RACE, *SHELBY COUNTY*, AND THE VOTER INFORMATION VERIFICATION ACT IN NORTH CAROLINA*

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ABSTRACT

Shortly after the Supreme Court in Shelby County v. Holder *struck down section 4(b) of the Voting Rights Act (VRA), the State of North Carolina enacted an omnibus piece of election-reform legislation known as the Voter Information Verification Act (VIVA). Prior to* Shelby, *portions of North Carolina were covered jurisdictions per the VRA's sections 4 and 5—meaning that they had to seek federal preclearance for changes to their election procedures—and this motivates our assessment of whether VIVA's many alterations to North Carolina's election procedures are race-neutral. We show that in presidential elections in North Carolina black early voters have cast their ballots disproportionately in the first week of early voting, which was eliminated by VIVA; that blacks disproportionately have registered to vote during early voting and in the immediate run-up to Election Day, something VIVA now prohibits; that registered voters in the state who lack two VIVA-acceptable forms of voter identification, driver's licenses and non-operator identification cards, are disproportionately black; that VIVA's identification dispensation for voters at least seventy years old disproportionately benefits white registered voters; and, that preregistered sixteen and seventeen year old voters in North Carolina, a category of registrants that VIVA prohibits, are disproportionately black. These results illustrate how VIVA will have a disparate effect on black voters in North Carolina.*

I. INTRODUCTION

In the final week of its 2012–2013 Term, the United States Supreme Court in *Shelby County v. Holder*[1] struck down as unconstitu-

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1. 133 S. Ct. 2612 (2013).

tional section 4(b) of the Voting Rights Act (VRA).[2] Historically a key objective of the VRA has been preventing retrogression in racial and language minority voting rights,[3] and the now-defunct section 4(b) contributed to this goal by defining a coverage formula that identified jurisdictions in the United States requiring federal preclearance before changing their election laws and procedures. By extension, the majority's decision undermined section 5 of the Act, which specifies preclearance procedures and heretofore required all or parts of fifteen states to receive preclearance before making any changes to their election procedures.

The Court issued *Shelby* on June 25, 2013. Shortly thereafter the North Carolina state legislature passed an omnibus elections bill, House Bill 589, which was signed into law by Republican Governor Pat McCrory on August 12, 2013.[4] Among its many alterations to the electoral environment in North Carolina, the Voter Information Verification Act, known colloquially as VIVA, shortened from seventeen to ten days the state's early voting period; eliminated same-day voter registration during early voting; created a photo identification requirement for casting a ballot in-person but with special dispensation for voters over the age of seventy; and, limited the preregistration of sixteen and seventeen year olds to those turning eighteen by Election Day.[5] Because 40 of North Carolina's 100 counties had been covered by section 5 of the VRA,[6] pre-*Shelby* these election law changes would have necessitated preclearance with the federal government so as to ensure that they did not lead to "retrogression in the position of racial minorities with respect to their effec-

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2. *See* 42 U.S.C. § 1973b(b) (2012), *invalidated by* Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013) ("[Congress's] failure to [update the coverage formula] leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.").

3. *See generally* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE (Bernard Grofman & Chandler Davidson eds., 1992); Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 97-98 (2013).

4. For the final session law version, see Voter Information Verification Act, ch. 381, 2013 N.C. Sess. Laws 1505. For the final House bill version, see H.R. 589, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013). Its legislative history is also available on the North Carolina General Assembly website. *House Bill 589 / S.L. 2013-381*, N.C. GEN. ASSEMBLY, http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?BillID=H589&Session=2013 (last visited Mar. 8, 2016).

5. VIVA's photo identification requirement is not slated to go into effect until 2016. In addition to the special dispensation made for registered voters over the age of seventy, VIVA also makes exceptions to its identification requirements for those with religious objections to photographic identification and to those who prior to an election were victims of a natural disaster. *See* Voter Information Verification Act § 2.1.

6. *Jurisdictions Previously Covered by Section 5*, U.S. DEP'T JUST., http://www.justice.gov/crt/about/vot/sec_5/covered.php (last updated Aug. 6, 2015) (presenting a list of, inter alia, the 40 North Carolina counties subject to preclearance prior to *Shelby*).

tive exercise of the electoral franchise."[7] Post-*Shelby*, however, no such preclearance requirement for North Carolina exists.

VIVA has been lauded by supporters for its focus on protecting the integrity of voting processes in North Carolina and criticized by others who view it as a piece of legislation designed to suppress votes, in particular votes of eligible black residents of North Carolina. Viewed in this light, VIVA exemplifies the contemporary—and increasingly partisan—debate in the United States over voting rights and the sometimes caustic struggle between those advocating for relatively liberal ballot access laws and those who urge vigilance in the face of allegations of election fraud.[8] The issue of race is entwined in this struggle, and in light of this, what follows is an analysis of North Carolina's electoral environment, one that focuses on the intersection of VIVA and race. Our attention here is specifically directed at race—as opposed to, say, political party affiliation—because of this construct's position in the VRA and the recent decision in *Shelby*, not to mention the legacy of racial discrimination in American electoral history.[9] Broadly speaking, our objective is assessing whether VIVA will have differential effects on the two major racial groups, blacks and whites, in North Carolina. According to 2012 estimates from the United States Census, these two groups constitute over ninety-three percent of North Carolina residents; in particular, the Census reports that roughly seventy-two percent of North Carolina residents are monoracial white and twenty-two percent, monoracial black.[10]

The scope of this study is the past three General Elections in North Carolina—those that occurred in 2008, 2010, and 2012—in addition to the past two off-year elections—those in 2009 and 2011. In light of this paper's stated objective of assessing whether VIVA will have differential effects across racial groups in North Carolina, our analysis of these five elections considers whether black and white early voters in North Carolina have traditionally cast their ballots on similar days during North Carolina's early voting period; whether blacks and whites in North Carolina tend to differ in their propensities to register to vote immediately prior to voting early; whether registered voters in North Carolina over the age of seventy

7. Beer v. United States, 425 U.S. 130, 141 (1976).

8. *See* Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 63 (2014).

9. *See generally* J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974).

10. *See* North Carolina QuickFacts from the US Census Bureau, U.S. CENSUS BUREAU, https://web.archive.org/web/20131028151451/http://quickfacts.census.gov/qfd/states/37000.html (last updated June 27, 2013) (presenting the 2012 racial demographics for North Carolina).

are disproportionately black or white; and, whether black and white voters will be differentially affected by VIVA's rules regarding voter identification. As will be made clear when we discuss VIVA in greater detail, we investigate these race-based questions because of the specific changes that VIVA has wrought on North Carolina election procedures.

The evidence we offer implies that VIVA will have a disparate effect on black voters in North Carolina and is thus not race-neutral. We show, for example, that blacks in the state often vote relatively early in the first week of what historically was an approximately seventeen-day early voting period, a week that VIVA eliminated when it reduced North Carolina's early voting period to ten days; that in two of the three most recent General Elections in North Carolina, blacks disproportionately registered on early voting days that VIVA has eliminated; that blacks are disproportionately represented among registered voters in North Carolina who lack two of the seemingly standard forms of photo identification that VIVA deems acceptable; that a special dispensation regarding photo identification requirements for older voters is a greater benefit to whites than to blacks; and, that prior to VIVA's eliminating preregistration in North Carolina for all sixteen and some seventeen year olds, preregistered voters were disproportionately black.

In the next Part of this Article we describe VIVA's political context, situating it in the post-*Shelby County v. Holder* landscape. After discussing the legislative history of VIVA and some of its particulars, we turn to the data used in our analysis of five recent North Carolina elections. Next we present results on the role of race in North Carolina early voting, registration timing, access to voter identification, and preregistration. We end this Article with some concluding thoughts.

II. ELECTORAL REFORM IN THE SHADOW OF *SHELBY COUNTY V. HOLDER*

The origins of VIVA predate by several months the Supreme Court's decision in *Shelby County v. Holder*. Nonetheless, the context surrounding this relatively recent North Carolina state law is now part of the aftermath of what appears to be one of the most momentous Supreme Court decisions in the area of voting rights since the 1960s.

A. The Voting Rights Act and Origins of Shelby

The VRA was originally passed by Congress in 1965 and signed into law by then-President Lyndon B. Johnson. The objective of the Act was elimination of voting discrimination, and the VRA established

extensive federal oversight of election administration. The VRA has many facets, but the particular aspects of this law that concern us here are its sections dealing with preclearance. In the introduction we noted that section 4(b) of the VRA provides a coverage formula that specifies the jurisdictions in the United States subject prior to *Shelby* to federal preclearance, i.e., that needed permission to modify their election procedures prior to implementing them. Section 4(b)'s formula includes indicators as to whether a given voting jurisdiction mandated a literacy "test or device" as a requirement for registering to vote as of November 1, 1964 or had registration or turnout rates of less than fifty percent of voting age population in 1964.[11] Section 5 of the VRA describes how preclearance is implemented and thus leans heavily on section 4(b). Beyond sections 4 and 5, section 2 of the VRA prohibits everywhere in the United States the dilution or denial of voting rights on the basis of race and language minority status.[12] In contrast to sections 4 and 5 and their emphasis on preclearing changes to election laws *before* they are promulgated, the VRA's section 2 places the burden of proof on those affected by ostensibly problematic election protocol changes.[13]

Pre-*Shelby*, all election law and protocol changes that affected covered jurisdictions—i.e., those characterized as such by the VRA's section 4(b)—were reviewed by the United States Department of Justice or the federal courts in order to determine if they had retrogressive effects on racial, ethnic, or language minorities. Between 2006, when Congress last reauthorized the VRA, and the spring of 2013, the Department of Justice used its preclearance authority to block many election law alterations that it determined would have discriminatory effects. Prior to the 2012 General Election, for example, the Department of Justice challenged and prevented restrictive photo identification laws from being implemented in Alabama, Mississippi, South Carolina, and Texas,[14] and it successfully forced Florida to modify a mid-2011 law that placed new restrictions on voter registration drives by third party organizations.[15]

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11. *See, e.g.*, *Section 4 of the Voting Rights Act*, U.S. DEP'T JUST., http://www.justice.gov/crt/about/vot/misc/sec_4.php (last updated Aug. 8, 2015).

12. *See* 42 U.S.C. § 1973 (2012).

13. *See id.* § 1973(b).

14. *See generally* Myrna Pérez & Vishal Agraharkar, *If Section 5 Falls: New Voting Implications*, BRENNAN CTR. FOR JUST. 3-5 (2013), http://www.brennancenter.org/sites/default/files/publications/Section_5_New_Voting_Implications.pdf; Wendy Underhill, *Voter Identification Requirements/Voter ID Laws*, NAT'L CONF. ST. LEG., http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx (last visited Mar. 8, 2016).

15. Michael C. Herron & Daniel A. Smith, *The Effects of House Bill 1355 on Voter Registration in Florida*, 13 ST. POL. & POL'Y Q. 279, 279-80 (2013) (explaining the Florida mid-2011 voter registration law).

Shelby struck down the VRA's section 4(b) on account of ostensible problems with the preclearance coverage formula, thus rendering section 5 of the VRA effectively toothless. As a result of this case, changes to voter registration procedures, new requirements for voter identification, and alterations to early voting hours, inter alia, in previously covered or partially covered states no longer must be vetted by the federal government before taking effect. According to Chief Justice Roberts's majority opinion, the VRA's antiquated preclearance formula was "based on 40-year-old facts having no logical relation to the present day."[16] Some scholars who historically have been critical of preclearance were pleased with *Shelby*, with vice-chair of the United States Commission on Civil Rights, Abigail Thernstrom, arguing that, "[t]he court's ruling Tuesday will benefit black America."[17] Similarly, former United States Department of Justice official, Hans von Spakovsky, stated that the Court "effectively threw out the preclearance requirements because they were based on 40-year old data," and in so doing, "foreclosed what seems to be one of the favorite pastimes of [Department of Justice] Voting Section lawyers—pretending it is still 1965."[18]

Others, even some who have historically been generally sympathetic with the goals of the VRA, concurred with Roberts' opinion that Congress had neglected its duty—most recently in 2006, when it reauthorized the VRA—to modernize the Act's coverage criteria. Noting that "the [VRA] was pivotal in bringing black Americans to the broad currents of political life," Issacharoff nonetheless concedes that the Court's "unromantic constitutional ruling" in *Shelby* reveals that "the race discrimination structure of section 5 could not be justified in light of the increasing distance between the prohibitions and the distinct practices of racial exclusion that lie at the heart of the Voting Rights Act."[19] Grofman writes similarly, arguing that, "the data used for the [section 4 trigger of section 5] were not just stale, they were incredibly stale."[20] Still, as Kimball points out, recent literature on ballot access shows that voting discrimination in the United States is

16. Shelby County v. Holder, 133 S. Ct. 2612, 2629 (2013).

17. Abigail Thernstrom, *A Vindication of the Voting Rights Act*, WALL STREET J. (June 26, 2013, 7:28 PM), http://www.wsj.com/news/articles/SB10001424127887323873904578569453308090298?mg=reno64-wsj.

18. Hans A. von Spakovsky, *Texas Residents Who Support Voter ID Denied Intervention in DOJ Lawsuit—Will the Same Thing Happen in North Carolina?*, NAT'L REV. ONLINE (Dec. 17, 2013, 8:04 PM), http://www.nationalreview.com/corner/366590/texas-residents-who-support-voter-id-denied-intervention-doj-lawsuit-will-same-thing.

19. Samuel Issacharoff, Comment, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 95-96, 117 (2013).

20. Bernard Grofman, *Devising a Sensible Trigger for Section 5 of the Voting Rights Act*, 12 ELECTION L.J. 332, 332 (2013).

hardly a thing of the past notwithstanding the raw voter turnout figures cited in the *Shelby* majority opinion as evidence of a lack thereof.[21]

Reactions from the voting rights community to the *Shelby* decision were predictably harsh. Congressional Representative John Lewis (D-Ga), who was alongside President Johnson in 1965 when he signed the VRA into law, excoriated the Supreme Court's decision:

> When the Supreme Court made the decision, I almost cried. I almost shed some tears . . . . I kept saying to myself, "I wish somehow the members of the Supreme Court—especially the five that voted to put a dagger in the heart and soul of the Voting Rights Act—could walk in our shoes." [22]

Voting rights groups quickly took aim at the decision, with Advancement Project, for example, issuing a statement expressing "disappoint[ment] that the Supreme Court has taken the extreme act of at least temporarily suspending the nation's strongest civil rights protection," and arguing that "[a]mple evidence shows that prior Section 4 formula—which enabled Section 5 to block more than 1,500 discriminatory voting laws from going into effect since its inception, including five last year—is still a critical necessity, and that the formula for those covered states was clearly appropriate."[23] The Campaign Legal Center, a nonpartisan public advocacy group specializing in elections, also decried *Shelby*, saying:

> The Roberts Court proved again that it will not be deterred by Supreme Court precedent, the realities on the ground in our nation; nor will it defer to Congress even when the legislative branch is granted clear authority by the Constitution to remedy our nation's long history of discrimination against racial and language minorities.[24]

The NAACP Legal Defense and Educational Fund, which defended the VRA in *Shelby*, called the Court's decision "extraordinary judicial overreach," which has "left millions of minority voters without the mechanism that has allowed them to stop voting discrimination

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21. David C. Kimball, *Judges Are Not Social Scientists (Yet)*, 12 ELECTION L.J. 324, 324-25 (2013).

22. *The Voting Rights Act: Hard-Won Gains, An Uncertain Future*, NPR (July 21, 2013, 5:58 PM), http://www.npr.org/2013/07/21/204284355/whats-next-for-the-voting-rights-act.

23. *Supreme Court Removes Critical Protection for Voters of Color, Civil Rights Group Pledges to Keep Fighting States That Discriminate*, ADVANCEMENT PROJECT (June 25, 2013), http://www.advancementproject.org/news/entry/scotus-removes-critical-protection-for-voters-of-color#sthash.

24. Ryan J. Reilly, Mike Sacks & Sabrina Siddiqui, *Voting Rights Act Section 4 Struck Down by Supreme Court*, HUFFINGTON POST (June 25, 2013, 10:19 PM), http://www.huffingtonpost.com/2013/06/25/voting-rights-act-supreme-court_n_3429810.html.

before it occurs."[25] Elisabeth MacNamara, President of the League of Women Voters, said the Court "erased fundamental protections against racial discrimination in voting that have been effective for more than 40 years."[26]

B. *The Aftermath of* Shelby

In the wake of *Shelby*, a debate among voting rights and election law scholars started over the future of the VRA's sections 4 and 5. Some legal scholars have argued that race-based criteria for preclearance remain defensible. Gilda Daniels, for example, asserts that Congress should expand section 5's preemptive preclearance power "to protect citizens from discriminatory voting laws."[27] Others, though, have proposed new, arguably race-neutral criteria for preclearance. Chris Elmendorf and Doug Spencer suggest that an alternative requirement for federal preclearance turn on the fraction of residents in a state who hold negative stereotypes of minorities;[28] drawing on the history of litigation under section 2 of the VRA, Bernie Grofman suggests a new trigger mechanism for federal preclearance, namely targeting jurisdictions that have had "multiple section 2 cases brought against them" or those that "have repeatedly been found in violation" of retrogressive changes under section 5;[29] Bruce Cain and Spencer Overton suggest a greater use of the VRA's section 3 "bail-in provision" in light of the concern that Congress in the near future is unlikely to craft more extensive franchise protections.[30] Alternatively, Janai Nelson argues that the courts should adhere to a more narrow construction of disparate impact claims under section 2 (as amended by Congress in 1982), specifically that statistical analyses of vote dilution should look not only at the racial impact "but also [at] the racial context in which this evidence is situated," or what she dubs the "causal context" that defines disparate vote deni-

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25. *Supreme Court Ruling on Voting Rights Opens Door to Wave of Minority Voter Suppression*, NAACP LEGAL DEF. & EDUC. FUND (June 25, 2013), http://www.naacpldf.org/update/supreme-court-ruling-voting-rights-opens-door-wave-minority-voter-suppression (quoting Sherrilyn Ifill, President and Director-Counsel of the NAACP Legal Defense and Educational Fund).

26. Stephanie Drahan, *LWV Reacts to Supreme Court Decision on the Voting Rights Act*, LEAGUE WOMEN VOTERS (June 25, 2013), http://lwv.org/press-releases/lwv-reacts-supreme-court-decision-voting-rights-act.

27. Gilda R. Daniels, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century*, 81 GEO. WASH. L. REV. 1928, 1934 (2013).

28. *See* Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After* Shelby County, 102 CALIF. L. REV. 1123, 1162 (2014).

29. Grofman, *supra* note 20, at 334.

30. *See* Bruce E. Cain, *Moving Past Section 5: More Fingers or a New Dike?*, 12 ELECTION L.J. 338, 340 (2013); Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19, 30 (2013).

al.[31] Finally, Rick Hasen takes a broader view, arguing that since race and party are tightly intertwined, federal courts should ensure that the rights of voters remain protected from maneuvers that could be interpreted as having harmful effects on the grounds of either party or race.[32] Sam Bagenstos labels this approach "universalist" since it seeks to "provide uniform protections to everyone" as opposed to, say, a particular racial group.[33]

Concomitant with the post-*Shelby* debate over the future of preclearance and possible trigger mechanisms for federal oversight of state-level and local election procedures, election law changes across many states are underway in various forms. Mississippi, Texas, and Virginia, for example, have begun implementing voter identification requirements that prior to *Shelby* could have faced extensive federal scrutiny.[34] In response to the Texas voter identification law, the federal Department of Justice has under section 2 of the VRA filed suit against the voter identification law known as Senate Bill 14, requesting that federal courts enjoin key sections of this bill and make Texas subject to the type of preclearance that it faced pre-*Shelby*.[35] Other states—Arizona and Kansas, the former previously a section 4 jurisdiction—have embarked on dual-registration systems, requiring proof of citizenship for voters wishing to cast their ballots in state elections.[36] Note that the Supreme Court ruled in *Arizona v. Inter Tribal Council of Arizona* that states cannot require proof of citizenship to vote in federal elections.[37] Dale Ho, Director of the ACLU's Voting Rights Project, notes that dual registration systems "were set up after Reconstruction alongside poll taxes, literacy tests and all the other devices that were used to disenfranchise African-American voters."[38] In Ohio legislative efforts are currently underway as of the writing of this paper not only to eliminate a week from early voting but also, as in North Carolina, to eliminate the so-called "Golden

31. Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 586 (2013).

32. *See* Hasen, *supra* note 8, at 61-62.

33. Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After* Shelby*)*, 123 YALE L.J. 2838, 2838 (2014).

34. Wendy Underhill, *Voter Identification Requirements/Voter ID Laws*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx (last visited Mar. 8, 2016).

35. Complaint at 14, United States v. Texas, No. 2:13-CV-00263 (S.D. Tex. Aug. 22, 2013), 2013 WL 4479214.

36. *See* Chelsea A. Priest, Essay, *Dual Registration Voting Systems: Safer and Fairer?*, 67 STAN. L. REV. ONLINE 101, 101-02 (2015), http://www.stanfordlawreview.org/sites/default/files/online/articles/67_Stan_L_Rev_Online_101_Priest.pdf.

37. *See* Arizona v. Inter Tribal Council of Arizona, 133 S. Ct. 2247, 2260 (2013).

38. Ari Berman, *Separate and Unequal Voting in Arizona and Kansas*, NATION (Oct. 15, 2013), http://www.thenation.com/blog/176650/separate-and-unequal-voting-arizona-and-kansas.

Week" that has permitted eligible citizens of Ohio to register and vote on the same day.[39] Even before *Shelby*, many states in the past several years have created new voter identification rules and passed restrictions on absentee and early voting, and Keith Bentele and Erin O'Brien, as well as Will Hicks and his coauthors, argue that this behavior follows a well-worn tradition in the United States of using ballot access laws for partisan purposes.[40]

C. North Carolina's Voter Information and Verification Act

The original version of VIVA—called House Bill 589—was filed in the North Carolina House on April 4, 2013, and at that time this proposed legislation was essentially a bill aimed at establishing a photo identification requirement for in-person voting in North Carolina. The early 2013 version of House Bill 589, for example, did not alter the length of the state's early voting period.[41] The North Carolina House passed (81 votes in favor, 36 opposed) House Bill 589 on April 24, 2013;[42] the North Carolina Senate received the legislation on the subsequent April 25, and following that date, legislative action on this bill ceased until late July 2013.

On July 23, 2013, a committee substitute for House Bill 589 was adopted in the North Carolina Senate, and with respect to the original bill, this substitute narrowed the types of permitted forms of voter photo identification, cut the number of early voting days in North Carolina by a week, eliminated same day registration and voting during early voting, and made other changes to the North Carolina electoral law.[43] Regarding narrowing the acceptable forms of voter photo identification, for example, an employee identification card was ac-

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39. *See* Ari Berman, *Ohio GOP Resurrects Voter Suppression Efforts*, NATION (Dec. 4, 2013), http://www.thenation.com/blog/177454/ohio-gop-resurrects-voter-suppression-efforts.

40. *See* Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL. 1088, 1091 (2013); William D. Hicks, Seth C. McKee, Mitchell D. Sellers, & Daniel A. Smith, *A Principle or a Strategy? Voter Identification Laws and Partisan Competition in the American States*, 68 POL. RES. Q. 18, 19-20 (2015); *see also* Kara Brandeisky et al., *Everything That's Happened Since Supreme Court Ruled on Voting Rights Act*, PROPUBLICA (Nov. 4, 2014, 12:31 PM), http://www.propublica.org/article/voting-rights-by-state-map (presenting a map-based display of changing voting rights since *Shelby*). *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000) (surveying the history of the right to vote in the U.S.).

41. For the text of the original House Bill 589, see H. B. 589, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013), http://www.ncleg.net/Applications/BillLookUp/LoadBillDocument.aspx?SessionCode=2013&DocNum=3118&SeqNum=0.

42. Vote History of House Bill 589 / S.L. 2013-381, N.C. GEN. ASSEMBLY, http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?BillID=H589&Session=2013 (last visited Mar. 8, 2016).

43. Voter Information Verification Act, H.B. 589, 2013 Gen. Assemb., Reg. Sess. (as passed by N.C. Senate, July 23, 2013), http://www.ncleg.net/Applications/BillLookUp/LoadBillDocument.aspx?SessionCode=2013&DocNum=7216&SeqNum=0.

ceptable under the original House Bill 589 but not under the substitute; moreover, expired forms of photo identification were acceptable under the former as long as date of expiry was fewer than ten years in the past. Notwithstanding the additional restrictions called for in the substitute House Bill 589, this piece of legislation passed (33 in favor, 14 opposed) the North Carolina Senate on July 25, 2013, and was sent immediately thereafter to the House, passing the lower chamber several hours later (73 in favor, 41 opposed), at 10:39 p.m.[44] House Bill 589 was signed into law by North Carolina Governor Pat McCrory thus producing what is now known as VIVA.

The passage of VIVA has engendered an acrimonious dispute between the Act's supporters, who describe the new legislation as protecting the integrity of North Carolina's election procedures, and its critics, who see VIVA as a bill designed to suppress votes. Particularly notable about the current dispute in North Carolina is the question of whether the Court's abandonment of section 5 federal preclearance is a harbinger of new attempts to insert race into debates about voting rights and ballot access.

Indeed, critics of VIVA have alleged that the Act's cut in North Carolina's early voting period might have differential effects on black voters in the state.[45] North Carolina Attorney General, Democrat Roy Cooper, whose job responsibilities include enforcing VIVA, claims the new law threatens "fifty years of progress" in the state[46] and has said as well that "[a] lot of bad public policy was lumped into this bill at the last minute."[47] And upon passage of VIVA, nine-term Democratic state Senator Ellie Kinnaird resigned in protest, saying that the law was designed "to deny people their right to vote."[48] Nonetheless, supporters of VIVA argue that the bill protects the right to vote for all eligible North Carolinians and, in addition, brings North Carolina

44. Vote History of House Bill 589 / S.L. 2013-381, N.C. GEN. ASSEMBLY, http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?BillID=H589&Session=2013 (last visited Mar. 8, 2016).

45. *See, e.g.*, Richard L. Hasen, *Supreme Error*, SLATE (Aug. 19, 2013, 12:08 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/08/north_carolina_s_speedy_vote_suppression_tactics_show_exactly_why_the_voting.html; John Peragine, *North Carolina Prosecutor Takes Shots at the Laws He's Obliged to Enforce*, N.Y. TIMES (Oct. 24, 2013), http://www.nytimes.com/2013/10/25/us/north-carolina-prosecutor-takes-shots-at-the-laws-hes-obliged-to-enforce.html?.

46. Roy Cooper, *North Carolina: Threatening Fifty Years of Progress in Ten Months*, HUFFINGTON POST (Oct. 15, 2013, 10:12 AM), http://www.huffingtonpost.com/roy-cooper/north-carolina-republicans_b_4100573.html.

47. *Roy Cooper Is Right to Object to Laws That Ill-serve the Public*, ROY COOPER (Nov. 9, 2013), 2013 WLNR 28264734.

48. Mollie Reilly, *Ellie Kinnaird, Nine-Term State Senator, Resigns over North Carolina Voter ID Law*, HUFFINGTON POST (Aug. 20, 2013, 9:23 AM), http://www.huffingtonpost.com/2013/08/20/ellie-kinnaird-resigns_n_3784644.html; *see also* Ellie Kinnaird, Resignation Newsletter, ELLIE KINNAIRD, http://elliekinnaird.org (last visited Mar. 8, 2016) (presenting the full text of Senator Kinnaird's statement).

into alignment with a majority of other states that do not allow voters to register to vote and then vote on the same day. Upon signing it into law, Governor McCrory said in a press release, "I am proud to sign [VIVA] into law. Common practices like boarding an airplane and purchasing Sudafed require photo ID and we should expect nothing less for the protection of our right to vote."[49] Senate President Pro Tem Phil Berger argued similarly, saying that "[VIVA] is a common sense measure to address concerns that a lot of people have about voting, about making sure that when people vote, they are who they say they are."[50]

As of this Article's writing VIVA continues to face multiple legal challenges. On September 30, 2013, the federal Department of Justice filed a lawsuit in federal district court alleging that parts of VIVA violate section 2 of the VRA insofar as they "would have the result of denying or abridging the right to vote on account of race, color, or membership in a language minority group."[51] The lawsuit specifically comments on VIVA's decrease in early voting hours and its elimination of same-day voter registration as well as aspects of VIVA that deal with provisional ballots and voter identification. The Department of Justice's lawsuit came on the heels of two other federal cases, both filed on August 12, 2013. In one of these federal suits, the North Carolina State Conference of the NAACP and other plaintiffs claim VIVA violates section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the Constitution.[52] In the second, League of Women Voters and others challenge VIVA, alleging the law would result in "the denial or abridgement of the right of African Americans in North Carolina to vote in contravention of Section

49. Press Release, Patrick McCrory, Governor of N.C., Governor McCrory Signs Popular Voter ID into Law (Aug. 12, 2013), https://votesmart.org/public-statement/803704/governor-mccrory-signs-popular-voter-id-into-law#.VeyBYZ1Viko. The press release also notes that 37 states do not allow same-day registration followed immediately by voting. *Id.* ("This new law also aligns North Carolina with the majority of states (37) that do not allow a person to register and vote on the same day.").

50. Ben Brown, *Voter ID Bill, Proposed System Overhaul Prompts Protest in Wilmington*, PORT CITY DAILY (July 25, 2013), http://portcitydaily.com/2013/07/25/voter-id-bill-system-overhaul-prompts-protest-in-wilmington.

51. Complaint at 31, United States v. North Carolina, No. 1:13-CV-00861 (M.D.N.C. Sept. 30, 2013), 2014 WL 494911.

52. *See* Complaint at 23, 27, 29, N.C. State Conference of the NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014) (No. 1:13-CV-00658), 2013 WL 4053231. The plaintiffs later amended their complaint but still included the two Fourteenth and Fifteenth Amendment claims. *See* First Amended Complaint at 35, 37, N.C. State Conference of the NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014) (No. 1:13-CV-00658), 2013 WL 6253645. As of this paper's writing, the separate federal lawsuits were consolidated into a single case, which has been partially affirmed and partially reversed by a 4th Circuit Opinion. League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 249 (4th Cir. 2014).

2 of the Voting Rights Act."[53] Beyond these three federal lawsuits, the League of Women Voters of North Carolina and various other plaintiffs have challenged VIVA in state court, arguing that the law's requirement pertaining to photo identification "imposes a [sic] unconstitutional property requirement in violation of Article I, § 10 [of the North Carolina state constitution] by requiring voters to possess not only an acceptable photo ID, but also the documents necessary to obtain the photo ID and the resources necessary to procure those documents."[54]

VIVA has many facets, and our analysis here focuses on what appear to be the most significant aspects of the Act. These include the changes VIVA made to the North Carolina early voting period (shortening it from seventeen days to ten); the elimination of same day voter registration; the creation of a photo identification requirement for voters albeit with a special dispensation for voters at least seventy years old; and, the elimination of preregistration of eligible sixteen and seventeen year olds unless they turn eighteen before an upcoming election. The existence of aspects of VIVA that we do not address should not be taken as an endorsement of the claim that these aspects are race-neutral or indeed neutral in any other fashion. Indeed, as Jonathan Wand and his coauthors and Laurin Frisina and her coauthors illustrate, seemingly anomalous or innocuous changes to electoral protocols can have serious consequences for elections.[55]

As a follow-up to a remark we made in the introduction, we emphasize here that we are not interested in this Article in whether VIVA may or may not have partisan effects in North Carolina. Insofar as race is often correlated with political preferences,[56] any conclusions we draw about differential effects of VIVA across racial groups will almost by construction have partisan implications as well. More-

53. Complaint at 2, League of Women Voters of N.C. v. North Carolina, No. 1:13-CV-00660 (M.D.N.C. Aug. 12, 2013), http://moritzlaw.osu.edu/electionlaw/litigation/documents/LOWVv.Howard.Complaint.pdf. There is also an intervening motion on this case. *See* Memorandum of Law in Support of Motion to Intervene as Plaintiffs by Louis M. Duke, Charles M. Gray, Asgod Barrantes, Josue E. Berduo, and Brian M. Miller, League of Women Voters of N.C. v. North Carolina, No. 1:13-CV-00660 (M.D.N.C. Nov. 25, 2013), 2014 BL 220658.

54. Complaint at 20, Currie v. State, 13-CV-001419 (N.C. Orange Cnty. Super. Ct. Div. Aug. 13, 2013), http://moritzlaw.osu.edu/electionlaw/litigation/documents/Currie-v-NC.pdf.

55. *See* Jonathan N. Wand, Kenneth W. Shotts, Jasjeet S. Sekhon, Walter R. Mebane, Jr., Michael C. Herron & Henry E. Brady, *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 AM. POL. SCI. REV. 793, 803 (2001); *see also* Laurin Frisina, Michael C. Herron, James Honaker & Jeffrey B. Lewis, *Ballot Formats, Touchscreens, and Undervotes: A Study of the 2006 Midterm Elections in Florida*, 7 ELECTION L.J. 25, 40-41 (2008).

56. *See, e.g.*, Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 217-18 (2013); Hasen, *supra* note 8, at 61.

over, the partisan implications of election-reform efforts presumably weigh heavily on office-motivated politicians. Still, we avoid the matter of partisanship because this construct is not protected by the VRA, and we leave for future research the question of whether VIVA's changes to voting laws in North Carolina could alter the partisan balance in the state.

III. NORTH CAROLINA REGISTRATION AND VOTING DATA

Our assessment of the extent to which VIVA has differential effects across racial groups in North Carolina is based on examining historical patterns in North Carolina elections. We have noted above, for example, that VIVA altered the length of North Carolina's early voting period, and this motivates our upcoming analysis of the types of voters in North Carolina who historically have tended to vote early. Such an analysis allows us to determine the types of voters who will be most affected by VIVA's shortening of the North Carolina early voting period.

We consider here five elections, in particular those that took place in 2008, 2009, 2010, 2011, and 2012. This collection of elections provides us with variance in several ways. Of these five elections, three were general—2008, 2010, and 2012—and two were off-year—2009 and 2011. Moreover, of the general elections, two were presidential—2008 and 2012—and the third was the 2010 midterm election that lacked a presidential contest.

We draw on three different data sources when analyzing our five elections of interest, and one key source is the North Carolina statewide voter file. Most of our analysis relies on a version of this file downloaded from the North Carolina State Board of Elections (SBOE) on September 5, 2013. We call this file the September 2013 voter file. To a limited extent, we also use copies of the North Carolina voter file that to the best of our knowledge were created in February 2009 and February 2011. We use these latter two files only when assessing the racial composition of the North Carolina registered voter pool as of February 2009 and February 2011, respectively, and below we make it clear when these two files are invoked.[57]

The September 2013 North Carolina voter file contains a list of registered voters in North Carolina.[58] It also contains names of previously registered voters who as of September 2013 were no longer registered in North Carolina because, for example, they had moved out of the state or had died. For both currently or previously registered voters in North Carolina, the September 2013 voter file contains

57. Michael McDonald of George Mason University provided these files to us.

58. To the best of our knowledge, the September 2013, voter file lists North Carolina registered voters as of the date that the file was created.

basic demographics (e.g., age, gender, and race), registration dates, and so forth. North Carolina voter files also include history information that describes for each registered North Carolina voter whether, and if so how, he or she participated in various elections. Such history information does not include actual vote choices, of course.[59]

As a consistency check on our September 2013 voter file consider Table 1. For the General Elections of 2008, 2010, and 2012, this table lists official turnout as characterized by the North Carolina SBOE, turnout based on counts in our voter file, and associated coverage percentages.[60] The three percentages in Table 1 are all very close to 100, and the very small discrepancies in the table may reflect provisional ballots and minor data errors.

Table 1: Voter File Coverage

Election	Official Turnout	Voter File Turnout	Coverage %
2008 General	4,354,052	4,347,938	99.86
2010 General	2,700,393	2,699,143	99.95
2012 General	4,542,488	4,540,838	99.96

Note: Table 1 reports general election participation counts from the September 2013 voter file, ignoring voters whose participation methods are listed as "elig-nv" *and* "abs-nv". *To the best of our knowledge, voters with these classifications did not cast valid ballots. Percentages are listed to four significant digits.*

North Carolina voter files contain fields that describe the registration statuses of each registered voter in the state. When a registered voter moves out of North Carolina or moves across counties within the state, said voter's record is marked as "removed." Despite the use of this word, a so-called removed record is not eliminated from the voter file; rather, it is simply marked as removed. If prior to September 2013, for example, a North Carolina registered voter moved from one county in the state to another, and in the process changed her county of registration, she has two records in the voter file, one corresponding to her initial county of registration and a second record cor-

59. The term "voter file" is a generic one that applies across states. Voter files provide snapshots of electorates at given moments in time. The September 2013 North Carolina voter file actually consists of two separate files. One file contains voter demographics and related variables, and the other file contains voter participation codes. Both files are on file with the authors. Together these files constitute one instance of the North Carolina voter file.

60. *Voter Turnout*, N.C. STATE BOARD OF ELECTIONS, http://ncsbe.azurewebsites.net/voter-turnout (last visited Mar. 8, 2016) (official statewide turnout for North Carolina elections). Per a phone conversation on January 8, 2014 with George McCue of the North Carolina SBOE, the overall turnout numbers on this website do not include provisional ballots that were not counted.

responding to her destination county. In addition, a North Carolina registered voter's status may change to "denied" if a county establishes that the voter "is not qualified to vote based on age, citizenship, residence or conviction of a felony."[61] For example, our September 2013 voter file contains 7,345,422 individual-level records, and there were 6,465,982 registered voters whose status as of the date when the file was created was neither "denied" nor "removed." These voters constitute the registered voter pool in North Carolina as of September 2013. Associated with the approximately 7.3 million records in the voter file are 28,422,881 participation records; each participation record describes how a given registered voter participated in an election.

Beyond voter files, the North Carolina SBOE creates for general and off-year elections what are called absentee files, and in September 2013 we downloaded absentee files for the 2008, 2009, 2010, 2011, and 2012 elections. So-called absentee files constitute our second data source, and an absentee file for a given election lists the North Carolina voters who voted early and absentee.[62] In North Carolina early voting is known as "one-stop" absentee voting, and this contrasts with what in the state is called absentee voting by mail. The latter form of voting is what is traditionally known simply as absentee voting. To keep matters clear, henceforth we refer to one-stop absentee voting as early voting and absentee voting by mail as simply absentee voting.

Table 2 describes three North Carolina registered voter pools and five early voting electorates. The registered voter pools reflect the collection of registered voters in North Carolina as of a given date, and the early voting electorates are associated with individual elections. Here we use our complete set of three voter files so that we have three snapshots of the North Carolina registered voter pool at three different times. The counts in Table 2 are disaggregated by race—in particular, using the categories of black and white—as these two racial groups are the largest two such groups in North Carolina. For example, as of February 2009, blacks and whites comprised approximately 94.89% of all registered voters in North Carolina.[63]

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61. GARY O. BARTLETT, N.C. STATE BD. OF ELECTIONS, APRIL 2013 SBOE-DMV ID ANALYSIS 2 (2013), http://www.democracy-nc.org/downloads/SBOE-DMVMatchMemoApril2013.pdf. The voter file field titled *voter_status_desc* specifies whether a registered voter's record is denied or removed.

62. For North Carolina absentee voter files, see *Absentee Data*, N.C. ST. BOARD OF ELECTIONS, http://ncsbe.azurewebsites.net/absentee-data (last visited Mar. 8, 2016).

63. Our five absentee files, one per each election in 2008 through 2012, contain a small number of voters whose recorded dates of early voting lie outside of official North Carolina statewide early voting periods. These voters do not appear in Table 2, and they are not part of the analysis in this paper.

Table 2: Basic Counts from North Carolina Voter Files and Absentee Files

Voter Type	Total	Black	White	Percent Black	Percent White
Reg. Feb. 2009	6,154,625	1,330,188	4,509,917	21.61	73.28
Reg. Feb. 2011	6,107,325	1,321,338	4,460,138	21.64	73.03
Reg. Sept. 2013	6,465,982	1,452,855	4,589,342	22.47	70.98
Early 2008	2,419,206	688,080	1,624,920	28.44	67.17
Early 2009	85,496	19,103	64,270	22.34	75.17
Early 2010	909,122	195,605	688,313	21.52	75.71
Early 2011	82,195	23,218	56,457	28.25	68.69
Early 2012	2,567,555	743,026	1,687,886	28.94	65.74

Note: "Reg." indicates registered voter. Registered voter counts and percentages are based on February 2009, February 2011, and September 2013 voter files, ignoring all records flagged as removed or denied. Early voting electorates are based on North Carolina SBOE absentee files, and early voters who have dates of voting outside of official North Carolina early voting periods are ignored. Percentages are reported to four significant figures.

We will come back to this point shortly, but Table 2 shows that early voters in North Carolina tend to be disproportionately black compared to the overall pool of registered voters in the state. One can readily see this in Table 2 by comparing percent black of the five early voting electorates with the various black percentages across the table's three registered voter pools. An exception to this occurred in the 2010 General Election, as the black early voting percentage was slightly lower than the black percentage of the February 2011 registered voter pool.

Another implication of Table 2 is that early voting in North Carolina is a frequently used method of electoral participation. For example, over 2.5 million North Carolina residents voted early in the 2012 General Election. The magnitude of this number in conjunction with the magnitudes of early voting counts for the other elections in Table 2 bring into relief one reason that VIVA's changes to North Carolina's early voting period have been so controversial.

Our third and final data source consists of two lists of registered voters who lack driver's licenses and a form of identification called a non-operator identification card. These two forms of identification are managed by the North Carolina Department of Motor Vehicles (DMV) and are permissible forms of voter identification as specified by VIVA. Our lists of registered voters who lack these two types of identification were created by the North Carolina SBOE and are described in two public reports, the first of which was released on January 7, 2013, and is titled "2013 SBOE-DMV ID Analysis" and the second of which

was released on April 17, 2013, and is titled "April 2013 SBOE-DMV ID Analysis." These two reports detail how the SBOE attempted to determine which registered voters in North Carolina lack driver's licenses and non-operator identification cards, and as described in the reports, the SBOE merged a voter file with a DMV-supplied list of individuals who have these forms of identification. Voter file names that could not be matched with names in the DMV list are assumed to lack driver's licenses and non-operator identification cards, and the implication is that these individuals face relatively higher risks of not having the types of identification necessary to vote. The January list of so-called unmatched registered voters (i.e., registered voters who appear to have neither a driver's license nor a non-operator identification card) contains 612,955 names and the April list, 318,643 names. These numbers differ roughly by an order of magnitude, and the discrepancy between them reflects the fact that the SBOE used a different merging algorithm in April 2013 than it had originally.[64]

IV. RACIAL TRENDS IN EARLY VOTING

We begin our assessment of the extent to which VIVA will have differential effects across racial groups in North Carolina with an analysis of early voting in the state in the general and off-year elections of 2008 through 2012. Prior to VIVA's enactment, the early voting period in North Carolina started three Thursdays before a Tuesday Election Day. This yielded an early voting period that could extend up to seventeen days, but in some years past this period contained fewer days because of a lack of early voting on what would have been the first Sunday of early voting.

Figure 1 displays for our five elections of interest early voting counts broken down by racial group. There are five panels in the figure, and the horizontal axis in each panel list days on which early

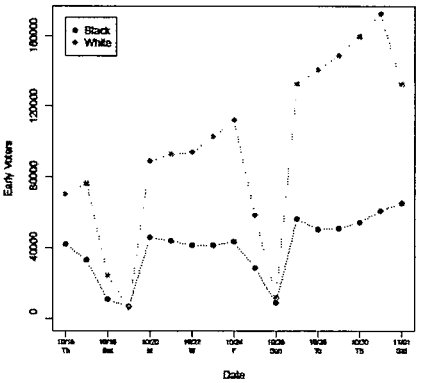
64. The January 2013 unmatched registered voter list, the April 2013 list, and an accompanying January report are on file with the authors. *See also* BARTLETT, *supra* note 61.

We checked whether the two unmatched voter lists contain any duplicate records where duplicate records are those with common county and county-level voter identification numbers; they do not. One issue regarding dates, though, is worth noting. The registration date field in the January file (it is called registr_dt) contains four-digit years so that, for example, 1911 can be distinguished from 2011; we checked whether any registration dates in this file were after January 2, 2013, and none was. That is consistent with the North Carolina SBOE report that describes the January file as drawing on individuals who were registered as of January 1, 2013. The registration date field for the April 2013 unmatched voter file contains two-digit years, and this leads to ambiguity between, say, 1950 and 2050. According to the North Carolina SBOE, the April file is based on registrants as of March 25, 2013; thus, a registrant with an ambiguous registration year, one that would lead to a registration post-March 25, 2013, is assumed to have a registration year in the twentieth century.

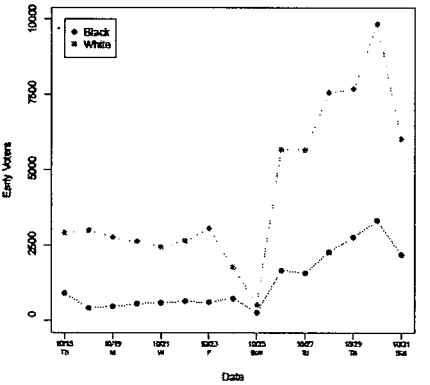
voting took place; not all horizontal axes have the same number of dates, and this reflects the occasional lack of Saturday and/or Sunday voting in an initial weekend of early voting. The arrangement of the panels in Figure 1 incorporates the fact that the elections of 2008, 2010, and 2012 were general elections whereas those in 2009 and 2011 were off-year elections. Within these two groupings the vertical axes are identical across the panels in Figure 1.

Figure 1: Daily Early Voting Totals by Race

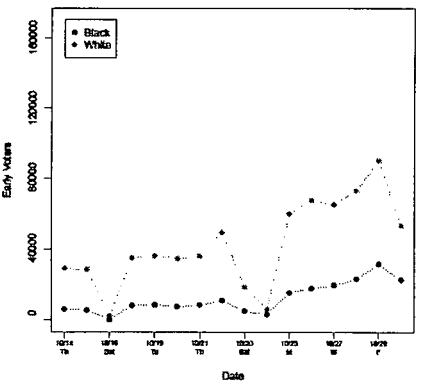
(a) 2008



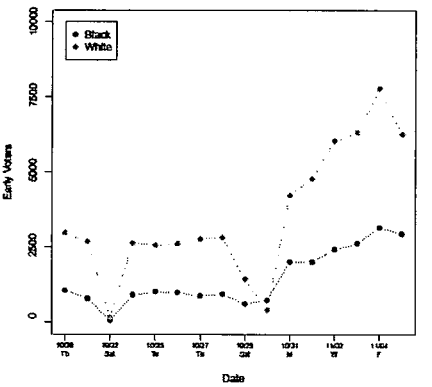
(b) 2009



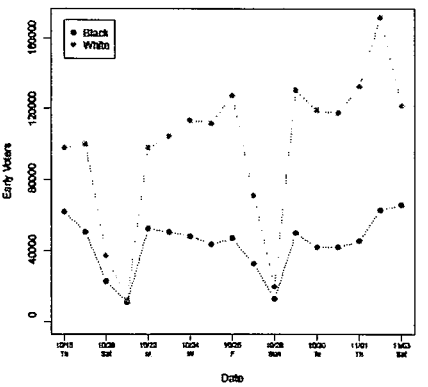
(c) 2010



(d) 2011



(e) 2012



The raw numbers in Figure 1 show that early voting in North Carolina is more heavily used in general elections than in off-year elections. This reflects the fact that the number of overall voters in 2009 and 2011, 508,372 and 495,296, respectively, was low compared to, say, the 2012 General Election, in which official turnout was 4,542,488 voters. See Table 3 for these numbers. The 2010 General Election was a midterm as opposed to a presidential election, and early voting counts in this year were noticeably lower than in 2008 and 2012. This is not an artifact of early voting: overall turnout in midterm elections is typically much lower than in presidential elections,[65] and we should not be surprised to see lower early voting turnout in 2010 than in 2008 and 2012.

Notwithstanding differences in overall turnout, the panels in Figure 1 make it clear that early voting in North Carolina is used by thousands of voters, many hundreds of thousands in high-turnout elections like those that took place in 2008 and 2012. The point of this is simply to note that early voting in North Carolina is not a fringe phenomenon and that any changes to the state's early voting laws have the potential to affect thousands of voters. We mentioned this earlier, and to get some perspective on the magnitudes of the counts in Figure 1, consider the aforementioned Table 3. This table lists overall election turnout in North Carolina for our five elections of interest, and in 2008 and 2012 early voting turnout constituted more than half of overall voter turnout. In contrast, early voters were approximately one-third of all voters in 2010 and around sixteen percent of all voters in 2009 and 2011.

Table 3: Overall and Early Voting Turnout

Election	Overall Turnout	Early Voting Turnout	Percent Early
2008	4,353,739	2,419,206	55.57
2009	508,372	85,496	16.82
2010	2,700,383	909,122	33.37
2011	495,296	82,195	16.60
2012	4,542,488	2,567,555	56.52

Note: Percentages are reported to four significant figures.

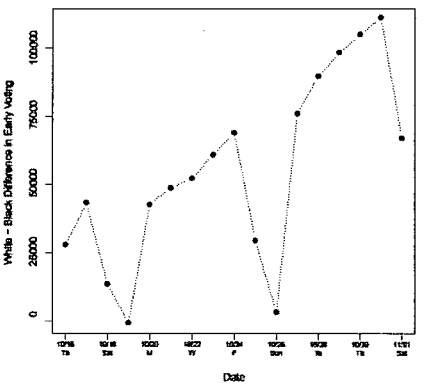
The five panels in Figure 1 report daily counts of early voters, and we can use these panels to understand patterns in temporal variability of early voting in North Carolina. To this end, several patterns

65. *See, e.g.*, Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963, 966 tbl.1 (2001).

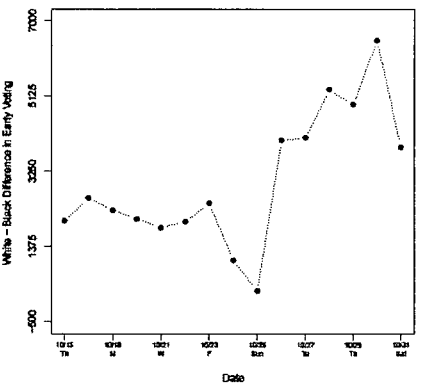
are evident in the figure. First, in all five elections pictured in the figure, there were disproportionately fewer early voters on weekends than on weekdays; this holds for both black and white early voters. Second, within weekends themselves, Sundays saw fewer early voters than Saturdays, again for both black and white voters. Third, on almost every day of early voting, more whites than blacks voted early; this is consistent with the fact that there are more whites than blacks in North Carolina, and this was evident in the aforementioned Table 2. Fourth, Figure 1 shows that, weekends notwithstanding, North Carolina early voters tend to vote in the second half of the state's early voting period; however, the matter of first versus second week of early voting (broadly construed insofar as North Carolina does not have exactly a two-week early voting period) is not constant across racial groups. Namely, the white-black gap in early voting turnout appears to increase as the early voting period progresses.

Figure 2: Daily White Black Differences in Early Voting Counts

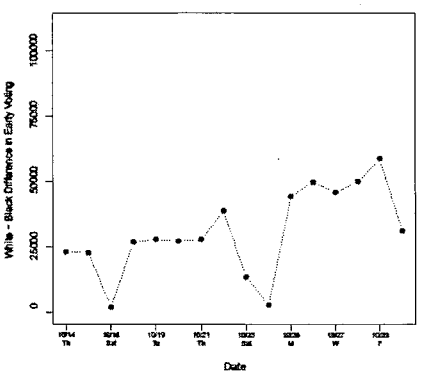
(a) 2008



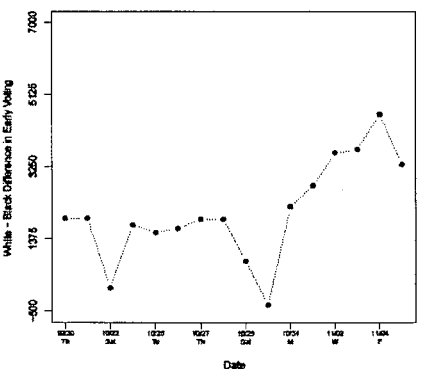
(b) 2009



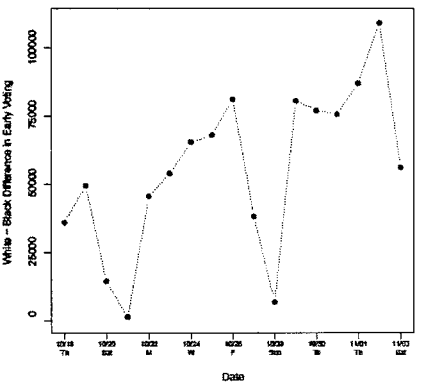
(c) 2010



(d) 2011



(e) 2012



This latter point is particularly noteworthy in light of VIVA's elimination of the first week of early voting in North Carolina. More details on the white-black early voting gap are reported in Figure 2, which plots white-black differences in early voting counts from the General Elections of 2008 through 2012. To be precise, the differences in Figure 2 are computed by subtracting black early voting counts in Figure 1 from corresponding white counts. When a difference on a particular day is relatively large and positive, then many whites compared to blacks early voted on that day. A white minus black early voting difference that is negative connotes a day on which more blacks cast their ballots early compared to whites.

Temporarily ignoring the evident weekend effects, what is clear in Figure 2 is that the five pictured white-black difference sequences in early voting turnout increase in time. In other words, early voting blacks tend to cast their ballots earlier than do early voting whites. Why this phenomenon obtains is beyond the scope of this study, and it would be difficult to address this matter with voter file data alone.[66] Regardless, Figure 2 documents that the two largest racial groups in North Carolina have historically voted at different times during the past early voting periods in the state.

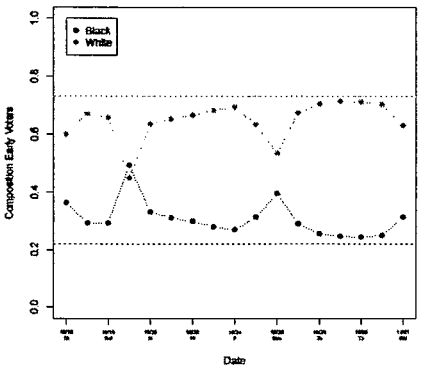
Weekends break up the patterns in Figure 2, but even here we see evidence of a changing white-black early voting gap. Comparing (when possible) the second Saturday of early voting to the first Saturday of early voting or the second Sunday of early voting to the first Sunday of

66. One explanation may lie in mobilization efforts carried out by groups such as Democracy North Carolina and the North Carolina NAACP, who have worked with African American congregations as well as the General Baptist State Convention and other churches, to get out the vote as part of an early voting "Souls to the Polls" Project. *See Souls to the Polls*, DEMOCRACY N.C., http://nc-democracy.org/get-involved/souls-to-the-polls (last visited Mar. 8, 2016).

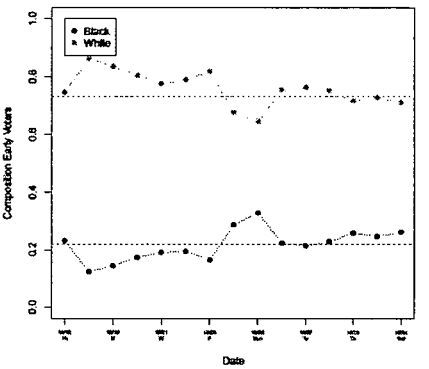
early voting shows that the white-black early voting gap is greater in second weekend early voting compared to first weekend early voting.

Figure 3: Racial Composition of Early Voting Electorates

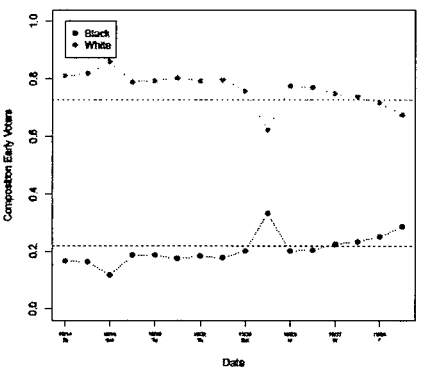
(a) 2008



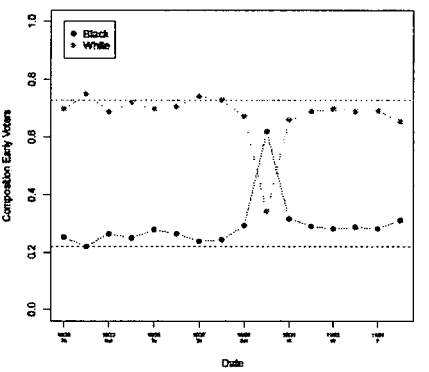
(b) 2009



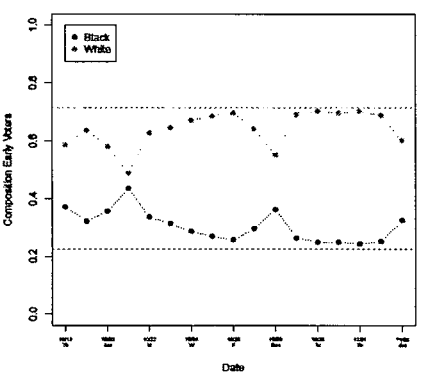
(c) 2010



(d) 2011



(e) 2012



This is consistent with the idea that black early voters in North Carolina tend to vote earlier in the allotted period than white early voters. Herron and Smith find evidence of similar weekend early voting effects in Florida in the 2008 and 2012 General Elections.[67]

Another perspective on the difference between black and white early voting rates in North Carolina can be gleaned by considering the fraction of a day's early voting electorate that was black (similarly, white) and then comparing this fraction to the fraction of blacks (similarly, whites) in a corresponding registered voter pool. With this in mind, for our five elections of interest Figure 3 plots for each early voting day the composition of the early voting electorate that is black and the composition that is white. On each early voting day these compositions sum to a number close to one because there are North Carolina early voters in all five of our elections of interest who were neither black nor white. The panels in Figure 3 contain dashed horizontal lines that indicate the fraction of the North Carolina registered voter pool that was black and white based on an appropriate voter file. The dashed lines reflect the black and white registered voter percentages in Table 2.[68]

Several things are apparent in Figure 3. First, in presidential election years—2008 and 2012—the early voting electorate in North Carolina was disproportionately black on every day of early voting. In Figures 3(a) and 3(c), that is, every black dot lies above its corresponding dashed line and every white dot below its dashed line. In the 2010 General Election, which was a general election yet did not feature a presidential contest, this pattern does not hold. In 2010, whites were disproportionately represented among early voters up until the end of the early voting period, when blacks became the disproportionately represented group.[69]

Second, the presence of weekend effects in Figure 3 is evident: the early voting electorate in North Carolina is disproportionately black on weekends compared to the registered voter pool in North Carolina. Third, in the presidential election years of 2008 and 2012, the black fraction of the early voting electorate gradually decreased over the course of the early voting period. There were only 17 days in the 2008

67. Michael C. Herron & Daniel A. Smith, *Race, Party, and the Consequences of Restricting Early Voting in Florida in the 2012 General Election*, 67 POL. RES. Q. 646, 656 (2014).

68. Table 2 shows that within the North Carolina registered voter pool, the black fraction increased slightly in 2013. This is incorporated in the placement of the dashed line in Figure 3(c), although visually speaking the height of this line is very similar to the heights of the dashed lines in Figures 3(a) and 3(b).

69. We computed difference-in-proportion z-statistics for each black percentage in Figure 4(a), 4(b), and 4(c). All the z-statistics—those that are positive because the black percentage of early voters lies above a dotted line and in addition those that are negative—are significantly different than zero at conventional confidence levels.

and 2012 early voting periods, of which five days were weekends, and thus we compare in Table 4 fraction black on the first day of early voting with fraction black on the last non-weekend day of early voting. The table shows that the first weekday-last weekday drop in fraction black of the early voting electorate was statistically significant at conventional confidence levels in four of our elections studied, with negative drops in 2008 and 2012 (presidential years) and the opposite in 2010 (midterm election).

Table 4: Fraction Black at Beginning and End of Early Voting Period

Election	First Thursday	Last Friday	Difference	*z*-statistic
2008	0.3611	0.2492	0.1120	69.83
2009	0.2316	0.2463	-0.01463	1.877
2010	0.1683	0.2510	-0.08277	32.83
2011	0.2503	0.2815	-0.03117	3.888
2012	0.3703	0.2518	0.1186	82.01

Note: Results are reported to four significant figures.

Fourth and finally, the dashed lines in the five panels of Figure 3 are notable insofar as they show that black early voters in 2008 and 2012 were overrepresented compared to blacks in the North Carolina voter pool and that white early voters were underrepresented. This pattern of black and white over and under representation obtains on every early voting day in 2012 and has been found in other contexts as well.[70] In 2008 there were some days on which the fraction of white early voters was slightly larger than the fraction of white registered voters in the state, but, as in 2012, black early voters were disproportionately overrepresented on every day of early voting.

V. RACE AND TIMING OF VOTER REGISTRATION

We earlier noted that VIVA altered the voter registration rules in North Carolina. Prior to this legislation's enactment, eligible North Carolina residents could register to vote during early voting and even on Election Day itself; Election Day registrants were not allowed to vote on the day they registered, however. Under VIVA, registration and subsequent voting during North Carolina's early voting period—what is often known as "Same Day Registration"—is no longer

70. *See, e.g.*, Michael C. Herron & Daniel A. Smith, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 ELECTION L.J. 331, 343 (2012).

permitted, and eligible residents in the state who want to register to vote in a General Election must register no later than twenty-five days prior to Election Day.

Are VIVA's changes to voter registration protocols in North Carolina race-neutral? Our initial look at this question considers VIVA's elimination of the opportunity for eligible North Carolina residents to register to vote in the twenty-five days prior to and including Election Day. For the General Elections in 2008, 2010, and 2012, Table 5 describes the total number (see the "All" row in the table) of North Carolina voter registrations in the year before the election as well as the total number of registrations in the twenty-five-day window beforehand. Table 5 also breaks down these registrations into black and white categories; for each election, it reports the percentages of a given registration pool that these two racial groups constituted.

One notable implication of Table 5 is easily summarized: before the elections of 2008-2012, black voter registrations were disproportionately represented in the twenty-five-day period before Election Day. For example, before the 2012 General Election, black voters constituted approximately 28.74% of all registrations in the year prior to Election Day in 2012; in the twenty-five-day period before this day, however, black registrations made up around 30.35%. The black-white registration gaps present in Table 5 all have the same direction, implying that blacks register more frequently in the periods immediately before elections.

For all three elections in Table 5, we carried out difference-in-proportion tests between fraction black of the registration pool in the twenty-five days before an election and fraction black in the 340 days prior to the beginning of the window that starts twenty-five days before an election. For example, according to our voter files, in the period before the 2012 General Election, there were 173,923 total registrations in North Carolina, of which fraction black was approximately 0.3035; these two numbers are in Table 5. In the 340 days prior to the twenty-five-day window, there were 637,129 voter registrations in North Carolina, of which fraction black was approximately 0.2830. The difference between these two proportions is approximately 0.0205, and this difference has a z-statistic that is approximately 16.8, i.e., the difference is statistically significant at conventional confidence levels. In all five elections covered in Table 5, we find statistically significant differences between black registration rates twenty-five days before an election and the preceding 340-day window (calculations available from the authors), and we thus conclude from Table 5 that the black voter registration rate is not constant in the year prior to an election and in fact increases in the twenty-five-day window prior to Election Day.

Table 5: Voter Registrations Before General Elections

		Total		Percentage	
Election	Group	1 Year Prior	25 Days Prior	1 Year Prior	25 Days Prior
2008	All	881,831	177,103	—	—
	Black	275,153	58,652	31.20	33.12
	White	503,150	95,398	57.06	53.87
2009	All	194,089	14,707	—	—
	Black	38,002	3,072	19.58	20.89
	White	13,7911	10,404	71.06	70.74
2010	All	263,731	46,475	—	—
	Black	52,940	11,291	20.07	24.29
	White	187,075	29,126	70.93	62.67
2011	All	242,905	21,773	—	—
	Black	54,304	5,209	22.24	23.92
	White	167,625	14,378	69.01	66.04
2012	All	811,052	173,923	—	—
	Black	233,072	52,790	28.74	30.35
	White	463,733	90,958	57.18	52.30

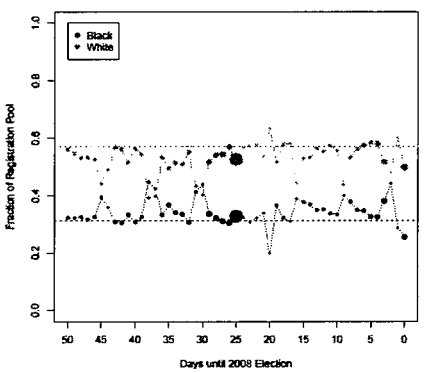
Note: The percentage columns in the table refer to the fraction of a registration cohort that a particular racial group comprises. Percentages are reported to four significant figures.

The language of VIVA focuses attention on the twenty-five-day period before an election, but our registration data allow us to compare daily black and white registration rates. For both blacks and whites and for each election of interest, we calculate using the September 2013 voter file the number of registrations on each day in a fifty-one-day window up to and including Election Day itself. Then, for each day we calculate the racial composition of the day's registration pool by dividing the number of blacks who registered on that day by the number of that day's registrations; this yields a daily time series of black registration compositions. We do the same for whites, thus generating a daily series of white registration compositions. We then plot our black and white sequences in Figure 4, and this figure contains five panels, each of which is associated with an election in North Carolina. The orientation of the panels in Figure 4 is identical to that seen earlier; the various dots in the panels denote race-based registration compositions, and the sizes of the dots are proportional to the overall number of registrations. Each panel in Figure 4 also contains two dashed lines, and these lines reflect the fractions of black and white registrants who registered in North Carolina in the year before a given Election Day.

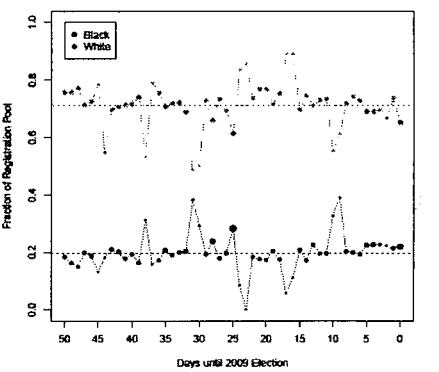
Consider Figure 4(a), which describes trends in registrations that occurred before the 2008 General Election. The 2008 early voting period was seventeen days long, and this period is particularly notable because, pre-VIVA, eligible North Carolina residents could register to vote during early voting and then cast a ballot. Figure 4(a) shows that on most early voting days in 2008, black registrations were disproportionately overrepresented and white registrations, underrepresented. This conclusion follows from the fact that the black-colored dots in Figure 4(a) are for the most part above the dashed black line and the grey dots, below the grey dashed line. We observe similar phenomena in the General Elections of 2010 and 2012, where the black dots in Figures 4(b) and 4(c) are above the corresponding dashed black lines and grey dots, below the grey lines. With respect to the off-year elections in 2009 and 2011, the patterns are more mixed, particularly in 2009, but on average, as shown in Table 5, registrations close to Election Day were disproportionately black.

Figure 4: Daily Race Based Compositions of North Carolina Registrants

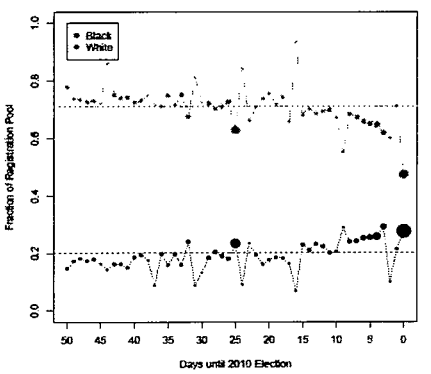
(a) 2008



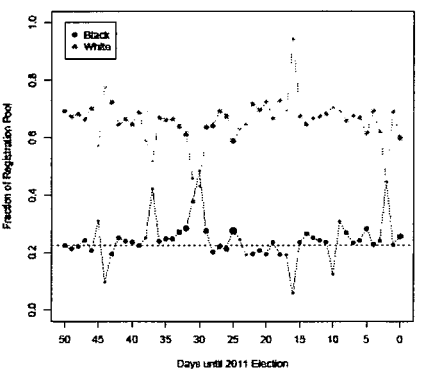
(b) 2009



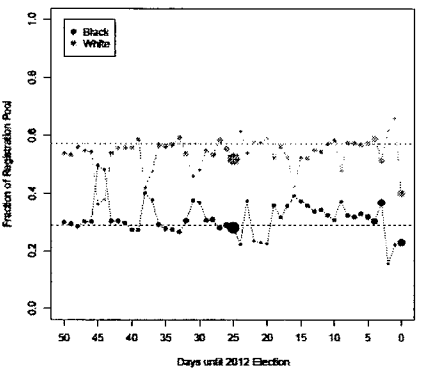
(c) 2010



(d) 2011



(e) 2012



Note: Each dot represents a day's worth of voter registration for a racial group. Dot sizes are proportional to the number of registrations, and the two dots for each day in the figure do not in general sum to one because there are racial groups in North Carolina beyond black and white.

VI. RACE AND AVAILABILITY OF VOTER PHOTO IDENTIFICATION

Our next look at VIVA considers the matter of voter photo identification. This subject is the focus of a variety of existing research projects,[71] and here we contribute to the literature a brief analysis of the availability of identification to currently registered North Carolina residents.

Prior to the passage of VIVA, North Carolina did not have a voter identification requirement. However, VIVA mandates that starting in 2016 all in-person voters in North Carolina must show photo identification prior to casting a ballot, and VIVA contains a list of identification forms that are acceptable for this purpose. This list includes the following eight types of identification: North Carolina driver's license; non-operator identification card; United States passport; United States military identification; Veterans Identification card; tribal enrollment card recognized by the United States; tribal enrollment card

71. *See, e.g.*, Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV. 185 (2009); Matt A. Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POL. SCI. & POL. 111 (2009); Jason D. Mycoff et al., *The Empirical Effects of Voter-ID Laws: Present or Absent?*, 42 PS: POL. SCI. & POL. 121 (2009); Richard Sobel & Robert Ellis Smith, *Voter-ID Laws Discourage Participation, Particularly Among Minorities, and Trigger a Constitutional Remedy in Lost Representation*, 42 PS: POL. SCI. & POL. 107 (2009); Kyle A. Dropp, Voter Identification Laws and Voter Turnout (May 28, 2013) (unpublished manuscript) (http://kyledropp.weebly.com/uploads/1/2/0/9/12094568/dropp_voter_id.pdf).

recognized by the State of North Carolina; and, driver's license or non-operator identification card issued by Washington, D.C., or a state other than North Carolina as long as the date of a voter's registration was within ninety days of an election.[72] In considering our objective of assessing the extent to which VIVA is race-neutral, it is natural to examine rates of identification ownership by racial group in North Carolina.

To the best of our knowledge, there are no publicly available lists of which residents of North Carolina (not to mention which registered voters in North Carolina) have passports, military identification forms, veterans identification forms, tribal enrollment forms, or driver's licenses issued by states other than North Carolina. However, the North Carolina SBOE has created lists of registered voters in the state who do not appear to have North Carolina driver's licenses or non-operator identification cards, and we rely on these lists when analyzing rates of identification ownership among North Carolina registered voters.

We discussed earlier when introducing our data sources the SBOE's attempts to determine rates of voter identification ownership,[73] and here it suffices to note that during the first half of 2013, the SBOE attempted to match names on a voter file with names of North Carolina residents who hold driver's licenses or non-operator identification cards; recall that these two forms of identification are managed by the North Carolina DMV. The SBOE carried out such matching exercises multiple times, and it published matching reports three times, once in January 2013, once in March 2013, and once in April 2013. Each matching exercise produced a list of what are called unmatched registered voters. To be clear, these registered voters are individuals who are registered to vote but appear not to have a driver's license or a non-operator identification card. The lists do not contain any voters whose status is "denied" or "removed."

In what follows we analyze unmatched registered voter lists produced by the SBOE's January and April matching exercises. These were the first and last (as of this paper's writing) exercises, and the March list contains fewer names than the January list but more names than the April list. The January and April unmatched voter lists are publicly available, and they differ in the criteria used to determine whether a match exists between a given registered voter and an individual whose name appears on a list of North Carolina residents who have, say, driver's licenses. For example, consider a registered voter in North Carolina whose first name, last name, and driv-

72. See Voter Information Verification Act, ch. 381, § 2.1, 2013 N.C. Sess. Laws 1505, 1506-07, for complete details on these eight forms of identification.

73. *See supra* pp. 478-79.

er's license number on record with the SBOE exactly match the first name, last name, and license number, respectively, associated with a driver's license issued in North Carolina. The April 2013 matching exercise would presume that said registered voter was issued a driver's license in North Carolina.

The example above is arguably not particularly complicated because it uses exact matches in ostensibly important fields (name and driver's license number) to link a registered voter in North Carolina with a driver's license. Indeed, perhaps the primary dilemma in matching records across lists of individuals is determining the tightness of criteria for asserting the existence of a match. To illustrate this point, the April matching exercise carried out by the North Carolina SBOE also assumes that a match exists between a registered voter and a given driver's license if the voter and license share exact first names, last names, and dates of birth; if they share exact first names, last names, and zip codes; or if the two first names sound similar (this is determined by an algorithm which assesses similarity in names based on sound), the last names match exactly, and dates of birth match exactly.

The January matching exercise used criteria that were much tighter than those used in the April exercise. In its April report, however, the SBOE writes as follows: "With [the] April 2013 analysis, the SBOE is [sic] expanded its matching criteria to allow for additional variation in voters' names and data entry errors on driver license number, social security number or date of birth in either of the databases."[74] The April report provides 29 criteria such that if any criterion is satisfied, a match is said to exist between a registered voter in North Carolina and a driver's license or non-operator identification card issued in the state.[75]

The top portion of Table 6 ("Active and inactive registered voters") contains a black-white racial breakdown for the January and April unmatched registered voter lists. Since the latter exercise had looser matching requirements, by construction it produced fewer unmatched registered voters.

74. BARTLETT, *supra* note 61, at 5.

75. *Id.* at 4-5.

Table 6: Unmatched Registered Voters

List	Total	Black	White	% Black	%White
Active and Inactive Registered Voters					
Jan.	612,955	191,104	348,141	31.18	56.80
Apr.	318,643	107,681	172,613	33.79	54.17
Excluding Inactive Voters					
Jan.	506,763	158,118	287,093	31.20	56.65
Apr.	255,160	87,721	137,429	34.38	53.86

Recall from Table 2 that blacks constituted approximately twenty-two percent of registered voters in North Carolina as of September 2013. With this in mind, the implication of the top portion of Table 6 is straightforward: black registered voters were disproportionately represented among registered voters with neither driver's licenses nor non-operator identifications. This conclusion holds regardless of whether one uses the relatively tight January criteria for matching or the looser April criteria.

Earlier we noted that the North Carolina SBOE sometimes classifies registered voters as denied or removed, indicating that such voters are not eligible to vote. Other registered voters are classified as "active," indicating for the most part that they are regular participants in North Carolina elections, and still another category of registered voters is known as "inactive." An inactive registrant is legally registered and can vote, but his or her status indicates that a North Carolina county elections office has concerns about a valid address for said voter. In particular, a voter who has not had contact with a county elections office for two General Elections cycles and who did not respond to a mailed contact request is placed on inactive status.[76] We mention the existence of active and inactive status designations because one might be concerned that the January and April lists of unmatched voters are confounded by the presence of many inactive registrants among the unmatched individuals in the top portion of Table 6; perhaps these individuals tend to participate infrequently in all parts of social and political life, i.e., voting, having a driver's license, and so forth. To see if such inactivity confounds our unmatched registered voter results, consider the lower portion of Table 6 ("Excluding Inactive Voters").

76. *See* Jennifer Suarez, *Roll Call: Answering Questions About Voter Removal*, RALEIGH PUB. REC. (Aug. 21, 2012), http://raleighpublicrecord.org/news/2012/08/21/roll-call-answering-questions-about-voter-removal/ (discussing the inactive status as well as issues surrounding removal from the list of registered voters in North Carolina).

If we exclude inactive voters, the fraction of black North Carolina registrants that lacks driver's licenses and non-operator identification cards increases, albeit very slightly, i.e., from approximately 33.79% in April 2013 to 34.38%. These two percentages are qualitatively practically identical, and thus Table 6 shows that the overrepresentation of black registrants among registrants who lack driver's licenses and non-operator identification cards is not a function of an overrepresentation of inactive registered voters among unmatched registered voters.

We now consider whether, and if so how, unmatched registered voters from the aforementioned January and April lists participated in the 2012 General Election. It is theoretically possible that all of these individuals did not vote in this election, and it is also theoretically possible that these individuals tend to vote absentee, which in principle could alleviate the concern that they lack some forms of VIVA-acceptable identification. According to VIVA, applications for absentee ballots require "[o]ne or more of the following in the order of preference": a North Carolina driver's license number; a non-operator identification card number; and the last four digits of an applicant's social security number.[77] We cannot assess how an absentee ballot request containing only a social security number would be handled by a county elections official in North Carolina. But, it nonetheless appears that voters may be able to participate actively in North Carolina elections without providing photo identification if they vote absentee.[78]

With this in mind, we merged the January and April lists of unmatched voters with our September 2013 voter file. This file contains records of who voted in the 2012 General Election, and results for this merge are in Table 7. An unmatched voter who has a record in the September voter file but no voting method for the 2012 General Election is assumed to have abstained from voting in this election.[79]

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77. *See* N.C. Gen. Stat. § 163-230.2(a)(4) (2014) (listing complete details of such requirements).

78. For exceptions related to first-time voters, see State Bd. of Elections, *Frequently Asked Questions*, VOTENC, http://voterid.nc.gov/pages/faqs.html#18 (last visited Mar. 8, 2016).

79. To merge the September 2013 voter file and its 2012 General Election participation codes with an unmatched voter list, we compared county voter identification numbers, county names, and North Carolina voter identification numbers. If these three fields matched across records in the September file and an unmatched voter list, then we treated an unmatched voter as having a 2012 General Election participation code. The January unmatched voter file contains 7641 individuals who registered on or after Election Day in 2012 (November 6) and the April file contains 8916 such individuals. These individuals are not part of the 2012 General Election analysis in Table 7. Also not part of that table are one January unmatched voter and three April unmatched voters who have invalid registration fields in their respective unmatched voter files.

Table 7 addresses two questions. First, do the January and April unmatched voter lists consist predominantly of non-voters? The answer here is no. While the 2012 General Election abstention rates—approximately forty-seven percent and approximately fifty-six percent—for our two sets of unmatched voters are greater than the then North Carolina abstention rate—approximately thirty-one percent—in November 2012, many tens of thousands of unmatched voters participated in the 2012 General Election.

Second, we noted that VIVA's voter identification requirements for absentee voting may be less stringent than those associated with in-person early or in-person Election Day voting. Regardless of one's interpretation of VIVA's language regarding absentee identification, Table 7 shows that unmatched voters are not heavy users of absentee voting. Rather, they are heavy users of both forms of in-person voting noted here. Thus, potential leniency in voter identification requirements as they pertain to absentee voting will not alleviate the identification problem that is implied by Table 7.

Table 7: Participation in the 2012 General Election by Matching Status

Group	Election Day	Early	Absentee	Abstain
Jan.	107,826	165,452	15,074	282,505
	(17.81)	(27.33)	(2.490)	(46.67)
Apr.	47,475	79,183	7,770	171,880
	(15.33)	(25.57)	(2.509)	(55.50)
All	1,721,587	2,556,145	218,469	2,098,292
	(25.93)	(38.50)		

Note: Report counts and percentages are based on the total numbers of January and April unmatched voters, ignoring those who registered on or after November 6, 2012. Percentages are reported to four significant figures and do not sum to 100 because not all voting methods are listed in the table. The table is based on voters whose participation codes are listed in the September 2013 voter file as "In-Person," "ABS-1STOP" and "ABS-MAIL." The January unmatched group of registrants includes 30,683 (approximately 5% of the list) individuals whose voter registration numbers and counties do not appear in the September 2013 voter file; the comparable April list count of unmatched voters who do not appear in the September voter file is 1554 (approximately 0.5% of the list). To calculate the abstention fraction for all registered voters, we use the official number of registered voters (6,639,131) in North Carolina as of the 2012 General Election.

Our finding that registered voters identified by the North Carolina DMV as not having driver's licenses or non-operator identification cards are disproportionately black is consistent with other studies

that consider race and voter identification. For example, drawing on survey data from Indiana, Matt Barreto and his colleagues find that blacks and those of lower socio-economic status are disproportionately likely to lack valid forms of identification,[80] and Trey Hood and Chuck Bullock find that minorities registered to vote in Georgia are less likely than whites to have a required government-issued photo ID.[81] Our analysis extends these results to North Carolina, and it complements the literature's survey-based findings on the relationship between voter identification possession and race.

VII. RACE, VOTER IDENTIFICATION, AND THE SEVENTY-YEAR SPECIAL DISPENSATION

We have thus far shown that black registrants in North Carolina are disproportionately represented among registered voters in the state who lack driver's licenses and non-operator identification forms. VIVA, however, provides a limited age-related exemption to its identification requirements, and this exemption reads as follows: "[A]ny voter having attained the age of 70 years at the time [the voter presents a form of identification] at [a] voting place shall be permitted to present an expired form of [an acceptable type] that was unexpired on the voter's 70th birthday."[82] In addition, for registered voters at least seventy years old as well as for legally blind, homeless, and certain classes of registered voters who are unable to obtain a driver's license, VIVA waives the fee for a special voter identification card.[83]

Might VIVA's special treatment of older registered voters ameliorate the overrepresentation of blacks among North Carolina registrants who lack some types of VIVA-acceptable identification? Or, in contrast, does the seventy-year dispensation exacerbate the racial imbalance that we have discussed above? One way to address these questions is to compare the black and white fractions of North Carolina registered voters who are at least seventy years old. Of course there are in North Carolina more white registered voters who are at least seventy years old compared to black registered voters of this age, but this is simply a reflection of the fact that there are more

80. *See* Barreto et al., *supra* note 71, at 113.

81. *See* M. V. Hood III & Charles S. Bullock III, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statute*, 36 AM. POL. Q. 555, 566 (2008); *see also* KEESHA GASKINS & SUNDEEP IYER, BRENNAN CTR. FOR JUSTICE, THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION 1 (2012); Matt A. Barreto et al., Presentation at the 2007 American Political Science Association Annual Conference: Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters 10, 17-19 (Sept. 1, 2007), https://www.brennancenter.org/sites/default/files/legal-work/63836ceea55aa81e4f_hlm6bhkse(1).pdf.

82. Voter Information Verification Act, ch. 381, § 2.1, 2013 N.C. Sess. Laws 1505, 1506.

83. § 3.1, 2013 N.C. Sess. Laws at 1510.

whites than blacks in the state. Thus, we consider here whether the composition of the seventy-years-plus registered voter pool is similar to the composition of the North Carolina registered voter pool in general.[84]

Table 8: Registered Voters and Registered Older Voters in North Carolina

Date	Total at least 70	% Black	% Black at least 70	% White	% White at least 70
All Registered Voters					
February 2009	732,864	21.61	15.05	73.28	83.02
February 2011	768,513	21.64	15.14	73.03	82.69
September 2013	832,767	22.47	15.33	70.98	81.99
Excluding Inactive Voters					
February 2009	704,340	21.61	14.95	73.28	83.11
February 2011	730,897	21.64	15.15	73.03	82.70
September 2013	784,289	22.47	15.26	70.98	82.11

Note: Table 8 is based on three voter files, each of which is associated with one of the dates in the table. The counts in the table ignore all records flagged in a voter file as removed or denied, and they also ignore records that have ages greater than 100 years. Percentages are reported to four significant figures.

The top portion of Table 8 ("All registered voters") describes the composition of three North Carolina registered voter pools, one per each voter file used here. Note that each of the three registered voter pools summarized in Table 8 includes over 700,000 individuals who are at least seventy years of age. Insofar as there were approximately 6.4 million registered voters in North Carolina as of September 2013,[85] VIVA's exemption for older voters affects, as of September 2013, approximately thirteen percent of all registered voters in North Carolina.[86]

84. *See infra* Table 8. Note that this table uses all three of the voter files discussed earlier.

85. *See supra* Table 2.

86. Our North Carolina voter files contain a number of voters whose recorded ages do not appear meaningful. For example, the September 2013 file includes 10,416 registered voters whose age is listed as 113 years; the explanation for this group of registrants lies in the fact that "[North Carolina v]oters who registered prior to the implementation of the [North Carolina] statewide voter registration database system and for whom the county board of elections had no record of their full date of birth, were given a date of birth in the [registration] system of 01/01/1900." *See* Bartlett, *supra* note 61, at 7 (footnote omitted). The September 2013 voter file also includes one registrant whose listed age is 137 and one with a reported age of 158. Since the counts in Table 8 are based on a maximum age of 100, none of these problematic ages confounds the numbers in the table.

Table 8 compares the composition of the North Carolina registered voter pool with the composition of this pool restricted to registrants of at least seventy years of age. We can make three such comparisons of this nature, one for each of our voter files, and the results of the comparisons are straightforward: whites are disproportionately represented among registered voters who are at least seventy years old. For example, in February 2009 the North Carolina registered voter pool was approximately 73.28% white. However, among registered voters who were at least seventy years old, the North Carolina registered voter pool was approximately 83.02% white.

It seems intuitively plausible that older registrants in North Carolina are more likely to have an inactive status than younger registrants, and in theory this could confound the associations described in Table 8 between age and race. Perhaps the overabundance of white registrants in the top portion of the table includes primarily inactive voters, in which case one might argue that the size of such a group is not particularly noteworthy. With this in mind, the lower portion of Table 8 ("Excluding inactive voters") reports results about age and race, this time excluding officially inactive registered voters. The racial percentages in the lower part of the table are not identical to those in the top half, but they are nonetheless qualitatively very similar. Indeed, the implications of both sections of Table 8 are identical: whites are overrepresented, and blacks underrepresented, among registered voters in North Carolina who are at least seventy years of age.

Figure 5 presents another look at the distribution of age among registered North Carolina voters. The figure contains three panels, one corresponding to each of the voter files considered here, and each panel describes the distribution of age among black and among white registrants. In particular, for ages 17 to 100 the black points in the three panels of Figure 5 describe the fraction of all black registered voters who are of a given age; the grey-colored points describe the same thing but for white registered voters. The sum of the heights of the black points (and similarly the white points) in each panel is one. Finally, each panel in Figure 5 contains a dashed vertical line at seventy years, and this reflects VIVA's seventy-year age dispensation.

The three panels in Figure 5 are not appreciably different, and this is not particularly surprising. It would be somewhat peculiar if, say, the distribution of age across North Carolina registered voters had changed dramatically between 2009 and 2013.

Figures 5(a)-5(c) show the following: Among black registrants, there are more relatively younger voters than older voters. This is evident in the heights of the black dots that correspond to lower ages, say, ages under forty. Among white registrants, though, one observes the opposite pattern, namely, that their older registrants are more

numerous than younger ones. Average ages follow a similar pattern. In September 2013, for example, the average age among black registrants was approximately 44.76 ($s \approx 17.26$), and the corresponding white registrant average, approximately 49.55 ($s \approx 18.03$).[87] This pattern—white registrants in North Carolina being on average older than black registrants—obtained in February 2009 and in February 2011 as well.[88]

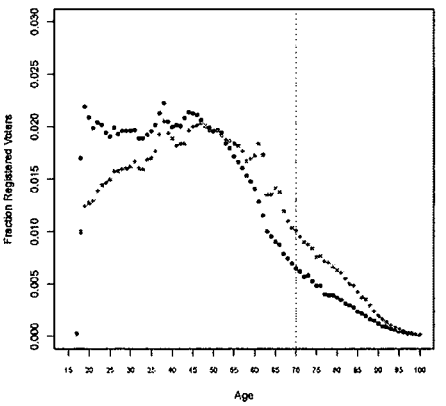
In sum, the composition of registered voters in North Carolina who are at least seventy years of age is disproportionately white, and there is also a greater proportion of white registered voters who are seventy years of age and older compared to black registered voters. We thus find that VIVA's photo identification dispensation for older, registered voters will likely only exacerbate the disparity across racial groups we have identified with respect to driver's licenses and non-operator forms of identification. This dispensation is not race-neutral as it effectively lowers the cost of in-person voting for a larger proportion of white registered voters than black registered voters.

87. These averages are based on registrants whose ages are reported to be between 16 and 100 years. The black and white averages are significantly different at conventional confidence levels.

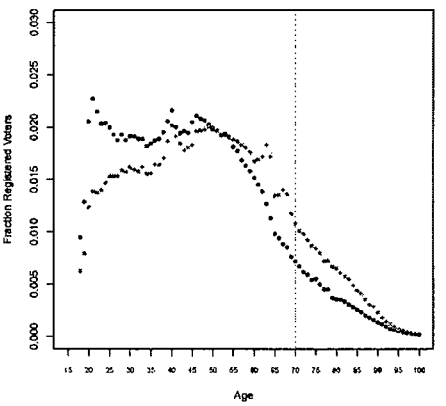
88. The results are available from the authors.

Figure 5: Racial Composition of Registered Voter Pool

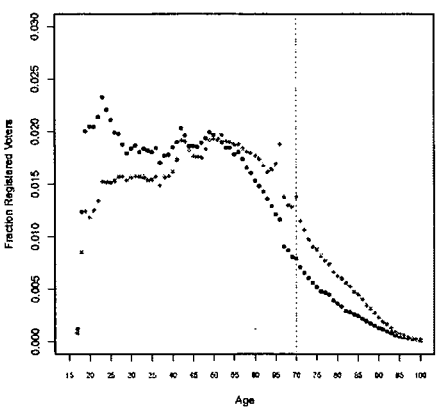
(a) February 2009



(b) February 2011



(c) September 2013



VIII. RACE AND YOUTH PREREGISTRATION

Related to the matter of registered voters age seventy and older is the question of very young registrants. Pre-VIVA, North Carolina allowed preregistration of sixteen and seventeen year olds, but VIVA has changed this.[89] Namely, under this new law no one can register to vote in North Carolina who will not be eighteen years old on the date of the next General Election.[90] It is thus natural to consider whether preregistrants in North Carolina are representative of registered voters in the state, and we now turn to this issue.[91]

Table 9: Racial Composition of Preregistrants Sixteen and Seventeen Years of Age

Group	Count	Percent
Black	1,778	26.94
White	3,880	58.79

Note: Table 9 is based on 6,601 preregistrants, ignoring those listed as denied or removed as of September 2013. Percentages are reported to four significant figures and do not sum to 100 because of the presence of other racial groups in North Carolina.

North Carolina voter files do not contain birth dates. They do, however, contain an age field, and Table 9 contains the racial breakdown of North Carolina preregistrants who are listed as sixteen or seventeen years old as of September 2013. The table ignores all preregistrants whose status is removed or denied, and it includes 6,601 total preregistrants.[92] The table does not have separate sections for active and inactive preregistrants because all preregistrations aged sixteen and seventeen are listed as active in the September 2013 voter file.

We saw in Table 2 that blacks constituted approximately twenty-two percent of the North Carolina registered voter pool as of September 2013. In contrast, Table 9 reveals that blacks constituted approximately twenty-seven percent of all preregistrants as of September

89. VIVA was implemented in stages, and the part of the law dealing with preregistration became effective on September 1, 2013. Section 12.1.(j) of the bill states: "This section [on preregistration] becomes effective September 1, 2013. All voter preregistrations completed and received by the State Board prior to that date shall be processed and those voters registered, as appropriate." Voter Information Verification Act, ch. 381, § 12.1.(j), 2013 N.C. Sess. Laws 1505, 1534.

90. N.C. GEN. STAT. § 163-82.4(d) (2014) (stating that those that will not be "18 years of age on or before election day" may not submit a preregistration form).

91. The literature on preregistration is not large and in general does not disaggregate registration rates down by race. *See, e.g.*, Michael P. McDonald & Matthew Thornburg, *Registering the Youth Through Voter Preregistration*, 13 J. LEGIS. & PUB. POL'Y 551 (2010).

92. The September voter file contains five individuals whose listed age is under sixteen. We ignored these five preregistrants.

2013, indicating that sixteen and seventeen year-old preregistration was used prior to VIVA disproportionately by blacks. The elimination of preregistration, except for those who will be old enough to vote in an upcoming election, is thus another feature of VIVA that will have disparate effects across the two main racial groups in North Carolina.

IX. CONCLUSION

With the passage in August 2013 of the Voter Information Verification Act, popularly known as VIVA, North Carolina altered its electoral laws in many ways. Among other things, VIVA shortened the early voting period in North Carolina; eliminated the opportunity for eligible residents of North Carolina to register to vote in the days immediately prior to an election; imposed a photo identification requirement for in-person voting; and, eliminated youth preregistration except for those who will be eligible to vote in the next election. Had these changes taken place before the Supreme Court ruled in *Shelby County v. Holder* that section 4(b) of the Voting Rights Act is unconstitutional, they would have triggered federal oversight because 40 of North Carolina's 100 counties were subject pre-*Shelby* to preclearance. As a result of the *Shelby* decision, though, in late summer 2013 the United States Department of Justice had no grounds to preclear VIVA.

Our study indicates that VIVA will have several disparate effects on black voters in North Carolina. Specifically, we find that in presidential elections the state's black early voters have traditionally cast their ballots disproportionately often in the first week of early voting, a week eliminated by VIVA; that blacks disproportionately have registered to vote during North Carolina's early voting period and in the run-up to Election Day, something now prohibited by VIVA; that VIVA's photo identification provision falls disproportionately on registered blacks in North Carolina; that the special identification dispensation for voters who are at least seventy years old disproportionately benefits white voters; and that prior to the implementation of VIVA, young African Americans were disproportionately more likely than whites to take advantage of preregistration. Although subsequent analyses of the 2014 General Election will certainly provide some clues regarding the extent of the disparate impact under VIVA, the law is likely to have its greatest effect on African American voter registration and turnout in the 2016 presidential election. Until then, our research—which draws entirely on public data from the State of North Carolina—reveals how this omnibus legislation affects the political participation of blacks and whites differently.