canvass  (n.)
Compilation of election returns and validation of the outcome that forms the basis of the official results by a political subdivision.
—U.S. Election Assistance Commission: Glossary of Key Election Terminology

State Legislation and the Voting Rights Act: Past, Present and Future

This past August marked the 50th anniversary of the signing of the Voting Rights Act (VRA) by President Lyndon Johnson in 1965. The VRA is a landmark bill that’s been called the most effective piece of civil rights legislation. But it’s also one of very few pieces of federal legislation governing the normally state-run world of elections. State actions, court decisions and its anniversary have brought the VRA back into the limelight over the past two years, leading to much discussion of the past, present and future of voting rights in America.

The Past

Can you answer the following questions?

“In what year did Congress gain the right to prohibit the migration of persons to the states?”

“Name one person by name or title who is part of the judicial branch of government in your state”

No? Well then you wouldn’t be able to register to vote in certain states in 1965. Those questions were examples of the literacy tests faced by African-Americans who tried to register to vote in many states throughout the South in the middle of the 20th century. The tests, combined with poll taxes, intimidation, and sometimes violence, kept minorities from registering to vote, let alone actually voting. The result was staggeringly low voter registration numbers for minorities (as low as 7 percent in Mississippi) as well as limiting the election of minority candidates at any level. The VRA was a federal response to racially-based uneven election administration throughout the nation.

The VRA prohibits the denial or abridgement of the right to vote on the basis of race, color, or membership in a language minority. One portion, Section 2, applies nationwide and on a permanent basis and says that no “standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color” (and eventually to language minorities).

Another section, Section 5, requires preclearance from the federal government for any changes to voting laws only in certain jurisdictions around the country, based on a formula set in Section 4. Section 4 applied to any state or jurisdiction that had a literacy test or other device to prevent voting or if less than 50 percent of the voting age population was registered to vote. As a result, for 48 years nine states and parts of six more had to seek approval from the Department of Justice (DOJ) before making any changes to their voting laws.

The effects of the VRA have been undeniable. Minority voter registration skyrocketed to 62 percent throughout many Section 5 jurisdictions as did the number of minority elected officials. Objections to state and local changes to election laws came pouring out from the U.S. Department of Justice, Civil Rights Division.

(cont. on page 2)
DOJ objections and litigation under Section 5 throughout the 1970s and 1980s covered a wide variety of topics, with redistricting at the top of the list. Others dealt with at-large districts (which were seen to overwhelmingly favor white candidates) and locations of polling places.

“Section 5 was a very powerful and successful tool,” says Christy McCormick, commissioner and chairwoman of the U.S. Election Assistance Commission (EAC) and a former DOJ attorney. “It did force changes where they were needed.” Despite Section 5 being originally intended as an emergency measure, the VRA, including Section 5 as originally formulated, was reauthorized by Congress in 1970, 1975 (when membership in a minority language group was added), 1982 and 2006, always with bipartisan support.

While Sections 2 and 5 get most of the spotlight, the VRA also contains a “bail-in” provision in Section 3 which allows the courts to subject a jurisdiction to preclearance if plaintiffs can prove intentional discrimination; allows federal observers into polling places; prohibits voter intimidation and voter registration fraud; requires absentee voting in presidential elections; requires election materials to be printed in multiple languages; and allows for those who need language assistance to vote to receive it.

The Present

“There is a new generation of issues when it comes to the VRA and in particular Section 2. It’s constantly changing because so much has been changing in election administration recently,” says Bruce Adelson, CEO of Federal Compliance Consulting and a former senior trial attorney at DOJ.

Since 2000, the debate over the VRA has reemerged thanks in large part to states’ interest in voter identification laws. Voter ID laws aren’t new – South Carolina enacted the first one in 1950, Hawaii followed suit in 1970, then Texas (1971), Florida (1977) and Alaska (1980). By 2000, 14 states had the requirement but allowed voters to cast a regular ballot if they did not have the identification.

In 2008, Georgia and Indiana first implemented a new form of strict voter ID requirement. An ID was not just requested, but required. If you did not show the proper ID you voted by provisional ballot and your vote was not counted until you returned a few days after the election with your ID. Now 36 states have enacted a voter ID requirement, with 32 of those in effect.

Texas was one of those states. It passed a strict voter ID requirement in 2011, and submitted it for preclearance. The DOJ, under its Section 5 powers, objected to the law, so it did not go into effect.

Things changed in Texas and around the nation when the U.S. Supreme Court rendered its decision in the case of Shelby County v. Holder in 2013. The Court found that the formula (in Section 4) for determining which states and jurisdictions were subject to the preclearance requirement (in Section 5) was outdated and a new one was needed to reflect current conditions. As a result, those states and jurisdictions previously covered under Section 5 no longer needed the federal government’s approval to make changes to their voting laws.

Immediately after the Shelby County decision came down, Texas put its previously disallowed law into effect. It didn’t take long before Texas was sued under Section 2 of the VRA; a district court held the law to be unconstitutional, and the appeals court looked it over and remanded it (sent it back down) for more analysis on whether the intent of the law was to discriminate. While court machinations continue, the law remains in effect.

As the Texas case goes on, North Carolina has emerged on the frontlines in terms of VRA enforcement, at least in regard to election administration. At issue in The League of Women Voters et al. vs. North Carolina is the passage of House Bill 589 in 2013 which instituted a voter ID requirement, eliminated same day registration, reduced early voting hours, prevented voting on the Sunday before an election, eliminated voting out of precinct, and discontinued a pre-registration program for 16 and 17 year olds.

“The 2013 legislation was simply to improve the real and perceived integrity of elections in our state,” says Representative David Lewis, chairman of the House Committee on Elections in North Carolina.

The plaintiffs are suing under Section 2 of the VRA (since Section 5 is no longer available) saying that Sunday voting, early voting and same-day registration were used more often by minority voters. Looking at these election administration policies in their totality through the VRA lens is decidedly new territory and could have far reaching effects when it comes to enforcing Section 2 across the country.

“It’s clear that the North Carolina bill is incredibly regressive. This case will be a test of how well Section 2 protects voting rights in a world where Section 5 is no longer available,” explains Myrna Perez, director of voting rights and elections project at the Brennan Center for Justice at New York University. The Brennan Center is a plaintiff in the case.

But not everyone agrees: “DOJ is attempting to change the legal standard and apply the much lower Section 5 standard for Section 2 cases,” says Hans von Spakovsky, a senior legal fellow at the Heritage Foundation and a former DOJ attorney. “If you’re one of the other states that doesn’t currently offer early voting or same day registration, will you be forced to by DOJ?”

(cont. on page 3)
Since 2010, eight states have enacted bills reducing early voting according to the Brennan Center. Many of those reduced particularly long early voting periods to still-generous times, such as 35 days to 28 days in Ohio, 35 days to 30 days in Nebraska and 45 days to 21 days in Georgia. Fourteen states don’t offer “no excuse” early voting of any kind.

So far in 2015, 114 bills have been introduced on voter ID, 78 bills on early and no-excuse absentee voting, 51 bills on same day registration, and 38 bills on pre-registration for 16 and 17 year olds. While the trend is definitely toward more states adopting these polices than reducing or eliminating them, the outcome of the North Carolina case could change the landscape dramatically. Since the Shelby County decision many supporters have called on Congress to establish a new formula for preclearance under Section 5. Some states introduced legislation for their own VRA and California recently passed its own preclearance requirement. So far Congress has yet to act on legislation that’s been introduced.

**The Future**

The Canvass talked to several experts who gazed into their crystal balls and speculated on what the future holds for the Voting Rights Act:

“I think the VRA is fine after the Shelby County decision. Its permanent provisions are very powerful tools to combat discrimination in the very rare cases in which it occurs today”– Hans von Spakovsky, Heritage Foundation.

“Section 2 looks like a poor substitute for Section 5 in formerly covered jurisdictions. If Section 5 was like a hammer which was used to pound nails, Section 2 may be more like a wrench. You wouldn’t ordinarily use it to pound nails, but if that’s all you have that’s what you are going to use. So we’ll see how useful a tool it is”– Rick Hasen, University of California Irvine School of Law.

“The Supreme Court’s 2013 decision to eliminate preclearance review was a significant blow to voting rights. Retrogression still occurs, but now the only way to challenge a retrogressed district is to file an expensive lawsuit that will almost certainly not be resolved by the time of the election. Congress must act, and act quickly, to pass a new preclearance requirement that satisfies the Supreme Court decision and protects vulnerable minority districts”– Senator Horacena Tate (D-Georgia).

“The VRA is an important piece of legislation that has expanded and protected the franchise, but I agree with the Supreme Court’s interpretation that all citizens should be subject to the same rules” – Representative David Lewis (R-North Carolina).

“With all the talk of Texas, voter ID and redistricting, election officials are not thinking about the new minority language requirements coming out soon. Many jurisdictions will have more than one language than ever before”– Bruce Adelson, Federal Compliance Consulting.

“Congress should absolutely restore the Voting Rights Act. Every election that passes where an eligible person is disenfranchised is an election where that voter has been silenced and has lost her voice in a crucial aspect of our democracy. Litigation under Section 2 is expensive, time consuming, and laborious”– Myrna Perez, the Brennan Center for Justice at New York University.

“It’s going to be difficult for Congress to come with a new coverage formula that can garner support across the board. The change from the Shelby County decision is likely permanent”— U.S. Elections Assistance Commissioner Christy McCormick.

“Congress will hopefully revisit the VRA, especially since it was overwhelming reauthorized in 2006. Things haven’t changed in terms of wanting to prevent voter intimidation or wanting to ensure that everyone who is eligible to vote is able to. We have to look towards moving forward and not moving backward”– U.S. Elections Assistance Commissioner Tom Hicks.

**Ask NCSL**

**Are student IDs acceptable for voter identification? How about gun permits?**

Thirteen states specifically mention school or student IDs in their lists of acceptable voter ID (Alabama, Florida, Idaho, Kansas, Michigan, Mississippi, Montana, New Hampshire, North Dakota, South Dakota, Virginia, Washington and Wisconsin). Six states mention concealed weapon permits (Kansas, Mississippi, Tennessee, Texas, Utah and Virginia)—and Alaska allows a hunting and fishing license. That’s not to say that student IDs and gun permits are disallowed in the other states—they may easily fit under general categories such as “a valid and current document showing a photo of the person to whom it was issued” in Rhode Island, or a document that “was issued by the United States, state of Oklahoma, or a federally recognized Indian tribe or nation,” in the Sooner State. For details, see NCSL’s Voter ID Requirements page.
Ballot Secrecy and Selfies: Some States are Changing the Law to Keep Up with Social Media

Is it, or is it not, ok to take a selfie of a voted ballot? It depends.

A recent federal district court decision may potentially spur changes to many states’ voting laws. At the heart of the issue in New Hampshire is the relatively new phenomenon of the selfie, and more specifically, the ballot selfie. The court decision held a 2014 New Hampshire law banning disclosure of one’s ballot unconstitutional as a violation of the First Amendment right to free speech. The Arizona Constitution has a compelling interest in preventing vote coercion.

Moving in a different direction, Arizona has a new law that expressly allows a voter to take a photo of his or her ballot and post the image to social media. However, Arizona, like Indiana, still prohibits all photography within a polling establishment. Thus, in Arizona, a person can only take a photo of a ballot while not in a voting booth, i.e. a sample or absentee ballot. "I believe strongly that voters have a First Amendment right to express their freedom of speech and to proudly state the candidate they supported on their ballot," said Arizona Senator Kimberly Yee, the legislation’s sponsor.

Senator Yee decided to pursue the legislation when a constituent brought the issue to her attention. Tyler Heald wanted to post a picture of his ballot on social media when a friend told him that it was against the law. After contacting the Arizona Secretary of State’s office, Tyler was surprised to find out that posting an image of his ballot was in fact against the law in Arizona. "It was immediately evident that this was a direct infringement on my First Amendment right to free speech – blatantly unconstitutional," Tyler said. After hearing Tyler’s experience, Senator Yee sponsored legislation that would allow voters to post pictures of their ballots on social media.

Utah also recently changed its law to allow for posting images of ballots on social media. Representative John Knotwell, the sponsor of the legislation, explained that the old law in Utah was vague on whether someone was legally able to take a picture of their ballot. When asked about the potential for vote-buying and voter coercion, Representative Knotwell said, “Nobody wants voter fraud, specifically in the area of selling your vote; but this is already against the law and the new law does not permit it.” Representative Knotwell went on to explain how the new law will not compromise the secret ballot.

Clearly, the current state of the law is in flux. In many states it is illegal to post a picture of a ballot; in other states, such as New Hampshire, Arizona, and Utah, it is legal in at least some circumstances. And still in other states, it is not clear whether the practice is legal or not.

-Ethan Wilson is a policy associate in NCSL’s Center for Ethics in Government.

The center champions ethical principles in the legislative process by developing ethical standards for legislators and advocates; conducting training programs in values-based ethical decision making; maintaining information on each state’s ethics and lobbying laws and rules; and holding forums to address issues of ethics and public integrity.
From the Chair


- Our perspective is that voting should be as voter friendly as possible. With that idea in mind there are still some things we can do or work on to make it as smooth as possible to vote and get more people involved in the process.

- We are figuring out how to better serve our overseas and military voters. We changed the date of the primary to ensure enough time to send ballots to overseas voters and we are looking at allowing a ranked choice type of voting in primaries for them as well.

- I feel very good about it (passing same day voter registration earlier this year). We took our time to come up with the right solution to satisfy concerns from the Secretary of State and local election officials. It won’t be in effect until January 2017, after next year’s presidential election, and in the end the final bill was supported by all three political parties in the Legislature.

- We don’t make changes to election laws lightly – we figure out how to do it right the first time. Generally, we don’t make changes in election years and we listen to local election officials. Our elections are something we take great pride in. They are inclusive and get everyone involved.

Read the full interview with Representative Sweaney.

The Election Administrator’s Perspective

Doug Curtis is the county clerk for Saline County, Arkansas. The county was named for the salt water springs that dot the landscape, and last November it voted to become a “wet” county and allow sales of alcohol. Mr. Curtis spoke to The Canvass on Sept. 17.

- I love elections. I knew a fair bit about elections, but learned quickly that I didn’t know nearly as much as I thought I did. I’m learning more and more every day.

- I’m really pushing to increase the turnout of early voting because more early voting takes so much pressure off of Election Day. We’re at about 50 percent early voting and I want to keep that going up. I’m also looking at vote centers as a way to help consolidate polling places. The world isn’t as small as it once was so we probably don’t need as many polling places. Vote centers have worked well in other parts of the state. It’s not something we can do overnight or even one election cycle, but is something to work towards.

- We’ve moved from paper ballots to direct-recording electronic voting machines. It’s saved money and now we aren’t throwing away as many extra ballots. People are growing more comfortable with them and getting over their fears of fraud. I’ve had many people who were skeptical at first tell me now they won’t ever go back to using a paper ballot.

- It’s very important to have open communication and develop relationships with your state legislators. I’m keeping a list of things I can talk to my legislators about. I don’t expect them to know everything.

Read the full interview with Mr. Curtis.
Worth Noting

- If you’re interested in election law be sure to check out the podcasts of Rick Hasen over at the Election Law Blog.

- Election officials know that maintaining an accurate voter roll is an ongoing battle, but two separate groups have found several counties throughout the country where the number of voters has exceeded the number of eligible adults. NCSL’s resources on voter list maintenance can help with that.

- Indiana has become the latest state to join the Voting Information Project (VIP), a project of The Pew Charitable Trusts and Google, and the first to affirm it through legislation. VIP works with states to provide official information to voters about where to vote and what’s on their ballots.

- West Virginia has made some pretty significant changes to elections for 2016—judicial races will now be nonpartisan, straight ticket voting is going away, and in some counties students will be bussed to the polls for early voting.

- All of September is “Register to Vote at Work Month” in Lee County, Fla. Local officials are offering to come to businesses with voter registration forms and vote-by-mail requests. National Voter Registration Day was Sept. 22.

- Add another tool to the toolbox for increasing voter turnout: California has signed into law Senate Bill 415 which would prevent jurisdictions from holding an election outside of a statewide election if that date results in 25 percent lower turnout than the last four general elections.

- Speaking of which – California is on track to become the second state to adopt automatic voter registration. Oregon became the first state earlier this year and is in the process of implementing it.

- A Minnesota Congressman is looking at getting young people more involved in government by lowering the age to vote to 16 years. What do you think? And in the meantime here’s information on pre-registration for 16 and 17 year-olds.

- More action in Minnesota: the Minneapolis City Council has advanced a bill to require landlords to give new tenants information on registering to vote.

- Many of our readers know about the impending crisis with the state of voting technology in this country, but the Brennan Center for Justice brought it mainstream with their new report America’s Voting Machines at Risk.

- In case you missed it (and how could you?) Pennsylvania, Iowa, Nebraska, Kentucky, and Vermont have joined or will join the ranks of states offering online voter registration. More interesting is that all, besides Nebraska, did it without authorizing legislation. A trend that’s likely to continue.

- The National Commission on Voting Rights has a new report out saying more needs to be done to improve voter registration and voting in the U.S.

We’ve been updating our webpages and wanted to share two new sites to add to your favorites:

**Elections Technology Overview**: This page pulls together all of the information that we’ve collected about election technology, and also includes a news feed (at the bottom) for information on counties/states that are buying new election equipment.

**Voter Registration Overview**: Provides a summary of how voter registration works.

Save some room on your calendar for NCSL’s Capitol Forum, December 8-11 in Washington, D.C. Registration is now open for the Forum which includes a Lobby Day for states on Capitol Hill. We’re crafting the agenda for election sessions as we speak and we guarantee it will have some interesting topics for the election road ahead.

Thanks for reading, and please stay in touch.

—Wendy Underhill, Dan Diorio and Ethan Wilson