

Don't Save the Date: How More Restrictive State Voter Registration Deadlines Disenfranchise Minority Movers

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Most states close their registration books before Election Day, claiming that they need time to verify new registrations and prepare for voters to come to the polls on Election Day. The Supreme Court has accepted these proffered explanations for advance deadlines and upheld constitutional challenges to advance voter registration deadlines. These deadlines, however, disenfranchise eligible voters who have moved right before Election Day. This Note provides statistical evidence that suggests that for voters that have recently moved, these deadlines disenfranchise minority voters at a greater rate than white voters, contravening the Voting Rights Act. States should make changes to their registration deadlines, either allowing Election Day registration, as some states have already done, or otherwise providing recent movers with the opportunity to register after registration books have closed. If states do not voluntarily make such changes, litigation under Section 2 of the Voting Rights Act may be successful in forcing states to make adaptations to enfranchise recently moved voters.

I. INTRODUCTION

The American people met the November 2008 election with both excitement and concern. Many predicted an unusually large and potentially overwhelming voter turnout in response to the

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campaign,¹ which featured a “long and divisive” Democratic primary season,² the first African-American major party ticket presidential candidate,³ and an unpopular second-term incumbent president.⁴ Although the focus in 2008 was on the federal election, state and local governments determined the state-by-state procedures for administering that election, and these bodies were tasked with preparing for the predicted large turnout. States have both the power to determine the qualifications of voters for local and state elections and the power to determine the methods and administration of elections for candidates for those offices, which occur at the same time as federal elections during federal election years.⁵ Therefore individual states have developed differing election regulations that affect the right to cast a ballot for president and vice president of the United States.

Although states administer elections, federal legislation places some limitations on states’ discretion. This is necessary because in the past states have used their administrative power to disenfranchise minorities.⁶ Piecemeal litigation against these state practices was ineffective, consuming much time and energy.⁷ Congress passed the Voting Rights Act (VRA)⁸ in 1965 to address the disenfranchisement of black voters by providing more effective measures to enforce the Fifteenth Amendment’s protection of the right to vote.⁹ In particular, Section 2 of the VRA establishes that election administration practices violate the VRA when they “are not equally open to participation by members of a class of citizens protected by [the VRA] . . . in that its members have less

1. See, e.g., Zachary Coile, *Election Officials Brace for Huge Turnout*, S. F. CHRON., Oct. 30, 2008, at A1; Michael P. McDonald, *This May be the Election of the Century*, POLITICO, Sept. 24, 2008.

2. Anne E. Kornblut, *Clinton Urges Backers to Look to November; ‘We Will Someday Launch a Woman into the White House’*, WASH. POST, June 8, 2008, at A1.

3. See Jim Rutenberg & Brian Stelter, *Obama’s Campaign Shifts to a Bigger Stage for His Big Night*, N.Y. TIMES, July 8, 2008, at A13.

4. See Tim Craig & Jon Cohen, *Poll Gives Obama 8-Point Va. Lead; McCain’s Image Still Linked to Bush*, WASH. POST, Oct. 27, 2008, at A1.

5. See generally *Roudebush v. Hartke*, 405 U.S. 15, 24–25 (1972); *Oregon v. Mitchell*, 400 U.S. 112, 124–25 (1970).

6. See *South Carolina v. Katzenbach*, 383 U.S. 301, 310–13 (1966).

7. *Id.* at 328.

8. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973 to 1973bb-1 (2006)).

9. See H.R. REP. NO. 89-439 at 8–16 (1965), as reprinted in 1965 U.S.C.C.A.N. 2437, 2440–42.

opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”¹⁰ Thus, states do not have complete freedom to determine election practices and are prohibited from employing some practices that were previously used to determine voter qualifications.¹¹

One election practice that states have developed is advance voter registration deadlines. Originally adopted to combat voter fraud,¹² advance voter registration deadlines are one way states attempt to manage the unwieldy task of assuring the accuracy of voter registration rolls.¹³ States justify advance registration deadlines by claiming they need time between receipt of registration materials and Election Day to verify the accuracy of registration.¹⁴ However, advance voter registration deadlines unquestionably burden the right to vote: witnesses at congressional hearings leading up to the passage of the National Voter Registration Act (NVRA) informed Congress that registration deadlines were a barrier to voting.¹⁵ The NVRA was passed to make registration and voting easier for all eligible citizens and establishes registration administration procedures for states to follow.¹⁶

States are exempt from NVRA provisions if they allow registration on the same day as a federal election.¹⁷ As of 2008, eight state legislatures had decided to allow Election Day registration (EDR): Montana, Wyoming, Idaho, Wisconsin, Iowa, Minnesota, Maine and New Hampshire.¹⁸ In addition, in 2008, North Caroli-

10. 42 U.S.C. § 1973(b) (2006).

11. For instance, Section 4 of the VRA bans literacy tests. 42 U.S.C. § 1973aa(b) (2006).

12. See Michael P. McDonald, *Portable Voter Registration*, 30 POL. BEHAV. 491, 496 (2008), available at <http://www.springerlink.com/content/f2276m7786p2l2t0/fulltext.pdf>.

13. See *Marston v. Lewis*, 410 U.S. 679, 680–81 (1973) (per curiam).

14. See, e.g., *Burns v. Fortson*, 410 U.S. 686, 686–87 (1973) (per curiam).

15. Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 39 U.S.C. § 3629, 42 U.S.C. §§ 1973gg to 1973gg-10 (2006)); see *Condon v. Reno*, 913 F. Supp. 946, 949 n.2 (D.S.C. 1995).

16. 42 U.S.C. § 1973gg(b)(1) (2006). The NVRA requires states to provide easier means for voter registration, regulates the purging of voter rolls, and provides that voters who have moved within their district or jurisdiction can vote if they are not registered at their new address and follow certain procedures.

17. § 1973gg-2(b)(2).

18. See DEMOS, 2008 ELECTION PRIMER: ELECTION ADMINISTRATION, VOTING RIGHTS & LEGAL CHALLENGES (2008), http://www.demos.org/pubs/dem_issues.pdf.

na allowed voters who missed the state's twenty-five-day deadline to simultaneously register and vote, in person, up to three days before the election.¹⁹ North Dakota does not require voter registration.²⁰

Because voter registration is tied to a physical address, registration deadlines before Election Day present a particular barrier to participation for those who have recently changed addresses. Individuals living at their address for months or years who are not registered are likely to have a reason for not registering that is unrelated to registration deadlines.²¹ But for those who moved so recently that they are unable to meet registration deadlines, these deadlines can be an absolute disenfranchisement mechanism, regardless of an individual's desire or efforts to register and vote.²²

This Note hypothesizes that these deadlines are more likely to disenfranchise minorities because, when controlling for age, education level, and economic characteristics, minorities move more frequently than whites.²³ An examination of how registration deadlines affect the registration of recent movers, especially movers who are members of a VRA-protected class, is increasingly important in the current American economic climate, as heightened housing and employment instability and mortgage foreclosures mean that there may be more moves in the near future.²⁴ As minorities were proportionately more likely than non-Hispanic

19. N.C. GEN. STAT. ANN. §§ 163-82.6A, 163-227.2(b) (2010); see also North Carolina State Board of Elections, How to Register and Vote at a One-Stop Absentee Site, <http://www.sboe.state.nc.us/content.aspx?ID=32> (last visited Mar. 22, 2010).

20. North Dakota Secretary of State, Qualifications for Voting in North Dakota, <http://www.nd.gov/sos/electvote/voting/voter-qualifi.html> (last visited Mar. 22, 2010).

21. See Randall D. Lloyd, *Voter Registration Reconsidered: Putting First Things First is Not Enough*, 29 AM. POL. RES. 649, 653-54 (2001).

22. Some recent movers are able to meet a registration deadline but do not register, as registering or re-registering may not be a priority relative to other factors that people must address when moving (for example, establishing utility and mail service, meeting new neighbors, setting up bank accounts, or registering for school). The closer a registration deadline is to Election Day, the more recent movers there are who will be able to register, while deadlines much earlier than Election Day prevent some recent movers from registering despite their willingness or desire to do so.

23. See JASON P. SCHACHTER, U.S. CENSUS BUREAU, GEOGRAPHICAL MOBILITY: 2002 TO 2003 8 (2004), <http://www.census.gov/prod/2004pubs/p20-549.pdf>.

24. See, e.g., Lisa Fleisher, *Home Foreclosures Decrease Across State*, STAR-LEDGER, Mar. 12, 2009, at 44; Renae Merle, *Lenders to Offer Reprieves to Delinquent Borrowers*, WASH. POST, Feb. 13, 2008, at D1.

whites to receive subprime mortgages,²⁵ they may be forced to move even more in future years than they have in the past.

This Note proceeds in three parts. Part II explores how the federal courts and Congress have addressed registration deadlines. Part III surveys previous social science research that analyzed how voter registration laws impact different demographic groups. It then presents original research showing that voter registration deadlines disenfranchise some minorities compared to white voters among the population of recent movers. Part IV provides suggestions for eliminating the disparate, negative effect of restrictive voter registration laws on recent movers of color compared to recent white movers. The Note argues that both radical solutions like Election Day voter registration and more moderate changes in state registration laws will have an enfranchising effect without being too burdensome for state election officials. It also advocates using Section 2 VRA challenges in districts with favorable conditions for such challenges.

II. FEDERAL ELECTION LAW AND ELECTION REGULATION

Although the Constitution guarantees the right to vote, the Supreme Court's standard of review in voting rights cases has evolved to allow states greater latitude to restrict the right. The Court has mediated the tension between the fundamental right to vote and the need for a state to adequately prepare for and ensure the integrity of elections.²⁶ This tension is apparent in constitutional challenges to both residency requirements and deadlines requiring voter registration before Election Day.²⁷ The Court has come to favor states' administrative needs over the individual burdens that early registration requirements impose.²⁸ At the same time, Congress has passed and amended the Voting Rights Act, which somewhat constrains state election administration to ensure the protections of the Fourteenth and Fifteenth Amendments.

25. Bob Tedeschi, *Subprime Loans' Wide Reach*, N.Y. TIMES, Aug. 3, 2008, at RE10.

26. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down Tennessee's durational residency requirement).

27. *See, e.g.*, *Marston v. Lewis*, 410 U.S. 679 (1973) (per curiam); *id.*

28. *See, e.g.*, *Burns v. Fortson*, 410 U.S. 686 (1973) (per curiam); *Marston*, 410 U.S. 679.

A. GENERAL TREATMENT OF ELECTION LAW CASES

Although the Supreme Court has held that voting is a fundamental right,²⁹ today constitutional challenges to state-specific regulations do not always receive the “strict scrutiny” review from courts that fundamental rights typically enjoy.³⁰ Strict scrutiny is a level of inquiry that requires narrow tailoring of state regulation to serve a compelling state interest.³¹ The Court has also limited the right to vote by declaring that the fundamental right to vote does not mean there is a fundamental right for a citizen to walk up to the voting booth on Election Day and demand a ballot.³²

Earlier voting rights cases did apply a heightened level of scrutiny to voting regulations. In *Dunn v. Blumstein*, which challenged residential-duration requirements for voters in Tennessee, the Court specifically stated that it applied the “compelling state interest” test to review the constitutionality of the state election law.³³ But a year later, in *Marston v. Lewis* and *Burns v. Fortson*, two cases where fifty-day advance registration deadlines were challenged, the Court focused on the state’s interest in organized election administration and did not explicitly state the test or level of review.³⁴ By the mid-1980s, the Court was balancing state interests against a regulation’s burden on voters.³⁵ To prevent the chaos that might ensue on Election Day without state regulation of election administration, states were allowed to enact legislation that somewhat affected an individual’s right to

29. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“The case of the political franchise of voting is [a maxim of constitutional law]. Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.”).

30. E.g., *Burdick v. Takushi*, 504 U.S. 428, 432 (1992).

31. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002).

32. See *Marston*, 410 U.S. at 680.

33. 405 U.S. 330, 337 (1972).

34. In *Marston*, the Court upheld Arizona’s fifty-day requirement as “necessary to achieve the State’s legitimate goals,” 410 U.S. at 680. In *Burns*, the Court upheld Georgia’s fifty-day requirement as “necessary to promote the State’s important interest.” 410 U.S. 686, 687 (1973) (per curiam).

35. *Anderson v. Celebrezze*, 460 U.S. 789 (1983).

vote, if such legislation carried “reasonable, nondiscriminatory restrictions.”³⁶

The Court explicitly declined to apply strict scrutiny in *Burdick v. Takushi*, which held instead that the level of review in voting rights cases is flexible and depends on the extent that the regulations burden the First and Fourteenth Amendments.³⁷ The Court recognized that the state’s legitimate interests in regulating elections were to avoid chaos, prevent fraud, and maintain the appearance of a controlled election.³⁸ This sliding scale of review for election law cases requires narrowly drawn regulations only when restrictions are “severe.”³⁹ Therefore, *Burdick* allows lower courts to determine, first, that the burden of residency requirements or registration deadlines is not severe and, second, to apply a more deferential review of legislative decisions than *Dunn* suggested.

The Court recently applied the *Burdick* balancing test to Indiana voter identification laws in *Crawford v. Marion County Election Board*.⁴⁰ In *Crawford*, the legislature passed a law requiring in-person voters to present government-issued photo identification⁴¹ to prevent voter impersonation.⁴² The Court held that the state’s dual interests in deterring and detecting fraud on Election Day as well as maintaining public confidence in the integrity of the electoral process⁴³ outweighed the burden on some eligible voters in obtaining state-issued photo identification.⁴⁴ Even though some voters would face a “special burden on their right to vote,” casting a provisional ballot along with an executed affidavit could mitigate that burden.⁴⁵ The Court found the burden on a

36. *Id.* at 788.

37. 504 U.S. 428, 434 (1992). *Burdick* could be distinguished from *Dunn*, *Marston*, *Burns* and the election administration laws explored in this Note because it concerned access to the ballot, not the right to cast a vote. The Supreme Court, however, has not made such a distinction.

38. *Id.* at 433.

39. *Id.* at 434.

40. 128 S. Ct. 1610 (2008).

41. *Id.* at 1613.

42. *Id.* at 1618.

43. *Id.* at 1617.

44. *Id.* at 1620–22.

45. *Id.* at 1621.

small number of voters was insufficient to declare the law unconstitutional.⁴⁶

In addition, the Court relied on petitioners' failure to present evidence regarding the number of voters the law would affect to conclude that the burden on voters did not outweigh the precise interests the state presented.⁴⁷ Thus, following *Crawford*, courts would likely reject a challenge to registration deadlines that fails to specifically identify how many voters are harmed.

B. CONSTITUTIONALITY OF VOTER REGISTRATION DEADLINES

The Supreme Court's rulings on general constitutional challenges to registration deadlines and residency requirements for state and local elections vary depending on the length of the deadlines. In *Dunn v. Blumstein*, the Supreme Court struck down as violative of the Equal Protection Clause Tennessee's requirement that voters have residency in-state for one year and in the county for ninety days to be eligible to vote.⁴⁸ Tennessee's justifications for the requirements were to prevent fraud and ensure that voters were informed.⁴⁹ While the Court recognized that the state's reasons for the requirements were valid, it found the means used were not the least restrictive way to prevent fraud and ensure that only bona fide residents voted.⁵⁰ Even when a state had an exceptionally significant interest, it still could not enact a regulation interfering with the right to vote when other, less burdensome means to achieve the objective were available.⁵¹

Dunn marks the only time the Court struck down an advance registration deadline. In *Burns v. Fortson*, a 1964 Georgia law required that registration books be closed fifty days before all general elections for all voters casting ballots other than for president and vice president.⁵² The Court upheld the deadline, stating that fifty days approached "the outer constitutional limits in

46. *Id.* at 1622–23.

47. *Id.* at 1623.

48. 405 U.S. 330 (1972).

49. *Id.* at 345.

50. *Id.* at 353. The Court proposed checking driver's licenses, dwelling, and occupation, among other records. *Id.* at 348.

51. *Id.* at 343.

52. 410 U.S. 686, 686 (1973) (per curiam).

this area⁵³ without specifying those limits. Concurring in the judgment, Justice Blackmun disagreed with this statement, advocating a case-by-case examination of registration deadlines rather than arbitrarily drawing the line at a given number of days.⁵⁴ Despite the *Burns* and *Marston*⁵⁵ decisions, today no state has a registration deadline or residency requirement longer than 30 days.⁵⁶

More recent decisions emphasize that general constitutional challenges to advance registration deadlines are likely to fail. In *Rosario v. Rockefeller*, the Court upheld an eight-month deadline for registering for a party (a requirement to vote in primary elections) in New York both because the plaintiffs deliberately failed to meet the deadline and because the state had a justified fear of party raiding⁵⁷ — necessitating a long deadline for party registration.⁵⁸ Lower courts have followed the Supreme Court's lead. The constitutionality of advance registration deadlines was challenged in Connecticut, which has the second-least restrictive voter registration deadline in the country, except for states offering Election Day registration (EDR) or not requiring registration.⁵⁹ The court dismissed the claim under *Burns* and *Marston*.⁶⁰ Thus,

53. *Id.* at 687.

54. *Id.* at 687–88 (Blackmun, J., concurring).

55. *See supra* text accompanying note 34.

56. *See* United States Election Assistance Commission, State Voter Registration Deadlines, <http://www.eac.gov/voter/Register%20to%20Vote/deadlines> (last visited Mar. 22, 2010).

57. In party raiding, members of one party register as members of the another party solely to vote in that party's primary, which determines the candidate for the general election.

58. 410 U.S. 752, 760–61 (1973) (per curiam). The dangers of party raiding do not apply to general elections, so upholding an eight-month deadline should not suggest to any state that such an early deadline would be acceptable for registration for a general election. In addition, because the plaintiffs in *Rosario* had not recently moved or been otherwise unable to meet the deadline, they lacked standing to claim that the eight month period was a residential-duration requirement, so the Court did not reach the issue. *Id.* at 759 n.9.

59. *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 122 (D. Conn. 2005). The Connecticut advance registration deadline in that case was seven days. The court detailed how the Connecticut legislature had considered and rejected legislation proposing EDR every year for four years before the case was decided. *Id.* at 138.

60. *Id.* at 142. At the outset of the opinion, however, the court noted that, "[i]mportantly, Plaintiffs do not assert in this case that Connecticut's pre-election-day registration requirement invidiously discriminates against any group." *Id.* at 122. This distinguishes the *ACORN* claim from a Section 2 VRA claim or a disparate impact claim based on an election practice.

courts are likely to dismiss general constitutional challenges to advance registration deadlines without more specific showings of voter burden. However, Congress has enacted the Voting Rights Act to provide greater protection of the right to vote and to provide causes of action against disenfranchising practices. Together with Congress's enforcement power under Section 5 of the Fourteenth Amendment, the VRA provides an unexplored opportunity to challenge voter registration deadlines.

C. CONGRESSIONAL POWER TO REGULATE AND THE VOTING RIGHTS ACT

The Supreme Court recognizes that the Fifteenth Amendment gives Congress the power to pass legislation regulating elections, including the VRA, even though this power is not explicitly stated in the Constitution.⁶¹ One section of the VRA bans literacy tests in both national and state elections;⁶² another requires pre-clearance: the process of receiving federal permission to change election law or venue in states, or parts of states, with a history of discrimination.⁶³ These sections were upheld not under Congress's Article I, Section 4 power to regulate elections, but instead under its power to enforce the Fourteenth and Fifteenth Amendments.⁶⁴

For the purpose of this Note, Section 2 is the most relevant part of the VRA because it provides the most potential aid for voters who are adversely affected by advance registration deadlines. Section 2(a) of the VRA prohibits the "denial or abridgment of the right . . . to vote on account of race or color" through voting qualifications or prerequisites.⁶⁵ Circuit courts have directly upheld the constitutionality of Section 2 as a valid exercise of Congress's remedial power under Section 5 of the Fourteenth and

61. *See, e.g.*, *Lopez v. Monterey County*, 525 U.S. 266, 283–85 (1999).

62. 42 U.S.C. § 1973b(e)(2) (2006).

63. § 1973c.

64. *South Carolina v. Katzenbach*, 383 U.S. 301, 327–28 (1966); *see also Oregon v. Mitchell*, 400 U.S. 112, 118 (1970). The Federal Constitution provides Congress the power to regulate federal elections: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art I., § 4, cl. 1.

65. § 1973(a).

Fifteenth Amendments,⁶⁶ and the Supreme Court has summarily affirmed its constitutionality.⁶⁷ Congress both identified shortcomings in state policies that evidenced constitutional violations and conducted extensive hearings and legislative fact-findings to determine that some intrusion into state and local governance was appropriate.⁶⁸ In addition, the Fifth Circuit found that Section 2 meets the Supreme Court's "narrowly tailored" requirement from *City of Boerne v. Flores*⁶⁹ because it does not require proportional electoral results.⁷⁰ Instead, Section 2 focuses on the circumstances leading up to election results, and it is necessary to secure rights that the Constitution already guaranteed.⁷¹

Section 2(b) of the VRA defines what violates Section 2(a) and clarifies that Congress does not require that states intend for election administration practices to suppress the minority right to vote.⁷² In 1982, Congress amended Section 2 in response to *Mobile v. Bolden*, where the Court interpreted the old Section 2 to require the plaintiff to provide proof that the state at least partially enacted the challenged practice for an invidious purpose.⁷³ Following *Bolden*, Congress amended Section 2 to read that:

A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in

66. See *United States v. Blaine County, Mont.*, 363 F.3d 897, 905 (9th Cir. 2004); *Jones v. Lubbock*, 727 F.2d 364, 375 (5th Cir. 1984).

67. *Miss. Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984).

68. *Id.* at 417–418 (Stevens, J., concurring).

69. 521 U.S. 507 (1997). In *Boerne*, the Court considered the extent of Congress's enforcement powers under Section 5 of the Fourteenth Amendment. *Id.* at 517. It established a requirement of "congruence and proportionality" between the injury and the means of remedy. *Id.* at 520.

70. *Blaine County, Mont.*, 363 F.3d at 909.

71. *Id.*

72. 42 U.S.C. § 1973(b) (2006).

73. 446 U.S. 55, 74 (1980).

the political process and to elect representatives of their choice.⁷⁴

Whether the legislative history of Section 2 applies to challenges to advance registration deadlines is unclear. Section 2 does not state that it only applies in vote dilution cases — when a practice prevents minority voters from electing the candidate of their choice. Advance registration deadlines present the possibility of vote denial, that is, a restriction that prevents citizens from voting. But *Bolden* was a vote dilution case,⁷⁵ and much of the language in the amended Section 2’s legislative history refers to vote dilution circumstances⁷⁶ because Congress was responding directly to *Bolden*.⁷⁷ During floor debates, senators referred to the “totality of circumstances,” which courts were to examine in determining whether a regulation violated Section 2.⁷⁸ Scholars debate whether courts applying the “totality of the circumstances” criteria in vote denial cases is appropriate because only some of the factors mentioned in the floor debates are applicable to a vote denial situation.⁷⁹ The Supreme Court has not specifi-

74. § 1973(b).

75. 446 U.S. at 58. The challenged practice was at-large elections.

76. See, e.g., S. REP. NO. 97-417, at 19–24 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 192–93 (examining the history of vote dilution cases before *Bolden*).

77. *Id.*

78. *Id.* at 28–29. These factors include: the history of official voting-related discrimination in the state or political subdivision; the extent to which voting in the elections of the state or political subdivision is racially polarized; and the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against minorities. Factors that tend to enhance discrimination against minorities include: unusually large election districts; majority-vote requirements; prohibitions against bullet voting; excluding minorities from the candidate slating processes; the extent to which minorities are discriminated against in areas like education, employment, and health — which hinder their ability to participate effectively in the political process; using overt or subtle racial appeals in political campaigns; and the extent to which minorities have been elected to public office in the jurisdiction. *Id.* After the Court explored this legislative history in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the factors became known as the *Gingles* factors.

79. See Paul Moke & Richard B. Saphire, *The Voting Rights Act and the Racial Gap in Lost Votes*, 58 HASTINGS L.J. 1, 23 (2006) (detailing how in some vote denial cases, courts have recited the factors, including the *Gingles* factors, and then declared them inapplicable); see also John A. Earnhardt, Note, *Challenging Episodic Practices Under Section 2 of the Voting Rights Act: Critical Analysis of Ortiz v. City of Philadelphia Office of the City Commissioners Voter Registration Division*, 52 WASH. & LEE L. REV. 1065 (1995) (arguing that vote denial cases should not be analyzed under the precedent of Section 2 vote dilution cases); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 720–21 (2006) (explaining that, because

cally answered this question. Interpreting Section 2, while listing the factors enumerated in the Senate Report as reflecting the “totality of the circumstances,” the Court relied on Committee Report statements to conclude that the factors were not meant to be exhaustive and that no particular number of factors needed to be present for a court to find a violation of Section 2.⁸⁰

Whether the Senate Report factors apply to vote denial cases is an important preliminary question for gauging the success of a vote denial claim under Section 2.⁸¹ Many of the factors will not be present in a vote denial claim, particularly when election practices that cause vote denial are both facially race-neutral and were not intended to deny the vote to minorities. If the Committee provided the factors only as guidelines for identifying vote dilution, their absence has little impact on the potential success of a vote denial claim. If courts look for the factors in vote denial cases as well, vote denial claims based on empirical evidence alone will be less likely to succeed.

Courts hearing Section 2 challenges have split on using the Senate Report factors. Some have used the first Senate Report factor — history of official discrimination in the state or political subdivision⁸² — to find against plaintiffs in vote denial claims because there was no such history of official discrimination in the jurisdiction being sued.⁸³ Others have found that a lack of historical discrimination was not an impediment to declaratory and injunctive relief under Section 2.⁸⁴ Courts have not made clear

determining vote dilution is difficult, vote dilution cases must use the circumstantial evidence provided by the factors listed in the Committee Report on the Section 2 amendment and the factors in *Gingles*. In contrast, in vote denial cases there can be direct evidence of a disproportionate impact and circumstantial evidence may not be required).

80. *Gingles*, 478 U.S. at 45.

81. See Tokaji, *supra* note 79. If the factors enumerated in the Committee Report do apply to vote denial claims, the factors that rationally apply to vote denial are: “history of official discrimination in the state or political subdivision”; “the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process”; and potentially “whether political campaigns have been characterized by overt or subtle racial appeals.” S. REP. NO. 97-417, at 28–29 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 206.

82. S. REP. NO. 97-417 at 28.

83. See *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595–96 (9th Cir. 1997); *Ortiz v. City of Philadelphia Office of the City Comm’rs Voter Registration Div.*, 28 F.3d 306, 312 (3d Cir. 1994).

84. See *Conn. Citizen Action Group v. Pugliese*, No. N 84-431, 1984 U.S. Dist. LEXIS 24869, at *13 (D. Conn. Sept. 27, 1984) (holding that “unresponsiveness” to minority con-

what a Section 2 vote denial plaintiff must prove because Section 2 vote denial claims are rare, and cases applying more than one of the Senate Report factors are even rarer.⁸⁵ When the Committee Report factors are present and also support a finding of a discriminatory effect, a court can use them as evidence of a Section 2 violation. Whether the plaintiff must prove these factors to bring a successful Section 2 case will be a question of first impression in many circuits, although one district court has found a Section 2 violation without discriminatory intent or any of the Committee Report factors.⁸⁶

Separate from the question whether courts should apply the Committee Report factors to vote denial claims is the question of causation. Can plaintiffs succeed in a Section 2 complaint solely by showing a correlation between an election administration practice and the disenfranchisement of minority voters, or do plaintiffs need to show that the election practice *causes* the disenfranchisement? The Court seemed to answer the question in *Thornerberg v. Gingles*, when it stated that “only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters.”⁸⁷ This statement implies that the correlation does not need to be explained for a court to find a Section 2 violation. Despite this language, however, some lower courts have required explanations for a correlation between a seemingly race-neutral voting practice and disenfranchisement in Section 2 vote denial cases.⁸⁸ To date, no challenges have been

cerns and Hispanic citizens’ lack of access to the political process were sufficient for the “totality of the circumstances” to indicate a violation of the VRA); *see also* *Brown v. Dean*, 555 F. Supp. 502, 506 (D.R.I. 1982) (“The Court does not question the good faith of the Board of Canvassers of the City of Providence. There is no evidence that the Board of Canvassers has acted out of bias or improper motivation . . .”).

85. Of thirty-nine vote denial cases brought under Section 2 from 1982 to 2005, five cases considered just one Committee Report factor, and nine cases considered more than one factor. *See* THE VOTING RIGHTS INITIATIVE, VOTING RIGHTS INITIATIVE DATABASE MASTER LIST (SECTION 2 LITIGATION: 1982–2005) (2006), www.votingreport.org (follow “Master List .xls” hyperlink under “Final Report”).

86. *See* *Goodloe v. Madison County Bd. of Election Comm’rs*, 610 F. Supp. 240 (S.D. Miss. 1985). While the court did not specifically review the Senate factors, the history of election practices in Mississippi would have likely satisfied the first Committee Report factor of a history of discrimination against black voters.

87. 478 U.S. 30, 63 (1986).

88. For more exploration of the issue, see Moke & Saphire, *supra* note 79. In *Ortiz v. Philadelphia Office of the City Commissioners*, the court found that voter purging that disproportionately affected minority voters in Philadelphia did not violate Section 2 because the plaintiffs had not proved that the purge caused the complaint’s alleged dispari-

brought to state registration deadlines and residency requirements under Section 2 of the VRA. Part IV of this Note explores whether Section 2 might be successfully used to challenge advance registration deadlines.⁸⁹

III. EMPIRICAL INVESTIGATIONS ON HOW VOTER REGISTRATION DEADLINES AFFECT REGISTRATION RATES

A. RESEARCH ON VOTER REGISTRATION

Social scientists have been analyzing voter registration data for decades.⁹⁰ Beginning in the 1960s, researchers investigated different demographic factors to determine how to increase rates of registration and voting among the voting-eligible population.⁹¹ Specific factors included race, socioeconomic status, age, education, and residential mobility, as well as institutional factors like registration deadlines.⁹² Low education and income levels are associated with lower registration rates.⁹³ Many other factors not

ties. 28 F.3d at 314. In *Farrakhan v. Washington*, the Ninth Circuit explored how the interaction between racial disparities in felony convictions and laws denying felons the vote could lead to disparities in political participation. 338 F.3d 1009 (9th Cir. 2003), *cert. denied*, 543 U.S. 984 (2004). Even in *Salas v. Southwest Texas Junior College District*, despite finding no Section 2 violation, the court implied that other socioeconomic factors can explain disparities in political participation. 964 F.2d 1542, 1556 (5th Cir. 1992) (“Further, the high incidence of Hispanic registration in the District is persuasive evidence that Hispanic voters are not deterred from participation in the political process because of the effects of prior discrimination, including unemployment, illiteracy, and low income.”). In *Gingles*, the Court recognized that “political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination.” 478 U.S. at 69.

89. See discussion *infra* Part IV.B. The Voting Rights Act is not the only federal legislation protecting the right to vote. See *supra* note 16 and accompanying text. In 2002, Congress passed the Help America Vote Act (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 36 U.S.C. §§ 152601–12, 42 U.S.C. §§ 15301–15545 (2006)), which includes requirements for modernizing ballot technology, maintaining voter registration lists, and making provisional ballots available in federal elections for voters who claim to be registered but do not appear on election rolls.

90. See CHARLES MERRIAM & HAROLD GOSNELL, *NON-VOTING: CAUSES AND METHODS OF CONTROL* (1924); HERBERT TINGSTEN, *POLITICAL BEHAVIOR* (1937).

91. See, e.g., Stanley Kelley, Jr. et al., *Registration and Voting: Putting First Things First*, 61 AM. POL. SCI. REV. 359 (1967); Donald R. Mathews & James W. Prothro, *Political Factors and Negro Voter Registration in the South*, 57 AM. POL. SCI. REV. 355 (1963).

92. See, e.g., Benjamin Highton, *Easy Registration and Voter Turnout*, 59 J. POL. 565 (1997).

93. See Glenn E. Mitchell & Christopher Wlezien, *The Impact of Legal Constraints on Voter Registration, Turnout, and the Composition of the American Electorate*, 17 POL.

explored in this Note have also been found to be significant determinants of voter turnout,⁹⁴ including sense of civic duty, strength of partisan attachment, internal political efficacy,⁹⁵ beliefs about government responsiveness,⁹⁶ and concern about outcome of the election.⁹⁷

The United States is one of the few industrialized countries placing the onus of registration on an individual.⁹⁸ In the majority of democracies with voluntary voting, it is the government's responsibility to register eligible citizens.⁹⁹ Putting the burden on the individual to register means that voting is a two-step process, increasing voting's cost.¹⁰⁰ It is easier to alter registration deadlines compared to changing other mutable variables connected with the likelihood of being registered, such as education and socioeconomic level. A seminal study by political science professors Raymond Wolfinger and Steven Rosenstone found that liberalizing registration deadlines to allow voting on Election Day would increase turnout 6.1%, while allowing registration up to seven days before the election would increase turnout 4.5%.¹⁰¹

An investigation focusing on how differing registration deadlines affect those who are residentially mobile is particularly useful given that registration is tied to an individual's address. Blacks and Hispanics are more likely than whites to have moved

BEHAV. 179, 185 (1995), available at <http://www.springerlink.com/content/v062m23155k84213/fulltext.pdf>. Pooling CPS data from 1972, 1978, 1980 and 1982, more years of education and higher income both had a significant, positive effect on the probability of being registered. *Id.* One explanation proffered is that those with less education and income are less able to "afford" the costs of registering and voting. *Id.* at 194.

94. See Carol A. Cassel & David B. Hill, *Explanations of Turnout Decline: A Multivariate Test*, 9 AM. POL. Q. 181, 188 (1981).

95. Feelings of personal political effectiveness.

96. See Paul R. Abramson & John H. Aldrich, *The Decline of Electoral Participation in America*, 76 AM. POL. SCI. REV. 502, 504 (1982).

97. Roughly equivalent to interest in the election.

98. In the 1970s, of seventeen democracies without compulsory voting, the United States and France were the only countries to allow voluntary registration, while Australia and New Zealand required individuals to register but enforced legal penalties if they did not. G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, 80 AM. POL. SCI. REV. 17, 21 (1986), available at http://web.rollins.edu/~ddavison/POL346Fall08/Powell_AmericanVoterComparativePerspective.pdf. In the other thirteen democracies, the state was at least responsible for initiating voter registration. *Id.* at 38.

99. *Id.*

100. See Benjamin Highton, *Voter Registration and Turnout in the United States*, 2 PERSP. ON POL. 507, 508 (2004), available at <http://journals.cambridge.org/action/displayFulltext?type=1&fid=246599&jid=PPS&volumeId=2&issueId=03&aid=246597>.

101. RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 78 (1980).

recently¹⁰² and to anticipate moving in the next five years.¹⁰³ Section 2 of the Voting Rights Act applies to denials or abridgments of the right to vote based on race or color. Therefore, this Note only focuses on how advance voter registration deadlines affect racial groups, although there are other demographic groups who move frequently and are thus likely disenfranchised by restrictive registration deadlines.¹⁰⁴

Earlier examinations of mobility and voter registration, which did not look at different racial groups found that those who have moved recently are less likely to be registered.¹⁰⁵ Previous research also found that the recently-moved are not registered because they need to register at a new address, not because they lack social connections at the new address.¹⁰⁶ This research suggests that changing voter registration deadlines might cause increased registration rates for the relevant groups. In Part III.B.2.b, this Note undertakes an in-depth analysis of how different voter registration deadlines affect eligible voters of different races, looking only at those who have recently moved in Part III.B.2.c.

B. DATA ANALYSIS, COMMUNITY POPULATION SURVEY (CPS), NOVEMBER 2008 DATA

1. *Data and Methodology*

The data for this Note comes from the Community Population Survey (CPS), a nationally representative monthly survey of 50,000 households in the United States that collects basic demo-

102. PEW RESEARCH CTR., AMERICAN MOBILITY: WHO MOVES? WHO STAYS PUT? WHERE'S HOME? 23 (2008), <http://pewsocialtrends.org/assets/pdf/Movers-and-Stayers.pdf>. Twenty-seven percent of whites, forty percent of Blacks, and forty-eight percent of Hispanics had moved in the past five years.

103. *Id.* at 24. Thirty-five percent of whites, fifty-nine percent of Blacks and forty-three percent of Hispanics reported that a move in the next five years was "[v]ery/somewhat likely," compared with sixty-four percent of whites, thirty-eight percent of Blacks, and fifty-six percent of Hispanics who said a move in the next five years was "[n]ot too/not likely at all."

104. For example, young people are more likely than older people to move. *Id.* at 9.

105. See Highton, *supra* note 92; see also Peverill Squire, Raymond E. Wolfinger & David P. Glass, *Residential Mobility and Voter Turnout*, 81 AM. POL. SCI. REV. 45 (1987).

106. Benjamin Highton, *Residential Mobility, Community Mobility, and Electoral Participation*, 22 POL. BEHAV. 109 (2000), available at <http://www.springerlink.com/content/q47x60hw72664363/fulltext.pdf>.

graphic data, including income, age, employment, race, and education.¹⁰⁷ Additionally, in November of federal election years, the CPS includes questions from the Voting and Registration Supplement, which asks eligible voters whether they are registered, whether they voted, and how long they have lived at their current address.¹⁰⁸ Responses to these questions are all collected at the individual level.

Using the dependent variables collected in the CPS, this Note uses multivariate regression analysis¹⁰⁹ to explore the effect of different registration deadlines. The regression analyses model how changes in registration deadlines and affect different groups of voters.¹¹⁰ The Note puts states into three different registration deadline categories based on the restrictiveness of their voting laws in 2008: 1) states with Election Day registration are “least restrictive” or “EDR” states;¹¹¹ 2) states with one-to-fifteen-day advance registration deadlines are “more restrictive”;¹¹² and 3) states with sixteen-to-thirty-day advance registration deadlines are “most restrictive.”¹¹³ This Note uses the term “voter” to refer to individuals who are eligible to vote, regardless of whether they have ever voted. Minority voters were compared only with white

107. Overview, Bureau of Labor Statistics, Community Population Survey, http://www.bls.gov/cps/cps_over.htm (last visited Mar. 22, 2010).

108. See U.S. Census Bureau, Voting and Registration, <http://www.census.gov/population/www/socdemo/voting.html> (last visited Mar. 22, 2010), for tabulations from different years of data using the November supplement. The questions are listed on the survey instrument, U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, NOVEMBER 2008: VOTING AND REGISTRATION SUPPLEMENT FILE TECHNICAL DOCUMENTATION (2008) [hereinafter TECHNICAL DOCUMENTATION], <http://www.census.gov/apsd/techdoc/cps/cpsnov08.pdf>. Voters were asked why they were not registered or, if registered, why they had not voted or, if they voted, how they voted (that is, early, on Election Day, in person, or by mail). *Id.* at 8-1 to -3.

109. A statistical technique to analyze the relationship between dependent and independent variables.

110. The data in this Note do not explore actual changes in deadlines. Instead, data from the 2008 CPS are used to predict the effect of a change in deadlines.

111. “Least restrictive” states are North Dakota (no registration required), New Hampshire, Maine, Idaho, Iowa, Montana, Minnesota, Wisconsin, and Wyoming.

112. “More restrictive” states are Alabama, California, Connecticut, Kansas, Nebraska, South Dakota, Utah, Vermont, and Washington.

113. “Most restrictive” states are Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Hawaii, Georgia, Indiana, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Mexico, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, West Virginia, and Virginia.

voters, not with minorities from other groups.¹¹⁴ Because regressions for each minority group (black, Hispanic, Asian, all minorities, and all minorities not-part-white) were run separately, many results are not displayed in a table.¹¹⁵ The number of observations for each comparative group is displayed in Table 1. The racial distribution both in the overall CPS voter population and in the CPS voter population that had moved in the past thirty days is approximately the same for all groups.

Table 1: Demographics of CPS Sample

Race	Number of individuals, voting age and citizens	% of sample (compared to white)	Number of individuals, moved in last 30 days	% of moved sample (compared to white)
White	62,918	-	692	-
All minorities	17,311	21.58	253	26.77
All minorities not-part-white	16,330	20.61	240	25.75
Black	7,264	10.35	102	12.85
Hispanic	5,793	8.43	105	13.17
Asian	2,437	3.73	22	3.08

2. Results

a. Variables Independently Affecting Likelihood of Registration

Before exploring how registration laws interact with race, a brief explanation of how they separately impact the probability of registering to vote is necessary. Controlling for race, education level, income, and age,¹¹⁶ in 2008, individuals in states with the least restrictive voting laws were approximately 2.5% and 1.1% more likely to be registered than individuals in more restrictive or most restrictive states.¹¹⁷ This statistic implies that changing

114. Concerning the question about race, “White” represents those who responded “White only” and “Non-Hispanic”; “Black” represents those who responded “Black only”; “Asian” represents those who responded “Asian”; “All minorities” represents those who responded with any race except “White only”; and “All minorities not part white” represents those who responded with any race except options that included white. Concerning the question about whether they were Hispanic, “Hispanic” represents those who responded “Hispanic.” See TECHNICAL DOCUMENTATION, *supra* note 108, at 6-21, 6-23.

115. All reported results are significant unless noted otherwise.

116. “Controlling for” means to take account of and erase the impact of a variable.

117. $p < .01$. This result is consistent with previous literature finding that changing registration deadlines alone will not have a large effect on increasing registration. See Mitchell & Wlezien, *supra* note 93, at 189 (3.7% increase in registration nationwide with

registration deadlines alone will not dramatically increase the overall percent of eligible voters who are registered. However, given the large voting-eligible population and number of voting-eligible citizens who are not registered (approximately sixty million in 2008¹¹⁸), a small increase in the percentage of voters registered predicts a large increase in actual number of individuals registered.

Without accounting for different levels of registration deadline restrictiveness but controlling for age, income, and education level, Asian voters were 4.7% less likely than whites to be registered to vote,¹¹⁹ and Hispanics were 5.4% less likely than whites to be registered.¹²⁰ All minorities and all minorities not-part-white were both about 1.6% less likely to be registered than whites.¹²¹ Results for African Americans suggest that they were 6.6% more likely to be registered than whites.¹²² For comparison, controlling for race, age, income, and registration deadline, individuals with a high school degree are approximately 17% more likely to be registered than individuals with less than a high school degree,¹²³ and individuals with at least some college education are approximately 31% more likely to be registered than those without a high school degree.¹²⁴ Thus, education level more strongly predicts registration status than race.

elimination of closing dates for registration); *see also* WOLFINGER & ROSENSTONE, *supra* note 101, at 78.

118. *See* U.S. Census Bureau, Reported Voting and Registration of the Citizen Voting-Age Population, for States: November 2008, <http://www.census.gov/population/www/socdemo/voting/cps2008.html>, (follow "Table 4a" hyperlink) (last visited Mar. 22, 2010).

119. $p < .01$.

120. $p < .01$.

121. $p < .01$.

122. $p < .01$.

123. When running a regression with independent variables race, registration categories, education level, income and age, $n = 80,229$, $df = 27$, compared to an education level of less than a high school degree, the coefficient on education of a high school degree was .17, std. error = .0042, $p = .000$.

124. When running a regression with independent variables race, registration categories, education level, income and age, $n = 80,229$, $df = 27$, compared to an education level of less than a high school degree, the coefficient on education of at least some college was = .3124, std. error = .0035, $p = .001$.

*b. How Registration Deadlines Affect Overall
Registration Rates*

More applicable to VRA litigation and suggestions for state best practices is the differential effect of more restrictive voting laws on persons of color as compared to whites. The previous regressions assumed that the independent variables (for example, race, age, and income) additively affect registration. For instance, the regression assumed that increasing income equally affects the likelihood of registration across different races. However, sometimes how one independent variable affects the dependent variable (here, likelihood of registration) is not constant over all other independent variables. Instead, it interacts differently with other independent variables. A regression that “interacts” race and registration restrictiveness reveals the predicted effect of changing the restrictiveness of registration deadlines on minority voters compared to white voters. In other words, this approach tests whether restrictive registration deadlines have a disproportionate impact on minority voters, relative to white voters. The results are displayed in Table 2, with the significant values bolded.

Table 2: Predicted Effects of Increasingly Restrictive Registration Deadlines

Compared to white voters in EDR states	Coefficient	Standard error
All minorities, 1-15 day	.0127	.0136
All minorities, 16-30 day	.0465	.0124*
N = 80,229, R2 = .11, df = 9		
All minorities not-part-white, 1-15 day	-.0207	.0145
All minorities not-part-white, 16-30 day	.057	.0134*
N = 79,248, R2 = .11, df = 9		
Black, 1-15 day	-.0086	.0281
Black, 16-30 day	.0308	.0259
N = 70,182, R2 = .11, df = 9		
Hispanic, 1-15 day	.1021	.0217*
Hispanic, 16-30 day	.073	.0207*
N = 68,711, R2 = .12, df = 9		
Asian, 1-15 day	-.0116	.0323
Asian, 16-30 day	-.0578	.0311
N = 65,355, R2 = .11, df = 9		

* p ≤ .01

Few results are statistically significant, but those that are significant show a beneficial effect of earlier registration deadlines on some minority voters compared to white voters. For all minorities and all minorities not-part-white, a hypothetical

change to the most restrictive laws has a larger effect (although small overall) on non-whites than on whites, with the change increasing the likelihood of non-white registration more than it increases the likelihood of white registration. The results suggest that an increase in restrictiveness will increase minority registration rates more than it will increase white registration rates. The results also suggest that a change for Hispanic voters from a state with Election Day registration to a state with one-to-fifteen-day advance deadlines will increase the likelihood of Hispanic voter registration ten percent more than that change will increase the likelihood of white voter registration. Notably, although all minorities but blacks are generally less likely to be registered than whites, the most restrictive laws have a larger positive effect on some minority groups' voter registration than on whites' voter registration.¹²⁵ There are several potential explanations for these counterintuitive results. One possibility is that the data were somehow skewed to produce inaccurate results. Assuming the results are accurate, the restrictive laws may not be what make minorities more likely to be registered. Instead the difference may be due to states' political, social, or economic characteristics. States have not been assigned "least" (EDR) or "most" restrictive laws randomly, and there may be certain characteristics of EDR states compared to restrictive states that the model does not measure. For example, one possible characteristic is the population difference between states that have EDR registration and states with more restrictive deadlines.

125. Other researchers have found perverse results when investigating the interaction between registration deadlines and income levels. The probability of voting increases as income increases. See Mitchell & Wlezien, *supra* note 93, at 185. It might be expected that those individuals are even less likely to be registered when registration deadlines are more restrictive. However, one study of CPS data using state dummies reveals that individuals with lower income levels are actually more likely to be registered in states with registration deadlines long before the election than in states with less restrictive voter registration laws. Jan E. Leighley & Jonathan Nagler, *Electoral Laws and Turnout, 1972–2004* 10 (Nov. 8, 2007) (unpublished manuscript), available at http://web.mit.edu/polisci/research/wip/laws_pcst_rv9.pdf. Using state dummies and grouping individuals into different income quartiles, Leighley and Nagler found that in all but the highest income bracket more days between the registration closing date and the election increased the likelihood of turnout. *Id.* at 18. When they dropped the state dummies, the estimates passed "the test of face-validity" that forcing people to register further from the election means that fewer people will manage to vote. *Id.* at 10. It seems illogical that any group would be more likely to vote when it has less time to register, especially a group that has lower income levels and is generally less likely to vote.

EDR states have low minority populations,¹²⁶ and states with fewer minority voters are probably less likely to have resources or organizations dedicated to minority citizens than states with larger minority populations. EDR states may also provide less information about voting specific to minority concerns.¹²⁷ In addition, none of the EDR states are located in the South, the region with the longest history of discriminatory voting practices.¹²⁸ The press likely gives these states more attention, and non-profit organizations and governments likely provide more resources to encourage minority voter registration and electoral system participation generally.¹²⁹

Another possibility is that minorities' civic engagement is lower in EDR states. Minorities may feel uninterested and detached from the majoritarian process. Thus, minorities in EDR states may be less interested in voting than individuals in more and most restrictive states.

Despite the possible explanations for the difference between non-white and white voters when registration laws are more restrictive, the difference is small probably because there are so many other important factors in deciding to register that are not accounted for in this regression. Those who have resided at their addresses since before the registration deadline have had the op-

126. See CYNTHIA A. BREWER & TRUDY A. SUCHAN, U.S. CENSUS BUREAU, MAPPING CENSUS 2000: THE GEOGRAPHY OF U.S. DIVERSITY 22 (2001), <http://www.census.gov/population/www/cen2000/atlas/pdf/censr01-104.pdf>.

127. For instance, there may not be information about voter registration in other languages in EDR states.

128. The only overlap between Section 5 coverage and EDR states is ten townships in New Hampshire. See Voting Rights: Determination of Director of the Bureau of the Census, 39 Fed. Reg. 16912 (May 10, 1974).

129. One potential explanation that the data apparently do not support is that most restrictive states, which includes almost all of the Section 5 states, have had more (or more successful) litigation regarding vote denial claims, and thus those states pay increased attention to minority voter behavior and access. Overall, courts were more likely to sustain significant Section 2 challenges (not differentiating between vote dilution and vote denial cases) in jurisdictions that Section 5 covers than challenges in non-covered jurisdictions, which were at the ninety-percent level. Ellen Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 183, 188–89 (Ana Henderson ed., 2007). However, among Section 2 cases specifically challenging election administration practices, challenges were brought roughly equally in covered and non-covered jurisdictions, and plaintiffs in non-covered jurisdictions prevailed more frequently than plaintiffs in covered jurisdictions — although the difference was not significant. *Id.* at 192.

portunity to register but, for any number of reasons, have not. However, for those who have recently moved, a voter registration deadline well before an election can be an absolute barrier to participation in the election process.

c. How Registration Deadlines Affect Recent Movers of Different Races

None of the aforementioned results investigate the specific effect of registration deadlines on individuals who moved within the last thirty days. The majority of people who change addresses must re-register even if they were registered at their old addresses.¹³⁰ As indicated in Part III.B.2.a, *supra*, advance registration deadlines alone do not have a strong impact on the likelihood of registration. Logically, the longer people live at one address, the more opportunity they have to register. For voters who have lived at their address for a long time, not being registered is likely much more related to factors other than registration deadlines.¹³¹ But institutional barriers to registration, especially reg-

130. One limitation of the data is that the survey does not differentiate between those whose move necessitated re-registration and those whose move did not. In the majority states, address changes require re-registration. In some states, moving does not require re-registration, but it does require advising the state of the new address. In North Carolina, moving within a county more than thirty days before an election does not require re-registration, but moving to a new county does. N.C. GEN. STAT. ANN. § 163-82.15 (West 2010). The statute does not make provisions for those who have moved within thirty days of an election within the county but outside their original precinct, § 163-82.15(a), (e), although those who moved within their precinct are able to vote regardless of the moving date. § 163-82.15(d). In Florida, individuals who move to a new address within the state can change their address without re-registering after the state registration books are closed. FLA. STAT. § 97.1031 (2010). In addition, the National Voter Registration Act does provide those who were already registered and moved within their local election jurisdiction with the right to vote at their old polling site, new polling site, or election administration office, without having to re-register. 42 U.S.C. § 1973gg-6(c) (2006).

131. See Randall D. Lloyd, *Voter Registration Reconsidered: Putting First Things First Is Not Enough*, 29 AM. POL. RES. 649 (2001) (criticizing past studies because they investigated the registration behavior of people who do not want to or need to register). The only other individuals that registration deadlines would likely strongly affect are those who want to vote in an upcoming election and have not previously registered at their address. Much of the focus on an election, including a large volume of advertising, happens within the two weeks before an election date. See *ACORN v. Bysiewicz*, 413 F. Supp 2d 119, 133-34 (D. Conn. 2005). Therefore, some individuals who wanted to vote will possibly be unable to do so even though they are otherwise eligible. However, those individuals did have the opportunity to register prior to the deadline and, for various reasons, did not have the desire to do so. Courts are unlikely to have sympathy for such voters. See *Rosario v. Rockefeller*, 410 U.S. 752 (1973).

istration deadlines, must be overcome by everyone who has just moved, even individuals who are otherwise more likely to be registered. For example, age is a significant factor in determining likelihood of registration.¹³² The impact of age on the likelihood of registration is diminished when looking at recent movers. While older voters who have remained at the same address literally have had more time, and thus more opportunities, to register than younger voters who have remained at the same address, a recent mover's age has no bearing on the number of opportunities to register. Focusing on voters who have recently moved, as opposed to everyone, is beneficial because it reduces the effect of other variables impacting an individual's registration status besides voter registration deadlines.

The data have some limitations. One limitation is that the question about moving within the last thirty days was asked more than a week after the election.¹³³ Some individuals who indicated that they had moved within the last thirty days actually moved after the election, meaning they would not have been required to re-register.¹³⁴ Such individuals are indistinguishable from those who moved just before the election, with no plausible solution to this problem with the data.

When the CPS sample is restricted to those who have only lived at their address for thirty days or less, the number of observations decreases substantially to approximately 900 (compared with over 80,000 eligible voters in the entire CPS sample who responded to the question about whether they were registered). Significant effects for some minority groups are found when grouping states into two categories of restrictiveness, with a deadline of seven days or less ("less restrictive")¹³⁵ compared with

132. See KELLY HOLDER, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2006, 16 (2008), <http://www.census.gov/prod/2008pubs/p20-557.pdf>.

133. The survey was administered November 16–22, 2008. Election Day was November 4, 2008.

134. The question pertaining to registration status does not solve this problem because the survey asks "[w]ere you registered to vote in the November 4, 2008 election?" not whether an individual was registered at the address where she currently resides. TECHNICAL DOCUMENTATION, *supra* note 108, at 7-1. Unless there is a reason to think that minorities would respond differently to this question than would whites, overall, the imprecise response to this question may not affect the results' validity.

135. "Less restrictive" states are Connecticut, Idaho, Iowa, Maine, Montana, Minnesota, New Hampshire, North Dakota, Vermont, Wisconsin, and Wyoming.

a deadline of eight days or more (“most restrictive”).¹³⁶ The results of these regressions are in Table 3.

Table 3: How Increasingly Restrictive Registration Deadlines Affect Recent Movers (within 30 days) (significant values bolded)

Compared with moving whites	Coefficient	Standard error	P value
All minorities from 0-7 days to 8-30 days	-.152	.105	.146
All minorities not-part-white from 0-7 days to 8-30 days	-.132	.109	.229
Black from 0-7 days to 8-30 days	.008	.226	.974
Hispanic from 0-7 days to 8-30 days	-.293	.150	.051
Asian from 0-7 days to 8-30 days	-.204	.324	.529

When grouping states into less and most restrictive categories, a significant difference exists between white voters and Hispanic voters, with Hispanic voters twenty-nine percent less likely than white voters to be registered if the registration deadline for their state is changed from seven or fewer days to eight or more days. The difference between white voters and all minority voters is marginally significant, showing that all minority voters are fifteen percent less likely to be registered than white voters if changed from a state with a deadline seven or less days in advance to a state with an eight-day or longer advance registration deadline.

Although estimates using the 2008 sample do not show many statistically different effects of advance registration deadlines on minority recent movers who are minority compared to those who are white, estimates using the 2004 CPS show more statistically significant results. There were no statistical differences when states were grouped into categories with a breaking point of seven days,¹³⁷ but there are significant results when grouping states into categories of a deadline fifteen days or less (“less restrictive–2004”)¹³⁸ compared with a deadline of sixteen days or more (“most restrictive–2004”).¹³⁹ This includes states with larger numbers of minority voters in the “less restrictive–2004” category.

136. “Most restrictive” states are all states not listed in note 135, *supra*, and the District of Columbia.

137. Results not shown.

138. “Less restrictive–2004” states are Alabama, California, Connecticut, Idaho, Iowa, Kansas, Maine, Minnesota, New Hampshire, North Dakota, South Dakota, Vermont, Wisconsin, and Wyoming.

139. “Most restrictive–2004” states are all states not listed in note 138, *supra*, and the District of Columbia.

ry, notably California and Alabama. The results of these regressions are in Table 4, with the significant values bolded.

Table 4: How Increasingly Restrictive Registration Deadlines Affects Recent Movers (within 30 days) in 2004 (significant values bolded)¹⁴⁰

Compared with moving whites	Coefficient	Standard error	P value
All minorities from 0-15 days to 16-30 days	-.1302	.0780	.096
All minorities not-part-white from 0-15 days to 16-30 days	-.178	.0844*	.035
Black from 0-15 days to 16-30 days	-.3450	.1365*	.010
Hispanic from 0-15 days to 16-30	-.1442	.1206	.232
Asian from 0-15 days to 16-30	.0515	.2958	.862

* p < .05

Grouping states into less and most restrictive categories, the effect of early registration deadlines is significantly different between black and white voters (-.345), and between all minorities not-part-white compared to white voters (-.178). These coefficients show that restrictive laws have a comparatively larger disenfranchising effect on black and minority not-part-white voters compared to white voters. The coefficient comparing all minorities to whites with a change from less to most restrictive states is negative (-.13) and marginally significant, and the coefficient for Hispanic voters (-.14) suggests a different effect. With more observations, a significant difference comparing all minority voters to white voters, and comparing Hispanic voters to white voters, might be found.

There are fewer significant effects found in the 2008 data likely because the 2008 election was well-publicized and registration efforts were more intense than in other years. Therefore, the 2004 data may be more indicative than the 2008 data of how registration deadlines usually affect recent movers. Taking into consideration both 2004 and 2008 data, the trend is that longer registration deadlines have an overall disenfranchising effect on minorities compared to white voters who have moved within the last thirty days.

140. The number of observations for each group is as follows: white, 848; all minorities, 293; all minorities not-part-white, 268; black, 124; Hispanic, 241; Asian, 14.

IV. HOW TO ENFRANCHISE RECENTLY MOVED MINORITY VOTERS

This Part explores how litigants, advocacy groups, state legislators, and Congress can use the abovementioned results to address minority vote denial.

A. LEGISLATIVE CHANGES IN STATE REGISTRATION DEADLINES

States can make a variety of changes to eliminate the differential effect of registration deadlines on minority voters compared to white voters. Adoption of Election Day registration would allow all voters, including those who have recently moved, to register and vote in a given election.¹⁴¹ In the past four years, both Iowa¹⁴² and Montana¹⁴³ have adopted Election Day registration, which allows all individuals, not only those who have recently moved, to avoid disenfranchisement. Individuals who only become interested in an election right before Election Day will be able to exercise their right to vote if EDR is introduced in all states. The argument that advance deadlines unfairly prevent those who become interested in voting “too late” from voting has been unsuccessful in voting rights litigation.¹⁴⁴ However, an event could occur shortly before an election that would greatly increase interest in voting, especially among those who previously had been uninterested in the electoral process. This event could be sufficiently significant that fairness or democratic principles support providing all interested voters with the ability to vote, despite missing the deadline.¹⁴⁵ Instead of waiting for such

141. A bill requiring states to provide EDR for federal elections has been introduced in the House or Senate almost every session in recent years. *See, e.g.*, Election Day Registration Act, S. 2959, 110th Cong. (2008); Election Day Registration Act, H.R. 5946, 110th Cong. (2008); Voting Opportunity and Technology Enhancement Rights Act of 2005, S. 17, 109th Cong. (2005); Same Day Voter Registration Act of 2005, H.R. 496, 109th Cong. (2005); Same Day Voter Registration Act of 2003, H.R. 3153, 108th Cong. (2003); Same Day Voter Registration Act of 2002, S. 2226, 107th Cong. (2002); Same Day Voter Registration Act of 1999, H.R. 2864, 106th Cong. (1999).

142. IOWA CODE § 48A.7A (2010).

143. MONT. CODE ANN. § 13-2-304 (2010).

144. *See* Rosario v. Rockefeller, 410 U.S. 752 (1973); ACORN v. Bysiewicz, 413 F. Supp. 2d 119, 149 (D. Conn. 2005).

145. A candidate action or allegation that is designed to sway voters shortly before an election has been dubbed an “October surprise,” and some politicians view it as an unfair

an event to occur — which would likely cause public outcry, emergency litigation, and hastily drawn legislation to prevent the problem from reoccurring — states could institute EDR.

Alternatively, if states are fearful that too many individuals registering on Election Day will cause delays and chaos at the polls,¹⁴⁶ or if states are otherwise opposed to Election Day registration, they can adopt modified EDR only for those who have recently moved. Voters could affirm that they have recently moved to the jurisdiction.¹⁴⁷ Further, states could require proof of a recent address change, although this could be hard to produce or validate¹⁴⁸ or could increase wait times at polls. Additionally, proof requirements might introduce additional variables that disproportionately affect minorities. Because allowing selective EDR may prove hard to administer, universal EDR could be a more practical solution, even though it would increase the number of individuals who would be registering for the first time on Election Day.

Providing EDR may contradict some state legislatures' determinations that only those who have resided in the state, county, or precinct for a certain amount of time are sufficiently informed about the candidates and the issues to be qualified to vote.¹⁴⁹

maneuver; however, it may also be seen as new information that validly increases interest in an election. Compare David. A. Strauss, *What's the Problem? Ackerman and Ayres on Campaign Finance Reform*, 91 CAL. L. REV. 723, 737 (2003) (arguing that an October surprise is a "dirty trick" and "subversion of democratic deliberation"), with *Wis. Realtors Ass'n v. Ponto*, 233 F. Supp. 2d 1078, 1092 (W.D. Wis. 2002) (stating that an October surprise is a routine, "unforeseen development" that shifts the political dynamic). October surprises are not the only possible events that might interest more people in an election after registration deadlines have passed. A candidate's death, a natural disaster, or a war are other possibilities.

146. See, e.g., *ACORN*, 413 F. Supp. 2d at 136 (citing testimony of voting registrars that the state would be unable to handle the additional 200,000 individuals who might register at the polls if Connecticut adopted EDR).

147. This would replicate the NRVA procedure used by voters who have moved within their jurisdiction. See discussion *infra* Part IV.B.

148. In addition to filing a change of address form at a post office, recent movers could provide a copy of either their lease with a recent start date or their residential home contract. Such forms could be fraudulent, but they would not be used to determine voter *eligibility*. Individuals would still have to provide the information that those registering before the deadline are required to supply. The additional documentation would only be used as proof of eligibility to register after the registration deadline for non-recent movers.

149. See *Howe v. Brown*, 319 F. Supp. 862 (N.D. Ohio 1970) for a decision upholding this reasoning as a legitimate state interest. In 2008, twenty states had residency requirements between ten and thirty days in the state, county, or precinct (or state and county, district, or precinct). See *Declare Yourself, State by State Info, State by State*

However, the most people move locally within the same county.¹⁵⁰ Thus, the justifications for forced disenfranchisement — a recent mover's unfamiliarity with candidates or lack of investment in local issues — do not apply to the majority of recent movers. The NVRA already requires election officials to allow voters who were registered at their old address to vote when they move within their jurisdiction.¹⁵¹ This provision should be more widely publicized because its current use and effectiveness is in doubt.¹⁵²

As technology increases and alternatives to paper ballots, including electronic voting, are explored, states can pass legislation allowing the recently-moved to vote in their new jurisdiction for the same candidates and in the same races as in their previous jurisdiction. Although such an allowance may have been unduly onerous or even infeasible in the past,¹⁵³ advances in technology make it administratively feasible to determine the candidates that correspond to both a voter's old and new addresses. As Section 303 of the Help America Vote Act (HAVA) requires states to maintain a centralized, interactive statewide voter registration database, states should no longer be able to claim that they cannot determine such information.¹⁵⁴

There are alternative ways to provide recent movers the opportunity to vote besides allowing re-registration after deadlines have passed. In recent years, Florida and North Carolina have passed registration laws providing those who have recently moved within the state the opportunity to vote at their new ad-

Voter Laws and Registration Deadlines, http://www.declareyourself.com/voting_faq/state_by_state_info_2.html (last visited Mar. 22, 2010). Congress can most likely not ban all residency requirements for state elections. See Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1516 (2007).

150. Fifty-seven percent of moves from 2004–2005 were within the same county, and twenty percent were to a different county within the same state. See U.S. CENSUS BUREAU, GEOGRAPHIC MOBILITY BETWEEN 2004 AND 2005 [hereinafter MOBILITY 2004–2005], <http://www.census.gov/population/www/pop-profile/files/dynamic/Mobility.pdf>; see also SCHACHTER, *supra* note 23, at 1 (fifty-nine percent of the moves from 2002–2003 were in-county, and nineteen percent of moves were in-state but to a different county).

151. 42 U.S.C. § 1973gg-6(e) (2006).

152. See McDonald, *supra* note 12, at 497.

153. At the time the NVRA was passed, there was no requirement that states maintain statewide voting lists. See ADAM SKAGGS & JONATHAN BLITZER, BRENNAN CTR. FOR JUSTICE, PERMANENT VOTER REGISTRATION 8 (2009), http://brennan.3cdn.net/1a1ce9f2a1e87c216a_yjm6iv2uo.pdf.

154. 42 U.S.C. § 15483 (2006).

dress without having to re-register.¹⁵⁵ In Florida, the new law allows individuals who move within the state to change their address after registration is closed and still be eligible to vote on Election Day, despite having moved after voter registration had closed.¹⁵⁶ While the Florida law does not accommodate those who have moved from outside the state, the vast majority move within the state.¹⁵⁷ For those voters the law prevents disenfranchisement. Connecticut has a longstanding provision allowing those who have recently moved to a municipality to register in a three-hour window on the last weekday before a general election.¹⁵⁸ Other states can draw from Florida's, North Carolina's, and Connecticut's enfranchising laws when establishing similar provisions.¹⁵⁹

There may be a low probability that state legislatures will voluntarily adopt the aforementioned changes in registration laws because legislators have been elected under laws that mostly deny recent movers the vote. Incumbents may be unwilling to change a system that got them elected.¹⁶⁰ Congress can provide

155. After the 2004 election, Florida clarified that address changes can be made after the registration deadline for new voter registration had closed, and also expanded its policy of not requiring re-registration from those who moved only within counties to anyone who moved within the state. FLA. STAT. § 97.1031 (2010). In 2008, North Carolina allowed in-person registration and voting at a one-stop voting site up to the Saturday before the 2008 presidential election. See N.C. GEN. STAT. ANN. §§ 163-82.6A, 163-227.2(b) (West 2010). However, North Carolina retains a 30-day county residency requirement. § 163-55.

156. See FLA. STAT. § 97.1031 (2010).

157. See MOBILITY 2004–2005, *supra* note 150.

158. CONN. GEN. STAT. § 9-17(b) (2010).

159. One study suggests that the changes recommended in this Note might not increase voting turnout. See McDonald, *supra* note 12. Professor McDonald found a small but significant positive effect on the probability of voting for “movers” whose new residence was in a state that provided either EDR or “portable registration,” and therefore allowed voters to take their registration status with them when they move within the state. *Id.* at 496. He concluded that neither EDR nor portable registration has a large effect on increasing turnout for movers. *Id.* at 491. However, when Professor McDonald analyzed the 2004 CPS data he defined “movers” as those who had moved since the 2000 election. *Id.* at 494. Therefore, he was not only studying voters who would not meet registration deadlines, but also those who might have moved four years before the 2004 election — many of whom did not need to avail themselves of either portable registration or EDR to be registered.

160. After the 2000 election, thirty-four states proposed EDR. See Steven Carbo & Brenda Wright, *The Promise and Practice of Election Day Registration*, in AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 65, 70 (Benjamin E. Griffith ed., 2008). Colorado and California proposed EDR on ballot initiatives that voters rejected in 2002. *Id.* Of the thirty-four states, only Iowa and Montana have since enacted

incentives for states to adopt such provisions without requiring them to do so. One way is to provide conditional funding to states that adopt EDR or other practices that increase opportunities for eligible voters to register. This funding might be specifically directed towards election administration, or it could be used at the discretion of the state. Alternatively, the federal government could provide additional voting equipment, or extra poll workers on Election Day to register new voters, to states that institute EDR. Congress could also encourage states to adopt EDR by expanding the exemptions from compliance with federal election law for states that allow EDR.¹⁶¹

B. CHALLENGES UNDER SECTION 2

If state legislatures do not adopt changes to address the differential effect of advance voter registration deadlines, the VRA provides a potential means for challenging these deadlines in court. Some have argued that voter registration laws are unconstitutional.¹⁶² However, given Supreme Court decisions upholding advance registration deadlines,¹⁶³ courts are unlikely to declare them unconstitutional. But the results discussed in Part III.B.2.c, *supra*, do suggest that more limited challenges to registration laws under Section 2 of the VRA might be possible. As discussed in Part II.C, *supra*, Congress provided a means for relief when a voting practice disproportionately disenfranchises minority voters. In its amendment of Section 2, Congress recognized that laws related to registration can effectively deny individuals the right to vote. It highlighted inconvenient hours and locations for voter registration offices as examples of practices that violate Section 2 of the VRA.¹⁶⁴ However, there are some dif-

EDR, *see supra* notes 142 and 143, although North Carolina has instituted a same day registration and voting procedure. *See* N.C. Gen. STAT. Ann. §§ 163-82.6A, 163-227.2(b) (2010); *see also* Mark Thomas Quinlivan, Comment, *One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration*, 137 U. PA. L. REV. 2361, 2386-87 (1989).

161. States that allow for EDR are exempt from certain provisions of the NRVA and HAVA. *See* 42 U.S.C. §§ 1973gg-2(b), 15482 (2006).

162. Deborah S. James, Note, *Voter Registration: A Restriction on the Fundamental Right to Vote*, 96 YALE L.J. 1615 (1987).

163. *See supra* Part II.B.

164. *See* S. REP. NO. 97-417 at 52 n.180 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 230 n.180 (considering the hours a registration office is open and the location of such office).

difficulties in presenting a Section 2 challenge, which include identifying what evidence is necessary and whether causation must be shown.

1. *Sufficiency of the Evidence against Advance Registration Deadlines*

One question is whether presenting the evidence in this Note pertaining to recent movers would be sufficient to establish a Section 2 violation. Statistical evidence that felon disenfranchisement laws disproportionately affect minority citizens has been unsuccessful in challenges to laws under Section 2.¹⁶⁵ However, voter registration deadlines are different from felon disenfranchisement laws in multiple ways. Federal bans on felon disenfranchisement laws would interfere with a state's historical right to criminal justice autonomy. While voter registration deadlines also have a long history,¹⁶⁶ many of the justifications for registration deadlines are no longer applicable due to advances in technology that have facilitated mobility and methods for states to keep track of, update, and verify their registration records. In addition, the Constitution lacks explicit references to registration deadlines, and, therefore, congressional regulation would not be viewed as overriding the Fourteenth Amendment.¹⁶⁷ The most important distinction between registration deadlines and felon disenfranchisement is that those who have moved have not engaged in any illegal acts that justify the denial of a fundamental

es in relation to areas with low black registration rates as indicative of whether a jurisdiction is making a bona fide effort to comply with the VRA).

165. See *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1230 n.31 (11th Cir. 2005); *Wesley v. Collins*, 791 F.2d 1255, 1260–61 (6th Cir. 1986).

166. See R. Michael Alvarez, Stephen Ansolabehere & Catherine H. Wilson, *Election Day Voter Registration in the United States: How One-Step Voting Can Change the Composition of the American Electorate* (Caltech/MIT Voting Tech. Project, Working Paper No. 5, 2002), available at http://vote.caltech.edu/drupal/files/working_paper/vtp_wp5.pdf. But see Carbo & Wright, *supra* note 160, at 66 (originally, voter eligibility was decided at the polls and advance registration deadlines were not common until after the 1870s).

167. In contrast, at least one court has used the text of § 2 of the Fourteenth Amendment — “[W]hen the right to vote . . . is denied to any of the male inhabitants . . . or in any way abridged, except for participation in rebellion, or other crime” — as a basis for finding that using Section 2 to strike down felon disenfranchisement laws would override the text of the Constitution. *Johnson*, 405 F.3d at 1217 n.4, 1228–29.

right.¹⁶⁸ Failure of Section 2 challenges to felon disenfranchisement laws should not be a barrier to challenges to registration deadlines under Section 2.

2. *Causation of the Disparate Effect on Minorities*¹⁶⁹

A second question is whether statistical evidence of a disparate effect on minority voters who have recently moved would be sufficient for courts to find for plaintiffs in a vote denial Section 2 claim. Courts might still demand an explanation for *why* the disparate effect occurs. As mentioned in Part II.C, *supra*, courts have applied different requirements for causation between a challenged voting practice and disenfranchisement. Circuits, like the Ninth, that examine factors external to the voting practice¹⁷⁰ will be most amenable to a Section 2 challenge of voter registration laws. Additional information that would be valuable to support a challenge, beyond analysis of the CPS data, includes other studies relating to the residential mobility of minorities compared with that of whites, and studies examining the basis for the frequency of moves — including its correlations with education levels or income.

A possible explanation for the differential effects identified may be variables not collected in the CPS, especially the specific moving date. Minorities might move at a time that meets a zero-to-fifteen day registration deadline but not a sixteen-to-thirty day deadline, while the moves of white voters may not be concentrated in one part of the month, or their usual time to move may

168. In ruling that felon disenfranchisement laws did not violate Section 2, the Sixth Circuit specifically differentiated between the disenfranchisement of individuals based on their conscious decisions to commit a crime and those “disenfranchised because of an immutable characteristic, such as race.” *Wesley*, 791 F.2d at 1262.

169. The limitations of the social science research presented in this paper should also be emphasized. The coefficients produced from multivariate regression are estimates, and varying amounts of immeasurable error means that the estimates are imprecise. In addition, an important point for litigants, judges, and jurors to keep in mind is that this research does not show any *causal* relationship between race, education, age, income, or anything else and registration behavior. See Moke & Saphire, *supra* note 79, at 9–15. Rather, demographic information and registration behavior are merely correlated.

A study showing a causal relationship would require randomly assigning different voter registration deadlines to different voters who are otherwise the same. This would allow any difference in likelihood of registration to be attributed solely to registration laws.

170. See *Farrakhan v. Washington*, 338 F.3d 1009, 1014–17 (9th Cir. 2003).

allow them to meet more restrictive deadlines.¹⁷¹ Courts seeking a more explicit connection between the challenged voting practice and disenfranchisement might be satisfied with data suggesting different patterns in residential moves for different races, which would, in turn, offer an explanation for the differential impact of registration laws on minorities compared to whites.

3. *Alternative Standard of Review for Voting Rights Cases*

Because Section 2 cases alleging vote denial are rare and will be cases of first impression in many circuits, various commentators have offered standards of review that courts should follow. One election law scholar proposes a standard similar to that in Title VII employment discrimination cases: the plaintiff presents evidence of a prima facie case of disparate effect, and the burden then shifts to the state to show why the challenged practice is “necessary to achieve a compelling state interest.”¹⁷² Another scholar has advocated for returning to the strict scrutiny standard applied in *Harper v. Virginia State Board of Elections*,¹⁷³ rather than allowing *Burdick v. Takushi*'s sliding scale of scrutiny to permit judges to apply a less exacting test.¹⁷⁴ Using Section 2 in general to challenge some election administration practices has also been criticized.¹⁷⁵ Concerning voter registration deadlines, however, the Court is unlikely to overturn past affirmations of the constitutionality of voter registration deadlines for the general population. Using Section 2 to challenge advance voter registration deadlines is not an effort to distract from public policy

171. Differences in the typical time of month that renters move compared to home owners might explain this difference. Renters also move more frequently than home owners. See MOBILITY 2004–2005, *supra* note 150, at 1. Higher frequency of home ownership for whites compared with minorities (although not controlling for other factors), see ROBERT R. CALLIS, U.S. CENSUS BUREAU, MOVING TO AMERICA — MOVING TO HOME OWNERSHIP: 1994–2002 6 (2003), <http://www.census.gov/prod/2003pubs/h121-03-1.pdf>, supports the proposition that the differences in moving to a new rental residence compared to a new owned residence might explain some of the differences observed in changing restrictiveness of voter registration deadlines on minorities compared to white voters.

172. See Tokaji, *supra* note 79, at 718.

173. 383 U.S. 663, 670 (1966).

174. Demian A. Ordway, Note, *Disenfranchisement and the Constitution: Finding a Standard That Works*, 82 N.Y.U. L. REV. 1174, 1202–07 (2007).

175. *Id.* at 1199 (stating that many election laws and regulations that are troublesome have no relation to race, so a Section 2 challenge distracts from the true problem with the election regulation).

discussions or legislative debates about the continuing utility of such laws or about changing registration deadlines for the general population. Instead, it is a means of requiring states to remedy an election administration practice that is facially race-neutral, yet, however unintentionally, disenfranchises minority voters because of differences in their behavior compared to white voters.

Courts could follow Justice Blackmun's concurrence in *Burns v. Fortson*, encouraging courts to determine the constitutionality of state registration deadlines on a case-by-case basis.¹⁷⁶ However, using the case-by-case method makes it difficult to draw general conclusions about the success of any Section 2 challenge to registration deadlines. The fact that courts may look for some of the 1982 Committee Report factors also means that some states or jurisdictions, particularly those with a history of discriminatory practices, may be better forums for bringing a Section 2 challenge. States that Section 5 of the VRA requires to obtain pre-clearance from the Department of Justice for any election administration changes could be strong candidates for a Section 2 challenge. However, if a court reviewing evidence of how voter registration deadlines discriminatorily affect Section 2-protected recent movers does not apply vote dilution criteria, it might rule that states must provide alternative registration methods for recent movers.

176. 410 U.S. 686, 687–88 (1973) (Blackmun, J., concurring); *see supra* text accompanying notes 53–54.

V. CONCLUSION

Social science researchers have long been interested in how advance voter registration deadlines impact different demographic groups. While social scientists have been disappointed in the generally small predicted effect of liberalizing voter registration laws, they have found that those laws have a significant effect on the registration behavior of residentially mobile individuals. Despite multiple investigations of residential mobility and registration laws in political science literature, litigation focused on protecting the voting rights of the residentially mobile has been unpopular. Thus, although the Supreme Court has accepted the validity of advance registration deadlines, courts have never been presented with evidence that advance registration deadlines have a differential effect on minority voters compared to white voters when looking at the segment of the voting-eligible population that has recently moved.

In addition, technology advances have facilitated the states' ability to update voter addresses and would allow recent movers to vote without contravening the states' desire to have knowledgeable voters. Jurisdictions can share information more readily than when Congress last passed national voting rights legislation. Thus, many of the original reasons for advance registration deadlines are now outdated. Because advance registration deadlines negatively impact minority voters compared to white voters, states or the federal government should pass new laws that allow recent voters more opportunity to vote despite their recent move. If legislators do not voluntarily take such steps, litigators can bring challenges under Section 2 of the VRA, employing the kind of data presented in this Note to show the differential effects of advance registration deadlines on minority voters compared to white voters.