. (W.Va. 2013); S.B. 477, 81st Legis. (W.Va. 2013).

76. Voting Rights Amendment Act of 2014, S. 1945, 113th Cong. (2014); Carrie Johnson, *Lawmakers Roll Out Voting Rights Act Fix*, NPR (Jan. 16, 2014), <http://www.npr.org/blogs/itsallpolitics/2014/01/16/263113258/lawmakers-roll-out-voting-rights-act-fix>.

77. PRESIDENTIAL COMM'N ON ELECTION ADMIN., *THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION (2014)*, available at <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

accurate.⁷⁸ For the latter reasons alone, these arguably commonsense measures *should* enjoy bipartisan support.

While restrictive legislation has been proposed in Illinois, expansive legislation has garnered more support. Because Illinois advocates and policymakers spend less time responding to restrictive legislation as a result, I believe Illinois is one of the states that has demonstrated the value of introducing laws that increase opportunities to participate in our democratic process and modernize our election administration.

The most dramatic reform in Illinois is the introduction of Online Voter Registration (OVR). The law requires voter registration applicants to enter and certify traditional eligibility information like age, citizenship, and residency. It also requires potential voters to enter their Illinois driver's license or state identification number, so their information can be verified and their signature can be pulled from the secretary of state database. The application is then forwarded to the local election jurisdiction, like all completed applications, for final eligibility confirmation after which the voter is added to the voter roll. This measure is likely to save taxpayers money based on the results of OVR in other states. For example, an Arizona county with a population larger than that in twenty-three states estimated that processing electronic voter registrations costs three cents, compared with eighty-three cents to process paper-based applications, resulting in savings of \$450,000 in one election year alone.⁷⁹ The state also saw the number of young citizens registering to vote nearly double after enacting OVR.⁸⁰ California has seen a similar increase in overall registration rates.⁸¹

The Illinois election reform law included other important changes. Previously, if a voter cast a ballot in the wrong precinct, the entire ballot would not be counted. Many polling places in Illinois have more than one precinct, e.g. a school gym may have separate tables for precinct one, precinct two, and precinct three. A voter who accidentally went to the wrong table would receive a provisional ballot because she would not be located in the poll book for that precinct. And, as a result of the previous election law, that provisional ballot would be rejected in its entirety because it was cast in the wrong precinct. Under the new law, officials must count the votes for every office in which the voter would have been entitled to vote had she cast a ballot in the right precinct. As such, the law promises to prevent the

78. See BRENNAN CTR. FOR JUSTICE, THE CASE FOR VOTER REGISTRATION MODERNIZATION (2013), *available at* <http://www.brennancenter.org/sites/default/files/publications/Case%20Voter%20Registration%20Modernization.pdf>.

79. *Id.*

80. *Id.*

81. *Id.*

needless disenfranchisement of voters due to confusion, miscommunication or poll worker error.⁸²

A persistent problem with elections throughout the state stems from our decentralized system of election administration. Illinois has over 100 election jurisdictions with a high amount of autonomy in designing their election practices. For example, the Illinois Election Code specifies the types of acceptable identification a voter must show to register in person by stating, “[t]hese forms of identification shall include, but not be limited to, any of the following”⁸³ Thus, some election jurisdictions accept additional types of identification not enumerated while others do not.

Another example of the inconsistencies in practices between Illinois jurisdictions was the previously disparate practices election jurisdictions adopted around Grace Period Voting. Grace Period Voting provided an opportunity for those who missed the regular registration deadline to register at the election authority’s office up to three days before an election and vote in that election. The law previously provided

a voter who registers . . . during this grace period wishes to vote at the first election or primary occurring after the grace period, he or she must do so by . . . voting[] either in person in the office of the election authority or . . . by mail, at the discretion of the election authority.⁸⁴

Most voters utilizing Grace Period Voting would then go in and register at an office designated by the election authority for that purpose and then cast a ballot through in-person early voting procedures. Reportedly, however, at least one jurisdiction required Grace Period voters to mail in an application for an absentee ballot, after which the jurisdiction would mail the ballot to the voter. If the voter returned the ballot by mail, it would have to be post-marked by midnight the day before the election.⁸⁵ Clearly the law was designed to provide late registrants an opportunity to register and vote past the standard deadline, but this arduous process posed the threat of denying the voter a meaningful opportunity to vote because of the time constraints. The new law aims to remedy this potential problem by allowing an election au-

82. Adopting electronic poll books, as recommended by the Presidential Commission on Election Administration, is another technology that may reduce errors and reduce administrative burdens. THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION, *supra* note 77. Electronic poll books would likely increase the manageability of the new Illinois provisional ballot counting rule and make future reforms, like Same Day Voter Registration, easier to implement.

83. 10 ILL. COMP. STAT. 5/4-10 (2013).

84. Election Code, Pub. Act 98-115, 2013 Ill. Legis. Serv. 1692.

85. H.B. 224, 2013 Leg., Reg. Sess. (Md. 2013); H.B. 2418, 98th Gen. Assemb., Reg. Sess. (Ill. 2014).

thority to require mail ballots only if ballots are unavailable for in-person early voting.⁸⁶

Moreover, there is still more that can be done to increase voter access, while also potentially lowering administrative costs and improving election integrity. While Illinois has strong Grace Period registration laws, there are many individuals who would like to vote on Election Day but have not registered. Even more so, there are people who have moved or changed names and have not properly updated their address. There are also those individuals who did register or who mailed in their registration but whose registration was lost or mishandled, as even the most effective systems will not be void of human error. These voters would currently be turned away or offered a chance to cast a provisional ballot, which has no chance of being counted unless the voter understands the in-person follow up procedures and is able to comply. Same Day Registration (SDR), also referred to as Election Day Registration,⁸⁷ allows voters to register or update their registration on Election Day. States use different processes, but they involve different means to verify the voter's identity as well as follow up procedures to prevent and prosecute any attempted double voting. At least ten states plus the District of Columbia offer SDR.⁸⁸ While numerous factors impact turnout in any given election, states with SDR have historically boasted turnout rates ten to twelve percentage points higher than states that do not offer SDR.⁸⁹ The top five states for strongest voter turnout during the 2008 election were all states that offer SDR.⁹⁰ Same Day Registration may benefit students, women who have recently changed their last name, low-income voters, and other communities with higher levels of transience.

86. H.B. 224, 2013 Leg., Reg. Sess. (Md. 2013); H.B. 2418, 98th Gen. Assemb., Reg. Sess. (Ill. 2014).

87. Same Day Registration is a term sometimes used to describe any practice that allows the voter to register and cast a vote the same day, usually during the early voting period as is allowed in Illinois. Election Day Registration refers only to same-day registration on Election Day. However, most advocates in Illinois use the term Same Day Registration to refer to reforms which allow registering on Election Day; I will do the same.

88. *Same Day Voter Registration*, NAT'L CONF. OF ST. LEGISLATURES (Nov. 14, 2013), <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

89. DEMOS, VOTERS WIN WITH SAME DAY REGISTRATION (2010), available at <http://www.nonprofitvote.org/documents/2011/02/voters-win-with-sdr-2310.pdf>. SDR might actually increase turnout among young voters even more. In a 2003 study about the 2000 Presidential Election, it was found that turnout was, on average, fourteen percentage points higher among eighteen to twenty four-year-old youths in states that had EDR. Kei Kawashima-Ginsberg et al., *State Election Law Reform and Your Voter Turn-out*, CIRCLE (Jul. 2009), <http://www.nonprofitvote.org/documents/2011/02/edr-helps-youth-turnout-circle.pdf>.

90. *See id.*

Over 36 million Americans moved between 2011 and 2012; nearly fifty percent of those who moved had low incomes.⁹¹

Other reforms that use modern technology to increase voter registration and participation while decreasing inefficiencies, errors, registration costs, and duplicate registrations include automated registration and portable registration. Automated voter registration would allow any eligible voter providing information to certain agencies—for example upon applying for public services, getting a driver's license, or becoming a naturalized citizen—an opportunity to use the information for voter registration purposes, without requiring separate forms or processes.⁹² After a voter certifies citizenship and other eligibility requirements, the information is transmitted to the local election authority. Portable registration, likewise, allows voters to choose to update their registration upon completing change of address forms with public agencies and DMVs. Not only would more citizens be offered the opportunity to register and stay registered, this system can automatically cancel old registrations with outdated addresses thus maintaining cleaner roles and promoting election integrity.

Similarly, systems like the new Electronic Registration Information Center (ERIC) can improve the accuracy of voter information and the efficiency of the registration system. Seven states⁹³ currently participate in the ERIC system, which is funded by participating states with assistance from the Pew Charitable Trusts. The ERIC system uses technology that compares data from multiple sources, including motor vehicle records, voter registration rolls, U.S. Postal service addresses, and Social Security death records, to cross check information and notify states when records may be out of date due to a change in name or address, or the death of a voter.⁹⁴ The system can also identify eligible but unregistered voters so states can encourage registration earlier in the election cycle to ease administrative burdens.⁹⁵

Low voter turnout continues to be a problematic feature of our democracy. Turnout is generally highest during presidential elections. Look at current voter participation rates, for example: 58.2% of eligible citizens

91. *What Is Same Day Registration? Where Is it Available?*, DEMOS.ORG (Mar. 1, 2013), <http://www.demos.org/publication/what-same-day-registration-where-it-available>

92. *The Case for Voter Registration Modernization*, BRENNAN CENTER FOR JUST. (2013), [www.brennancenter.org/sites/default/files/publications/Case Voter Registration Modernization.pdf](http://www.brennancenter.org/sites/default/files/publications/Case%20Voter%20Registration%20Modernization.pdf).

93. Colorado, Delaware, Maryland, Nevada, Utah, Virginia, and Washington—and the District of Columbia. *Electronic Registration Information Center (ERIC)*, THE PEW CHARITABLE TRUSTS (Jan. 3, 2014), <http://www.pewstates.org/research/featured-collections/electronic-registration-information-center-eric-85899426022>.

94. *Id.*

95. *Id.*

voted in 2012; 61.8% in 2008; 60.1% in 2004.⁹⁶ But voting during federal midterm election is significantly lower: 41% in 2010; 40.4% in 2006.⁹⁷ The deficit in robust democratic participation is even more glaring in local elections. A recent study reviewing 340 mayoral elections in 144 U.S. cities from 1996 to 2012 found that voter turnout in those cities averaged at 25.8%; city mayors have been elected with single-digit turnout in multiple races.⁹⁸

It is my view that low voter turnout and outdated election administration systems and practices are the challenges that our legislation should address as we move further into the twenty-first century. Adopting modern technology will improve our election by promoting cost savings and lower administrative burdens on election administrators. Moreover, it will help prevent the needless disenfranchisement resulting from anything from registration processing errors to a voter failing to update an address upon moving. I've heard an election official recently proclaim: "It's not our job to make voting as easy as possible" and argue that voters need to take personal responsibility. But I think election officials, as well as advocacy organizations like the Chicago Lawyers' Committee for Civil Rights should make voting easy. We must make voting accessible for the recently naturalized voter with limited English proficiency. We must make voting more accessible for the high school student who is intimidated by being in a polling place for the first time in her life. We must make voting easy for the hourly worker who would like to vote early, or not wait in long polling place lines, to avoid missing work. We must make voting easier for the elderly low-income man who does not have a photo ID or a birth certificate and lives far from the DMV. We must make voting easy for the woman who recently changed to a new married name but did not know to update her records.

When I contemplate the many intricate election law questions our society is encountering, it is those voters who already face challenges to having their voice heard in the political process that I think of first. New voters and underrepresented voters, by their very nature, may not be in the majori-

96. Dr. Michael McDonald, *Voter Turnout*, U.S. ELECTION PROJECT, http://elections.gmu.edu/voter_turnout.htm (last visited Mar. 5, 2014). Voter turnout is commonly measured against Voting Age Population (VAP), which includes everyone residing in the U.S. over the age of eighteen, according to the U.S. Census, and includes those who may be ineligible to vote, such as noncitizens or felons. Thus, turnout estimates based only on the percentage of voters who cast a ballot compared to the number of people eligible to vote are naturally higher. For example, in 2012, 53.6% of the VAP turned out to vote.

97. *Id.*

98. *What Affects Voter Turnout Rates*, FAIR VOTE: THE CENTER FOR VOTING AND DEMOCRACY, <http://www.fairvote.org/what-affects-voter-turnout-rates#.UuHIELRMHIU> (last visited Mar. 5, 2014). For example, turnout in Dallas's 1999 mayoral election was a mere five percent. *Id.*

ty, but our society is dependent upon principles of fairness and protection for *all*.

The many issues presented herein and in this issue should be of concern to every citizen who recognizes that a well-functioning democracy requires citizens who are engaged and actively participate. However, there are many complexities inherent in the struggle between the conflicting accessibility, integrity, and fiscal responsibility values. In this important era for voting rights, these articles provide valuable insight to both foster deeper understanding and provoke rigorous debate.