

# SWING STATE RULINGS ON RESTRICTIVE VOTING LAWS HIGHLIGHT THE NEED FOR COMPREHENSIVE ELECTORAL REFORM

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*The right to elect our leaders has been one of the defining features of America’s political system from its very beginning. Throughout the two and a half centuries that the United States has existed, that right to vote has gradually been expanded to previously disenfranchised groups, and strengthened through legislation like the Voting Rights Act, Help America Vote Act, and National Voter Registration Act. However, recent elections—such as Florida in 2000 and Ohio in 2004—have shown that the right to vote can still be undermined by incompetent or conflicted officials. Additionally, measures whose purpose is ostensibly to prevent voter fraud, such as voter identification (ID) laws and rules regarding voter registration, can also have a disenfranchising effect. This Comment reviews these recent problems, and proposes that state-by-state administration of Federal elections is no longer adequate to ensure that all eligible voters are enfranchised. Instead, standardized national rules and independent, nonpartisan election commissions should govern Federal elections.*

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## INTRODUCTION

In an article published shortly before the 2012 presidential election, *The Economist* told the story of South Carolina resident Raymond Rutherford's attempt to secure the proper identification so that he could vote in the upcoming election.<sup>1</sup> Prior to 2012, South Carolina did not require voters to show photo identification (ID) at their polling place, but that changed with the passage of Act R54, which required a voter to show a specified form of photo ID.<sup>2</sup> The problem for Mr. Rutherford was that he had to show a birth certificate to obtain an approved form of photo ID.<sup>3</sup> However, because he had been born at home in the early 1950s and delivered by a midwife, the name on his birth certificate was Raymon Croskey.<sup>4</sup> The reason for this was that the midwife who delivered Rutherford was a friend of his mother, whose surname was Croskey.<sup>5</sup> Errors like this were common at a time when midwives often registered several births at once, days after they occurred.<sup>6</sup> Names became confused.<sup>7</sup> Because of the discrepancy between the name on the birth certificate and his given name, Rutherford feared that he might be denied the necessary identification.<sup>8</sup> In the end, Rutherford's efforts to obtain a photo ID in his proper name led him into "a Kafkaesque ordeal of record searches and large lawyers' fees."<sup>9</sup>

Fortunately, Mr. Rutherford was assured the chance to vote in the 2012 election when a three-judge panel of the United States Federal District Court in Washington, D.C.

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1. *Access to the Polls: Counting Voters, Counting Votes*, *ECONOMIST*, Oct. 27, 2012, at 34, available at <http://www.economist.com/news/united-states/21565259-discouraging-citizens-voting-not-good-democracy-counting-voters-counting-votes>.

2. Act R54, § 5, 2011 S.C. Acts 90, 94–96 (amending S.C. Code Ann. § 7-13-710(D)(1)(b) (1976)).

3. *Access to the Polls: Counting Voters, Counting Votes*, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

blocked implementation of the new South Carolina voter ID law, stating that there was too little time to implement it that year.<sup>10</sup> However, this was only a temporary reprieve for South Carolina voters who would have difficulty obtaining an ID. The court also held that the law was not discriminatory on its face and would be allowed for future elections.<sup>11</sup>

Voting laws in America vary widely from state to state, including laws governing whether voters must present a photo ID.<sup>12</sup> Had Mr. Rutherford been born in North Carolina, or any of the other twenty states that do not require identification to vote, he would not have faced the dilemma that he did.<sup>13</sup> On the other hand, had the D.C. District Court allowed South Carolina's law rather than temporarily enjoining it, Mr. Rutherford's ability to exercise his right to vote may have simply come down to the luck of the state in which he was born.<sup>14</sup> Therein lies the problem: although several pieces of federal legislation, discussed later in this Comment, have sought to impose uniformity on state voting laws, those pieces of legislation have not gone far enough.<sup>15</sup> A great deal of variation still exists among states' voting procedures and laws, including voting hours, ID laws, rules governing voter registration organizations, early voting periods, mail-in ballots, systems used to record votes, and ballot-counting procedures.<sup>16</sup> Furthermore, no federal voting legislation has addressed the most critical problem: voting laws are enacted by partisan legislatures and elections overseen by partisan elected officials.<sup>17</sup> One commentator likened this system to "having a NFL game where the referees are part-owners of one of the

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10. *S. Carolina v. United States*, 898 F. Supp. 2d 30, 50–51 (D.D.C. 2012).

11. *Id.* at 45, 50–51.

12. *Election 2012: Voting Laws Roundup*, BRENNAN CENTER FOR SOC. JUST., <http://www.brennancenter.org/analysis/election-2012-voting-laws-roundup> (last visited Sept. 16, 2013).

13. *Voter Identification Requirements*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last visited Sept. 16, 2013).

14. *See supra* note 12 (providing a list of the twenty states that do not require voter ID).

15. *See infra* Parts I.A. and I.B.

16. *Voter Protection Map*, ADVANCEMENT PROJECT, <http://advancementproject.org/map> (last visited Mar. 24, 2013).

17. *Fresh Air: Could a Second Term Mean More Gridlock?*, NAT'L PUB. RADIO (Nov. 7, 2012), <http://m.npr.org/news/Arts+%26+Life/164609577>.

teams.”<sup>18</sup>

Individual state voting laws result in a patchwork of different rules that can result in selective disenfranchisement, as Mr. Rutherford’s episode in South Carolina shows. Individual state voting laws can also result in accusations of partisan tampering, thus eroding the legitimacy of the entire democratic process.<sup>19</sup> In order to faithfully give effect to the right to vote, Congress should implement strict, uniform national standards administered by non-partisan state bodies.<sup>20</sup> These standards should cover a range of areas that have resulted in problems in previous elections, such as voter ID rules, the number of days for early and absentee voting, rules for voter registration groups, and the number and type of voting machines used. This Comment develops a proposal in three parts. Part I traces the history of the right to vote in America and how it came to be considered the most important of all rights—the right upon which all other rights are based. Part II reviews several controversies that have arisen since the 2000 presidential election and shows how these demonstrate the need for greater uniformity between states in their voting procedures. Finally, Part III proposes several options that would help cure many of the defects inherent in the current system.

## I. THE RIGHT TO VOTE AND ITS HISTORICAL IMPORTANCE

### A. *Voting in Early America*

The right to elect representatives in government is one of the core founding principles of the United States. Indeed, in rejecting the king of England’s “absolute Tyranny over these States”<sup>21</sup> and embracing a government that “derive[s] [its] just powers from the consent of the governed,”<sup>22</sup> the right to elect

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18. *Id.*

19. *See infra* Parts II.A., II.B., and II.C.

20. A good model for a nonpartisan election commission is the Congressional Budget Office (CBO), which “conducts objective, impartial analysis” in a “strictly nonpartisan” fashion. According to their mission statement, “all CBO employees are appointed solely on the basis of professional competence, without regard to political affiliation.” *Overview*, CONG. BUDGET OFFICE, <http://www.cbo.gov/about/overview> (last visited Aug. 4, 2013).

21. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

22. *Id.*

our government became the founding principle of the United States. The writings of the Founding Fathers illustrate this notion. Alexander Hamilton stressed the importance of enshrining the right to vote in the law of the land, writing, “[a] share in the sovereignty of the state, which is exercised by the citizens at large, in voting at elections is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law.”<sup>23</sup> Thomas Jefferson noted that voting is the right that underpins and safeguards all other rights, acting as a corrective to the potential excesses and missteps of government: “Should things go wrong at any time, the people will set them to rights by the peaceable exercise of their elective rights.”<sup>24</sup> James Madison believed that “under every view of the subject, it seems indispensable that the [m]ass of [c]itizens should not be without a voice, in making the laws which they are to obey, [and] in [choosing] the Magistrates, who are to administer them.”<sup>25</sup> And John Jay declared Americans to be “the first people whom Heaven has favored with an opportunity of deliberating upon and choosing the forms of government under which they should live.”<sup>26</sup>

Despite the importance they placed on the right of suffrage, the Founders did not agree completely on who should count as a citizen for the purpose of voting. Alexander Hamilton, for example, while extolling the virtues of voting, also noted approvingly Blackstone’s observation that some, like the indigent, might be tempted to vote “under undue influence.”<sup>27</sup> Thus, he endorsed the British system of qualifications for voting, whereby “some who are suspected to have no will of their own, are excluded.”<sup>28</sup> Partly as a result of the uncertainty about who should be allowed to vote, the question of suffrage was not addressed head-on in the

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23. Alexander Hamilton, *Second Letter from Phocian* (1784), in THE PAPERS OF ALEXANDER HAMILTON VOL. III, 544–45 (Harold C. Syrett ed., 1962).

24. Thomas Jefferson, *Letter to Wilson C. Nicholas* (1806), in THE JEFFERSONIAN CYCLOPEDIA, 841 (John P. Foley ed., 1900).

25. James Madison, *Note to his Speech on the Right of Suffrage*, in 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, 454 (M. Farrand ed. 1911).

26. JOHN JAY, THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY vol. I, 161 (Henry P. Johnston ed., 1890).

27. Alexander Hamilton, *The Farmer Refuted* (1775), in THE WORKS OF ALEXANDER HAMILTON VOL. II, 63 (John. F. Hamilton, ed., 1850).

28. *Id.*

Constitution. As the Supreme Court noted, “the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.”<sup>29</sup> In fact, a close reading of the Constitution shows that there is nowhere in it a plainly stated affirmative right to vote.<sup>30</sup> Instead, Article I, Section 4 of the Constitution left it to the states to decide the time, place, and manner of holding elections for representatives and senators, while reserving to Congress the power to pass laws “[making] or [altering] such regulations, except as to the places of [choosing] senators.”<sup>31</sup> As for the election of the president, the Constitution again left it to the states to appoint, in a way of their choosing, a number of electors equal to the number of senators and representatives to which the state was entitled.<sup>32</sup> The only federal control Congress retained for presidential elections was to designate the day that each state chose its electors and the day on which the electors gave their votes—both of which would be the same throughout the United States.<sup>33</sup> Suffrage, therefore, was largely a state issue, with “eligibility to vote for representatives . . . based on each state’s rules for voting on the state legislature’s lower house.”<sup>34</sup>

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29. *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991) (citations omitted).

30. The lack of a positively stated right to vote led United States Representatives Mark Pocan and Keith Ellison to introduce a bill in 2013 that would have amended the Constitution to read

Section 1: Every citizen of the United States, who is of legal voting age, shall have the fundamental right to vote in any public election held in the jurisdiction in which the citizen resides. Section 2: Congress shall have the power to enforce and implement this article by appropriate legislation.

Bill Glauber, *Pocan, Ellison Seek Right-to-Vote Constitutional Amendment*, MILWAUKEE J. SENTINEL, ALL POL. BLOG (May 13, 2013), <http://www.jsonline.com/blogs/news/207236941.html>. In evaluating Pocan’s claim that “nothing in the Constitution explicitly guarantees our right to vote,” fact-checking website Politifact rated that statement as “true,” citing the works of a number of scholars, including Yale Law School’s Heather Gerken, who wrote “The Constitution does not guarantee Americans the right to vote. That always comes as a surprise to non-lawyers.” *U.S. Constitution is Not Explicit on the Right to Vote*, *Wisconsin Rep. Mark Pocan Says*, POLITIFACT.COM, <http://www.politifact.com/wisconsin/statements/2013/may/30/mark-pocan/us-constitution-not-explicit-right-vote-wisconsin/> (last visited Sept. 12, 2013).

31. U.S. CONST. art. I, § 4, cl. 1.

32. U.S. CONST. art. II, § 1, cl. 2.

33. *Id.* at cl. 3.

34. *The Constitution and Suffrage*, VOTING RTS. & CITIZENSHIP, [http://www1.cuny.edu/portal\\_ur/content/voting\\_cal/the\\_constitution.html](http://www1.cuny.edu/portal_ur/content/voting_cal/the_constitution.html) (last visited Feb. 3, 2013).

Changes to voting laws in the United States evolved gradually over the first several decades of the country's history. In 1790, the Naturalization Law passed, stating "that only 'free white' immigrants [could] become naturalized citizens."<sup>35</sup> North Carolina became the last state to eliminate property requirements for voting in 1856, opening up the franchise to all white males.<sup>36</sup> In the aftermath of the Civil War, however, Congress passed two landmark constitutional amendments that exerted significant federal control over voting and reflected a new understanding of the concept of universal suffrage. The Fourteenth Amendment, ratified in 1868, conferred citizenship on all persons "born or naturalized in the United States, and subject to the jurisdiction thereof."<sup>37</sup> The Fifteenth Amendment, ratified in 1870, prohibited the federal government or any state from denying citizens the right to vote based on "race, color, or previous condition of servitude,"<sup>38</sup> with a reservation of power for Congress to enforce the law through appropriate legislation.<sup>39</sup> In short, the mid-1800s saw a significant expansion of the class of citizens to whom the franchise extended.<sup>40</sup>

Despite the force of these constitutional amendments, by the end of Reconstruction in 1877, many southern states had devised institutional schemes to deprive black citizens of the right to vote, including poll taxes and literacy tests.<sup>41</sup> Other tactics included vouchers of good character, disqualification for crimes of moral turpitude, and "allowing 'private' political parties to conduct elections and establish qualifications for their members."<sup>42</sup> These tactics effectively disenfranchised

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35. N. CAL. CITIZENSHIP PROJECT, U.S. VOTING RIGHTS TIMELINE (2004), available at <http://www.kqed.org/assets/pdf/education/digitalmedia/us-voting-rights-timeline.pdf>.

36. *Id.*

37. U.S. CONST. amend. XIV, § 1.

38. U.S. CONST. amend. XV, § 1.

39. *Id.* § 2.

40. Sadly, this newly enfranchised class did not include women. It was not until 1890 that Wyoming became the first state to grant women the right to vote, and a further thirty years after that until Congress adopted the 19th Amendment, which forbade state or federal government from denying the right to vote on the basis of sex. *Women's Suffrage Timeline (1840-1920)*, NAT'L WOMEN'S HIST. MUSEUM, <http://www.nwhm.org/education-resources/history/woman-suffrage-timeline> (last visited Sept. 12, 2013).

41. *Jim Crow*, VOTING RTS. & CITIZENSHIP, [http://www1.cuny.edu/portal\\_ur/content/voting\\_cal/jim\\_crow.html](http://www1.cuny.edu/portal_ur/content/voting_cal/jim_crow.html) (last visited Sept. 12, 2013).

42. *Introduction to Federal Voting Rights Laws: Before the Voting Rights Act*,

most black voters in former Confederate states by 1910.<sup>43</sup>

Even though a steady stream of individual lawsuits intended to force southern states to protect the right of blacks to vote,<sup>44</sup> by 1965 these efforts had “achieved only modest success overall and in some areas had proved almost entirely ineffectual.”<sup>45</sup> This systemic failure, and a widely publicized attack on peaceful civil rights activists by state police in Selma, Alabama, proved to be the catalysts needed for drastic action.<sup>46</sup> Shortly thereafter, President Johnson put into motion the legislation that would become the Voting Rights Act (VRA), “generally considered the most successful piece of civil rights legislation ever adopted by the United States Congress.”<sup>47</sup> Section 2 of the VRA effectively eliminated literacy tests as a condition for voting, while Section 5 implemented “special enforcement provisions targeted at those areas of the country where Congress believed the potential for discrimination to be the greatest.”<sup>48</sup> This included a requirement that those areas, known as “Covered Jurisdictions,” apply for preclearance from either the Attorney General or the District Court for the District of Columbia before enacting any changes to their voting procedures.<sup>49</sup> Combined with the Twenty-Fourth Amendment, that prohibited poll taxes,<sup>50</sup> these federal measures overrode any conflicting state laws, creating a level of uniformity among the states in terms of voting laws and access to the polls. They enfranchised, as much as possible, all

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U.S. DEPT OF JUSTICE, [http://www.justice.gov/crt/about/vot/intro/intro\\_a.php](http://www.justice.gov/crt/about/vot/intro/intro_a.php) (last visited Feb. 3, 2013).

43. *Id.*

44. *The Voting Rights Act of 1965*, U.S. DEPT OF JUSTICE, [http://www.justice.gov/crt/about/vot/intro/intro\\_b.php](http://www.justice.gov/crt/about/vot/intro/intro_b.php) (last visited Feb. 3, 2013).

45. *Id.*

46. *Id.*

47. *Introduction to Federal Voting Rights Laws*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/crt/about/vot/intro/intro.php> (last visited Sept. 12, 2013).

48. *The Voting Rights Act of 1965*, *supra* note 44.

49. *Id.* Section 5 “Covered Jurisdictions” included the entire states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, as well as selected areas in California, New York, North Carolina, South Dakota, and Michigan. *Section 5 Covered Jurisdictions*, U.S. DEPT OF JUSTICE, [http://www.justice.gov/crt/about/vot/sec\\_5/covered.php](http://www.justice.gov/crt/about/vot/sec_5/covered.php) (last visited July 8, 2013). In June of 2013, the Supreme Court effectively invalidated Section 5 of the Voting Rights Act by holding Section 4 of the Act unconstitutional in *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2623–24, 2631 (2013). *See infra* Part III.

50. U.S. CONST. amend. XXIV, § 1.

citizens of the United States who were eligible to vote.

The importance of this legislation showed through in some early court decisions upholding its constitutionality. For example, the Supreme Court used extraordinarily strong language to condemn voter suppression when it upheld the VRA in the 1966 case *South Carolina v. Katzenbach*.<sup>51</sup> Summarizing the legislative history behind the VRA, the Court observed that Congress “felt itself confronted by an insidious and pervasive evil which has been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”<sup>52</sup> The Court also noted that the patchwork of laws designed to enforce the Fifteenth Amendment would have to be “replaced by sterner and more elaborate measures in order to satisfy the clear commands” of the Amendment.<sup>53</sup> Finally, the Court remarked that the interests of both greater protection of voting rights and judicial efficiency were served by the preclearance requirement, writing:

Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.<sup>54</sup>

Thus, in the face of repeated efforts by southern states to pass laws that disenfranchised certain segments of the population, Congress passed an act requiring “covered” southern states to pre-clear any changes to their voting procedures.<sup>55</sup> The burden shifted to the covered states to show that any new voting procedures were not discriminatory, freeing disenfranchised voters and the Department of Justice (DOJ) from the difficult task of showing that any new voting

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51. 383 U.S. 301 (1966).

52. *Id.* at 309.

53. *Id.*

54. *Id.* at 328.

55. *The Voting Rights Act of 1965*, *supra* note 44.

procedures were discriminatory.<sup>56</sup> It was a smart and effective rule, but one that affected only nine mostly southern states and portions of five others.<sup>57</sup> As this Comment will argue below, the Supreme Court's revocation of Section 4 (and effective nullification of Section 5) means that Congress must act now to extend the requirement of "preclearance" to all fifty states.

### *B. After the Voting Rights Act*

Congress has re-authorized the Section 5 preclearance requirement of the VRA four times since 1965, renewing it in 1970, 1975, 1982, and, most recently, 2006.<sup>58</sup> The 2006 re-authorization bill passed the House 390-33 and unanimously passed the Senate.<sup>59</sup> Not only does the VRA enjoy a huge base of bipartisan support, but lawmakers, judges, and scholars have emphasized that it is one of the most effective pieces of legislation passed in United States history. For example, Representative Jim Sensenbrenner, former chairman of the House Judiciary Committee, called it "the most successful of all civil rights acts in actually limiting discrimination."<sup>60</sup> In oral arguments during the *Shelby* case, Justice Alito noted that "there is no question that the Voting Rights Act has done enormous good. It's one of the most successful statutes that Congress passed in the twentieth century and one could probably go farther than that."<sup>61</sup> In testimony before the Senate Judiciary Committee, Wendy R. Weiser, a leading scholar at New York University Law School's Brennan Center for Justice, called the VRA "the most effective tool in American law to combat racial discrimination in voting. [It] is widely acknowledged as the most effective piece of civil rights legislation, a cornerstone of American law guaranteeing

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56. *Id.*

57. See Section 5 "Covered Jurisdictions," *supra* note 49.

58. *Introduction to Federal Voting Rights Laws*, *supra* note 42.

59. Bill Summary and Status, 109th Congress (2005–2006), H.R.9, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00009:@@L&summ2=m&%7CTOM:/bss/d109query.html%7C>.

60. Meredith Shiner, *Voting Rights Act Will Be Restored, Lawmakers Vow*, ROLL CALL (July 17, 2013), <http://blogs.rollcall.com/wgdb/voting-rights-act-will-be-restored-lawmakers-vow/>.

61. Transcript of Oral Argument at 33, *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 594 (2013) (No. 12-96), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-96.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96.pdf).

political equality.”<sup>62</sup> In the wake of the success of the VRA, Congress has also passed two other major pieces of voting legislation: The National Voter Registration Act and the Help America Vote Act.<sup>63</sup>

The National Voter Registration Act of 1993 (NVRA) made it easier for citizens to register to vote by requiring states to register voters at any location where citizens apply for or renew drivers licenses; at any location that provides public assistance; at “all offices that provide state-funded programs primarily engaged in providing services to persons with disabilities”; and by mail-in forms developed by each state in consultation with the Federal Election Commission.<sup>64</sup> The NVRA “also creates requirements for how States maintain voter registration lists for federal elections.”<sup>65</sup> However, as events in Florida’s 2000 and 2012 presidential elections show, even these protections are not necessarily sufficient to prevent wrongful purges of voter names and specious attempts to limit registration drives by public interest groups.<sup>66</sup>

Shortly after the NVRA was passed, it was challenged by nine states,<sup>67</sup> some of which were not covered by the preclearance requirement of the VRA.<sup>68</sup> In affirming the constitutionality of the NVRA, the Court established that the federal government could exert considerable oversight over the manner in which individual states conduct elections even absent a showing of significant prior disenfranchisement.<sup>69</sup> As this Comment will show, this precedent should be extended even further to cover more aspects of states’ voting procedures.<sup>70</sup>

Most recently, in the wake of the 2000 election recount in Florida, Congress stepped in again to implement further

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62. *From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013) (testimony of Wendy R. Weiser, Brennan Center for Justice), available at <http://www.brennancenter.org/analysis/senate-testimony-working-together-restore-protections-voting-rights-act>.

63. *Introduction to Federal Voting Rights Laws*, *supra* note 42.

64. *Provisions of the NVRA*, DEPT OF JUSTICE, [http://www.justice.gov/crt/about/vot/nvra/activ\\_nvra.php#prov](http://www.justice.gov/crt/about/vot/nvra/activ_nvra.php#prov) (last visited Feb. 3, 2013).

65. *Id.*

66. *See infra* Parts II.A. and II.C.1.

67. *Provisions of the NVRA*, *supra* note 64.

68. *See supra* note 45.

69. *Provisions of the NVRA*, *supra* note 64.

70. *See infra* Part III.

federal oversight and requirements in the form of the 2002 Help America Vote Act (HAVA).<sup>71</sup> The purpose of the Act was to “reform many facets of the voting process and increase voter education and turnout.”<sup>72</sup> Goals of the HAVA include “the replacement of voting machines, voter registration reform, better access to voting for the disabled and poll worker training.”<sup>73</sup> One of the key provisions of the Act was to create a federal commission, the Election Assistance Commission, to guide states “in their compliance with HAVA and help[ ] . . . pursue the specific objectives that HAVA states,” as well as “develop[ ] a system for testing election systems throughout the country.”<sup>74</sup> Again, while its goals are laudable, the HAVA was not robust enough to prevent serious irregularities with voting machines in the 2004 Ohio election,<sup>75</sup> or lines so long at certain Florida voting locations in 2012 that President Obama was forced to create a bipartisan panel to investigate long lines and other voter irregularities.<sup>76</sup>

As these bills suggest, a fairly clear trend has emerged in recent federal voting legislation: the federal government has sought to exercise greater central control over the manner in which the states conduct their elections. The goal of this increased control is to ensure the highest levels of voter access to the polls. This increased control by the federal government comports with the principle articulated in *Reynolds v. Sims*, where the Court noted:

Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote and to have their

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71. *Help America Vote Act of 2002 (HAVA): An Overview*, LEGAL INFO. INST., <http://www.law.cornell.edu/background/HAVA.html> (last visited Feb. 3, 2013).

72. *Id.*

73. *Id.*

74. *Id.*

75. *See infra* Part II.B.

76. *Obama Forms Commission on Long Lines to Vote*, CNN, <http://politicalticker.blogs.cnn.com/2013/03/28/obama-to-form-commission-on-long-lines-to-vote/> (last updated Mar. 28, 2013).

votes counted.<sup>77</sup>

However, as Part II of this Comment will show, even following the passage of the HAVA, elections—presidential elections, in particular—continue to be plagued with irregularities and controversy.<sup>78</sup>

In light of these problems, one might ask if the goals articulated in the legislation discussed above are being met under the current system. Currently, partisan state legislatures create state election laws and often implement those laws in close temporal proximity to the elections. Judicial oversight, if applied at all, is often done hastily in eleventh-hour proceedings subsequent to the passage of the law. Furthermore, state officials, who almost invariably belong to one of the two major United States political parties (Republican or Democrat), hold tremendous discretion over how to run the elections. As Part II argues, events in several key states in recent election cycles suggest strongly that for the reasons above, the goals of the VRA, NVRA, and HAVA are not being served.<sup>79</sup> Thereafter, Part III asserts that greater federal control over presidential elections, in the form of a new Voting Rights Act, is the best way to remedy the problem.

## II. CURRENT FEDERAL PROTECTIONS FAIL VOTERS

Despite the presence of the federal safeguards enumerated above, the current system has failed to fully protect the right of citizens to vote and have their votes counted. The events in Florida during the 2000 election,<sup>80</sup> Ohio during the 2004 election,<sup>81</sup> and two swing states (Florida and Pennsylvania) during the 2012 election<sup>82</sup> demonstrate that the right to vote, especially among vulnerable groups such as the homebound and indigent, as well as among minorities, remains in jeopardy. This Comment details the problems with each of the foregoing elections in turn, showing how they illustrate the ongoing failure of federal protections to effectively safeguard the right

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77. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (internal citations omitted).

78. *See infra* Parts II.B. and II.C.

79. *See infra* Part II.

80. *See infra* Part II.A.

81. *See infra* Part II.B.

82. *See infra* Part II.C.

to vote.

Much of the disenfranchisement that took place in each of those elections can be traced to the substantial authority that states continue to wield in running elections, despite federal oversight. Crucially, the state officials tasked with running elections are partisan elected officials belonging to the two main political parties.<sup>83</sup> Election officials face a conflict of interest, with strong incentives to craft laws and procedures that disenfranchise as many voters of the opposing party as possible. Some of the most recent rulings on election laws from 2012 seem to recognize that this partisan interest is a major, if not primary motive in enacting these laws (trumping the state interests, such as preventing voter fraud).<sup>84</sup>

In light of these issues, this Part argues that, if the right to vote is indeed the most fundamental of all rights that we enjoy as citizens, the current system has not provided an adequate level of protection. Since the 2000 election, systemic failures and the passage of voting laws with questionable motives have pointed to the glaring need for electoral reform. The following Parts treat several of those most notable failures in depth.

#### A. *The 2000 Florida Presidential Election*

The events in Florida during the 2000 presidential election marked a low point in modern United States electoral history, with images of vote-counters poring over partially-punched

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83. For example, during the 2012 elections, the Chief Elections Officer in Ohio was Secretary of State John Husted. *Ohio Secretary of State Jon Husted Biography*, ST. OHIO, <http://www.sos.state.oh.us/sos/agency/secHustedRedBio/Biography.aspx> (last visited June 6, 2013). According to the Ohio Secretary of State's website,

the Secretary of State oversees the elections process and appoints the members of boards of elections in each of Ohio's 88 counties. The Secretary of State supervises the administration of election laws; reviews statewide initiative and referendum petitions; chairs the Ohio Ballot Board, which approves ballot language for statewide issues; canvasses votes for all elective state offices and issues; investigates election fraud and irregularities; trains election officials; and works with counties to train poll workers.

*Duties and Responsibilities*, ST. OHIO, <http://www.sos.state.oh.us/sos/agency/secHustedRedBio/dutiesResponsibilities.aspx> (last visited June 6, 2013). He is also a member of the Republican Party. *Our Republic Party Representatives: Jon Husted*, OHIO REPUBLICAN PARTY, <http://www.ohiogop.org/statewide/husted/> (last visited June 6, 2013).

84. See *infra* note 136.

ballots saturating the media and the phrase “hanging chad” entering the popular lexicon.<sup>85</sup> In reality, however, the electoral problems and disenfranchisement began well before the spectacle of the recount and Supreme Court challenge, thanks to conflicts of interest that plagued the top two election officials in the state. Indeed, this election became a perfect example of why independent, nonpartisan election commissions are so badly needed.

During the 2000 election, the two top election officials in Florida were Governor Jeb Bush, the brother of presidential candidate George W. Bush<sup>86</sup> and Katherine Harris, Secretary of State.<sup>87</sup> Harris, in addition to her post as Secretary of State, also served as the co-chair of George W. Bush’s Florida campaign.<sup>88</sup> Thus, of the top two election officials in Florida, one was the brother of the candidate, and the other was both the state’s Chief of Elections<sup>89</sup> and co-chair of the campaign to get him elected.

Prior to the election, Harris used a “scrub list” of 173,000 names to eliminate possible ineligible voters from the rolls of the Florida voter registry.<sup>90</sup> Further investigation revealed that the list was deeply flawed, with fully eligible voters listed as felons (who generally cannot vote in Florida),<sup>91</sup> possibly costing thousands of voters their right to vote.<sup>92</sup> Additionally, the same company that provided the scrub list also provided Florida officials a list with the names of eight thousand ex-felons to

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85. *How We Got Here: A Timeline of the Florida Recount*, CNN <http://edition.cnn.com/2000/ALLPOLITICS/stories/12/13/got.here/> (last visited Oct. 15, 2013).

86. *Florida Governor Jeb Bush*, NAT’L GOVERNORS ASS’N, [http://www.nga.org/cms/home/governors/past-governors-bios/page\\_florida/col2-content/main-content-list/title\\_bush\\_jeb.html](http://www.nga.org/cms/home/governors/past-governors-bios/page_florida/col2-content/main-content-list/title_bush_jeb.html) (last visited June 6, 2013).

87. Biographical Directory of the United States Congress: Katherine Harris, U.S. HOUSE OF REPRESENTATIVES, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H001035> (last visited June 6, 2013).

88. *Katherine Harris’ W Files*, CBS NEWS (Feb. 11, 2009), [http://www.cbsnews.com/2100-250\\_162-305435.html](http://www.cbsnews.com/2100-250_162-305435.html).

89. *About the Department*, FLA. DEP’T OF STATE, <http://www.dos.state.fl.us/oss/index.aspx> (last visited June 6, 2013).

90. Gregory Palast, *Florida’s Flawed “Voter-Cleansing” Program*, SALON (Dec. 4, 2000, 9:19 AM), [http://www.salon.com/2000/12/04/voter\\_file/](http://www.salon.com/2000/12/04/voter_file/) (those whose names were on this scrub list would not be able to vote in the 2000 election).

91. *More Details on State Felon Voting Policies: Florida*, PROCON. ORG, <http://felonvoting.procon.org/view.resource.php?resourceID=000286#florida> (last visited Mar. 24, 2013).

92. Palast, *supra* note 90.

expunge from their voter list.<sup>93</sup> However, none on the list were guilty of felonies, only misdemeanors.<sup>94</sup> While Florida officials tried to reinstate the eligible status of those individuals, “the large number of errors uncovered in individual counties suggests that thousands of eligible voters may have been turned away at the polls.”<sup>95</sup>

Furthermore, voting irregularities occurred on the day of the election. In Volusia County, Al Gore’s vote tally dropped suddenly when one precinct reported 16,000 negative votes.<sup>96</sup> This led Jeb Bush to ask Fox News to call the election for his brother.<sup>97</sup> Later that evening, Gore discovered that he was actually ahead by 13,000 votes in Volusia County.<sup>98</sup> By this time, though, “Gore was cast as a sore loser in a hostile media environment.”<sup>99</sup> Irregularities such as these helped to cast a cloud of doubt over the legitimacy of the Florida election.

Possibly the most serious allegations of impropriety came from a 2001 investigation by several media organizations, which found political documents related to George W. Bush’s election campaign on government computers in Harris’s state office.<sup>100</sup> The documents endorsed Bush for president, despite assurances from Harris that she had erected a firewall between her state office, which was tasked with running the election, and the Republican Party.<sup>101</sup> One document endorsing Bush’s candidacy stated that Bush had “proven in Texas that he can manage like an executive, govern across party lines and lead with inclusiveness.”<sup>102</sup> Although Harris was never prosecuted, the documents seemed to run afoul of the Florida law stating that candidates cannot “use the services of any officer or employee of the state during working hours.”<sup>103</sup>

Despite the fact that Harris avoided prosecution, the

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93. *Id.*

94. *Id.*

95. *Id.*

96. In other words, 16,000 votes disappeared from his total. Victoria Collier, *How to Rig an Election*, HARPERS MAGAZINE (REPORT), Nov. 2012, at 33, 34.

97. *Id.*

98. *Id.*

99. *Id.*

100. David Royse, *Media Examine Harris’ Computers*, WASH. POST, Aug. 8, 2001, [http://www.washingtonpost.com/wp-srv/aponline/20010808/aponline135403\\_000.htm](http://www.washingtonpost.com/wp-srv/aponline/20010808/aponline135403_000.htm).

101. *Id.*

102. *Id.*

103. FLA. STAT. ANN. § 106.15 (West) (2002).

presence of the documents contributed to the strong appearance of impropriety at the top level of Florida's election office. At best, the mere suggestion that the system is rigged might deter people from voting in the first place.<sup>104</sup> At worst, the documents suggest Harris might have actually used the power of her state office to help Bush win the presidential election in Florida.

The voting irregularities in Florida ultimately led to an investigation by the U.S. Commission on Civil Rights and a scathing report on Florida's handling of the election.<sup>105</sup> Relying on three days of hearings, thirty hours of testimony from over one hundred witnesses under oath, and 118,000 pages of documents, the Commission found "serious, and not isolated" problems with Florida's presidential election.<sup>106</sup> The core finding was "an extraordinarily high and inexcusable level of disenfranchisement, with a significantly disproportionate impact on African American voters."<sup>107</sup> The causes of this disenfranchisement included:

- (1) a general failure of leadership from those with responsibility for ensuring elections are properly planned and executed;
- (2) inadequate resources for voter education, training of poll workers, and for Election Day trouble-shooting and problem solving;
- (3) inferior voting equipment and/or ballot design;
- (4) failure to anticipate and account for the expected high volumes of voters, including inexperienced voters;
- (5) poorly designed and even more poorly executed purge system; and
- (6) a resource allocation system that often left poorer counties, which often were counties with the highest

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104. A 2006 study by the Pew Research Center found that high numbers of non-voters believed that voting does not change things, and that they have little confidence in the government. THE PEW RESEARCH CENTER, REGULAR VOTERS, INTERMITTENT VOTERS, AND THOSE WHO DON'T: WHO VOTES, WHO DOESN'T, AND WHY 4 (2006).

105. U.S. COMM'N ON C.R., VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (June 8, 2001), *available at* <http://www.usccr.gov/pubs/vote2000/report/main.htm>.

106. *Id.* at Executive Summary.

107. *Id.*

percentage of black voters, adversely affected.<sup>108</sup>

In the final analysis, while the report did not find any conspiracy to disenfranchise voters, “[t]he state’s highest officials responsible for ensuring efficiency, uniformity, and fairness in the election failed to fulfill their responsibilities and were subsequently unwilling to take responsibility.”<sup>109</sup>

Florida’s 2000 presidential election strongly supports the creation of nonpartisan, professional state election commissions. The finding of pervasive, systematic failure by top state officials to run a competent election, especially in a state that ultimately decided a presidential election, shows the need for an election commission whose employees are not interested parties in the outcome of the election they are running. Congress subsequently enacted legislation designed to remedy some of the failures of the 2000 Florida Presidential election, in the form of the HAVA of 2002.<sup>110</sup> But even that did not stop the same combination of factors—incompetence and conflicts of interest—from disenfranchising voters in the next presidential election’s critical battleground state: Ohio.

### *B. The 2004 Ohio Presidential Election*

In 2004, Ohio occupied the critical “swing state” position that Florida had held in 2000; Republican George W. Bush’s 118,601-vote victory in that state allowed him to defeat Democrat John Kerry in the national election.<sup>111</sup> Yet even with the new provisions of HAVA in force, such as those requiring the Election Assistance Commission to test and certify voting system hardware and software,<sup>112</sup> many of the same problems that affected the 2000 Florida election also cropped up in Ohio. These problems included flawed voting mechanics, as well as the conflict of interest posed by Ohio Secretary of State J. Kenneth Blackwell, the top official in charge of running the election simultaneously working as the co-chair of Ohio’s

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108. *Id.*

109. *Id.*

110. Help America Vote Act of 2002, H.R. 3295, 107th Cong. (2002).

111. 2004 Presidential General Election Results – Ohio, DAVE LEIP’S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/state.php?year=2004&fips=39&f=0> (last visited Mar. 24, 2013).

112. Help America Vote Act of 2002 at Title II § 231(B) (codified as 42 U.S.C.A. § 15371 (West 2002)).

Committee to re-elect George W. Bush.<sup>113</sup> As with Florida in 2000, a very similar set of problems again highlighted the need for professional, nonpartisan oversight of the voting process.

In the Ohio election, many of the worst problems stemmed from the electronic voting machines manufactured by a company named Diebold.<sup>114</sup> In 2003, Diebold CEO, Walden O'Dell, a top fundraiser for George W. Bush, made a “jaw-dropping public promise to ‘deliver’ Ohio’s electoral votes to Bush.”<sup>115</sup> Those comments reverberated when, on election night, reports of voting anomalies came in, including supposed “glitches” that switched votes from Kerry to Bush.<sup>116</sup> In one precinct, the disparity between the percentage of votes the exit polls predicted Kerry would receive and the percentage he received in the certified tally was so great that experts gave the odds of that outcome occurring only as a result of a sampling error as 1 in 867,205,553.<sup>117</sup> Lou Harris, a pioneer of modern political polling, called Ohio’s 2004 election “as dirty an election as America has ever seen.”<sup>118</sup>

Lou Harris was not the only person to feel that way. Ranking Democratic House Judiciary Member John Conyers requested a report by the House Judiciary Democratic Staff into the voting irregularities that occurred during the 2004 Ohio elections.<sup>119</sup> The report contains a number of deeply troubling findings, including “that there were massive and unprecedented voter irregularities and anomalies in Ohio. In many cases these irregularities were caused by intentional misconduct and illegal behavior, much of it involving Secretary of State J. Kenneth Blackwell, the co-chair of the Bush-Cheney campaign in Ohio.”<sup>120</sup> The report identified problems including misallocation of voting machines, which led to unacceptably long lines, restrictions on provisional ballots, and even the rejection of voter applications based on paper weight, all of which led to “disenfranchise[ment] . . . of predominantly

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113. HOUSE JUDICIARY COMM. DEMOCRATIC STAFF, PRESERVING DEMOCRACY: WHAT WENT WRONG IN OHIO 4 (2005) [hereinafter PRESERVING DEMOCRACY].

114. Collier, *supra* note 96, at 36.

115. *Id.*

116. *Id.* at 38.

117. *Id.*

118. *Id.*

119. PRESERVING DEMOCRACY, *supra* note 113, at 4.

120. *Id.*

minority and Democratic voters.”<sup>121</sup> Additional problems involved selective intimidation of minority voters, preventing voters who did not receive absentee ballots in a timely fashion from being able to receive provisional ballots, improper purging, an irregularly high number of spoiled ballots, and other unexplained irregularities throughout the state.<sup>122</sup> George W. Bush eventually won Ohio—and consequently a second term—by approximately 140,000 votes.<sup>123</sup>

No proof ever emerged sufficient to charge Blackwell with violations of either local or federal election law. But the Democratic report makes clear that, as was the case in Florida, registered voters had once again been deprived of their right to vote by what was at best gross mismanagement of the election, and at worst, a concerted effort by partisan state officials to sway the election in their candidate’s favor.<sup>124</sup> This occurred despite the protections afforded by the VRA, the NVRA, and the HAVA.

The elections in Florida in 2000 and Ohio in 2004 show that the safeguards afforded by federal election laws cannot protect voters from disenfranchisement as long as partisan elected officials oversee elections. By the time wrongdoing or failures are uncovered, the damage has often already been done. Two 2012 holdings,<sup>125</sup> discussed in the next Part, show that pressure groups are doing a better job of challenging restrictive election laws before they come into force. They also show that courts seem to be giving greater scrutiny to state interests advanced as rationales for these laws.

However, the current balance of power in favor of states still results in a game of cat and mouse. States can enact changes to voting law, and plaintiffs must then challenge them in court, sometimes dangerously close in time to the elections themselves.<sup>126</sup> Furthermore, this problem has only

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121. *Id.*

122. *Id.* at 5–6.

123. *Ohio 2004 Election Results*, WASH. POST (Nov. 11, 2004, 1:59 AM), <http://www.washingtonpost.com/wp-srv/elections/2004/oh/>.

124. PRESERVING DEMOCRACY, *supra* note 113.

125. *See infra* notes 129 and 146.

126. The D.C. District Court also blocked a Texas voter ID law within nine weeks of the 2012 general election. *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012) *vacated and remanded*, 133 S. Ct. 2886 (U.S. 2013). An additional seven states enacted or toughened voter ID laws in 2011. Melanie Eversley, *Voter ID Laws are Growing; So Are Challenges*, USA TODAY, Feb 20,

metastasized in the wake of the Supreme Court's ruling in *Shelby County, Alabama v. Holder*, which invalidated Section 4 of the VRA (and effectively gutted Section 5 as well).<sup>127</sup> In short, the current system has not enacted safeguards commensurate with the importance of the right in jeopardy.

*C. The 2012 Presidential Election: Courts Cast Doubt on Motives of Voting Laws*

If the Florida and Ohio elections showed the ways in which voters could somewhat “passively” be disenfranchised by conflicts of interest and incompetence at the top levels of the state election apparatus, Florida and Pennsylvania's elections in 2012 demonstrate how states can actually go on the offensive and take active steps that have the strong likelihood of disenfranchising voters. Although Florida and Pennsylvania were never covered by the now-invalidated preclearance requirements of the VRA, a stronger federal system that mandates rules on election procedures, like voter registration requirements and voter IDs, for all fifty states would help greatly in avoiding dangerous situations like these in the first place.

1. Florida

In 2011, Florida amended its election code to impose new regulations on voter registration groups, including provisions regarding the delivery of voter registration forms to election offices and reporting requirements on voter registration volunteers and personnel.<sup>128</sup> In *League of Women Voters v. Browning*, Florida's League of Women Voters challenged these new regulations on the grounds that they were unduly burdensome and violated both the First and Fourteenth Amendments.<sup>129</sup> In unusually forceful language, Judge Robert Hinkle of the United States District Court of the Northern District of Florida found in favor of the plaintiffs and imposed a

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2012, <http://usatoday30.usatoday.com/news/nation/story/2012-02-14/voting-rights-id/53160530/1>.

127. See *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

128. FLORIDA DEPT. OF ST., DIV. OF ELECTIONS, A COMPILATION OF THE ELECTION LAWS OF THE STATE OF FLORIDA, 10–11 (Sept. 2011).

129. 863 F. Supp. 2d 1155, 1158 (N.D. Fla. 2012).

temporary injunction on imposition of the new rules until they could be considered on the merits after the 2012 election.<sup>130</sup> The court described the challenged provisions as:

[A] harsh and impractical 48 hour deadline for an organization to deliver applications to a voter-registration office [that] effectively prohibit[s] an organization from mailing applications in. And the statute and rule impose burdensome record-keeping and reporting requirements that serve little if any purpose, thus rendering them unconstitutional even to the extent that they do not violate the NVRA.<sup>131</sup>

The court went on to address the new requirement that voter registration organizations turn in completed forms to a voter registration office within forty-eight hours.<sup>132</sup> Applying the balancing test articulated in *Anderson v. Celebrezze*<sup>133</sup> between states' interest in orderly elections and citizens' right to vote, the court essentially accused the State of Florida of implementing these laws to discourage voter registration.<sup>134</sup> Noting that "the state has little if any legitimate interest in setting the deadline at 48 hours," the court went on to openly question the motives of the State of Florida for enacting the law, stating "[i]f the goal is to discourage voter-registration drives and thus also to make it harder for new voters to register, the 48-hour deadline may succeed. But if the goal is to further the state's legitimate interests . . . 48 hours is a bad choice."<sup>135</sup>

The *League of Women Voters* court was not the only entity to question the motives behind the Florida law. The DOJ Civil Rights Division filed a separate suit against Florida because it believed the Florida legislature may have passed the new rules with a discriminatory intent.<sup>136</sup> The DOJ felt Florida "ha[d] not

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130. *Id.*

131. *Id.*

132. *Id.*

133. 460 U.S. 780, 789 (1983).

134. *League of Women Voters*, 863 F. Supp. 2d at 1160.

135. *Id.*

136. Ryan J. Reilly, *DOJ: Florida Voting Restrictions May Discriminate Intentionally*, TALKING POINTS MEMO, [http://tpmmuckraker.talkingpointsmemo.com/2012/03/feds\\_florida\\_early\\_voting\\_third\\_party\\_registration\\_laws\\_may\\_have\\_been\\_passed\\_with\\_discriminatory\\_purpose.php](http://tpmmuckraker.talkingpointsmemo.com/2012/03/feds_florida_early_voting_third_party_registration_laws_may_have_been_passed_with_discriminatory_purpose.php) (last visited Sept. 16, 2013).

met its burden of proof” in demonstrating that “the proposed voting changes neither have the purpose nor will have the effect of denying or abridging the right to vote on the basis of race, color, or membership in a language minority group.”<sup>137</sup>

When a federal judge declares that a state’s election laws, at best “serve little if any purpose”<sup>138</sup> and the DOJ calls them, and at worst, “discriminatory,”<sup>139</sup> it is a sign that the method by which these laws are enacted is deeply flawed. These criticisms further call into serious doubt the continuing validity of the right to vote when citizens and federal agencies have to put out these fires as they pop up. Under this system, inevitably, a bad law will go unchallenged, or the plaintiffs will lose when they fail to convince a judge of the validity of their position. Indeed, Florida voters were not the only ones in 2012 who had to rush to enjoin a restrictive voting law. Voters in Pennsylvania faced a similar predicament with a voter ID law that very same year. And this law perhaps best illustrates that some state legislatures have less-than-noble motives at heart when enacting new voting legislation.

## 2. Pennsylvania

One of the most hotly contested voter laws of the 2012 election cycle was Pennsylvania’s law requiring all voters to show a state-issued photo ID when voting in person.<sup>140</sup> The main reason that voter ID laws cause controversy is that they invariably tend to disenfranchise a significant portion of the population.<sup>141</sup> Those voters at risk of disenfranchisement are often poor and/or minority voters, who tend to vote Democrat.<sup>142</sup> The Brennan Center for Justice found that over 10 percent of voting-age citizens lack current, government-issued photo ID.<sup>143</sup> Among some populations, these numbers are even higher: 25 percent of African-Americans, 16 percent of

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137. *Id.*

138. *League of Women Voters*, 863 F. Supp. 2d at 1158.

139. Reilly, *supra* note 136.

140. H.B. 934, 195th Gen. Assemb., Reg. Sess. (Pa. 2011).

141. Suevon Lee, *Everything You’ve Ever Wanted to Know About Voter ID Laws*, PROPUBLICA (Nov. 5, 2012), <http://www.propublica.org/article/everything-youve-ever-wanted-to-know-about-voter-id-laws>.

142. *Id.*

143. KEESHA GASKINS & SUNDEEP IYER, *THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION 2* (2012).

Hispanics, and 18 percent of Americans over age sixty-five do not have government-issued photo ID.<sup>144</sup> Poor and minority voters also face disproportionate challenges in terms of the time, cost, and transportation needed to obtain the proper documents.<sup>145</sup>

In Pennsylvania, the American Civil Liberties Union (ACLU), among other plaintiffs, brought a suit against the state challenging the voter ID law in *Applewhite v. Commonwealth of Pennsylvania*.<sup>146</sup> The ACLU's expert witness testified that 12.8 percent of the electorate, comprising over a million registered voters, did not have the required state-issued photo ID.<sup>147</sup> Furthermore, 379,000 registered voters did not have the documents required to even obtain valid ID.<sup>148</sup> Of those, 174,000 voted in 2008.<sup>149</sup>

Against this potentially huge disenfranchisement of eligible voters, the state advanced the justification of preventing in-person voter fraud.<sup>150</sup> The law requiring photo IDs, the state contended, "ensure[s] that every elector who presents himself to vote at a polling place is in fact a registered elector and the person that he purports to be, and to ensure that the public has confidence in the electoral process. [It] is a tool to detect and deter voter fraud."<sup>151</sup>

The problem with this justification is that voter fraud is exceedingly rare.<sup>152</sup> One study by a group of journalism students working through a project called News21 analyzed

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144. *Id.*

145. *Id.* at 4. For example, the report notes that "in the 10 states with restrictive voter ID laws, more than 450,000 eligible voters do not have vehicle access and live more than 10 miles from their nearest state ID-issuing office open more than two days a week." These same states also have among the worst investment in public transportation, leaving citizens with few good options for obtaining voter ID. *Id.* at 5.

146. *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012).

147. Ari Berman, *Ten Takeaways from Pennsylvania's Voter ID Trial*, NATION ONLINE (Aug. 3, 2012), <http://www.thenation.com/blog/169230/ten-takeaways-pennsylvanias-voter-id-trial>.

148. *Id.*

149. *Id.*

150. Am. Answers of Resp'ts to Pet'rs' First Set of Interrogs. at 2, *Applewhite v. Commonwealth*, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012) (No. 330 M.D.2012).

151. *Id.*

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

2,068 cases of alleged election fraud since the year 2000 and found that the rate of election fraud is “infinitesimal.”<sup>153</sup> The rate of in-person voter impersonation, the specific type of fraud that voter ID laws are designed to combat, is “virtually non-existent.”<sup>154</sup> Specifically, their search of public records and court proceedings turned up only ten documented cases of voter impersonation in the twelve years their study covered, at a time when there were 146 million registered voters in America.<sup>155</sup> Based on her own research, Rutgers political science professor Lorraine C. Minnite calls the rate of in-person voter impersonation “statistically zero.”<sup>156</sup> The State of Indiana, which enacted a voter ID law in 2006 similar to Pennsylvania’s, could produce no evidence of the type of fraud the law was ostensibly designed to protect against when the law was challenged in court.<sup>157</sup> Columbia Law professor Nathaniel Persily calls in-person voter fraud “imaginary fraud,” explaining, that “it is an incredibly stupid and inefficient way to rig an election.”<sup>158</sup> Absentee ballots, he notes, are the “fraudster’s method of choice.”<sup>159</sup> In short, evidence of actual occurrences of the type of fraud that these laws are designed to protect against simply does not exist.

Even the Pennsylvania officials who voted for the photo ID law knew that there was no in-person voter fraud to defend against: in a stipulation to the court, the State admitted that there had been no investigations or prosecutions of in-person voter fraud in Pennsylvania; they were not aware of any incidents of in-person voter fraud in Pennsylvania; they would not offer any evidence that in-person voter fraud has occurred in Pennsylvania; and they would not offer “any evidence or argument that in person voter fraud is likely to occur in November 2012 in the absence of the Photo ID law.”<sup>160</sup>

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153. *Id.*

154. *Id.*

155. *Id.*

156. Carl Bialik, *Voter Fraud: Hard to Identify*, WALL ST. J., Aug. 31, 2012, <http://online.wsj.com/article/SB10000872396390443864204577621732936167586.html>.

157. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 792–93 (S.D. Ind. 2006) *aff’d sub nom.* Crawford v. Marion Cnty. Election Bd., 472 F.3d 949 (7th Cir. 2007) *aff’d*, 553 U.S. 181 (2008).

158. Nathaniel Persily, *Invisible Voter v. Imaginary Fraud*, CNN (Aug. 31, 2012), <http://www.cnn.com/2012/08/31/opinion/persily-voter-id-laws/index.html>.

159. *Id.*

160. Pet’rs Stipulation in the *Matter of Applewhite*, *Applewhite v.*

All of this begs the question: What motivates legislatures to vote for these voter ID laws, if not actual voter fraud? Two facts support a theory that, in Pennsylvania at least, partisan political considerations trumped good faith concerns for the electoral system. First, the law passed the Pennsylvania legislature without the vote of a single Democrat, suggesting that partisan concerns were more persuasive than actual concern for voting integrity.<sup>161</sup> Second, at a Republican State Committee meeting in June, Pennsylvania House Republican Leader Mike Turzai made comments strongly suggesting that the House's true motive for passing the voter ID law was to benefit the Republican party politically.<sup>162</sup> Turzai went through a list of measures advanced by the Republican Pennsylvania legislature, stating, "Pro-Second Amendment? The Castle Doctrine, it's done. First pro-life legislation—abortion facility regulations—in 22 years, done. Voter ID, which is gonna allow Governor Romney to win the state of Pennsylvania, done."<sup>163</sup> Statements like this call into question the ability or willingness of partisan state legislatures to protect the right of all citizens in their jurisdiction to vote, when manipulating the rules can offer potential electoral gains to their party. That is especially so when there is no evidence of the type of fraud the laws are supposedly designed to protect against, and the party passing the law freely admits as much.

Fortunately, the ACLU successfully blocked implementation of the Pennsylvania law during the 2012 election cycle, with the lower court finding, on remand from the Pennsylvania Supreme Court, the possibility that there might be voter disenfranchisement arising from the implementation of the law.<sup>164</sup> However, a powerful dissent by Justice McCaffrey of the Pennsylvania Supreme Court argued that the law should

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Commonwealth, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012) (No. 330 M.D.2012).

161. Ethan Bronner, *Voter ID Rules Fail Court Tests Across Country*, N.Y. TIMES, Oct. 2, 2012, <http://www.nytimes.com/2012/10/03/us/pennsylvania-judge-delays-implementation-of-voter-id-law.html>.

162. Kelly Cernetich, *Turzai: Voter ID Law Means Romney Can Win PA*, POLITICSPA (June 25, 2012), <http://www.politicspa.com/turzai-voter-id-law-means-romney-can-win-pa/37153/>.

163. *Id.*

164. Supplemental Determination on Application for Preliminary Injunction at 5, *Applewhite v. Commonwealth*, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012) (No. 330 M.D.2012).

have been blocked at the Supreme Court level rather than remanded to the lower court, where the judge may have allowed the law to stand.<sup>165</sup> Justice McCaffrey wrote that if the law stood, “many thousands—indeed, ultimately uncountable numbers—of otherwise qualified electors will lack a Photo ID for purposes of the upcoming election, and hence will be disenfranchised. . . .”<sup>166</sup> He concluded that in the absence of any evidence of past voter fraud, or any reason to forecast it in the future, “[t]he Commonwealth’s interest in the implementation of this law, at least as concerns the November election, is somewhere from slight to symbolic.”<sup>167</sup> When state supreme court justices worry that laws disenfranchising large numbers of voters are being passed for spurious reasons, there is serious cause for alarm.

While the lower court reached a decision that protected those voters who may have not been able to obtain ID, there was a very real danger that would not happen. The events in Pennsylvania show that voting laws can be unilaterally implemented by one party to the detriment of the constituents of the other. Why, though, should this even be a possibility? Given the importance of voting, and how much federal legislation has gone into protecting it, why leave a full 10 percent of a state’s voters in jeopardy of losing the franchise because of a rule imposed by one party with, by their own admission, no justification?

While it is comforting that the courts reached the decisions that they did in Pennsylvania and Florida, protection for a right as valuable as the right to vote should not come down to what is essentially a game of judicial whack-a-mole. Having private plaintiffs challenge laws as they are passed serves neither the interests of equal protection for the right to vote from state to state nor judicial efficiency. Furthermore, the appearance of impropriety from partisan officials overseeing elections or working on the campaign staff of a candidate in the election erodes the legitimacy of the whole democratic process.

It is clear that our electoral system badly needs reform. The biggest problem is that elections are run at the state level, and the state officials tasked with running them are members

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165. *Applewhite v. Commonwealth*, 54 A.3d 1, 6 (Pa. 2012) (McCaffrey, J., dissenting).

166. *Id.* at 7

167. *Id.* at 8.

of the political parties fielding candidates in those same elections. It is a game where the players are the referees, and one team gets to make up the rules. It is a court where the prosecutor is also the judge. It is an honor system with no honor. An operating procedure with conflicts of interest so deep and intractable that we see laws, like the voter ID laws described above, where state election officials cannot produce one credible instance of the type of conduct the law is supposed to deter. Part III argues that Congress must take bold action and pass electoral reform that eliminates conflicts of interest and protects voters from the caprices of individual state laws governing federal elections.

### III. FIXING THE PROBLEM

In a 2012 opinion piece, former New York Governor Eliot Spitzer warned of the danger from the Supreme Court's grant of certiorari in *Shelby County, Alabama v. Holder*,<sup>168</sup> a case challenging the VRA.<sup>169</sup> This review, he worried, may result in the VRA being overturned, an "unthinkable" outcome "given all of the efforts to suppress voting rights over the past year."<sup>170</sup> Referencing the voter ID law in Pennsylvania and a similar law in Wisconsin, Spitzer credits the VRA as the statute that "led to these unfortunate state laws being overturned."<sup>171</sup>

In fact, the unthinkable outcome Spitzer worried about did come to pass: the Supreme Court invalidated Section 4b of the VRA, thus nullifying the preclearance requirement.<sup>172</sup> Commentators have noted that this could have grave consequences: the Brennan Center for Justice compiled an entire report of expected outcomes from the overturn of the law, predicting widespread attempts to pass restrictive voting

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

169. Eliot Spitzer, *The Supreme Court's Threat to the Voting Rights Act*, SLATE (Nov. 15, 2012), [http://www.slate.com/blogs/spitzer/2012/11/15/voting\\_rights\\_act\\_will\\_the\\_supreme\\_court\\_overturn\\_it.html](http://www.slate.com/blogs/spitzer/2012/11/15/voting_rights_act_will_the_supreme_court_overturn_it.html).

170. *Id.*

171. *Id.*

172. *Shelby Cnty.*, 133 S. Ct. at 2631. The Court declared that it found itself "with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance." In other words, covered jurisdictions with historically low minority voter turnout in *supra* note 49, no longer need to seek approval from the D.C. Circuit Court before enacting changes to voting laws.

laws in formerly covered jurisdictions.<sup>173</sup> In fact, events proved the report correct. In August, North Carolina, a jurisdiction formerly subject to preclearance, enacted a new voter ID law.<sup>174</sup> In addition to enacting a strict photo ID requirement to vote, the law “cut back on early-voting days, eliminated the ability of people to register to vote on the same day as casting an early ballot, and prohibited the counting of provisional ballots cast by eligible voters who went to the wrong precinct.”<sup>175</sup> As the *New York Times* notes, the DOJ is already planning to sue North Carolina to block implementation of this law and force North Carolina to once again “preclear” any changes to its voting laws with the DOJ.<sup>176</sup> However, even with the DOJ proactively filing lawsuits against jurisdictions that implement discriminatory laws, this still leaves voters with only the protection of case-by-case litigation to secure their voting rights—an inadequate solution at best.<sup>177</sup>

While it is true that this decision will likely hurt enfranchisement efforts in the short term, civil rights groups and lawmakers should also look at it as an opportunity to start

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173. MYRNA PEREZ & VISHAL AGRAHARKAR, *IF SECTION 5 FALLS: NEW VOTING IMPLICATIONS* (2013). The report predicts specifically that jurisdictions will attempt to

re-enact discriminatory voting changes that have been formally blocked by Section 5 [the preclearance requirement]; adopt discriminatory voting changes that previously were deterred by Section 5; implement discriminatory voting changes that have lain dormant while awaiting Section 5 review; adopt new restrictive changes; or implement discriminatory voting changes that have been blocked from going into effect, but technically still remain on the books.

*Id.* at 1.

174. *Governor McCrory Signs Popular Voter ID into Law*, ST. OF N.C., GOVERNOR PAT MCCRORY (Aug. 12, 2013), <http://www.governor.state.nc.us/newsroom/press-releases/20130812/governor-mccrory-signs-popular-voter-id-law>.

175. Charlie Savage, *Justice Department Poised to File Lawsuit over Voter ID Law*, N.Y. TIMES, Sept. 30, 2013, <http://www.nytimes.com/2013/09/30/us/politics/justice-department-poised-to-file-lawsuit-over-voter-id-law-in-north-carolina.html>.

176. *Id.*

177. PEREZ & AGRAHARKAR, *supra* note 173. The report notes that, prior to the enactment of the VRA,

[c]ase-by-case litigation did little to curb widespread discriminatory election practices. Even when DOJ or private plaintiffs succeeded in obtaining an injunction against a discriminatory practice, the defendants frequently adopted a different discriminatory procedure that would have to be challenged in another round of litigation. DOJ and civil rights groups lacked the resources or time to combat constantly shifting acts of voting discrimination.

*Id.* at 2.

from scratch and implement even more sweeping and desperately needed measures. While the VRA has been tremendously important in helping to equalize voting levels between whites and minorities in the mainly southern states covered by the “preclearance” requirements of the Act, serious problems remain, as shown by Florida’s 2000 election and Ohio’s in 2004. As long as states can continue to pass laws whose motives are questionable, with the onus largely falling on private citizens and organizations to challenge them in court, the right to vote will not be protected to a degree that reflects the importance we place on it as a nation.

Congress must, at a minimum, set federal voting rules at the national level, so that in federal elections, every voter across the country has the same amount of time to vote, is subject to the same ID rules, the same provisional ballot rules, sees the same form of ballot, votes in a location with uniform staffing and provisioning requirements, and has that ballot counted by the same type of voting apparatus. If states are free to enact their own separate sets of voting laws, even when subject to some federal oversight, then the protection afforded to the right to vote will not be truly equal. Equal protection of the right to vote must mean that all United States citizens vote under the same set of rules, laws, and procedures.

At a more ambitious level, the single most effective change Congress could make would be to take the administration of voting out of the hands of partisan elected officials altogether. This would remove the pall of illegitimacy over elections and complaints of impropriety that result every year from voters on both sides of the political divide who suspect that state officials may have “massaged” the rules in a way that favors their candidate. American Enterprise Institute scholar Norman Ornstein notes that “every other democracy uses independent authorities to handle the administration of elections.”<sup>178</sup> Our current system came about largely by happenstance. “Nobody . . . thought this through. It’s just a terrible way to run an election process. It evolved without forethought, but now it’s there.”<sup>179</sup> He makes the sensible suggestion that we move to a system similar to those in place in Canada, Australia, Britain, and Germany, with “impeccable, nonpartisan career people

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178. *Fresh Air*, *supra* note 17.

179. *Id.*

adjudicating the elections.”<sup>180</sup>A good way to do this would be, as University of California, Irvine, Law Professor Rick Hasen suggests, a national nonpartisan election administration headed by a presidential appointee, subject to a 75 percent confirmation in the Senate.<sup>181</sup> A system like this would ensure that “the people who run our elections . . . have their primary allegiance and owe their professional success to the fairness and integrity of the political process and not to a political party.”<sup>182</sup>

Other safeguards would create an additional layer of protection for voters. Representative Steny Hoyer has proposed a Voter Empowerment Act that would, among other things, “[ban] purges of the voter rolls, [enshrine] in law opportunities to hold registration drives and participate in early voting, and [strengthen] the Election Assistance Commission Congress created [with the HAVA].”<sup>183</sup> The House Democratic Judiciary Committee, in their report on the 2004 Ohio election, suggested legislation to both prevent state and local election officials from using their office for political gain and restrict state contractors from participating in campaign activities, thus stamping out two major sources of the conflict of interest that can taint the legitimacy of elections.<sup>184</sup>

In short, Congress must pass legislation that starts moving states towards uniformity of voting laws for federal elections. Ideally, Congress would mandate that all states form nonpartisan electoral commissions to run elections. Federal oversight of elections, in the form of the VRA, has proven incredibly successful. Now is the time to build on that momentum and try to establish national standards so that debacles like Florida’s 2000 election, or Ohio’s in 2004, do not happen again.

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180. *Id.*

181. Rick Hasen, *Ending the Voting Wars*, TALKING POINTS MEMO (Aug. 23, 2012, 1:00 PM), [http://talkingpointsmemo.com/archives/2012/08/ending\\_the\\_voting\\_wars.php](http://talkingpointsmemo.com/archives/2012/08/ending_the_voting_wars.php).

182. *Id.*

183. Rep. Steny Hoyer, *10 Years After the Help America Vote Act, Votes Face New Challenges*, HUFFINGTON POST (Oct. 29, 2012), [http://www.huffingtonpost.com/rep-steny-hoyer/ten-years-after-the-help\\_b\\_2040161.html](http://www.huffingtonpost.com/rep-steny-hoyer/ten-years-after-the-help_b_2040161.html)

184. PRESERVING DEMOCRACY, *supra* note 113, at 102.

## CONCLUSION

From the time that the founders signed the Declaration of Independence, voting has been the single fundamental right on which all others rested. In contrast to the monarchy against which we rebelled, enfranchised voters could legally and legitimately remove their rulers and replace them when they no longer represented the will of the people. In the modern civil rights era, Congress has attempted to protect the right to vote against tampering at the state and individual level with a series of federal laws. This effort began with the VRA, widely considered the most successful piece of civil rights legislation ever enacted.<sup>185</sup> However, recent elections in Florida, Ohio, and Pennsylvania have shown that significant disenfranchisement still occurs despite these protections.

The federal legislation enacted so far has been helpful, but inadequate, to faithfully protect the right to vote to the extent that it deserves. Additionally, the protections afforded by the appeals of private parties against individual state laws result only in an ad hoc patchwork of decisions that fail to address the problem of state-by-state disenfranchisement in any sort of systematic way. In order to give effect to the importance that the United States' foundational texts and history places on voting, Congress should pass comprehensive election reform. Most importantly, Congress should take the responsibility for running elections out of the hands of partisan officials and give it to an independent election body run by non-partisan civil servants. This would eliminate both the conflict of interest posed by partisan officials running an election their party is contesting and put the job in the hands of career professionals best equipped to run an election competently. Additionally, Congress should enact additional laws that standardize voting rules and procedures for federal elections across all fifty states. Only then will the right to vote receive the equal protection that it is due.

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185. *See supra* Part I.B.