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CENTER

FOR JUSTICE

VOTING LAW CHANGES IN 2012

Wendy R. Weiser and Lawrence Norden

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EXECUTIVE SUMMARY

Over the past century, our nation expanded the franchise and knocked down myriad barriers to full electoral participation. In 2011, however, that momentum abruptly shifted.

State governments across the country enacted an array of new laws making it harder to register or to vote. Some states require voters to show government-issued photo identification, often of a type that as many as one in ten voters do not have. Other states have cut back on early voting, a hugely popular innovation used by millions of Americans. Two states reversed earlier reforms and once again disenfranchised millions who have past criminal convictions but who are now taxpaying members of the community. Still others made it much more difficult for citizens to register to vote, a prerequisite for voting.

These new restrictions fall most heavily on young, minority, and low-income voters, as well as on voters with disabilities. This wave of changes may sharply tilt the political terrain for the 2012 election. Based on the Brennan Center's analysis of the 19 laws and two executive actions that passed in 14 states, it is clear that:

- These new laws could make it significantly harder for more than five million eligible voters to cast ballots in 2012.¹
- The states that have already cut back on voting rights will provide 171 electoral votes in 2012—63 percent of the 270 needed to win the presidency.
- Of the 12 likely battleground states, as assessed by an August *Los Angeles Times* analysis of Gallup polling, five have already cut back on voting rights (and may pass additional restrictive legislation), and two more are currently considering new restrictions.²

States have changed their laws so rapidly that no single analysis has assessed the overall impact of such moves. Although it is too early to quantify how the changes will impact voter turnout, they will be a hindrance to many voters at a time when the United States continues to turn out less than two thirds of its eligible citizens in presidential elections and less than half in midterm elections.

This study is the first comprehensive roundup of all state legislative action thus far in 2011 on voting rights, focusing on new laws as well as state legislation that has not yet passed or that failed. This snapshot may soon be incomplete: the second halves of some state legislative sessions have begun.

INTRODUCTION

Legislators introduced and passed a record number of bills restricting access to voting this year. New laws ranged from those requiring government-issued photo identification or documentary proof of citizenship to vote, to those reducing access to early and absentee voting, to those making it more difficult to register to vote. In total, at least nineteen laws and two executive actions making it more difficult to vote passed across the country, at least forty-two bills are still pending, and at least sixty-eight more were introduced but failed.

As detailed in this report, the extent to which states have made voting more difficult is unprecedented in the last several decades, and comes after a dramatic shift in political power following the 2010 election. The battles over these laws were—and, in states where they are not yet over, continue to be—extremely partisan and among the most contentious in this year’s legislative session. Proponents of the laws have offered several reasons for their passage: to prevent fraud, to ease administrative burden, to save money. Opponents have focused on the fact that the new laws will make it much more difficult for eligible citizens to vote and to ensure that their votes are counted. In particular, they have pointed out that many of these laws will disproportionately impact low-income and minority citizens, renters, and students—eligible voters who already face the biggest hurdles to voting.

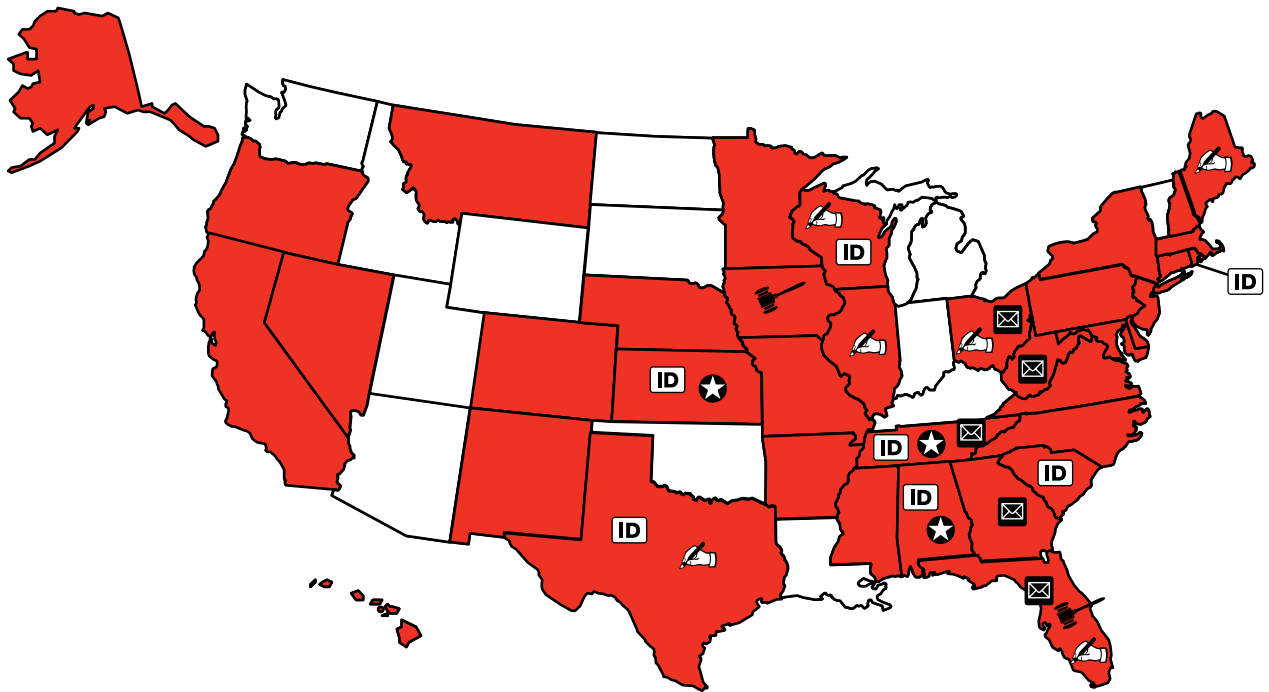
This report provides the first comprehensive overview of the state legislative action on voting rights so far in 2011. It summarizes the legislation introduced and passed this legislative session, provides political and legal context, and details the contentious political battles surrounding these bills.







Overall, legislators introduced and passed the following measures:

- **Photo ID laws.** At least thirty-four states introduced legislation that would require voters to show photo identification in order to vote. Photo ID bills were signed into law in seven states: Alabama, Kansas, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin. By contrast, before the 2011 legislative session, only two states had ever imposed strict photo ID requirements. The number of states with laws requiring voters to show government-issued photo identification has quadrupled in 2011. To put this into context, 11% of American citizens do not possess a government-issued photo ID; that is over 21 million citizens.
- **Proof of citizenship laws.** At least twelve states introduced legislation that would require proof of citizenship, such as a birth certificate, to register or vote. Proof of citizenship laws passed in Alabama, Kansas, and Tennessee. Previously, only two states had passed proof of citizenship laws, and only one had put such a requirement in effect. The number of states with such a requirement has more than doubled.
- **Making voter registration harder.** At least thirteen states introduced bills to end highly popular Election Day and same-day voter registration, limit voter registration mobilization efforts, and reduce other registration opportunities. Maine passed a law eliminating Election Day registration, and Ohio ended its weeklong period of same-day voter registration. Florida,

Illinois, and Texas passed laws restricting voter registration drives, and Florida and Wisconsin passed laws making it more difficult for people who move to stay registered and vote.

- **Reducing early and absentee days.** At least nine states introduced bills to reduce their early voting periods, and four tried to reduce absentee voting opportunities. Florida, Georgia, Ohio, Tennessee, and West Virginia succeeded in enacting bills reducing early voting.
- **Making it harder to restore voting rights.** Two states—Florida and Iowa—reversed prior executive actions that made it easier for citizens with past felony convictions to restore their voting rights, affecting hundreds of thousands of voters. In effect, both states now permanently disenfranchise most citizens with past felony convictions.



-  Legislation introduced
-  Photo ID requirements passed
-  Proof of citizenship passed
-  Restrictions on voter registration passed
-  Restrictions on early/absentee voting passed
-  Executive action making it harder to restore voting rights

I. VOTER IDENTIFICATION

A. Background

By far the most widespread legislative development this session involved bills to impose stricter documentary identification requirements on voters. Voter ID laws—especially those that require voters to show one of a small number of government-issued photo IDs to vote—have been the subject of intense debate over the past few election cycles, and the debate heated up this year.

Proponents of strict voter ID laws maintain that they are reasonable measures to prevent fraud by persons improperly casting ballots in the names of other registered citizens, real or imagined. They dispute that such laws will discourage voting by any group, claiming that photo IDs are needed for many aspects of modern life, including boarding an airplane or entering certain government buildings.³ Opponents maintain that photo ID laws exclude large swaths of the electorate, since 11% of citizens—and an even greater percentage of low-income, minority, young, and older citizens—do not have state-issued photo IDs.⁴ They argue that photo ID requirements are similar to a poll tax, whether or not the IDs are offered for free, because to obtain the necessary IDs citizens must produce documents that cost money, like passports and birth certificates.⁵ Opponents also claim that impersonation voter fraud—the only type of fraud prevented by voter ID laws—almost never happens since our laws adequately protect against and punish such fraud.⁶ Although the best available study found that strict voter ID laws reduce turnout, neither side can definitively demonstrate the extent of the effect on voter turnout, since such laws have not been in effect long enough to permit accurate study.⁷ Each side also questions the other's motives.

Voter ID is nothing new—indeed, federal law requires every new voter who registers by mail to show ID before voting,⁸ and a variety of states have additional common-sense ID requirements.⁹ What is new, however, is the degree to which the voter ID bills that were proposed and passed this session were restrictive, excluding many common forms of photo and non-photo IDs, such as student IDs and Social Security cards, and offering no alternative mechanisms for eligible citizens without the selected IDs to cast ballots that will count. What also is new is the extent to which such restrictive bills passed this session.

Prior to the 2006 elections, *no* state required its voters to show government-issued photo ID at the polls (or elsewhere) in order to vote. In 2006, Indiana became the first state in the nation to do so. Although Georgia and Missouri passed photo ID laws at around the same time, both states' laws were blocked by courts on the ground that they interfered with the right of eligible citizens to vote—under the U.S. Constitution in Georgia's case and the Missouri State Constitution in Missouri's case.¹⁰ In 2008, the U.S. Supreme Court upheld Indiana's voter ID law against a constitutional attack.¹¹ After lengthy litigation in response to which Georgia amended its voter ID law several times, Georgia's law was eventually upheld as well.¹² That law first went into effect in late 2007, making Georgia the second state in the nation to require its citizens to show photo ID at the polls.

Thus, as of the start of this legislative session, only two states had ever imposed strict photo ID requirements on voters, and only for a short period of time. Several other states—Florida, Hawaii, Idaho, Louisiana, Michigan, and South Dakota—also requested, and still request, photo ID from their voters at the polls, but if a voter in those states does not have photo ID, she can still cast a ballot that

will count after an alternative verification procedure, like a signature match or a sworn affidavit. The remainder of the states had more flexible voting identification requirements.¹³

B. Roundup of Legislative Developments

This year, at least thirty-four states introduced a record number of bills to require photo ID to vote.¹⁴ As Jenny Bowser, senior fellow at the National Conference of State Legislatures, observed, “It’s remarkable ... I very rarely see one single issue come up in so many state legislatures in a single session.”¹⁵

Photo ID bills passed and were signed into law in seven states to date: Alabama, Kansas, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin.¹⁶ (The Alabama, South Carolina, and Texas laws cannot go into effect unless and until they are pre-cleared by either the U.S. Department of Justice or a federal court under the Voting Rights Act.) Bills also passed but were vetoed in five additional states: Minnesota, Missouri, Montana, New Hampshire, and North Carolina.¹⁷ A number of additional states—including Pennsylvania¹⁸—still have active photo ID bills pending in ongoing legislative sessions. In New Hampshire, legislators failed to override the Governor’s veto,¹⁹ and in North Carolina, legislators could attempt to push a new voter ID bill despite the Governor’s veto.²⁰

In addition, Missouri legislators passed a ballot measure to amend the state constitution to allow the state to impose photo ID requirements on voters; the measure will appear on the state ballot in November 2012.²¹ (If the measure passes, legislators will have to enact further legislation before a photo ID requirement could be imposed.) Supporters of strict voter ID in Mississippi similarly introduced a ballot initiative that will appear on the November 2011 ballot.²²

C. What the Bills Say

In general, the photo ID bills that were introduced this session are more restrictive than those in prior sessions, including fewer forms of acceptable IDs, fewer exemptions, or fewer alternative mechanisms for eligible voters without the specified IDs to vote.

Those laws that have passed this session vary in several respects, including: (1) the types of photo ID that voters are permitted to show for voting; (2) whether the requirement to provide ID applies only to in-person voters or to those who vote by mail as well; (3) whether there are any exemptions from the requirement to provide ID; and, most importantly, (4) whether there is an alternative way for a voter who does not have an accepted form of photo ID to cast a ballot that counts. Detailed descriptions of each bill are included in the appendix to this report.

The types of ID permitted. With the exception of Rhode Island, each of the states that passed voter ID bills require voters to show government-issued photo IDs, though the list of acceptable IDs differs from state to state. All seven states accept an unexpired driver’s license, non-driver’s ID issued by a motor vehicle department, U.S. passport, or U.S. military photo ID. All states except for Kansas and South Carolina also accept U.S. naturalization documents bearing a photo. Alabama, Rhode Island, and Tennessee broadly accept any photo ID issued by state and federal governments, though Tennessee expressly excludes student IDs from consideration. Only Alabama, Kansas, and Rhode Island accept

student photo IDs issued by state institutions of higher education. Wisconsin purports to accept certain state-issued student IDs, but the state's new law imposes criteria for such IDs that few if any state schools' IDs meet. Kansas and Texas expressly allow concealed handgun licenses, and Alabama, Rhode Island and Tennessee accept such IDs as well. Only Alabama and Wisconsin accept a tribal ID card with a photo. Rhode Island is the only state that accepts non-governmental photo IDs for voting; indeed, any current ID with a voter's name and photograph suffices.

Who must show photo ID. All seven states require individuals appearing to vote in person at a polling place to show photo ID. Only Alabama and Kansas require all persons who vote absentee to submit a copy of their photo IDs with their mail-in ballots. Those states are now the first two states in the nation ever to require photo ID with absentee ballots. Wisconsin requires permanent absentee voters to submit a copy of their photo IDs, but only the first time they vote absentee. As a practical matter, all absentee voters in Wisconsin will have to provide a copy of their photo IDs when the law first goes into full effect in 2012.

Exemptions. Several states exclude certain categories of voters from the requirement to show photo ID for voting. Alabama exempts individuals who are entitled to vote absentee under federal laws protecting certain military and overseas voters and certain elderly and disabled voters. Wisconsin also exempts military and overseas voters, as well as voters designated as "confidential," such as police officers or domestic violence victims. It does not exempt elderly or disabled voters other than those indefinitely confined to certain care facilities. Tennessee exempts voters who are either hospitalized or in nursing homes. Texas exempts certain voters with disabilities who can produce a statement that they have been determined to be disabled by specified government agencies and do not have the required ID. And Kansas exempts only permanently disabled and absent military voters from its law, but allows persons over sixty-five to show expired photo IDs.

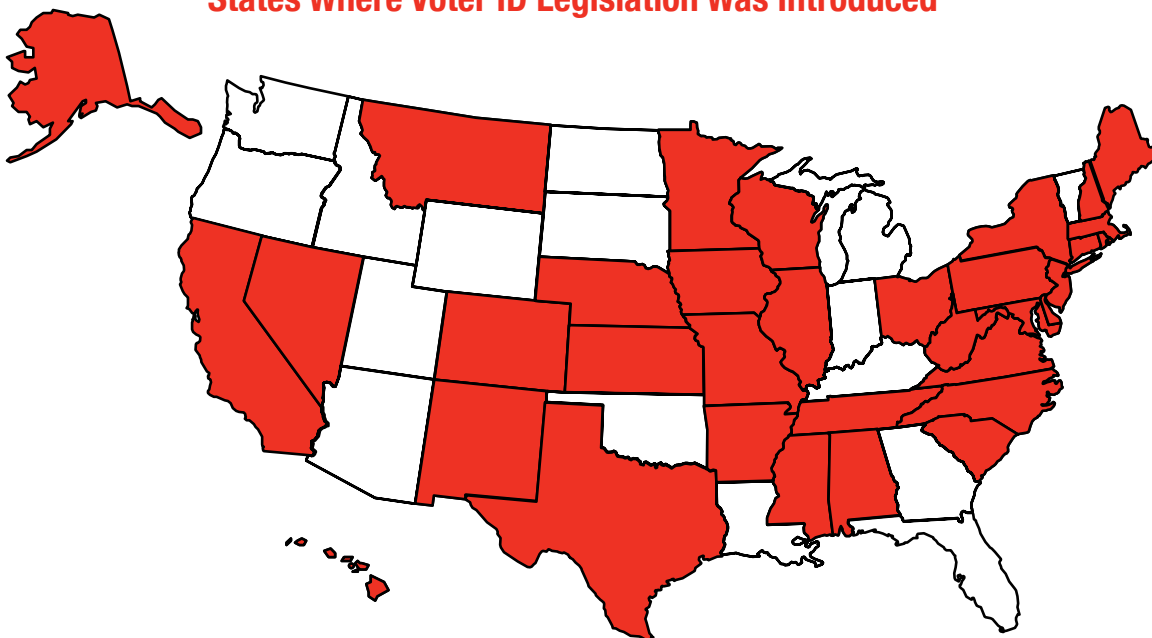
Alternative voting procedure. Three states—Rhode Island, South Carolina, and Tennessee—offer an alternative way for all or many voters who are unable to produce photo ID to vote and have their votes count. In Rhode Island, citizens who do not have photo ID must vote by provisional ballot, and election officials are directed to count all such ballots so long as the signature on the provisional ballot envelope matches the signature on the voter's registration. In South Carolina, persons who have a "reasonable impediment" to obtaining a photo ID or a religious objection to being photographed may cast a provisional ballot along with an affidavit explaining why they do not have ID. Election officials are directed to count those ballots unless there are grounds to believe the affidavit is false. In Tennessee, persons who cannot afford a photo ID or who have a religious objection to being photographed can swear an affidavit of identity and vote a regular ballot. These alternative means of demonstrating one's identity and voting without a photo ID separate these states' laws from the much stricter laws of Alabama, Kansas, Texas, and Wisconsin.²³

Free IDs. The U.S. Supreme Court has made it clear that states that require their voters to present government-issued photo IDs for voting must make such IDs available to voters free of charge.²⁴ And indeed, each of the seven state laws provides a mechanism for free IDs for persons who need them for voting. Kansas and Tennessee specify that free IDs will be available only to those who swear an affidavit saying they need the ID for voting purposes and do not have other qualifying photo ID. It is not clear

whether those states or the others will sufficiently advertise their free ID offers so that eligible but indigent voters can obtain such IDs. For example, it appears that Wisconsin officials have taken the position that prospective voters must expressly request free IDs before one is offered; according to a key transportation official, “the statutory language specifically puts the onus on the customer for getting the ID for free for voting.”²⁵ DMV officials reportedly turned away a Madison, Wisconsin voter when she did not have enough money to renew her photo ID because she did not specifically request a free ID for voting.²⁶ And a former state employee claimed that he was fired because he sent an e-mail to coworkers urging them to inform people that the free IDs had to be specifically requested.²⁷ It is unclear under the case law whether and under what circumstances states may be required to defray the costs of the documents voters need in order to obtain photo IDs—most notably birth certificates, which typically cost between \$15 and \$25.²⁸ Currently, only Kansas’s law allows voters born in the state to obtain a birth certificate free of charge if needed to obtain ID for voting.

Effective Dates. The ID provisions for all of the new ID laws have effective dates on or before 2012, with two exceptions. The photo ID requirements in Alabama will not go into effect until 2014, if they are pre-cleared under the Voting Rights Act. The Rhode Island law goes into effect in 2012, but only partially; it allows either photo or non-photo ID (including, but not limited to, social security cards and government-issued medical cards) prior to 2014. Beginning in 2014, Rhode Island will allow only photo IDs at the polls.

States Where Voter ID Legislation Was Introduced



Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.

Making it Harder for Students to Vote

A fair amount of attention has been paid this year to the impact of voter ID laws on students. Three of the seven photo ID bills to have passed—South Carolina’s, Texas’s, and Tennessee’s—expressly do not allow students to use photo IDs issued by state educational institutions to vote, and Wisconsin’s bill effectively excludes most student IDs as well.

When **Wisconsin**’s photo ID bill was first introduced, it too excluded all student IDs.²⁹ After substantial public debate and controversy,³⁰ the bill was amended to permit student IDs that meet certain criteria. The problem is that the student IDs currently issued by the University of Wisconsin system and various other schools do not meet those criteria. The University of Wisconsin would have to spend an estimated \$1.1 million to issue new ID cards to students for its photo IDs to be accepted for voting purposes.³¹

Many question the fairness of voter ID laws that exclude government-issued photo IDs held by such a large segment of the population. This is especially the case with laws like Texas’s, which does not allow voters to use student IDs but does allow them to use concealed weapon licenses for voting.³² Some read into the fact that these bills exclude student IDs as a partisan motive to exclude certain groups of voters more likely to Democratic.³³

The legislative targeting of students this session was not limited to voter ID laws. In **New Hampshire**, for example, Republican lawmakers introduced highly controversial legislation that would have prevented students and members of the military who previously lived elsewhere from acquiring voting residency in the state.³⁴ No other state singles out students or any other group for special voting residency requirements—and for good reason; as the Brennan Center pointed out, such a discriminatory rule clearly violates the U.S. Constitution.³⁵ The Speaker of the State House was notoriously caught on tape telling a Tea Party group that he supported the bill because students tend to vote Democratic. He said, “the kids [are] coming out of the school and basically doing what I did when I was a kid. Voting as a liberal. You know, that’s what kids do. They don’t have life experience and they just vote their feelings.”³⁶ After strong public pressure, including opposition from both College Democrats and College Republicans, the bill failed on the House floor.³⁷

The targeting of student voters has also gone beyond legislation. The newly-elected Secretary of State of **Maine** recently announced he was forwarding a list of 206 students who were registered to vote in the state but paid out-of-state tuition to law enforcement for voter fraud investigations.³⁸ But under Maine law, like in other states, the rules for tuition are very different from those for voting; many students meet the legal voting residency requirements while still being ineligible for in-state tuition.³⁹

D. Legislative Battles

The voter ID battles this session differed from the past not only because the proposed laws were more restrictive but also because those pushing the bills prioritized them far more than their predecessors and commanded far greater legislative support. Another new feature of the legislative landscape was the reported involvement of the American Legislative Exchange Council (ALEC), a conservative group made up of state legislators and business and other interests. As in past sessions, voter ID bills were hotly contested along partisan lines, with Republicans largely supporting and Democrats largely opposing stricter ID requirements.

1. A High Priority After Years Without Success

State legislators across the country have been pushing strict photo ID requirements for almost a decade now, with little success before this year. In recent legislative sessions, a majority of states—though fewer than this year—saw the introduction of stricter voter ID bills.⁴⁰

Although most voter ID bills did not advance very far in those years, there was a strong push in some states, especially where ID laws passed this year. Wisconsin's new voter ID law passed a decade after then-legislator and now-Governor Scott Walker first authored a photo ID bill; former Governor Jim Doyle vetoed the bill three times between 2002 and 2005.⁴¹ In Kansas, legislators were successful in passing a voter ID bill in 2008, but it was vetoed by then-Governor Kathleen Sebelius. In Texas, strict voter ID bills came close to passage in both 2007 and 2009, but were blocked under a state procedure akin to the filibuster.⁴² In 2009, legislators in the South Carolina House passed a photo ID bill over angry resistance from their Democratic colleagues,⁴³ inciting them to storm out of the session in protest.⁴⁴ In Tennessee in 2009, a voter ID bill passed the Senate, but died in the House.⁴⁵ In Mississippi in 2009, legislators fought so hard for a restrictive voter ID bill that they killed a compromise proposal to require photo ID because it was not strict enough—and the bill would have also permitted early voting.⁴⁶ In Alabama, a photo ID bill was part of the Republican Party's legislative agenda for more than a decade, with recent bills introduced in 2007, 2009, and 2010.⁴⁷ Following a failed bill in 2007,⁴⁸ Rhode Island's House passed a voter ID bill in 2009, but a Senate version stalled.⁴⁹

In most states, however, strict voter ID bills did not advance very far before this year. Indeed, previously only two states (Indiana and Georgia) had ever implemented a photo ID requirement for voters. Between 2006 and 2011, no state passed a photo ID law. This year, in contrast, strict voter ID bills met with far greater success, passing twelve state legislatures—though ultimately vetoed in five—and passing one legislative chamber in at least six more.⁵⁰

a. Change in Partisan Control

There are at least two major reasons for this change. The first is the stark shift in the partisan makeup of state legislatures after 2010. As noted, there is typically a sharp partisan divide over the issue of strict voter ID requirements, with Republicans generally pushing more restrictive measures and Democrats generally opposing them. This year, in every case but one, strict voter ID bills were introduced by Republican legislators. Newly elected legislators introduced about a quarter of these bills.⁵¹

As a result of Republican electoral success in state houses across the country in 2010, proponents of strict voter ID bills were able to garner much greater legislative support than in the past. In the 2010

elections, Republicans picked up at least 675 state legislative seats across the country.⁵² Republicans therefore controlled both legislative chambers in twenty-six states, up from fourteen earlier in 2010.⁵³ In Wisconsin, for example, both houses switched to Republican control for the first time since 1998; Republicans gained fourteen seats in the Assembly and four in the Senate.⁵⁴ Similarly, in Alabama, Republicans won overwhelming majorities in both legislative chambers in 2010, and they made voter ID a priority.⁵⁵ With the exception of Rhode Island, every state that enacted stricter voter ID requirements this session had both houses and the governor's office controlled by Republicans.

Focus: Rhode Island and Ohio—Exceptions That Prove the Rule. As noted above, support and opposition to voter ID laws in state legislatures in 2011 fell almost entirely along partisan lines, with Republicans largely supporting and Democrats largely opposing stricter ID requirements. There were two notable exceptions.

In Rhode Island the photo ID bill that eventually became law was introduced by a Democratic legislator, passed two legislative chambers controlled by Democrats, and was signed by an independent governor. Senate sponsor Harold Metts said, “[I]n this day and age, very few adults lack one of the forms of identification that will be accepted, and the rare person who does can get a free voter ID card from the Secretary of State. While I’m sensitive to the concerns raised, at this point I am more interested in doing the right thing and stopping voter fraud.”⁵⁶ But Rhode Island’s bill is significantly less restrictive and differs substantially from the others that passed this session, in two major respects. First, unlike the other states that provide a narrow list of acceptable photo IDs, Rhode Island broadly accepts any ID with a voter’s name and photograph.⁵⁷ Second, although Rhode Island now requires that all voters present photo ID before receiving a ballot in person, a voter without photo ID may sign an affidavit that she does not have a photo ID and cast a provisional ballot that will count if the signature on the ballot matches the voter’s registration signature. In other words, a voter without photo ID can still cast a ballot that will count.

In Ohio the usual pattern was broken in a different way: a very restrictive photo ID bill was introduced by a Republican state legislator and uniformly opposed by Democrats, but it was ultimately defeated because of opposition from several prominent Republicans, including the Secretary of State.⁵⁸ In rejecting a proposal from the Ohio House that would only have allowed voters to present one of four types of government issued ID, Secretary Husted stated:

I want to be perfectly clear, when I began working with the General Assembly to improve Ohio’s elections system it was never my intent to reject valid votes. I would rather have no bill than one with a rigid photo identification provision that does little to protect against fraud and excludes legally registered voters’ ballots from counting.⁵⁹

The reaction of Husted and some of his fellow Republicans in the state senate may have something to do with the fact that Ohio is several years ahead of most of the country when it comes to acrimonious partisan fighting over election administration. In particular, the passage of a voter ID bill in 2005 by a Republican-controlled legislature, in a partisan battle typical of this year’s fights, led to years of costly litigation and negative publicity about the new law.⁶⁰ That battle ultimately ended in a court-ordered settlement in 2009.⁶¹ In the meantime, the new requirements received exceptionally harsh coverage from commentators and editorial boards across the state,⁶² while election officials of both major parties complained that the

law was far too complicated and difficult to administer.⁶³ Given this history, it is perhaps not surprising that there were elected officials of both political parties who preferred to stay away from a proposal that would have imposed an even more restrictive set of ID requirements on Ohio voters.

b. Heightened Priority

The second reason for the greater success of photo ID bills this year is that legislators made them more of a priority than they had been in the past. Many of the Republican legislators and election administrators swept into office in 2010 made voter ID a significant campaign issue as well as a major legislative priority. Previously, it was rare for voter ID to become a campaign issue; in 2010, in contrast, newly elected Secretaries of State Matt Schultz of Iowa, Kris Kobach of Kansas, Scott Gessler of Colorado, and Dianna Duran of New Mexico all made voter ID a prominent part of their campaign platforms.⁶⁴ Newly-elected Wisconsin Governor Scott Walker similarly made voter ID a campaign issue in 2010.⁶⁵ Even before the legislative sessions began, state lawmakers had already pre-filed voter ID bills in a number of states.⁶⁶

Focus: Texas. The Texas example is illustrative. After Republicans gained twenty-six seats in the State House, Texas State Representative Debbie Riddle camped out overnight in the State Legislature to be the first to pre-file voter ID legislation.⁶⁷ (As it turns out, her proposed bill was not the legislation that eventually passed.) Eager lawmakers introduced so many voter ID bills—at least fourteen—that a new “House Select Committee on Voter ID and Voter Fraud” was established to review the legislation. To ensure that more stringent voter ID rules would pass quickly, Texas Governor Rick Perry used emergency powers to alter the usual legislative process, declaring voter ID an “emergency item,” allowing legislators to begin deliberation on voter ID bills immediately instead of waiting until after the first sixty days of the session, as is customary.

This rush came after at least six years of contentious and partisan debate in Texas on voter ID.⁶⁸ Democrats successfully blocked voter ID bills in the last three legislative sessions, under dramatic circumstances. In 2007, a Democratic senator on sick leave left his bed and rushed to the State Capitol to block a vote on proposed voter ID legislation. After casting the deciding vote to prevent debate, he went to the lounge and vomited.⁶⁹ That same session, another state senator rallied to block proposed legislation, despite the fact that he was suffering complications from a recent liver transplant and needed a hospital bed to be kept about one hundred feet from the Senate floor.⁷⁰ Two years later, in 2009, sparring⁷¹ over a new voter ID proposal drove marathon hearings running for twenty-three hours straight.⁷²

c. Support by Conservative ALEC

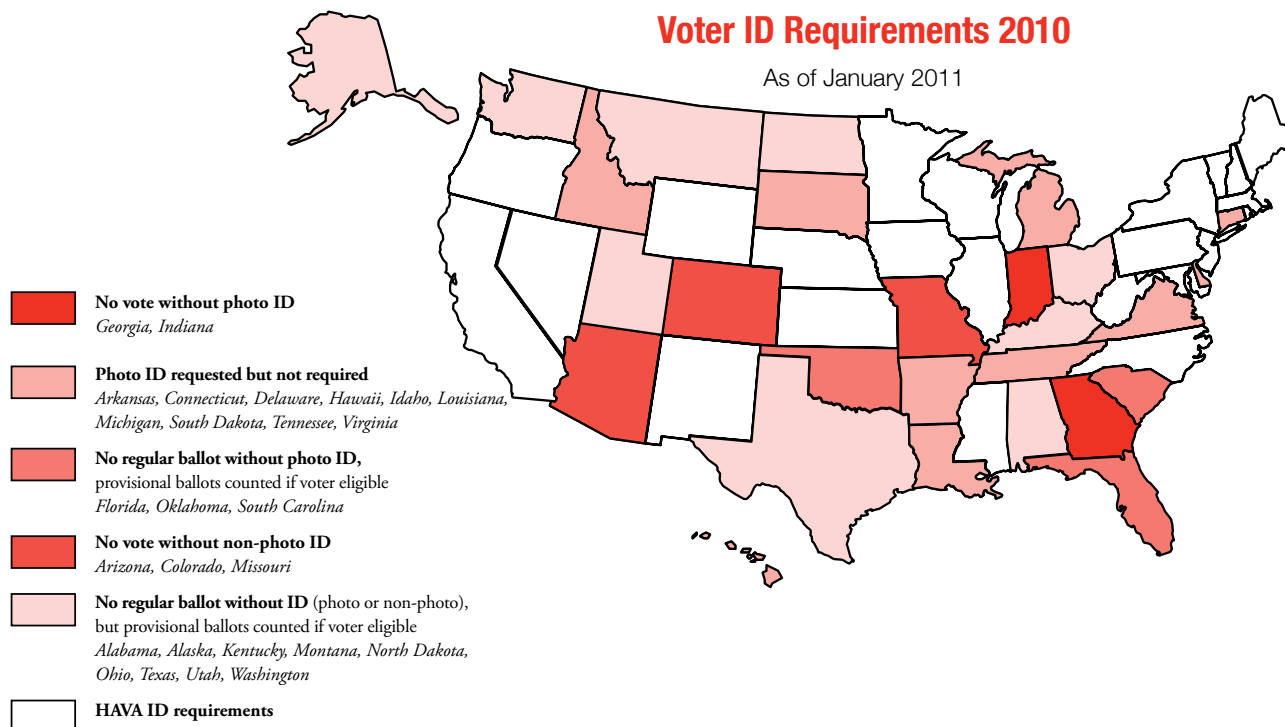
A third possible reason for the success of voter ID bills this year is the reported involvement of the American Legislative Exchange Council (ALEC), a powerful conservative group that brings together state legislators and private interests to develop and support state legislation and policy. According to the *New York Times*, “[m]any of [this session’s voter ID] bills were inspired by the American Legislative Exchange Council, a business-backed conservative group, which has circulated voter ID proposals in scores of state legislatures.”⁷³ In 2009, according to other media reports, not long after ALEC featured a cover story called “Preventing Election Fraud” in its member magazine, the organization adopted

model voter ID legislation and circulated it to its members across the country.⁷⁴ The voter ID bills that were eventually introduced and passed in the states this session all bear some resemblance to ALEC’s model legislation. Although the extent of ALEC’s involvement in voter ID legislation is unknown, the organization boasts that each year more than 1,000 bills based on its models are introduced in state legislatures, and that approximately 17% of those bills become law.⁷⁵ In addition to developing model bills, ALEC typically provides a range of support services to help advance the policies it supports, including trainings and seminars, studies, talking points, strategic plans, and action alerts.⁷⁶

2. The Debate

As in previous legislative sessions, with the exception of Rhode Island, the debates over photo ID bills were highly charged and divided along partisan lines.

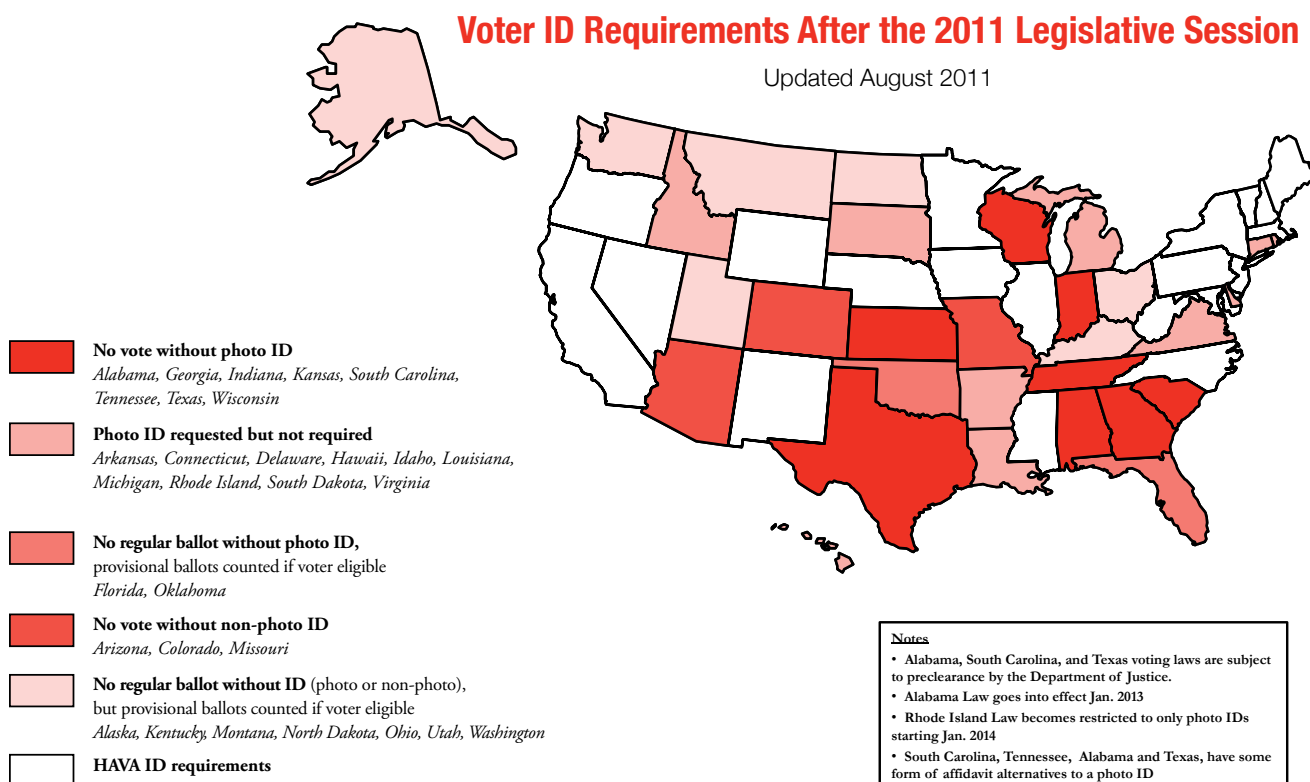
Nowhere was the debate more heated than in **Wisconsin**. There, Republican legislators considered passing the hotly contested photo ID bill while the Democrats were absent, boycotting the legislature to block the bill that eliminated collective bargaining rights for public employees.⁷⁷ Because the photo ID bill entailed significant costs for the state, state legislative rules prevented Republicans from proceeding unilaterally without a quorum. But the drama did not stop there. Once the Democrats returned, the State Senate passed the voter ID bill in a hasty and boisterous vote, denying opponents the opportunity to debate or speak out against the bill. Senate President Mike Ellis cut off the most senior member of the chamber, State Senator Fred Risser, to call a vote. Democratic members sought to stop the roll call, but President Ellis declared the bill passed once it had received enough votes. Some Democratic senators did not vote out of protest or confusion, and reportedly could not add their votes after the commotion was over.⁷⁸ Similarly, in **Alabama**, Senate leadership limited debate on the voter ID bill to twenty minutes.⁷⁹



The debates were also characterized by a high level of mistrust between both sides. Opponents of voter ID accused proponents of attempting to shrink the electorate for partisan gain. Former President Bill Clinton, for example, asserted that voter ID laws are intended to specifically hurt Democratic voters, and that proponents “are trying to make the 2012 electorate look more like the 2010 electorate than the 2008 electorate.”⁸⁰ Columnist E.J. Dionne wrote that “[s]ometimes the partisan motivation” behind these efforts “is so clear.”⁸¹ Proponents, on the other hand, accused opponents of trying to ignore or even foster voter fraud. According to one columnist, the Democrats’ “rhetoric is over the top, probably because voter ID does get at the problem of voter fraud which—for some Democrats—is not so much a theory as a turn out model, a key to winning close elections.”⁸²

The content of the debate on voter ID bills was noteworthy for its consistency across the country. Proponents of photo ID bills consistently cited allegedly rampant voter fraud in their states and the need for greater ballot security to justify legislation. For example, in support of voter ID legislation, Kansas Secretary of State Kris Kobach relied upon 221 reported instances of voter fraud in Kansas between 1997 and 2010.⁸³ Similar claims were made by proponents of voter ID in other states.⁸⁴ Many also argued that voting is a “privilege” for which it is reasonable to require voters to expend effort.⁸⁵

Opponents, on the other hand, argued that photo ID requirements will disenfranchise thousands of eligible Americans—especially low-income citizens, minorities, students, and older Americans.⁸⁶ They also pointed out that the kind of fraud addressed by ID requirements hardly ever occurs in American elections.⁸⁷ For opponents, voting is a fundamental right rather than a privilege. Thus, in explaining his veto of a photo ID bill, New Hampshire Governor John Lynch said, “[t]he right to vote is a



fundamental right ... [The voter ID bill] creates a real risk that New Hampshire voters will be denied their right to vote.”⁸⁸ And, as discussed below, opponents focused on the high costs of voter ID laws.

As voter ID laws were being considered across the country, members of Congress began weighing in on the issue, with a strong partisan divide. Upon achieving their new majority, House Republicans announced concerns about election administration and called for additional measures to “better protect the electoral process.”⁸⁹ Congressional Democrats, on the other hand, decried the new push toward restrictive voter ID requirements. Representative John Lewis (D-GA) said, “this year’s Republican-backed wave of voting restrictions has demonstrated that the fundamental right to vote is still subject to partisan manipulation.”⁹⁰ Some congressional Democrats took to the house floor to denounce the new legislative efforts on voter ID, raising questions about the motives underlying those efforts. Congresswoman Marcia Fudge (D-OH), a leading opposition voice, charged that “these efforts have an all-too familiar stench of the Jim Crow era.”⁹¹ Representative G.K. Butterfield (D-NC) charged that the voter ID push “is a cynical and malicious Republican attempt to suppress minority and elderly voters who turned out in historical numbers for the ‘08 elections.”⁹² One hundred and fifteen Democratic House members signed a letter to Attorney General Eric Holder asking him to oppose the new voter ID provisions.⁹³ Voter ID was a prominent topic in a September 8, 2011 hearing before a Senate Subcommittee chaired by Senator Dick Durbin examining the rash of new state voting laws that threaten to suppress voter turnout across the country.⁹⁴

3. When All Else Fails: Ballot Measures

Lawmakers who were unsuccessful in passing strict voter ID laws or whose laws were blocked by the courts have begun trying a new route: passing ballot measures to amend their state constitutions, as **Oklahoma** did in 2010. Oklahomans passed voter ID as a ballot measure in 2010, after a voter ID bill was vetoed by then-Governor Brad Henry. The new law—which is not nearly as restrictive as other measures introduced this year¹⁰⁸—was implemented on July 1, 2011.

Though **Missouri** Governor Jay Nixon vetoed a photo ID bill this year, the Legislature passed a voter ID ballot measure, which cannot be vetoed, and which will be on the Missouri ballot in November 2012. The ballot measure would amend the State Constitution to allow the Legislature to impose stricter photo ID requirements on voters. This constitutional amendment effort comes five years after the Missouri State Supreme Court ruled a highly controversial voter ID law unconstitutional, noting that it would burden voters.¹⁰⁹ No state photo ID requirement can be imposed on Missouri voters unless the State Constitution is amended to overturn that decision. And even if the ballot measure passes, voters will not be required to show photo ID unless the Legislature passes and the Governor signs additional legislation.

Supporters of stricter voter ID have been pushing ballot measures in other states as well. A ballot measure requiring photo ID to vote will appear on the **Mississippi** ballot in November 2011.¹¹⁰ In **Minnesota**, legislators in the House introduced a ballot measure to amend the State Constitution to require voter ID to counter this year’s veto; the measure has not yet been introduced in the Senate.¹¹¹

The Costs of Voter ID

The high cost of implementing voter ID laws was a big issue this session, when states were facing serious fiscal crises. States that pass voter ID laws must, according to court decisions, incur a range of costs, including the costs of providing free photo IDs to voters who do not have them, ensuring that IDs are reasonably accessible to all voters, and educating the public and election officials.⁹⁵ Although there was widespread agreement that voter ID laws entail necessary costs, there were disputes over what those costs would be, with bill opponents accusing proponents of dramatically understating the costs.⁹⁶

The high cost of voter ID requirements caused local and county election officials in some states—including Iowa, Pennsylvania, and Wisconsin—to oppose new voter ID laws.⁹⁷ They also deterred legislators in Nebraska and Iowa, two states that considered, but did not pass, voter ID legislation this year.

Nebraska. The fiscal note attached to Nebraska’s photo ID bill (L.B. 239), estimated negligible costs associated with its implementation, assuming that only voters who could prove they were indigent would be provided with free IDs.⁹⁸ Opponents argued that forcing voters to prove indigence before they could be provided with a photo ID could subject the bill to constitutional challenge, and argued that all IDs should be free.⁹⁹ The original sponsor of the bill, Senator Charlie Janssen, proposed an amendment to the bill that would have added non-photo ID and voter registration confirmation cards to the list of acceptable forms of voting identification.¹⁰⁰ This drew a rebuke from Larry Dix, director of the Nebraska Association of County Officials, who said the amendment would increase costs for the counties without providing any extra security. “I don’t see that the [proposed amendment] solves the problem at all,” he said, “there’s no security in that.”¹⁰¹ Ultimately, the bill failed to leave committee and therefore died when the legislative session ended.¹⁰²

Iowa. The Iowa State Association of County Auditors (ISACA)—a bipartisan organization representing county auditors, who are responsible for administering elections at the county level—opposed the voter ID bill proposed in their state.¹⁰³ ISACA conducted an independent study of the impact of voter ID measures in Indiana, and found that the proposed Iowa bill would impose too high a cost and burden on local election jurisdictions to justify its adoption.¹⁰⁴ As one county auditor put it, the legislation would be an “unfunded mandate” on counties, who would have to bear the brunt of meeting the obligation of “educating the public and the voter [about the bill’s requirements].”¹⁰⁵ As a result, the Association voted to officially oppose H.F. 95.¹⁰⁶ Both Democratic and Republican representatives in ISACA opposed the measure, with not one person voting to support it and with 16 of 60 county representatives choosing to remain neutral. According to Mike Gronstal, the Senate majority leader, the opposition from ISACA was one of the main reasons the bill ultimately failed.¹⁰⁷

II. DOCUMENTARY PROOF OF CITIZENSHIP TO REGISTER OR VOTE

A. Background

In general, except for certain local elections, a person must be a U.S. citizen over eighteen years old to be eligible to participate in American elections. A voter typically establishes her eligibility by swearing an affidavit, under penalty of perjury, that she is a U.S. citizen of voting age and meets all the other eligibility requirements of her state (such as residency and lack of disqualifying criminal convictions).¹¹² A non-citizen or other ineligible person who falsely claims eligibility and either registers to vote or votes is subject to serious criminal penalties—including five years in prison and \$10,000 in fines under federal law¹¹³—and also deportation.

Until recently, no state has ever required any voter to produce documentary proof of citizenship—or age or any other component of eligibility—to participate in elections. In 2004, however, as part of a broad-ranging ballot initiative, called Proposition 200, regulating the treatment of immigrants, Arizona for the first time passed a law requiring prospective voters to present documentary proof of citizenship in order to register to vote.¹¹⁴

As of the start of this legislative session, only two states had ever sought to require documentary proof of citizenship for voter registration or voting.

The Arizona law, which went into effect before the 2006 elections, specifically directs election officials to reject voter registration applications that are not accompanied by one of several specified citizenship documents,¹¹⁵ thus denying those individuals the ability to vote. Until this year, this Arizona law was an outlier, unique in the country.

Arizona's proof of citizenship law sparked significant controversy from the outset. In March 2006, the U.S. Election Assistance Commission, a bipartisan federal agency charged with regulating certain election administration matters, voted to reject Arizona's request to amend the federal voter registration application form to reflect the state's new rules.¹¹⁶ Shortly afterward, the law was challenged in federal court;¹¹⁷ it has been wrapped up in litigation ever since. In the most recent ruling in that case, a panel of the U.S. Court of Appeals for the Ninth Circuit held that the proof of citizenship requirement conflicts with federal law—specifically, the National Voter Registration Act of 1993.¹¹⁸ The Ninth Circuit agreed to rehear that case *en banc*, and oral argument was held before a larger panel on June 21, 2011. The court has not yet issued its decision.

Georgia became the second state to pass a proof of citizenship law in 2009, requiring prospective voters to provide documentary proof of citizenship in order to register to vote.¹¹⁹ This came after the Department of Justice blocked implementation of an earlier Georgia policy for checking the citizenship of registered voters as unreliable and discriminatory.¹²⁰ The Department of Justice ultimately approved of Georgia's proof of citizenship law in April 2011,¹²¹ but the state has not yet put the law into effect.

Thus, as of the start of this legislative session, only two states had ever sought to require documentary proof of citizenship for voter registration or voting, only one had implemented such a requirement, and the legality of the requirement had not yet been resolved (and still is not resolved) in the courts.

The push for proof of citizenship requirements should also be considered in the context of the bills targeting immigrants that swept the states this year. Alabama, Arizona, Georgia, Indiana, South Carolina, and Utah are among the states that passed laws supposedly designed to restrict benefits for, and crack down on, undocumented immigrants.¹²² As with Proposition 200, Arizona was the national leader in this effort, with its highly controversial H.B. 1070.

B. Roundup of Legislative Developments

This session, at least twelve states introduced legislation that would require documentary proof of citizenship to register or vote: Alabama,¹²³ Colorado,¹²⁴ Connecticut,¹²⁵ Kansas,¹²⁶ Maine,¹²⁷ Massachusetts,¹²⁸ New Hampshire,¹²⁹ Nevada,¹³⁰ Oregon,¹³¹ South Carolina,¹³² Tennessee,¹³³ and Texas.¹³⁴ Washington State introduced a resolution to request that any federal voting mandates make funding contingent upon the adoption of photo ID and proof of citizenship requirements.¹³⁵ Three proof of citizenship bills passed: in Alabama, Kansas, and Tennessee.¹³⁶ The new Kansas and Tennessee laws go into effect immediately; the Alabama law must await approval by the U.S. Department of Justice or a federal court under the Voting Rights Act.¹³⁷ To date, Alabama has not yet submitted the law for preclearance.¹³⁸

C. What the Bills Say

The new Alabama and Kansas proof of citizenship laws are virtually identical. Like the 2004 Arizona law, both laws require prospective voters to provide documentary evidence of U.S. citizenship with their voter registration applicants, and election officials to deny registration to any applicant who does not provide satisfactory documentation.¹³⁹ Acceptable documents include: any driver's or non-driver's ID that includes a notation that the person submitted proof of U.S. citizenship, a U.S. birth certificate, a U.S. passport or U.S. naturalization documents, certain tribal IDs, and other rare documents.¹⁴⁰ The Alabama and Kansas laws apply only to new registrants; they specifically exempt all people already registered in the state, even those who move and must update their voter registration records.¹⁴¹ Neither law includes any exceptions for prospective voters who were not previously registered. Both laws specify that applicants whose registrations are denied because they failed to include satisfactory proof of citizenship may challenge election officials' determination in court.¹⁴² The bills that did not pass this session similarly would have required documentary proof of citizenship to register to vote.

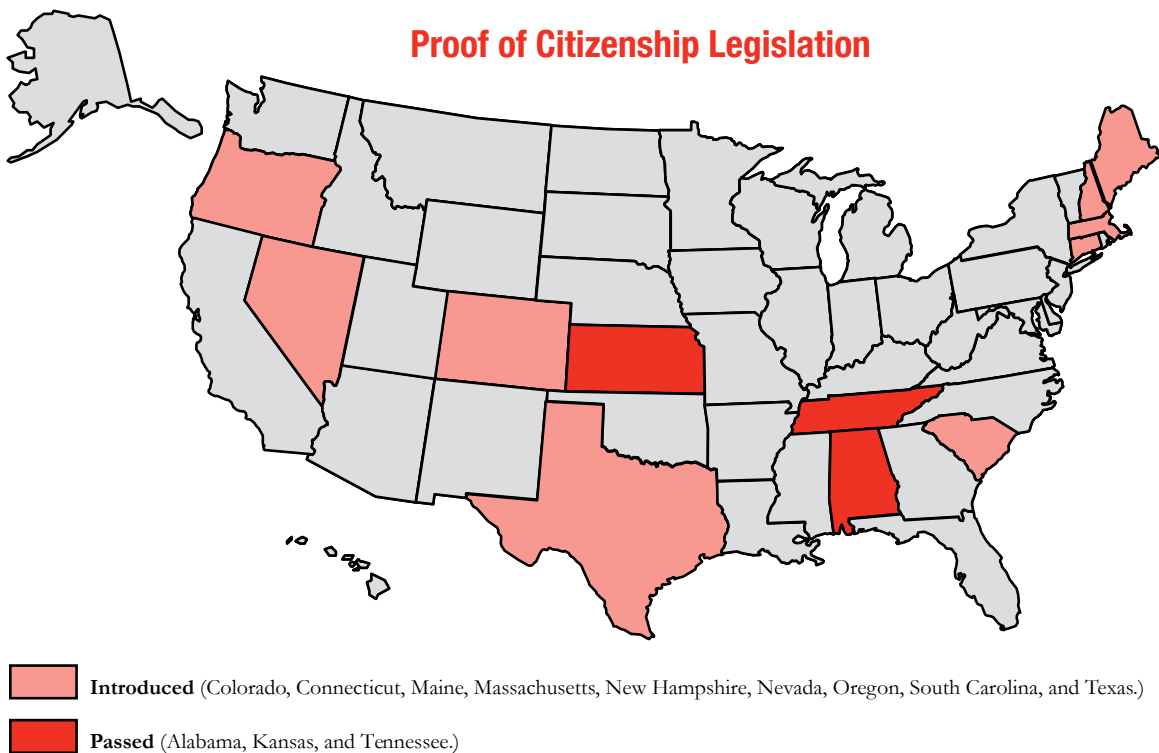
Unlike the Alabama and Kansas laws, the Tennessee law applies only to individuals flagged by state officials as potential non-citizens based on a database check. The Tennessee law therefore applies to a smaller number of prospective voters.

D. Legislative Battles

Legislative debate over proof of citizenship bills was at times rancorous. For example, in Colorado, Democratic legislators and others pressed Republican Secretary of State Scott Gessler on his claims of widespread voter fraud by non-citizens. One Colorado Democratic representative demanded that Mr.

Gessler turn over evidence of actual instances of non-citizens voting.¹⁴³ Another representative insisted that Mr. Gessler prosecute actual instances of voter fraud of which he was aware, suggesting that Mr. Gessler did not actually have any cases that could be prosecuted.¹⁴⁴ County clerks also demanded that Gessler turn over evidence of voter fraud, insisting that they were not aware of any such instances.¹⁴⁵ The legislative debates over proof of citizenship mirrored those over voter ID. Proponents claimed that proof of citizenship requirements are needed to prevent non-citizens from illegally voting in elections. In several states, proponents claimed to have uncovered evidence of such illegal voting. Colorado Secretary of State Scott Gessler, for example, claimed that up to 11,805 non-citizens were registered to vote in Colorado,¹⁴⁶ while Kansas Secretary of State Kris Kobach claimed to have found 67 non-citizens illegally registered to vote in Kansas.¹⁴⁷ These claims were hotly disputed, and they have since been debunked.¹⁴⁸ Nonetheless, Representative Gregg Harper (R-MS) called the finding “shocking,” and at a hearing he chaired on the topic, said, “[w]e simply cannot have an electoral system that allows thousands of non-citizens to violate the law and vote in our elections ... [w]e must do more to protect the integrity of our electoral processes.”¹⁴⁹

Opponents, on the other hand, claimed that proof of citizenship requirements exclude large numbers of eligible voters, pointing out that millions of eligible Americans—at least 7% according to a leading study by the Brennan Center¹⁵⁰—do not have ready access to the documents needed to prove citizenship. As Tennessee State Senator Thelma Harper said, “[i]t hampers people who want to be a part of the system.”¹⁵¹ Opponents further disputed the claim that there is a problem of non-citizen voting in American elections, pointing out that only a miniscule number of non-citizens have been found to have voted illegally, and that it is already easy to catch non-citizen voters since they leave a clear paper trail.¹⁵²



III. MAKING VOTER REGISTRATION HARDER

In every state but one, citizens must be registered in order to vote. Voter registration facilitates election administration by enabling election officials to more easily plan for elections, process voters, and prevent fraud. But registration requirements can also function as a barrier to many eligible voters, preventing them from participating because of technical hurdles or missed deadlines.¹⁵³

Experts have long pointed out that the nation's outdated registration system is among the most significant barriers to voting, resulting in the disenfranchisement of millions of Americans during every federal election.¹⁵⁴ In 2001, the Carter-Ford National Task Force on Election Reform found that “[t]he registration laws in force throughout the United States are among the world’s most demanding ... [and are] one reason why voter turnout in the United States is near the bottom of the developed world.”¹⁵⁵ This impact has not abated: around 3 million Americans tried to vote in the 2008 Presidential election but could not, due to voter registration problems.¹⁵⁶

The general thrust of the law over the past few decades has been to ease registration requirements to make it easier for eligible citizens to get on the voter rolls. The most significant advance was the National Voter Registration Act of 1993, also known as the “Motor Voter” law, which made voter registration opportunities widely available across the country.¹⁵⁷ More recently, states have taken the lead in modernizing their voter registration systems so that more voters are getting on the rolls and the rolls are getting more accurate.¹⁵⁸

This year, the tide reversed. Instead of efforts to increase voter registration, this year new registration requirements have been instated that will make it more challenging for eligible citizens to ensure that they are registered to vote on Election Day. Voter registration regulations range from restrictions on individuals and groups who help register voters, to efforts to scale back Election Day and same-day registration, to new rules making it harder for voters to stay registered after they move.

Part 1: Voter Registration Drive Regulations

A. Background

Voter registration rates in the United States are routinely lower than they are in other democracies around the world: more than a quarter of voting-age Americans are not registered and thus cannot vote.¹⁵⁹ This is in part because, unlike in other democracies, U.S. state governments do not assume the responsibility of getting voters onto the rolls; instead, we rely on individual voters to ensure that they are registered. Community-based voter registration drives play an important role in encouraging and assisting other citizens to register to vote. Restrictions on voter registration drive activity have a direct impact on who has access to voter registration and who gets registered to vote.

Although community-based voter registration drives have been around in some form for decades, Congress helped expand such voter registration activity by passing the National Voter Registration Act of 1993 (NVRA).¹⁶⁰ Among other things, the NVRA greatly simplified voter registration application

forms, required states to follow uniform rules for accepting those forms, and required them to make blank forms generally available “with particular emphasis on making them available for organized voter registration programs.”¹⁶¹ As a result, civic groups were easily able to obtain and circulate voter registration forms to potential voters who might not otherwise register or become engaged in the electoral process.

Voter registration drives have become an increasingly important registration method in the past decade, especially for low-income citizens, students, members of racial and ethnic minority groups, and people with disabilities. For example, in the 2004 general election, large-scale voter registration drives report assisting almost 10 million citizens to register to vote, contributing to a surge in new registrations and increased turnout in that election. In one county in Florida alone, voter registration organizations were responsible for registering 62.7% of all newly registered voters.¹⁶² Nationally, Census data show that Hispanic and African-American voters are approximately twice as likely to register to vote through a voter registration drive as white voters.¹⁶³

Voting rights advocates point to increased voter registration rates, especially among minority, low-income, and younger citizens, as a positive effect of voter registration drives and a reason to expand them. They also cite recent falling voter registration rates as a reason to encourage voter registration drives. The 2010 election saw a plunge in new voter registrations, as new voter registrations in 2010 were down almost 17% from the 2006 cycle.¹⁶⁴ This was accompanied by a dramatic decrease in voter registration drive activity, for the first time in years. But voter registration drives have unfortunately become an increasingly controversial political topic.

Over the past few years, there has been a growing effort to push back against voter registration drives. Opponents have argued that voter registration drives are susceptible to fraud, citing allegations of fraud related to ACORN, a defunct organization that focused on registering low-income voters.¹⁶⁵ Presidential candidate John McCain cited allegedly fraudulent registration cards submitted by ACORN as “one of the greatest frauds in voter history in this country, maybe destroying the fabric of democracy.”¹⁶⁶ Other opponents have argued that voter registration should be made more difficult to reflect the importance of the right to vote.¹⁶⁷ At the extreme end of the spectrum, some have argued that by specifically empowering low-income voters to register, voter registration drives are “antisocial and un-American.”¹⁶⁸

Recently, a number of state legislatures have pushed legislation to regulate and restrict community-based voter registration drives. This extensive regulation of voter registration drive activity is a unique government regulation of private political activity. These regulations have serious consequences for citizens’ ability to organize and conduct voter registration drives; for example, the recent Florida law imposing a set of new restrictions on third-party voter registration activity (discussed at length below) has resulted in the volunteer-based League of Women Voters placing a moratorium on all voter registration work because the law imposes too great a burden on voter registration. The type and extent of laws governing voter registration have a direct impact on who gets to participate in the process, and who is permitted to assist them in doing so.

B. Roundup of Legislative Developments

Bills placing new restrictions on voter registration groups have been proposed in at least seven states—California (passed in both houses; awaiting governor’s action), Florida, Illinois (pending), Mississippi (failed), Nevada (restrictions removed by amendment), New Mexico (failed), North Carolina (pending), and Texas.

These bills have been signed into law in Florida and Texas. Florida and Texas stand out as two states that have long histories of restricting voter registration drives, and the new laws passed in this session will make both states further outliers in limiting this activity. Neither state had reported cases of registration fraud linked to voter registration drives in the past election cycle, nor any other apparent precipitating cause for the further regulations imposed by these bills.

C. What the Bills Say

Although the bills seeking to regulate voter registration drives vary in their content, there are several recurring elements. Almost universally, these bills would require citizen registration groups to register with the state before undertaking a voter registration drive.¹⁶⁹ They may also require special training for volunteers; the use of special forms, disclosure, and reporting systems; or short deadlines for the submission of voter registration forms. Violation of these rules, or registering voters outside the mandated system, usually carries criminal or civil penalties. The legislation that succeeded this year is described below.

Florida. Florida’s House Bill 1355, a mammoth 158-page omnibus bill, was signed by Governor Rick Scott on May 19th.¹⁷⁰ The new law requires voter registration groups to pre-register with the state before engaging in any voter registration activity, requires every volunteer or employee to sign a sworn affidavit under penalty of perjury listing all criminal penalties for false registration, and mandates that every registration form collected by a voter registration group be physically received by county officials within 48 hours of signature or face strict civil penalties and fines. In order to comply with this tight turnaround time, groups must write the precise date and time when an individual completes a voter registration form on each registration form. The law also requires voter registration groups to place their government-issued organizational code on each form they obtain from elections officials or receive from a voter, to track the precise numbers of both state and federal voter registration forms that each group obtains or collects, and to submit those figures in monthly electronic reports to the state.

Texas. Texas introduced a series of bills that would limit the ability of persons to register others to vote, two of which were signed into law (H.B. 1570 and H.B. 2194).¹⁷¹ H.B. 1570 requires that anyone who registers voters first be deputized and attend a mandatory training; the law delegates the development of the training to the Secretary of State, and explicitly permits an “exam” at the end of the training.¹⁷² H.B. 2194 requires anyone registering others to be a Texas resident and qualified voter, and prohibits performance-based compensation for anyone who is paid to register voters.¹⁷³

D. Legislative Battles

The two bills signed into law in 2011 that restrict voter registration drive activity were uniformly supported by Republican legislators. In Florida, the law passed along straight party lines in the House of Representatives, with all Democrats opposing. Democrats were joined by two Republicans voting against the bill in the State Senate.¹⁷⁴ In Texas, which passed two companion bills restricting third-party voter registration, one bill passed unanimously,¹⁷⁵ while its companion bill passed only the Senate unanimously,¹⁷⁶ with seven House members, all Democrats of color, voting against the bill.¹⁷⁷

Florida History

Florida has a history of implementing restrictive rules for voter registration drives—rules that have been successfully challenged before. (The Brennan Center for Justice has litigated twice in the past on behalf of Florida civic groups to challenge these restrictions.¹⁷⁸)

The first major imposition of restrictions on voter registration drives occurred in 2005, a year after ACORN's community organizing work resulted in enough signatures to place a citizen initiative on the ballot to increase Florida's minimum wage. The law required third-party voter registration groups to meet a new ten-day deadline to submit registration forms to election officials, no matter how far away the registration deadline, and imposed hefty and potentially unlimited fines for each form submitted after that time under a strict liability scheme. The law specifically excluded political parties from its new restrictions.

On May 18, 2006, the League of Women Voters of Florida and other voter registration groups and filed a lawsuit in federal court challenging as unconstitutional the 2005 Florida law regulating voter registration drives.¹⁷⁹ On August 28, 2006, a federal court in Miami blocked enforcement of the Florida law.¹⁸⁰

After the state appealed that ruling, the Florida state legislature went back and reenacted a similar law with some changes in 2007, which the League and others also challenged.¹⁸¹ During the lawsuit, the Secretary of State agreed not to implement the law before an administrative rulemaking process was completed. Civic groups were therefore able to resume their regular registration activities leading up to the 2008 election. In early 2009, the Florida Division of Elections proposed a final rule implementing the challenged statute in a way that reduced the negative impact on voter registration groups. The parties agreed to settle the lawsuit, and on June 17, 2009, the case was dismissed. The 2007 law has since been in effect.

2011 Debate in Florida

Between 2009 and 2011, there was no controversy in Florida involving voter registration and indeed nothing to suggest why the state legislature again took up the subject of restricting voter registration drives. Proponents of H.B. 1355, the omnibus voting bill that included new restrictions on voter

registration drives, merely claimed that they sought to reduce fraud. They also made it very clear that they wanted to make voting harder. The bill's sponsor, Florida State Senator Mike Bennett (R-Bradenton), was quoted as saying "But I have to tell you, I don't have a problem making it harder. I want people in Florida to want to vote as bad as that person in Africa who walks 200 miles across the desert. This should not be easy. This should be something you should do with a passion."¹⁸² Florida State Senator Ellen Bogdanoff agreed: "Democracy should not be a convenience," she said.¹⁸³

The new Florida law garnered broad opposition from civic and minority rights groups and prompted tens of thousands of emails to Governor Rick Scott urging him to veto the bill. Nonetheless, the law quickly passed on straight party lines and was signed into law, over strong opposition and condemnation by the Democratic Party. Shortly after its enactment, the all-volunteer Florida League of Women Voters and a variety of other voter registration groups announced they would discontinue their voter registration activities in the state. The League explained that the new law "imposes an undue burden on groups such as ours that work to register voters,"¹⁸⁴ and that "we cannot and will not place thousands of volunteers at risk, subjecting them to a process in which one late form could result in their facing financial and civil penalties."¹⁸⁵

The Florida law is currently being considered by a federal court for "preclearance," federal approval required for jurisdictions covered under Section 5 of the Voting Rights Act because of a history of discrimination. Section 5 requires covered jurisdictions to supply evidence that changes to a state's election laws will not harm minority voters before those changes may go into effect. Five of Florida's sixty-seven counties are covered jurisdictions, where H.B. 1355 remains on hold awaiting preclearance; Secretary of State Browning has ordered election supervisors in the sixty-two non-covered counties to implement the law. Voting rights advocates have submitted evidence to both the Department of Justice and the federal court arguing that the new restrictions on voter registration drives, as well as the bill's other provisions reducing early voting days and eliminating cross-county address changes at the polls, will disproportionately impact Florida's minority voters.

Impact of New Voting Laws on Minority Voters

Opponents of the bills and laws detailed in this report frequently point to their negative impact on the ability of African American and Latino citizens to vote, and with good reason: there is substantial evidence that these laws will make it far more difficult for minorities than whites to vote.

For instance, **Florida's** new law—which places so many new burdens on voter registration drive activity that most groups have discontinued their voter registration activities in the state—will almost certainly hit African American and Hispanic voters hardest. In Florida, U.S. Census Bureau data from the 2004 and 2008 election cycles show that both African-Americans and Hispanics rely more heavily than white voters on community-based voter registration drives; in fact, African-American and Hispanic citizens in Florida are more than twice as likely to register to vote through such drives as white voters.¹⁸⁶

Similarly, the most restrictive voter ID laws, which only allow a small number of specified government issued photo IDs to vote, seem certain to create more burdens for minority citizens. According to one study, as many as 25% of African-American voters do not possess a current and valid form of government issued photo ID, compared to 11% of voters of all races.¹⁸⁷ And the kinds of government issued IDs that are permitted in the various state laws often put minorities at an even greater disadvantage. For instance, as noted above, the new **Texas** voter ID law, permits voters to use a concealed handgun license as proof of identity, but precludes voters from using a student ID, even if the student ID was issued by a state university. As the Texas Department of Public Safety recently noted, African Americans are significantly underrepresented among the state's handgun license holders. Of the more than 100,000 concealed handgun licenses issued in Texas last year, only 7.69% were issued to African Americans, even though African Americans constitute 12.1% of the state's voting age population. In contrast, African Americans are more likely to attend a public university in Texas than whites. According to the 2009 American Community Survey, 8.0% of voting-age African Americans in Texas attended a public university compared with only 5.8% of voting age whites.¹⁸⁸

New restrictions on early voting will also have their biggest impact on people of color. Opponents of these restrictions have been particularly angered by the efforts to eliminate Sunday early voting, which they see as explicitly targeting African-American voters. **Florida** eliminated early voting on the last Sunday before Election Day, and **Ohio** has eliminated early voting on Sundays entirely. There is substantial statistical and anecdotal evidence that African Americans (and to a lesser extent Hispanics) vote on Sundays in proportionately far greater numbers than whites.¹⁸⁹ For instance, in the 2008 general election in Florida, 33.2% of those who voted early on the last Sunday before Election Day were African American and 23.6% were Hispanic, whereas African Americans constituted just 22.7% of all early voters for all early voting days, and Hispanics just 11.6%.¹⁹⁰

Part 2: Eliminating Same-Day Registration

A. Background

Prior to 2011, eight states—Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Wisconsin, Wyoming—allowed for Election Day registration (“EDR”), meaning that citizens could register and vote at their local polling place on Election Day.¹⁹¹ Maine was the first state to adopt EDR, in 1973; Iowa was the most recent, in 2008.¹⁹² In 2007, North Carolina adopted same day registration for the early voting period, but not on Election Day.¹⁹³ Beginning in 2008, Ohio allowed same day registration for the first week of early voting.¹⁹⁴ (Other states provide for EDR in certain circumstances; for instance, in Connecticut and Rhode Island, voters who register on Election Day may vote for presidential candidates only.)

Voting rights advocates have long praised EDR.¹⁹⁵ Because it has existed in some states for nearly forty years, there is a substantial record of its benefits. States with EDR have consistently had higher turnout than states without, and the top five states for voter turnout in 2008 were all EDR states.¹⁹⁶ There is also evidence that EDR specifically increases turnout among young voters.¹⁹⁷

Proponents of EDR point out that it greatly reduces the use of provisional ballots¹⁹⁸ (under federal law, provisional ballots are provided to voters when there is a question about the voter’s eligibility, very often related to whether they are properly registered). Most voting rights advocates prefer the use of regular ballots to provisional ballots where possible, because a significant percentage of provisional ballots go uncounted in every election.¹⁹⁹

The most common objection to EDR is that it “invites” voter fraud.²⁰⁰ This has been the main public explanation provided by supporters of bills to end same day registration, though some have also argued that same day registration imposes administrative burdens on those running the polls on Election Day.²⁰¹

Bills to eliminate same day registration in 2011 were uniformly sponsored by Republicans. The bills that passed the Montana and Ohio legislatures were unanimously opposed by Democratic legislators in the legislative chambers that voted on them.²⁰²

The partisan split over Election Day Registration has not always existed. When Maine became the first state to adopt EDR in 1973, the Republicans controlled both houses of the Legislature, and the proposal passed unanimously.²⁰³

B. Roundup of Legislative Developments

Bills to eliminate EDR or same day registration were introduced in five states: Maine, Montana, New Hampshire, North Carolina and Ohio. The bills in Maine and Ohio have been enacted, though both bills may be overturned in the coming months by ballot initiative processes currently underway in each state. The bill in Montana passed the legislature, but was vetoed by Governor Brian Schweitzer on March 4, 2011.²⁰⁴ The bill in North Carolina is still pending.

C. What the Bills Say

Maine. On June 21, Governor Paul LePage signed a bill to repeal Maine’s 38-year old law allowing same-day voter registration.²⁰⁵ It was the oldest EDR law in the country. The Montana bill that was vetoed similarly would have eliminated EDR in that state.

Ohio. Beginning in 2008, the state of Ohio adopted what effectively became same day registration during the first week of early voting.²⁰⁶ In both 2008 and 2010, the first week of early voting overlapped with the final week before the registration deadline, and meant that citizens were able to register and vote on the same day.²⁰⁷ An omnibus election reform bill, signed by Governor John Kasich on July 1, substantially reduced the early voting period, thereby eliminating “Golden Week,” and Ohio’s *de facto* same day registration period.

North Carolina. Current law in North Carolina allows eligible voters to register to vote or update their registration information during the early voting period. A bill currently under consideration in the North Carolina Senate would eliminate same day registration (it would also reduce the early voting period, as discussed below) and the ability of voters to update their registration information during early voting.²⁰⁸

The Special Case of Ohio’s Referendum

Ohio is no stranger to partisan fights over election law. With Republicans in control of both the Legislature and the executive branch this year, it is not particularly surprising that the state passed a new omnibus election law dramatically altering the state’s election code. It was signed by Governor Kasich on July 1 and passed along party lines—without a single Democratic vote.²⁰⁹ The bill, supported by the current Republican secretary of state of Ohio, impacted many areas of election administration.²¹⁰ Among the most significant changes relevant to this report, it cut the in-person early voting period by two thirds, eliminated early voting on Sundays, eliminated the state’s *de facto* “same day registration” week during the early voting period, and forbade county boards of election from mailing out return-paid absentee ballot applications or absentee ballots.²¹¹ Democrats argued that the bill would suppress votes, particularly votes of groups that traditionally favor Democrats, like African-Americans.²¹²

Unlike minority parties in most other states, Democrats had a weapon that allowed them to fight changes to the election code even after they were passed into law: the Ohio referendum. Under the unique rules of that state, if opponents of the bill get enough signatures, all of the new provisions will be stayed until the referendum vote in November 2012.²¹³ Former Democratic Secretary of State Jennifer Brunner has led a petition drive to do just that.²¹⁴ If organizers gather enough signatures by September 29 to qualify for the referendum in November 2012, none of the bill’s provisions will go into effect before the referendum.²¹⁵ That would mean, among other things, that Ohio would continue to operate under its old rules for early and absentee voting in 2012.

D. Legislative Battles

Efforts to repeal same day registration fell almost entirely along partisan lines. In states where repeal proposals received votes, most or all Republican legislators supported the repeal, and all Democratic legislators opposed it.²¹⁶

A primary argument of those seeking repeal was that same day registration increased the possibility of fraud. “When you’re able to register and vote on the same day, there’s simply not the time to go and make sure that the registration is proper,” argued Ohio State Senator Mark Wagoner.²¹⁷ Legislators seeking repeal also frequently emphasized the responsibility of the voter to ensure she could vote on Election Day. Maine Senate Republican Nichi Farnham stated “If it is something that’s so important, our right to vote, then why would it be a problem to plan ahead to register?”²¹⁸

In contrast to other states, proponents of the EDR repeal in Maine often placed more emphasis on the administrative burden of EDR than fraud, perhaps because of EDR’s long history there, and the absence of evidence of voter fraud during that time.²¹⁹ Republican Secretary of State Charles E. Summers, Jr. wrote in an op-ed that “I have never argued that this is a measure necessary to prevent voter fraud ... In fact, I have stressed repeatedly that this bill has been designed to relieve some of the stress on the system.”²²⁰ Proponents of EDR in Maine have responded to this argument by pointing out that elimination of EDR means the state must adopt a system for provisional ballots,²²¹ which comes with its own additional costs and administrative burdens.²²²

“The notion that same day voter registration leads to voter fraud is a myth . . . This is a solution in search of a problem.”

—Maine Rep. Mark Dion

Not surprisingly, opponents of repeal were unanimous in disputing claims that same day registration invited fraud. Montana Representative Bryce Bennett pointed to the fact that the current Secretary of State and two of her predecessors all argued that EDR had not led to any fraud.²²³ Maine Representative Mark Dion made similar comments about EDR in his state. “The notion that same day voter registration leads to voter fraud is a myth . . . This is a solution in search of a problem.”²²⁴

Opponents of repeal also pointed to the benefits of EDR, including increased registration among the young and those who moved shortly before Election Day, greater voter turnout, and greater convenience for voters. Montana Secretary of State Linda McColloch argued that since its passage in 2006, 19,000 people registered to vote on Election Day in Montana, and that the repeal attempt ran “counter to the core freedoms of our democracy ... [i]f you support freedom, and you support democracy, you cannot support a bill that will turn your neighbors away at the polls.”²²⁵

Focus: Maine and the People’s Veto

Because Maine has a referendum process known as “the People’s Veto,” which allows Maine citizens to reverse a legislative decision, it is not clear that the repeal of EDR will be in effect on Election Day. On

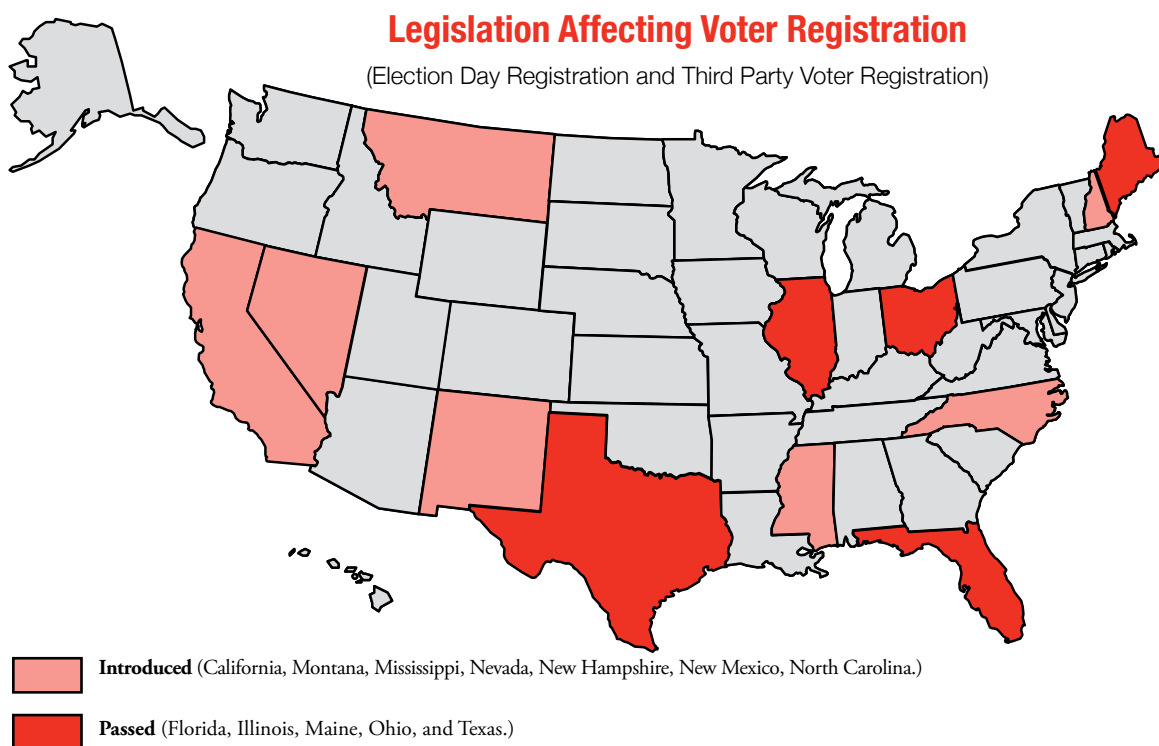
June 21, the same day that Governor Paul LePage signed the bill to repeal EDR, a coalition led by the League of Women Voters of Maine filed papers to launch a People’s Veto campaign. They have gathered enough signatures to get the question on the November 2011 ballot.²²⁶ It will appear as question number one on the ballot.²²⁷

Part 3: Other Restrictions on Voter Registration

While attempts to limit voter registration drives and same day registration were the most widespread efforts to restrict voter registration this year, there have been additional, state-specific efforts that will make it more difficult for voters to ensure that they are registered and able to vote at their current addresses on Election Day. We provide two examples of these new limitations below.

Florida. Though Florida does not have Election Day registration, it does have a longstanding policy permitting voters who changed their address before an election to update their new address at the polls on Election Day, where the voters’ existing registrations were cross-checked in a state database before the voters were given a ballot. The Florida omnibus bill eliminated that right. This has the potential to disenfranchise a significant number of voters in Florida, especially those who move and are unaware of the change in law or who move within the state after the registration deadline.

Wisconsin. Wisconsin also worked to limit voter registration possibilities. Though commonly known for its voter ID provisions, there are other voter registration restrictions in the new Wisconsin election law, including extending the length of residency period before an eligible person may register to vote from ten to twenty-eight days.



IV. MAKING VOTING HARDER: RESTRICTING EARLY IN-PERSON AND MAIL-IN ABSENTEE VOTING

A. Background

For years, the growth of early voting—through in-person early voting sites and no-fault absentee voting by mail—has been dramatic, and seemed unstoppable. 2011 marks the first year that inexorable progress may have stalled. Early in-person and absentee voting have come under attack by legislatures around the country; these attacks have been particularly successful against early in-person voting.

The numbers tell the story of early voting's growth in just the last decade. In 2000, an overwhelming majority of Americans still voted at their local polling places on Election Day; less than 4% voted at early voting sites, and only 10% voted by mail. By 2008, more than a third of American voters voted early. The percentage of Americans voting at early voting sites had increased nearly five-fold, to 18%, and the percentage voting by mail nearly doubled to 19%.²²⁸

The primary benefit of early voting is convenience. Voters are provided more options and days during which they can vote.²²⁹ While there is little evidence that early and absentee voting increase turnout,²³⁰ there is strong anecdotal evidence that it makes election administration easier, reducing the crush of voters at the polling place on a single day.²³¹ In the past, that Election Day crush has led to hours-long lines, and resulted in the *de facto* disenfranchisement of tens of thousands of voters.²³²

Through much of its growth, early voting has had strong support from both Democrats and Republicans.²³³ In 2011, most, though not all, of the new restrictions on early voting have been proposed by Republicans and adopted by Republican-controlled legislatures.

As discussed below, the reasons most often provided for restricting early voting were cost and administrative burden, though they sometimes also included arguments that the restrictions would reduce fraud.²³⁴ Opponents of the new restrictions frequently disputed the alleged savings,²³⁵ and many argued that the changes were really a response to the success in 2008 of Barack Obama's campaign to get the candidate's supporters—and in particular black voters—to vote before Election Day.²³⁶

B. Roundup of Legislative Developments

At least nine states—Florida, Georgia, Maryland, Nevada, New Mexico, North Carolina, Ohio, Tennessee, West Virginia—all considered bills to reduce their respective early voting periods this year.²³⁷ At least four states—Georgia, New Jersey, Ohio, and Wisconsin—saw the introduction of bills to change or add new restrictions on absentee voting.²³⁸

Texas introduced a law that would omit early voting locations from official notices of a general or special election, but the measure did not pass.²³⁹ In Wisconsin, a provision to eliminate no-excuse absentee voting was later removed from the state's voter ID bill.²⁴⁰

Ultimately, laws reducing early voting were passed and signed into law in five states: Florida, Georgia, Ohio, Tennessee, and West Virginia. Pending bills remain in North Carolina, Georgia, and New Jersey.

C. What the Bills Say

Ohio. As already discussed, Governor Kasich of Ohio signed into law an omnibus election reform bill on July 1. Among other things, this new law also substantially reduced early in-person voting and access to vote by mail. Under the new law, the in-person voting period was cut by more than two thirds, from thirty-five days to eleven.²⁴¹ Early voting on Saturday afternoon and Sunday was eliminated entirely.²⁴²

Controversially, the new law also prohibited county boards from mailing absentee ballot applications to all voters, or prepaying postage on absent voter's ballot applications.²⁴³ Both practices were employed by Franklin (Columbus) and Cuyahoga (Cleveland) counties in past elections, and were credited by some voting rights advocates and election officials with reducing congestion at the polls on Election Day, and eliminating equity issues associated with requiring voters to pay to mail in their ballots.²⁴⁴ Proponents of this ban, including Secretary of State Jon Husted, supported it on the grounds that all counties should adopt the same practices with regards to absentee ballots, and some counties could not afford to mail absentee ballot applications to all voters or prepay postage on those applications.²⁴⁵ The impact of this law may have been largely thwarted by the Cuyahoga County Council, which voted to have its public works department oversee mailings of absentee ballot applications to all voters (the ban only applied to elections boards). As a result, Secretary Husted—arguing that uniformity in county practices was of paramount concern—decided that the State will mail absentee ballot request forms to voters in *all* counties ahead of the 2012 presidential election.²⁴⁶

Florida. The same Florida law that led the League of Women Voters to discontinue its voter registration operations also reduces the early voting period from two weeks to one. Florida also eliminated the Sunday before Election Day as an early voting day.²⁴⁷

Other states with new laws. In **Georgia**, on May 13, Governor Nathan Deal signed H.B. 92 into law, which reduces the early voting period from forty-five to twenty-one days.²⁴⁸ In **Tennessee**, in June, Governor Bill Haslam signed S.B. 923²⁴⁹ which shortens the early voting period by two days. In **West Virginia**, on March 18, Governor Earl Ray Tomblin signed S.B. 581, which reduces early voting by five days, but allows early voting on Saturdays for the first time.²⁵⁰

Pending bills. In **Georgia**, H.B. 138 would limit when in-person absentee ballots may be cast by requiring that when an absentee ballot is requested in person during the early voting period, the absentee ballot must be cast within the registrar's office at that same time.²⁵¹ In **New Jersey**, S.B.1596 would end no-excuse absentee voting.²⁵² In **North Carolina**, S.B. 657 would cut down the early voting period by one week and eliminate Sunday voting.²⁵³ Another election law bill, S.B. 47, also originally contained a provision that would eliminate Sunday early voting. That provision, however, has since been removed from the bill.²⁵⁴

D. Legislative Battles

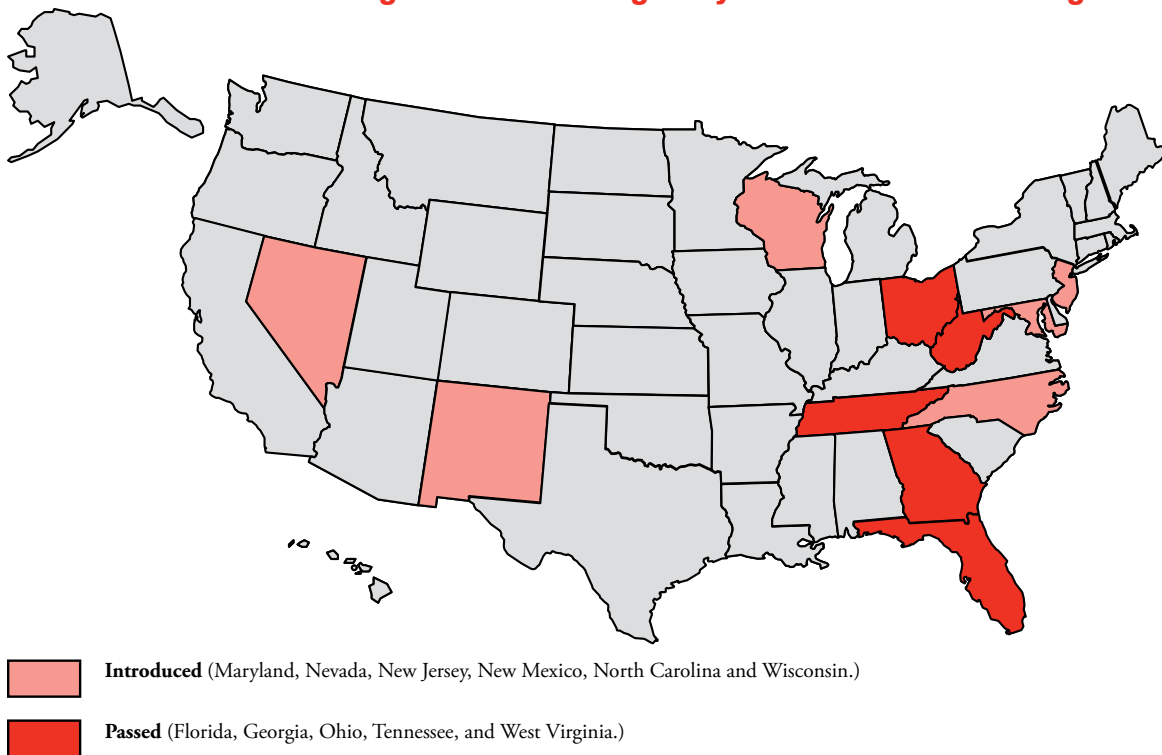
This year saw a substantial push in several states to reduce or, in some cases, eliminate these programs, and substantial resistance to those efforts. Of the five states that reduced early voting, four—Florida, Georgia, Ohio and Tennessee—saw sharp partisan divisions over those reductions. In all four cases, Republicans had uniform control over the legislative and executive branches, and passed the reductions over frequently vociferous objection by Democrats.²⁵⁵ In the fifth state, West Virginia, the law reducing the early voting period also added early voting on Saturdays for the first time. It received bipartisan support.²⁵⁶

Until this year, the expansion of early voting seemed unstoppable. In 1972, just two states allowed no-fault absentee voting and five allowed early in-person voting. By 2010, thirty-two states and the District of Columbia allowed no-fault absentee voting, while thirty states and the District of Columbia allowed in-person early voting.²⁵⁷

The Debate

While some of the bills that reduced in-person early voting also put new restrictions on absentee voting by mail, it was the reduction of in-person early voting that received the most attention, and was the source

Legislation Affecting Early and/or Absentee Voting



of the most bitter disagreements between the political parties. Proponents of such reductions usually praised the convenience of early voting, while arguing that it needed to be limited to reduce costs and administrative burdens on election officials. In Georgia, Republican Representative Bill Hembree stated that “We need to maintain early voting, which is very popular, [but] we also need to keep in mind that cities and counties are having economic problems. This bill still allows people to vote early, but saves money.”²⁵⁸ Supporters of a bill to reduce early voting in North Carolina made similar points. The *Herald Sun* editorialized “this is not a black and white issue, as some who want to inject race into everything are trying to say. This is a green and white issue ... as in saving the taxpayers a few greenbacks.”²⁵⁹

Democrats and others who opposed these measures were less sure of the motives behind the bills and disputed the cost savings. In Georgia, Democratic State Senator Donzella James said, “We must provide every way possible for people to vote. It’s not costing that much. The staff is already there and the facilities are available.”²⁶⁰ In North Carolina, George Gilbert, Director of Elections for Guilford County, argued that a reduction of early voting would not bring any savings. “If early voting begins later, a crush of voters will require more early voting sites to accommodate the crowds. There won’t be any cost savings.”

Some Democrats and editorial boards argued that the real motivation for reducing early voting was the success of the Obama campaign in using early voting in 2008. Morgan Jackson, a Democratic consultant stated, “This is pure partisanship ... they see the numbers that Obama rolled up in early voting (and) they want to eliminate it.”²⁶¹ A *New York Times* editorial made a similar argument. “Early voting skyrocketed to a third of the vote in 2008, rising particularly in the South and among black voters supporting Barack Obama,” the *Times* wrote, adding “and that, of course, is why Republican lawmakers in the South are trying desperately to cut it back.”²⁶² The suspicion that partisanship, rather than cost savings, was the main motivation for new early voting restrictions was particularly strong for proposals that eliminated or significantly reduced early voting on Sundays, thought to be a day of high turnout for black voters.²⁶³

Early Voting on Sunday and the Black Vote

Among the most controversial early voting reductions has been the partial or full eliminations of early voting on Sunday. Ohio has eliminated in-person early voting on Sundays entirely,²⁶⁴ Florida has eliminated it on the last Sunday before Election Day,²⁶⁵ and a North Carolina bill, proposes to eliminate all in-person early voting on Sundays.²⁶⁶ Critics have cried foul, arguing that these measures are “aimed squarely at reducing African-American turnout.”²⁶⁷ In particular, these critics charge, it is common for Black voters to go to the polls in large groups on Sundays, after church,²⁶⁸ and for some African-American churches to organize “Souls to the Polls” voting drives.²⁶⁹ In Florida, a local Democratic club leader noted that “Churches had either hired buses, or used their buses to take people to the polls, or even suspending [sic] the service on the Sunday before.”²⁷⁰ The Palm Beach Post stated that “[m]ore than half of the black voters in the [November 2008] election voted before Election Day and many of them went on [the] final Sunday.”²⁷¹ In Ohio, WilliAnn Moore, coordinator of the northwest Ohio district of the NAACP, labeled Ohio’s new legislation “voter-suppression legislation,” taking specific aim at the part of the law that eliminated Sunday early voting, noting that it had become a regular practice in the black community for voters to “pile into vans after church to cast their ballots.”²⁷²

Where available, the evidence supports the contention that black (and to a lesser extent Hispanic) voters used Sunday early voting in numbers proportionally greater than other groups. For instance, in the 2008 general election in Florida, 33.2% of those who voted early on the last Sunday before election day were black and 23.6% were Hispanic, whereas blacks constituted 22.7% of all early voters statewide (for all early voting days) and Hispanics constituted 11.6%.²⁷³

Among those who supported these laws, which reduced early voting in additional ways, there was little public explanation of why Sunday was specifically targeted, other than the general argument that the elimination was needed to reduce costs and administrative burden. In North Carolina, Senator Jim Davis, the sponsor of his state’s bill, opined that “We were just trying to minimize the time early voting polls were open ... so the expense is not so great for local election boards ... [e]verybody who wants to vote still can vote.” One of his colleagues, Senate Leader Phil Berger, got closer to the issue of eliminating Sunday voting stating, “It’s my understanding that there are some folks who feel that Sundays should not be mixed politics and religion, that it’s probably better to have a day that folks take a day off from politics. That’s one of the comments that I’ve heard.”²⁷⁴

V. MAKING IT HARDER TO RESTORE VOTING RIGHTS

A. Background

Disenfranchisement after criminal conviction remains the single most significant barrier to voting rights in the United States. Nationally, 5.3 million American citizens are not allowed to vote because of a criminal conviction; of those, 4 million have completed their sentences and live, work, and raise families in their communities.²⁷⁵ This disenfranchisement disproportionately impacts African-American men. Nationwide, 13% of African-American men have lost the right to vote, a rate that is seven times the national average.²⁷⁶ Given current rates of incarceration, three in ten of the next generation of African-American men across the country can expect to lose the right to vote at some point in their lifetime.²⁷⁷

These voting bans are exceptional among democratic nations. The United States is one of only two countries that disenfranchise large numbers of persons for lengthy or indefinite periods after they have completed their time in prison.²⁷⁸

While the history of felon disenfranchisement laws in the United States dates to the nation's earliest days,²⁷⁹ its greatest growth came in the decades after the Civil War. By 1900, thirty-eight states had some type of criminal voting restriction, most of which disenfranchised convicted individuals until they received a pardon.²⁸⁰

The last decade and a half saw a striking reversal of these restrictions. Since 1997, twenty-three states either restored voting rights or eased the restoration process; nine of these states repealed or amended lifetime disenfranchisement laws.²⁸¹ These changes occurred under both Republican and Democratic governors.²⁸²

Iowa and Florida saw the most recent dramatic restoration of voting rights. In Iowa, in 2005, Democratic Governor Tom Vilsack issued an executive Order ending the state's permanent disenfranchisement policy (at the time, Iowa was one of only three states with such a broad restriction on voting) and restoring voting rights to 80,000 Iowans.²⁸³

Like Iowa, Florida also had a notoriously severe law modified by executive action. Prior to 2007, nearly one million Floridians were permanently disenfranchised in the state; almost a quarter of them were African-American. In 2007, Republican Governor Charlie Crist amended the State's clemency rules in an attempt to streamline the restoration process for some individuals with non-violent convictions. Since restoration rules were streamlined, the voting rights of at least 150,000 Floridians were restored.²⁸⁴

B. Roundup of Legislation and Executive Actions

Last year marked the end of fifteen years of progress restoring the right to vote to formerly incarcerated persons. Specifically, the dramatic changes in Iowa and Florida were reversed. By executive action, the Governors Terry Branstad of Iowa and Rick Scott of Florida, both Republicans, returned their state

policies to *de facto* permanent disenfranchisement for all citizens convicted of felonies. In Florida, this has meant that 87,000 persons who were in the “backlog” of cases waiting for restoration under Governor Crist’s new rules will not get their voting rights restored.

Also in 2011, Nevada Governor Brian Sandoval, also a Republican, vetoed a bill that would have automatically restored voting rights to anyone who honorably completed a felony sentence of imprisonment, probation, or parole. The bill had received bipartisan support in the Legislature.

Five states saw bills further restricting the ability of people with criminal convictions to participate in the political process: Alabama, Maryland, South Carolina, Washington, and West Virginia. None of these bills have passed.²⁸⁵

C. Content of Executive Actions

Florida. Governor Scott changed Florida’s clemency rules, and the change denies the right to vote to hundreds of thousands, maybe as many as a million, Florida citizens. These changes make Florida the most punitive state in the country when it comes to disenfranchising people with criminal convictions in their past.

The Florida Constitution denies the right to vote for life to anyone with a felony conviction, unless he is granted clemency by the governor. It essentially gives the governor, an elected official, the power to decide who will (or will not) be allowed to vote in the next election.

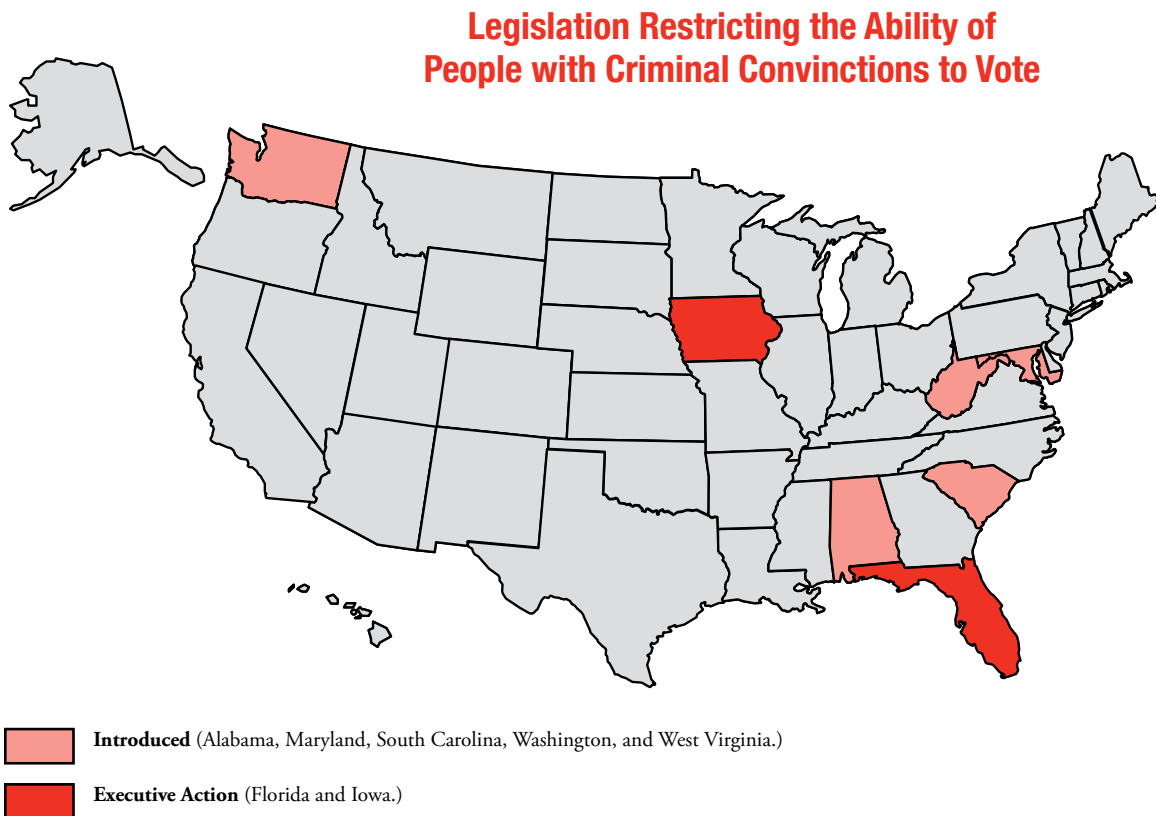
The new clemency rules²⁸⁶ not only roll back reforms²⁸⁷ passed by former Governor Charlie Crist, but they are far more restrictive than those in place under former Governor Jeb Bush. Under the new rules, people with even nonviolent convictions must wait five years after they complete all terms of their sentence before even being allowed to apply for restoration of civil rights. The clock resets if an individual is arrested for even a misdemeanor during that five-year period, even if no charges are ever filed. Some people must wait seven years before being able to apply, and must appear for a hearing before the clemency board. A provision allowing people to apply for a waiver of the rules, in place under Governors Bush and Crist, is eliminated. Everyone applying for clemency must provide various documents with their application—Bush and Crist had made an exception for those applying for restoration of civil rights. Florida’s law is now the most restrictive in the country.²⁸⁸

Iowa. Governor Branstad, almost immediately after taking office, revoked Executive Order 42, a policy signed in 2005 by former Governor Tom Vilsack, which automatically restored voting rights to individuals with criminal convictions once they had completed their sentences.²⁸⁹ Under the new policy, Iowa has become one of just four states that permanently disenfranchise all citizens after a criminal conviction. Prior to Executive Order 42, Iowa disenfranchised adults at a rate twice the national average, and had the nation’s highest rate of African-American disenfranchisement.²⁹⁰

Nevada. Governor Sandoval vetoed Assembly Bill 301, a bill passed with bipartisan support in the State Legislature. The bill would have streamlined and simplified Nevada’s complicated laws governing the restoration of voting rights after a criminal sentence, and would have automatically restored voting rights to anyone who honorably completed a felony sentence of imprisonment, probation, or parole.

D. The Debate

Governor Scott's and Governor Branstad's actions to reverse recent voting rights gains for persons with felony convictions were the subject of considerable publicity and debate in their states. The debate in Florida and Iowa mirrored the debate nationally about restoring the voting rights of formerly incarcerated persons. Those favoring further restrictions argued that persons convicted of felonies needed to "earn" the right to vote again,²⁹¹ while those opposed to harsher restrictions argued that preventing these citizens from voting was counter-productive and anti-democratic,²⁹² further penalizing those who had already completed their prison sentence,²⁹³ and undermining the state's interest in re-integrating such citizens into society and reducing recidivism.²⁹⁴



ENDNOTES

- ¹ This estimate is derived as follows: (1) New photo ID laws for voting will be in effect for the 2012 election in five states (Kansas, South Carolina, Tennessee, Texas, Wisconsin), which have a combined citizen voting age population of just under 29 million. 3.2 million (10.3%) of those potential voters do not have state-issued photo ID. Although Rhode Island's law will be in effect in 2012, the requirements are less onerous than those in the other states and so it was excluded. (2) New proof of citizenship laws will be in effect in three states (Alabama, Kansas, Tennessee), two of which will also have new photo ID laws. Assuming conservatively that those without proof of citizenship overlap substantially with those without state-issued photo ID, we excluded those two states. The citizen voting age population in the remaining state (Alabama) is 3.43 million. Of those potential voters, 240,000 (7%) do not have documentary proof of citizenship. (3) Two states (Florida and Texas) passed laws restricting voter registration drives, causing all or most of those drives to stop. In 2008, 2.13 million voters registered in Florida and, very conservatively, at least 8.24% or 176,000 of them did so through drives. At least 501,000 voters registered in Texas, and at least 5.13% or 26,000 of them did so via drives. (4) Maine abolished Election Day registration. In 2008, 60,000 Maine citizens registered and voted on Election Day. (5) The early voting period was cut by half or more in three states (Florida, Georgia and Ohio). In 2008, nearly 8 million Americans voted early in these states. An estimated 1 to 2 million voted on days eliminated by these new laws. (6) Two states (Florida and Iowa) made it substantially more difficult or impossible for people with past felony convictions to get their voting rights restored. Up to one million people in Florida could have benefited from the prior practice; based on the rates of restoration in Florida under the prior policy, 100,000 citizens likely would have gotten their rights restored by 2012. Other voting restrictions passed this year that are not included in this estimate.
- ² The 12 states identified as "swing states" are Arizona, Colorado, Florida, Georgia, Iowa, Nevada, North Carolina, New Mexico, Ohio, Oregon, Pennsylvania and Virginia. David Lauter, *Obama's Gallup Numbers Show 12 States in Play in 2012*, L.A. TIMES, Aug. 15, 2011, <http://articles.latimes.com/2011/aug/15/news/la-pn-inside-gallup-20110815>. The five of those states that cut back on voting rights are Florida, Georgia, Iowa, Nevada, and Ohio. The four of those states with pending legislation are Georgia, Iowa, North Carolina, and Pennsylvania.
- ³ Kris W. Kobach, Op-Ed, *The Case for Voter ID*, WALL ST. J., May 23, 2011, <http://online.wsj.com/article/SB10001424052748704816604576333650886790480.html>; *New State Voting Laws*, THE DIANE REHM SHOW (NPR radio broadcast, June 21, 2011), available at <http://thedianerehmshow.org/shows/2011-06-21/new-state-voting-laws/transcript>.
- ⁴ Opponents of strict voter ID laws argue that the impersonation of registered voters at the polls—the only type of voter fraud that voter ID bills have the potential to address—rarely occurs. They note that while there is no credible evidence that impersonation fraud occurs, reliable evidence proves that photo ID and proof of citizenship bills erect hurdles that prevent real citizens from voting. The citizens affected are predominantly elderly and indigent voters, and citizens from minority communities. BRENNAN CENTER FOR JUSTICE, *CITIZENS WITHOUT PROOF* (2006), available at http://www.brennancenter.org/content/resource/citizens_without_proof_a_survey_of_americans_possession_of_documentary_proof.
- ⁵ John Lewis, Op-Ed, *A Poll Tax by Another Name*, N.Y. TIMES, Aug. 26, 2011, available at <http://www.nytimes.com/2011/08/27/opinion/a-poll-tax-by-another-name.html>.
- ⁶ JUSTIN LEVITT, *THE TRUTH ABOUT VOTER FRAUD*, BRENNAN CENTER FOR JUSTICE (2007), available at <http://www.brennancenter.org/content/resource/truthaboutvoterfraud/>.
- ⁷ The most rigorous study on voter ID and turnout to date, recently published in the leading political science methodology journal, found that stricter voter ID requirements depress turnout, particularly among less educated and lower income populations. See R. MICHAEL ALVAREZ ET AL., *AN EMPIRICAL BAYES APPROACH TO ESTIMATING ORDINAL TREATMENT EFFECTS* 26-30 (2010), available at http://brennan.3cdn.net/a5782740e4185414a8_snm6bhfwg.pdf. Some studies suggest that voter ID laws have only a small or no effect on turnout. See Jason Mycoff et al., *The Empirical Effects of Voter-ID Laws: Present or Absent?*, 42 PS: POL. SCI. AND POL. 121 (2009), available at <http://journals.cambridge.org/action/displayFulltext?type=1&fid=3260872&jid=PSC&volumeId=42&issueId=01&aid=3260864&bodyId=&membershipNumber=&societyETOCSession=#>. But unlike the Alvarez study, these studies use aggregate data, which cannot provide any meaningful insight into how specific inputs—like voter ID—affect the behavior of individuals within a large group. For a comprehensive list of studies on voter ID, see *Research and Publications on Voter ID*, BRENNAN CENTER FOR JUSTICE, http://www.brennancenter.org/content/resource/research_on_voter_id/ (last visited July 15, 2011).

- ⁸ See 42 U.S.C. § 15483(b) (2010).
- ⁹ See generally VOTER IDENTIFICATION REQUIREMENTS, NAT'L CONFERENCE OF STATE LEGISLATURES (NCSL), <http://www.ncsl.org/default.aspx?tabid=16602> (last updated July 13, 2011).
- ¹⁰ Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326, 1369-70 (N.D. Ga. 2005); Weinschenk v. Missouri, 203 S.W.3d 201 (Mo. 2006).
- ¹¹ The Court upheld Indiana's law on the ground that the "evidence in the record [was] not sufficient" to justify striking down the whole statute. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 200-203 (2008). The Court expressly left open the possibility of future constitutional challenges to Indiana's law and other voter ID laws.
- ¹² Common Cause/Ga. v. Billups, 544 F.3d 1340 (11th Cir. 2009); Democratic Party of Ga. v. Perdue, 707 S.E.2d 67 (Ga. 2011) (upholding Georgia's voter ID law against a challenge under the state constitution) Georgia's initial voter ID law was previously blocked by a federal court in October 2005. Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). The court blocked an amended version of that law in July 2006 and again in September 2006. See Common Cause/Ga. v. Billups, 544 F.3d 1340, 1347-48 (11th Cir. 2009) (discussing injunctions in 2006). A state trial court had also blocked enforcement of the 2006 version of Georgia's voter ID law; this decision was later overturned by the Georgia Supreme Court due to the plaintiff's lack of standing. Perdue v. Lake, 647 S.E.2d 6 (Ga. 2007).
- ¹³ See BRENNAN CENTER FOR JUSTICE, ID REQUIREMENTS DISCOURAGE VOTERS (Jan. 1, 2011) (map of state voter ID laws prior to the 2011 legislative session), available at <http://www.brennancenter.org/page/-/Democracy/Voter%20ID%202010%20States.pdf>; Voter Identification Requirements, NCSL, <http://www.ncsl.org/default.aspx?tabid=16602> (last updated July 13, 2011) (information on previous and existing voter ID statutes).
- ¹⁴ These states are: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. See generally NHU-Y NGO & KEESHA GASKINS, BRENNAN CENTER FOR JUSTICE, VOTER ID LEGISLATION IN THE STATES, http://www.brennancenter.org/content/resource/voter_id_legislation_in_the_states/, (last updated July 6, 2011).
- ¹⁵ Fredreka Schouten, *More States Require ID to Vote*, USA TODAY (June 20, 2011), http://www.usatoday.com/news/nation/2011-06-19-states-require-voter-ID_n.htm.
- ¹⁶ H.B. 19, 2011 Gen. Assemb., Reg. Sess., Act No. 2011-673 (Ala. 2011), available at <http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011RS/Printfiles//HB19-enr.pdf>; H.B. 2067, 2011 Leg., Reg. Sess. (Kan. 2011), available at http://kslegislature.org/li/b2011_12/year1/measures/documents/hb2067_enrolled.pdf; S.B. 400 Sub. A, 2011 Leg., Jan. Sess. (R.I. 2011), available at <http://www.rilin.state.ri.us/BillText11/SenateText11/S0400A.pdf>; H. 3003, 119th Gen. Assemb., Reg. Sess. (S.C. 2011), available at http://www.scstatehouse.gov/sess119_2011-2012/prever/3003_20110511.htm; S.B. 16, 107th Gen. Assemb., 2011 Reg. Sess. (Tenn. 2011), available at <http://www.capitol.tn.gov/Bills/107/Bill/SB0016.pdf>; S.B. 14, 82d Leg., Reg. Sess. (Tex. 2011), available at <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB00014F.pdf#navpanes=0>; Assemb. B. 7, 2011 Leg., Reg. Sess. (Wis. 2011), available at <http://legis.wisconsin.gov/2011/data/acts/11Act23.pdf>.
- ¹⁷ S.F. 509, 87th Leg., Reg. Sess. (Minn. 2011), available at <https://www.revisor.mn.gov/bin/bldbill.php?bill=S0509.6.html&session=ls87>; S.B. 3, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011), available at <http://www.senate.mo.gov/11info/pdf-bill/tat/SB3.pdf>; H.B. 152, 62d Leg., Reg. Sess. (Mont. 2011), available at <http://data.opi.mt.gov/bills/2011/billpdf/HB0152.pdf>; S.B. 129, 2011 Gen. Ct., 2011 Reg. Sess. (N.H. 2011), available at <http://www.gencourt.state.nh.us/legislation/2011/SB0129.html>; H.B. 351, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011), available at <http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H351v6.pdf>.
- ¹⁸ H.B. 934, Reg. Sess. 2011-12 (Pa. 2011), available at <http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2011&kind=0&body=H&type=B&BN=0934>. Other states with pending bills that are less likely to succeed include Illinois, Massachusetts, New Jersey, New York, and Ohio. S.B. 2035, 97th Gen. Assemb. (Ill. 2011), available at <http://www.ilga.gov/legislation/billstatus.asp?DocNum=2035&GAID=11&GA=97&DocTypeID=SB&LegID=58180&SessionID=84>; H.B. 3058, 97th Gen. Assemb. (Ill. 2011), available at <http://www.ilga.gov/legislation/billstatus.asp?DocNum=3058>

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