

2013—A Year of Election Law Changes

In 2013, the United States Supreme Court and the North Carolina General Assembly together made major changes in the law of elections. This was a watershed year in elections law.

The Change from the Supreme Court—the End of Pre-Clearance

In June, in the case of *Shelby County v. Holder*, the Supreme Court declared Section 4 of the Voting Rights Act of 1965 unconstitutional. Section 4 identified the jurisdictions in the nation that were required under Section 5 of the Act to submit changes related to voting for approval by the U.S. Department of Justice, in a process known as “preclearance.” With Section 4 unconstitutional, Section 5 is left without force. It is, for all practical purposes, dead.

What, exactly, does that mean for North Carolina’s 40 counties that were covered by Section 4? For decades, those counties and their cities and school boards and boards of elections have been required to submit elections changes for preclearance. No change related to voting in any of those 40 counties—or any school board or any municipality in the county—could go into effect until the U.S. Department of Justice gave permission

And, because any elections law that applied statewide also obviously affected those 40 counties, every state elections statute also had to be submitted to the Department of Justice for preclearance.

Now, however, Section 5 is dead. For elections changes made starting in June 25, 2013, preclearance is no longer required. It is not required for changes at the county or municipal level or at the state level.

But Section 2 of the Voting Rights Act remains alive and well. It is the basic anti-discrimination portion of the Act. It prohibits discrimination in matters related to voting throughout the entire state of North Carolina and throughout the United States. Cities and counties and boards of education still may be sued for voting practices that have a discriminatory effect, as may the state. The decision in *Shelby County v. Holder*, which for all practical purposes killed Section 5, has no effect at all on Section 2.

Changes from the North Carolina General Assembly

In an act entitled the Voter Information Verification Act (H 589, SL 2013-381), the state legislature in 2013 made several significant changes in the administration of elections in North Carolina. The new act is referred to as “VIVA.” Before the *Shelby County v. Holder* decision, all of VIVA’s changes would have been subject to the preclearance requirement. But with that decision, no submission for preclearance was required.

Here are VIVA's five biggest changes:

- Photo ID at polls
- End of same-day registration and vote
- Shortening of the early voting period
- End of straight-ticket voting
- Mail-in absentee ballot request changes

Photo ID at the Polls

Starting with elections in 2016, VIVA requires that, in order to vote, a voter (with a couple of limited exceptions) will have to show one of the following forms of identification, with a photograph:

- NC drivers license
- NC DMV non-driver ID card
- Passport
- US military ID card
- Veterans Administration ID card
- Tribal enrollment card
- Other state drivers license if the voter moved to NC recently

The ID must be current—that is, unexpired—unless the voter is over 70 and the ID was unexpired when the voter turned 70. If a voter is turned away for lack of photo ID, he or she may vote a provisional ballot and show photo ID later. The state will issue DMV non-driver photo ID cards for free. See “Voters without Drivers Licenses” on page 8.

Photo ID is not required for mail-in absentee voting.

A voter who comes to the polls without a photo ID may vote a provisional ballot and make up the deficiency before canvass. (See “Provisional Voting,” p. 6.)

End of Same-Day Registration and Voting

“Early voting” is really absentee voting. (See the discussion beginning on page 4.) Not everyone realizes that. When you vote early, you are voting an absentee ballot that is in fact “retrievable.” All ballots cast at an early voting site are counted on election day, not on the day they are cast. Since 2007, the law has permitted eligible voters who are not registered to apply to register at an early voting site and cast their absentee ballot (which could, if necessary, be retrieved) at the same time. Elections officials then compared the identification information supplied (drivers license number or last digits of the Social Security Number) with data in DMV and Social Security Administration data bases. If the numbers matched, the ballot would be counted. If the numbers did not match, the ballot could be removed if the problem could not be straightened out by the date of the official canvass of the votes.

VIVA eliminates same-day registration and voting. Now, as before 2007, you must be registered to vote 25 days before election day in order to vote, whether you are voting at an early voting site or at your precinct on election day.

Shorten the Early Voting Period

Until VIVA, the early voting period has run from the third Thursday before election to the Saturday before election. Beginning in 2014, the period will be shortened by a week, running from the second Thursday before election to the Saturday before election. But the total number of hours of early voting is to be kept the same. Just how county boards of elections will implement that requirement remains to be seen.

End of Straight-Ticket Voting

Until now, a voter could mark the “Republican” or “Democratic” circle on the ballot—or the “Libertarian” circle—and vote for all the candidates of that party in all races on the ballot. A number of years ago, the law was changed to take the Presidential race out of straight-ticket voting. VIVA eliminates straight-ticket voting altogether. Beginning in 2014, voters will have to mark the ballot in every race in which they wish to cast a vote. Non-partisan elections are not affected by this change.

Mail-in Absentee Ballot Application Changes

There are two distinct ways to cast an absentee ballot. As mentioned above, “early voting” is really absentee voting. It feels very much like regular election-day voting, but it has some differences.

The other way to vote by absentee ballot is by mail. VIVA makes a significant change in mail-in absentee voting. Beginning in 2014, anyone can print out or copy a state-prepared form for requesting absentee ballots and provide that form to anyone else. So, parties or candidates will be able, for example, to send the forms to their potential voters along with campaign flyers. The voter then fills out the form and mails it to the county elections office. The county board of elections will then mail to the voter the application for absentee voting and the ballots, which the voter can mark and verify (with witnesses) and mail back.

This process is more streamlined than the former processes. Combined with the fact that photo ID will not be required for mail-in absentee voting, it is anticipated that the volume of mail-in absentee ballots that county boards of elections may receive will be greatly increased.

Other General Assembly Changes

VIVA contains a number of other elections administration changes. Among them:

- Public financing of judicial and three executive branch races ended
- Pre-registration of 16- and 17-year olds ended
- More observers
- More people eligible to challenge voters

- Presidential preference primary moved earlier
- Out-of-precinct provisional voting ended
- Referendums can be held only on primary or election days

The Development of Early Voting in North Carolina

You have a choice of how to vote in North Carolina. You can vote by regular, secret ballot on election day. Or you can vote before election day by a personally identifiable absentee ballot. More about that secrecy difference in a moment.

It is commonly thought that absentee ballots are used *exclusively* by people who cannot get to the polls on election day because of illness, disability, or travel. Once upon a time that was true, and absentee ballots are indeed still available for people in those circumstances. They can request the absentee ballots by mail and mark them and return them by mail.

But emphatically it is no longer true that absentee ballots are used *exclusively* by people who cannot get to the polls on election day. In fact, in the general election in November 2012, more than a half of all ballots cast were cast through absentee voting—56% of 4.5 million votes. How can that be true? It is because what we routinely call “early voting” in this state is, in reality, absentee voting

Old fashioned, traditional absentee ballots by mail, now a small minority of all absentee ballots, are available 60 days before most elections. Generally speaking, they must be returned to the county board of elections by 5:00 on the day before the election. Voters who want to use such traditional absentee ballots must plan in advance in order to obtain their ballots, get them marked, and return them in time.

But early voting is different. By early voting, a voter, for a period beginning 11 days before an election and ending on the Saturday before the election, may vote at voting places throughout his or her county in a way that feels very much like regular voting but is in fact absentee voting.

To be more precise, what we call “early voting” is really one-stop no-excuse absentee voting at designated sites around the county. Each element of that description came along at a different time.

Step One: Introduction of absentee voting. Until the early days of the twentieth century voting in person on election day was the only option. The introduction of absentee voting made it possible for people who were ill or disabled or who were to be away on election day to cast a vote. The process was cumbersome. The voter applied for absentee ballots, usually by mail. Elections officials considered the application and, if they approved it, sent the ballots to the voter, by mail. The voter then marked the ballots and returned them to the elections officials, by mail.

Step Two: Introduction of one-stop absentee voting at the board of elections office. In 1977, the General Assembly amended the absentee ballot laws to permit a person to come to the

county board of elections office and, in one procedure, apply for absentee ballots and mark the ballots. If elections officials subsequently approved the application, they counted the ballots. This “one-stop” absentee voting, like all absentee voting, applied only to individuals who were eligible under the law to vote by absentee ballot, because they were ill or disabled or would be away.

Step Three: Introduction of “no excuse” absentee voting. In 1999 the General Assembly authorized “no-excuse” absentee voting in even-year general elections. That is, anyone could now vote by absentee ballot—through the mail or at the board of elections one-stop site—for any reason in those elections.

Step Four: Introduction of remote one-stop sites. Also in 1999 the General Assembly authorized counties to establish one-stop absentee voting sites in locations around the county, not just at the board of elections office. Now, voters in the county who wished to vote by no-excuse absentee ballot had their choice of where to go to vote—and over time boards of elections began to set up one-stop absentee voting sites at non-traditional places, such as shopping malls. In 2001, the provision for no-excuse absentee voting was extended from even-year general elections to all elections. So, by 2001 we had one-stop no-excuse absentee voting at designated sites around the county for all elections. It could be said that “early voting” was by then in place.

Step Five: Expanding the times for one-stop voting. In 2001, the General Assembly defined the time for one-stop absentee voting to begin on the third Thursday before the election and to end on the Saturday before the election. It added a local option for counties to include evenings and weekends in the 18 days before the election.

Step Six: Allowing individuals to register and vote at the same time at one-stop sites. In 2007, the General Assembly enacted legislation allowing an individual to come to a one-stop site and, at the same time, fill out an application to register to vote and cast an absentee ballot at the one-stop site.

“Early voting” has become extremely popular. Of the 2.6 million absentee votes cast in the 2008 general election, all but 200,000 of them were cast at early-voting sites. This popularity no doubt derives from the convenience that early voting provides: voters have a choice of many days (including at least one Saturday) to vote and a choice of several locations (not just their one assigned election-day precinct voting place).

Not all voters are aware, however, of one significant characteristic of ballots cast in early voting. They are not, strictly speaking, secret ballots.

When you vote on regular election day, once you have placed the paper ballot in the tabulator or hit the “confirm vote” button on the computer touch screen (depending on the system in use in your county), how you voted can no longer be traced to you. There is nothing that identifies you with the ballot you cast. It is secret.

But when you vote at an early voting site, that is not true. The ballot that you cast (whether on paper or on a computer screen) is “retrievable.” That is, there is a code right on the

ballot (marked on the paper ballot or electronically in computer screen voting) that identifies you with that ballot. How come? Because of a provision in the election laws, G.S. 163-89(a), that permits challenges to absentee ballots on regular election day. If you vote in early voting, your ballot, as an absentee ballot, can be challenged on election day. Because of the possibility that that challenge might be sustained—perhaps you are not an eligible voter because of, say, your residence—the ballot that you cast in early voting must be retrievable. It must be possible for election officials to find it and remove it from the set of ballots that will be counted.

In the 12-year history of early voting, no such retrieval of early voting ballots has ever been necessary. As long as the law remains in its current form, however, it remains a possibility.

Provisional Voting in North Carolina

Throughout North Carolina history, until very recently, elections officials had full control over the voter registration process. The law required that a person who wanted to register to vote had to come in person before an elections official—typically an elections board member or employee. The elections official would question the applicant to determine eligibility to vote (that the person was 18 years of age, a citizen of the United States, and a North Carolina resident). The elections official would then administer an oath to the applicant, the applicant swearing that she was eligible and would support the constitutions of the United States and North Carolina. This procedure put the registration application automatically in the hands of an elections official, and the county board of elections could then directly review the application, approve it, and enter the applicant on the voter rolls.

Then, beginning in the 1990s, that direct control over the voter registration process slipped away from elections officials.

In 1993 Congress passed an act requiring states to permit voter registration by mail and at drivers' license offices, public-assistance offices, and a few other public offices. The General Assembly passed state legislation to comply with this new federal law.

With the new rules, elections officials were faced with applications for voter registration that had been filled out in many different kinds of places, totally without the supervision of elections officials.

Three problems immediately resulted. First, the error rate on the applications went up. The forms were simply filled out improperly more often. Second, delays developed in the transmittal of the application forms. Whereas in the past elections officials had custody of the applications from the moment they were filled out, now elections officials received applications from drivers' license offices and employment security offices and others—applications they did not even know about until received—on whatever schedule they made their way to the elections office. Third, people who filled out the forms were not always savvy to the difference between applying to register to vote, on the one hand, and actually being registered after the application was approved, on the other. Individuals frequently thought of themselves as having “registered” to vote when they filled out the form at DMV, for example, unaware that the registration was not complete until the application was reviewed and approved at the elections board.

As a result, in increased numbers, individuals showed up at the polls on election day believing that they were registered to vote, only to find out that their names were not to be found on the precinct registration books. Perhaps the application had not made its way from the DMV office to the elections office in time. Perhaps the elections board, in reviewing the application, had found mistakes and omissions and had sent the application back for revision.

So what happens when a voter comes to the precinct to vote, but that voter is not on the poll book?

In years past, that potential voter would simply have been turned away and her vote would have been lost. But North Carolina responded to the new difficulties with “provisional voting.” An individual who believes that her name should be on the voter rolls, but is not, or who for some other reason appears ineligible, can vote provisionally. On the spot, the voter fills out an application for a provisional ballot, marks the ballot, and seals it in a special envelope. In the days between the closing of the polls and the announcement of the official vote totals, county elections officials review the application and determine whether in fact the voter was eligible. If the determination is made that the voter was not eligible, the application is denied, the ballot remains in the sealed envelope, and that person’s votes do not count. If, however, the determination is made that the voter was in fact eligible, the envelope is opened, the ballot is counted, and the votes count.

There are seven circumstances in which provisional votes will count.

First, the review by the board of elections may reveal that the voter was in fact registered but through some error did not appear on the precinct records. That is the classic problem that served as the impetus for provisional voting in the 1990s.

Second, the voter may have moved to a new precinct within the county more than 30 days before the election. Before the advent of provisional ballots, that voter’s right to vote would have expired at the 30-day mark. Now, she may vote a provisional ballot at either the new or old precinct and her votes will count in the races applicable to the new precinct.

Third, the voter may have been removed from the registration rolls by the county board of elections under old removal provisions that no longer apply. The review will disclose this, the voter will be restored, and her provisional ballot will be counted.

Fourth, a voter may have been offered the wrong ballot (for example, a ballot for county commissioner District One, although she lives in District Two) but she asks for and votes the correct ballot provisionally. If the review shows she was right, her provisional ballot will be counted.

Fifth, the voter may have been given the ballot of the wrong party in a primary election. She may vote provisionally the ballot of the other party and it will count if the review determines that the record at the precinct was wrong.

Sixth, the voter may have voted after normal closing time of the polls. Polls close at 7:30 p.m. A voter who is in line at that time may vote, even if it's after 7:30 before she gets to the voting booth. But sometimes problems at the polls may result in an order from a court to keep the polls open after 7:30. A voter who gets in line after that time and then votes because the polls have been kept open late will be given a provisional ballot, and that ballot will count as long as it is not subsequently determined that the order to keep the polls open was unlawful.

And seventh, with the implementation of VIVA's photo ID requirement in 2016, the voter may have failed to show the appropriate photo ID at the voting place. Perhaps she left her drivers license at home. She will be allowed to vote a provisional ballot, which will count if she subsequently provides proper ID to the county board of elections.

Until VIVA, there was an eighth category of provisional ballot, that occurred when the voter on election day had gone to a precinct within the county other than her assigned precinct and wished to vote there. She would be given a provisional ballot and her votes would count, but only for the races she would have been eligible to vote in her assigned precinct. The constitutionality of this "out-of-precinct" voting was challenged in court after the 2004 elections, but the constitutional issue was not decided. In VIVA, however, the General Assembly outlawed out-of-precinct voting altogether.

Voters without Drivers Licenses

It seems a safe bet that, when the requirement that voters must show photo ID at the polls becomes effective in 2016, the overwhelming majority of voters will simply use their drivers licenses (or DMV-issued non-operator photo ID card). They will already have the license in their purse or pocket and will simply show it to the elections officials.

It is a near certainty, however, that some number of voters will not have a drivers license (or non-operator ID card). How many?

In April 2013 the State Board of Elections issued a report that attempted to estimate how many registered voters at that time did not have a drivers license (or non-operator ID card). Using a number of different matching criteria, it compared names in its computerized voter registration list of 6.4 million voters with the DMV computerized list of 12.4 million customers who had been issued a drivers license (or non-operator ID card).

It found 318,000 names on the registration rolls that could not be matched to names in the DMV. That would seem to represent the largest possible number of then-registered voters who lacked a drivers license (or non-operator ID card).

The true number was likely not that high, however, since it is a near certainty that some names among the 6.4 million on the registration rolls should not be there. People have died or moved away but not been removed from the rolls. In recognition of this fact, the State Board of Elections did a second comparison. It compared the DMV records to the 4.5 million voters who actually voted in the 2012 general election. Among those voters, it found 138,000 names that could not be identified as having a drivers license (or non-operator ID card).

Among that 138,000, women were disproportionately represented—85,000. Common experience indicates that women have a greater likelihood of name changes through the course of a lifetime than men. Perhaps a significant number of the 138,000 are women voters who have used a married (or maiden or previously married) name on the voter roll and a maiden (or married or previously married) name on the DMV roll.

No one knows the true number of registered voters, otherwise eligible to vote, who do not have a drivers license (or non-operator ID card). It seems likely, however, that the number may be in the range of 100,000 or higher.

VIVA provides, of course, for the use of ID alternatives other than drivers licenses (or non-operator ID cards): passports, military ID cards, tribal cards, recent and out-of-state drivers licenses. Even so it seems likely that some significant number of voters who lack a drivers license (or non-operator ID card) will also lack any of these alternatives.

Special Topic: College Student Voting in Light of 2013 Elections Legislation

Imagine that it's 2016. VIVA's photo-ID-to-vote requirement is in place.

Think of Jennifer Student. She grew up in Nash County and finished high school there. She goes off to UNC-G as a freshman. If she considers her UNC-G dorm as her residence and she has no plan to return to her parents' home when she finishes school, she may register to vote in Guilford County, just as before the new photo-ID law was passed. She uses 202-D Jones Hall, Greensboro, as her voter registration address. Nothing in the new law changes that. If she has a North Carolina drivers license, she can show that at the polls when she goes to vote and should have no problem. Now, in all likelihood she will not have changed the address on the drivers license, so the address that she shows to the precinct officials on her drivers license (in Nash County) will not be the same as the address that the pollbook shows as her voter registration address (Jones Hall, Greensboro, Guilford County). That should not matter. If she asserts that in fact Jones Hall is her residence address, she will be allowed to vote. The photo ID must, according to the new law, be unexpired and it must bear a reasonable resemblance to the person, but there is no requirement that the addresses match.

So, in-state students who have a valid, non-expired NC drivers license should be able to vote using that ID, even if the address shows a different town. They should not have substantial trouble.

But for in-state students, a problem may arise in the form of voter challenges. Any voter of the county may challenge the eligibility of any other voter of the county either at the county board of elections 25 or more days before election day or at the polls when the person presents herself to vote. The mere fact that the address on the drivers license does not match the address on the registration record will not, however, be sufficient grounds to sustain a challenge.

North Carolina students enrolled in North Carolina colleges who want to vote in the college town will have a harder time if they do not have a drivers license. I am willing to go

with the assumption that the vast majority of enrolled college students do in fact have drivers licenses, but surely some percentage do not. Those folks will have to make other arrangements, most likely a DMV ID card or a passport.

Now think of Johnny Undergraduate. He grew up in Roanoke, Virginia and finished high school there. He comes to UNC-Charlotte as a freshman. He has the right to consider his college dorm his residence, just as Jennifer Student does, and he may register to vote there (in Mecklenburg County) just as Jennifer does. He has a Virginia drivers license. Under the new law, his out-of-state drivers license is valid ID to show at the polls for the first 90 days that he is registered. The idea is that people who have moved to North Carolina deserve some slack time to get their ducks in a row and get a North Carolina drivers license. They can continue to use their old (unexpired) out-of-state license for 90 days after they register. So, Johnny registers to vote. In the May primary (within 90 days after he registers), he goes to vote. All should be well, just as it was for Jennifer. He shows his Virginia drivers license and he votes. The fact that the address on the drivers license does not match the address on the registration books will not keep him from voting—even though the license address is in another state.

The problem for Johnny will come when he goes to vote in the November general election. That is more than 90 days after he registered (remember, he voted in the May primary). He cannot use his Virginia ID to vote. He will have to use some other ID—such as a passport. Whether he can get a North Carolina DMV ID card while still holding a valid Virginia drivers license is unclear. Perhaps he could go all the way and get a North Carolina drivers license.

End of Out-of-Precinct Voting

A second change that may have an effect on college student voters is VIVA's banning of out-of-precinct election day provisional voting.

There are three ways to vote: (a) mail-in absentee ballots; (b) early voting, which is in fact one-stop absentee voting; and (c) regular election day voting.

Mail-in absentee voting is fully available to students. North Carolina students attending North Carolina colleges may continue to consider their parents' homes as their residence and may return there to vote or may vote by mail-in ballot. Jennifer Student, if she does not consider her dorm room at UNC-G to be her residence, may retain her residence at her parents' home and vote in Nash County by mail-in absentee ballot.

Early voting is actually a form of absentee voting. During the early voting period, any voter of the county may go to any early voting site in the county and vote. The photo ID requirement applies at early voting sites just as it does at the precinct on election day. In 2012, 56% of all voters in North Carolina voted by early voting. Jennifer Student, if she has registered to vote using her dorm address, may vote at an early voting site in Guilford County.

The traditional way of voting is at the assigned precinct on election day. Every voter, including, of course, a student registered at a college address, is assigned a precinct based on residence address. On election day, the voter may go to his or her precinct and vote. Before

VIVA, a voter on election day had a further choice: go to any precinct in the county and vote. If that precinct was not the voter's assigned precinct, the voter would be allowed to vote a provisional ballot, which would count for all races for which the voter was eligible to vote. (There may be some races—elections by district, for example—on the ballot in the chosen precinct for which the voter would not be eligible to vote.) Such a voter's vote for president or governor and may other offices would count, since everyone is eligible to vote for those offices regardless of place of residence.

Now, with VIVA, if you are to vote on election day you must vote only at your assigned precinct. This change could conceivably have an impact on college students who are not accustomed to the idea of voting in particular precincts and who may be unfamiliar with the local geography.

