Interest in voting issues is hotter than the 4th of July. This new fourth edition of *America Votes!* answers our questions on voting and voters’ rights. Readers can consult this comprehensive guide to learn the latest scholarship in an easy-to-read format. It’s a good book to have on your table to consult while watching or reading the news.

—Linda Klein, Past President of American Bar Association

This book is a superb resource for practitioners and anyone seeking a firmer grasp of the election process that is so vital to our Democracy. Building on the clear and comprehensive framework set forth in previous volumes, Ben Griffith and Jack Young have loaded this new edition with comprehensive and updated sourcing and nuanced analysis by a diverse array of leaders in the field.

—Thurgood Marshall Jr., Partner, Morgan, Lewis & Bockius

Who gets to vote? Madison wrote in Federalist 57 it is “[n]ot the rich more than the poor; not the learned more than the ignorant; not the haughty . . . more than the humble,” but rather “the great body of the people of the United States.” Much of our history has involved struggles to ensure that the “great body of the people” includes all Americans, and to overcome a long series of obstacles to that ideal—from the earliest racial, gender, and property restrictions; through later poll taxes and literacy tests; to today’s gerrymandering, voter ID, cybersecurity, immigration, and other concerns. With this latest, updated edition of *America Votes!*, the ABA continues to render an essential service to legal scholars, practicing attorneys, and all who care about our most precious right—to choose and hold accountable those who govern us.

—Hon. Bernice B. Donald, Judge, United States Court of Appeals for the Sixth Circuit

From voter ID laws to redistricting, and from campaign finance to election cybersecurity, *America Votes!* offers extensive analysis and commentary. A volume that should be on the bookshelf of everyone who cares about election law in the run up to the 2020 election.


—Laughlin McDonald, Special Counsel and Director Emeritus, ACLU Voting Rights Project.
Watergate brought us the modern era of campaign finance regulation. Government by the consent of the governed has become government by the consent of the rich. After Citizens United, dark money has become the currency for political engagement. At the same time, the Supreme Court in Selby County ushered in a return to limits on access to registration and voting. The Supreme Court also continues to struggle to define unconstitutional gerrymandering America Votes!, Fourth Edition confronts these issues. The authors challenge us to think of a political system in new ways with a focus on our founders’ goal of a more perfect union. This book is a must-read for anyone concerned about our political future.

America Votes!, Fourth Edition addresses important electoral issues, including:

• Voter qualifications, registration, immigration and citizenship, language minority participation, and Native American voting;
• The voting process, early voting, same day registration, cybersecurity threats, campaign finance pitfalls, and Maine’s experiment with ranked-choice voting;
• Voting rights litigation, section 2 of the Voting Rights Act, criminal enforcement, the impact of Shelby County and legislation to reform the voting process;
• Recounts and audits and the legacy of Gore v. Bush; and
• Redistricting equal protection and fair districts math and partisan gerrymandering.
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*Kristen Clarke, Julie Houk, John Powers*

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*Nancy G. Abudu*

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About the Authors

The following is a summary of the biographical backgrounds of the authors of the 21 chapters comprising the fourth edition of America Votes! Challenges to Modern Election Law and Voting Rights.

**Nancy Abudu** is the Deputy Legal Director for the Southern Poverty Law Center’s (SPLC’s) Voting Rights Practice Group. In that role, she leads a team of lawyers, community organizers, and technical experts in protecting and strengthening the voting rights of minority communities and other politically vulnerable populations. Prior to joining SPLC, Nancy was the Legal Director for the American Civil Liberties Union (ACLU) of Florida and a senior staff attorney with the ACLU’s Voting Rights Project. She has litigated a variety of civil rights and civil liberties issues in federal and state courts, including legal challenges to state felon disfranchisement, proof of citizenship, and voter photo identification (ID) laws; and has pushed for greater enforcement of the Voting Rights Act, the National Voter Registration Act, Help America Vote Act, and other federal laws. Her practice areas have also included criminal justice reform, free speech, reproductive rights, immigrants’ rights, LGBT rights, privacy and government surveillance, and education issues. In addition, Nancy has worked as a staff attorney with the Eleventh Circuit Court of Appeals in Atlanta, and an associate with the law firm Skadden, Arps, Slate, Meagher & Flom LLP in New York. She served as an international election observer in Albania, is a member of the American Bar Association’s (ABA’s) Advisory Committee to the Standing Committee on Election Law, and is a Senior Fellow with the Environmental Leadership Program based in Washington, D.C. She received her B.A. from Columbia University and her J.D. from Tulane Law School where she won the “Most Outstanding Managing Editor Award” for her work on the Tulane Environmental Law Journal. She is admitted to practice in Florida, Georgia, New York, the U.S. Supreme Court, and several other federal and state courts.

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**Peter Brann** is a Visiting Lecturer in Law at Harvard and Yale Law Schools, co-teaching a class on state attorneys general, and a partner at Brann & Isaacson, handling complex corporate and intellectual property litigation. He represents companies and individuals in their dealings with the government and has been hired by governments as outside counsel. He has litigated cases in state and federal court in more than 20 states and before state and federal agencies and has represented more than a dozen of the 100 largest Internet retailers. He was counsel to the winning candidate in constitutional litigation concerning the first congressional election using ranked-choice voting. Peter previously served as an Assistant Attorney General and then the State Solicitor for the state of Maine. In the latter capacity, he was responsible for all civil appeals for the state of Maine. He also handled a number of election cases for the state. He has acted as lead counsel in more than 100 appeals for public and private party clients in the U.S. Supreme Court, most of the U.S. Courts of Appeal, and state appellate courts in seven states. He received his J.D. from Boston University School of Law and holds a B.A. from Bates College.

**Christina E. Bustos** is an associate at Sandler Reiff Lamb Rosenstein & Birkenstock, in Washington, D.C. Christina advises clients on how to lawfully and effectively engage in political and lobbying strategies at the local, state, and federal levels, including navigating gift and ethics rules. Christina’s practice includes formation of and ongoing guidance for the growth of nonprofit organizations and corporations. She counsels candidates, officeholders, and associations on a wide array of political law. Christina also represents candidates and parties in recounts and other electoral disputes, most recently as part of the Voter Protection Team during the 2018 Florida recount. Prior to joining Sandler Reiff, Christina practiced trial- and appellate-level civil litigation in Richmond, Virginia.

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Kristen Clarke, President and Executive Director of the Lawyers’ Committee for Civil Rights under Law, leads one of the country’s most important national civil rights organizations in the pursuit of equal justice for all. Under her leadership, the organization has been at the forefront of some of the nation’s biggest racial justice problems today. The Lawyers’ Committee seeks to promote fair housing and community development, economic justice, voting rights, equal educational opportunity, criminal justice, judicial diversity, and more. Kristen received her A.B. from Harvard University and her J.D. from Columbia Law School.

Maia Cogen is a litigator with Lawrence & Bundy LLC focusing on employment matters, election law, the Telephone Consumer Protection Act, internal investigations, class action litigation, and general commercial litigation. Maia also has experience in securities litigation and enforcement, regulatory compliance and litigation, bankruptcy litigation, disability insurance advice, corporate compliance, and professional liability. She has represented clients in a variety of jurisdictions and forums including state and federal courts, Financial Industry Regulatory Authority arbitrations, federal agency investigations, and mediations. Before joining Lawrence & Bundy, she was an associate at Eversheds Sutherland, where she participated in the firm’s 2012 summer associate program. Also, she previously served as a summer law clerk with the National Association for the Advancement of Colored People Legal Defense and Education Fund in Washington, D.C. Before attending law school, Maia worked as a teacher with Teach for America in Atlanta, Georgia. Maia graduated summa cum laude from Spelman College and received her J.D. from Harvard Law School.

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Rebecca Green teaches election law, privacy law, and alternative dispute resolution at William & Mary Law School. She is Co-Director of the Election Law Program, a joint project with the National Center for State Courts that provides state-specific resources to judges about state election statutes at www.ebenchbook.org. Rebecca
co-founded Revive My Vote, a project that helps Virginians with felony convictions regain the right to vote. Rebecca received her law degree from Harvard Law School, an M.A. in Chinese history from Harvard University, and her B.A. from Connecticut College.

**Ben Griffith** is Principal of Griffith Law Firm in Oxford, Mississippi, and Adjunct Professor of Election Law at the University of Mississippi School of Law, earning a J.D. in 1975 after receiving a B.A. in English and German from the Ole Miss in 1973. His practice emphasizes civil litigation in the fields of voting rights, election law, civil rights, and school desegregation, and he has been trial and appellate counsel for governmental defendants in federal civil litigation in the Fourth, Fifth, and Eleventh Circuits. He chaired the ABA Standing Committee on Election Law and the Section of State and Local Government Law. He is a member of the Council of the Central European and Eurasian Law Initiative (CEELI), the ABA Board of Governors (2016–2019), and House of Delegates (2010–2019). He chairs the International Steering Committee of the International Municipal Lawyers Association and is recipient of the Association’s Charles S. Rhyne Lifetime Achievement in Municipal Law Award. He is a member of the American Law Institute, past President of the National Association of County Civil Attorneys and the Mississippi Association of County Board Attorneys, and past Chair of the Mississippi Bar’s Government Law Section. Since 1994 he has been board certified in Civil Trial Advocacy by the National Board of Trial Advocacy. He was a contributor to *International Election Principles: Democracy and the Rule of Law* (ABA 2008), *International Election Remedies* (John Hardin Young ed., ABA Standing Committee on Election Law 2016), *Homeland Security and Emergency Management: A Legal Guide for State and Local Governments* (Ernest B. Abbott & Otto Hetzel eds., ABA Section of State and Local Government Law 3d ed. 2018), editor of the first three editions of *America Votes! Challenges to Modern Election Law and Voting Rights* (2008, 2012, 2016), and co-editor of this fourth edition.

**Paul Gronke** is a Professor of Political Science and Director of the Early Voting Information Center (EVIC) at Reed College in Portland, Oregon. Paul studies American politics, specializing in convenience and early voting, election administration, public opinion, and elections. He served for eight years as editor of the *Election Law Journal* and is currently co-editor of *PS: Political Science and Politics*. In 2005, Paul established EVIC (https://blogs.reed.edu/earlyvoting/). EVIC searches for nonpartisan solutions to identified problems in election administration that are backed by solid empirical evidence. Paul works to improve access and ensure integrity in the American elections system. Paul received his Ph.D. from the University of Michigan in 1993, his M.A. from the University of Essex in 1984, and his B.A. from the University of Chicago in 1982.

**C. Robert Heath**, one of the founding partners of Bickerstaff Heath Delgado Acosta LLP—a 30-lawyer firm with offices in Austin, El Paso, and Houston—has been involved in redistricting since 1971. He has represented hundreds of governmental
entities in drawing districts and obtaining preclearance from the Department of Justice. In addition, he has represented many governments in significant federal voting rights litigation in Texas and in the District of Columbia district courts, in the Fifth Circuit, and in the U.S. Supreme Court. These cases include Chen v. City of Houston and Lepak v. City of Irving, both of which present the issue of whether noncitizens should be included in the apportionment base for one-person, one-vote purposes.

Julie Houk joined the Lawyers’ Committee for Civil Rights under Law in 2014 and is currently Managing Counsel for Election Protection. Julie's focus at the Lawyers' Committee has been on voting rights litigation and election protection work that has sought to ensure equal access to the ballot box for all voters, and, in particular, for voters of color. Julie received a B.A. in journalism and political science and an M.A. in political science from Marquette University in Milwaukee, Wisconsin, and received her J.D. from the Golden Gate University School of Law in San Francisco, California. She is admitted to practice law in California, Illinois, Massachusetts, New Hampshire, and the District of Columbia. Prior to joining the Lawyers’ Committee, Julie spent most of her professional career litigating civil rights cases in California.

Margaret Hu is an Associate Professor of Law at Washington and Lee University School of Law. Her research interests include the intersection of immigration policy, national security, cybersurveillance, and civil rights. She has published several works on dataveillance and cybersurveillance, including Biometric ID Cybersurveillance; Big Data Blacklisting; and Algorithmic Jim Crow. She is a member of the Advisory Board of the Future of Privacy Forum, a nonprofit think tank in Washington, D.C., that promotes responsible data privacy policies. Previously, she served as senior policy advisor for the White House Initiative on Asian Americans and Pacific Islanders and also served as special policy counsel in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), Civil Rights Division, U.S. Department of Justice, in Washington, D.C. Professor Hu holds a B.A. from the University of Kansas and a J.D. from Duke Law School. She is a Truman Scholar and a Foreign Language Area Studies Scholar. She clerked for Judge Rosemary Barkett on the U.S. Court of Appeals for the Eleventh Circuit and subsequently joined the U.S. Department of Justice through the Attorney General’s Honors Program.

Kurt Kastorf is a Supreme Court and appellate advocate who has worked on well over 100 appeals for the U.S. Department of Justice and in private practice in both Washington, D.C., and Atlanta, Georgia. Kurt also counsels clients on difficult election law and voting rights issues, from local candidates and nonprofits to nationally known figures such as Hillary Clinton. His most recent work includes representing Stacey Abrams in post-election litigation in Georgia and preparing the petitioners before the Supreme Court in Rucho v. League of Women Voters of North Carolina, a challenge to partisan redistricting. Kurt graduated from Emory College and Emory University School of Law, where he serves on the Emory Law Alumni Board and teaches trial techniques.
Allegra Lawrence-Hardy uses creativity and results-oriented strategic analysis to develop legal solutions that work for her clients. Allegra works with her clients on complex commercial and labor and employment matters. She has successfully defended Fortune 100 companies throughout the United States and abroad in numerous trials, arbitrations, and other forms of alternative dispute resolution. Allegra is known for her skill in trying cases, negotiating complex settlements, and finding creative solutions. Allegra helps develop processes and tools for improving the efficiency and delivery of legal services. Allegra is the co-founder of the commercial litigation firm Lawrence & Bundy. Lawrence & Bundy represents an array of sophisticated business entities and people in Atlanta, Georgia, and Washington, D.C.

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Peter Miller is a researcher in the Democracy Program at the Brennan Center for Justice at New York University School of Law. His research interests include American and comparative politics, voting behavior, political institutions, and public opinion. His work has been published in several peer-reviewed journals, including the Annual Review of Political Science, Electoral Studies, Election Law Journal, American Politics Research, and Journal of Elections, Public Opinion, and Parties. He is a former Fulbright Scholar to Finland. He holds a Ph.D. in political science from the University of California, Irvine, and a B.A. in political science from Reed College.

Terry Ao Minnis is the Senior Director of the census and voting programs for Asian Americans Advancing Justice. Terry co-chairs the Leadership Conference on Civil and Human Rights’ Census Task Force. She sat on the U.S Department of Commerce’s 2010 Census Advisory Committee from 2002 through 2011 and the Census Bureau’s National Advisory Committee on Racial, Ethnic, and Other Populations from 2013 to 2019. Terry has published several articles, including “When the Voting Rights Act Became Un-American: The Misguided Vilification of Section 203” (Alabama Law Review) and “No Longer Invisible: Engaging the Growing Asian American Electorate in the South” (Mississippi Law Journal), and has been counsel on numerous amicus briefs filed before the Supreme Court on voting rights cases, including Shelby County v. Holder. Terry was one of the key leaders in campaigns on reauthorizing the Voting Rights Act in 2006 and is actively engaged in addressing the Supreme Court’s decision in Shelby County v. Holder. She also helped lead the 2010 census outreach campaign for Asian Americans, Native Hawaiians, and Pacific Islanders, and is doing so again for the 2020 census. Terry received her J.D., cum laude, from American University Washington College of Law and her bachelor’s degree in economics at the University of Chicago.
G. Michael Parsons Jr. is an Acting Assistant Professor at New York University School of Law and an Adjunct Fellow at FairVote. His work focuses on voting rights, election law, and the political process, with an emphasis on gerrymandering, money in politics, and alternative models of representation. Michael served as a law clerk to the Honorable Norman H. Stahl of the U.S. Court of Appeals for the First Circuit and the Honorable Robert E. Payne of the U.S. District Court for the Eastern District of Virginia. He received his J.D., magna cum laude, from the Georgetown University Law Center, and his A.B., cum laude, from Davidson College. For updates and commentary on voting rights, money in politics, and other election law developments, follow Michael on Twitter @GMikeParsons or visit https://moderndemocracyblog.com.

Kevin Paulsen is an attorney at the Federal Election Commission’s (FEC’s) Office of the General Counsel—Policy Division. Prior to joining the FEC, he was an associate at Shearman & Sterling LLP. Kevin graduated from the University of Iowa in 2012 with a B.S. in political science and journalism and mass communication. He graduated from the George Washington University Law School in 2015. During law school, Kevin served as a law clerk for former FEC Commissioner Ann M. Ravel. All views or opinions expressed herein are Kevin’s alone and are expressed solely in his personal capacity.

Trevor Potter co-chairs the Political Law Practice at Caplin and Drysdale in Washington, D.C. He is a former Commissioner and Chairman of the FEC. He has taught campaign finance law as a visiting lecturer at the University of Virginia School of Law and at Oxford University. He was general counsel of Senator John McCain’s presidential campaigns in 2000 and 2008.

John Powers is a voting rights attorney at the Lawyers’ Committee for Civil Rights under Law, which he joined in 2015. John’s work at the Lawyers’ Committee focuses on litigation and election protection efforts directed at voter purges and other barriers to the ballot box, as well as discriminatory redistricting plans. John received his B.A. in history at Haverford College and his J.D. from the Georgetown University Law Center. He is admitted to practice law in Maryland and the District of Columbia. Prior to joining the Lawyers’ Committee, John worked for more than eight years at the Department of Justice, where he was part of litigation teams challenging the Texas voter ID and North Carolina omnibus election laws in federal district court. His published works include “Statistical Evidence of Racially Polarized Voting in the Obama Elections, and Implications for Section 2 of the Voting Rights Act” (Georgetown Law Journal).

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for former public employees. Prior to joining Venable, Rachel was an associate at Sandler Reiff Lamb Rosenstein & Birkenstock, P.C., and she also served as a Presidential Management Fellow at the U.S. Department of Education, during which she completed a detail at the FEC. Rachel co-authored the chapter The Administrative Challenges for Recounts, Contests, and Post-Election Audits with John Hardin Young in the America Votes! third edition. Prior to law school, Rachel was a Teach for America corps member in the Bronx, New York. Rachel holds a law degree from William & Mary Law School, a master’s in teaching from Fordham University, and a bachelor’s degree from the College of the Holy Cross.

Gowri Ramachandran is a Professor of Law at Southwestern Law School in Los Angeles, California. She received her J.D. from Yale Law School, a master’s in statistics from Harvard University, and her undergraduate degree in mathematics from Yale College.

Thomas W. Ryan received his Ph.D. in electrical and computer engineering from the University of Arizona. For 26 years, he worked for Science Applications International Corporation as a project manager and algorithm designer in the field of automated image analysis. In 2003, he became interested in election procedures and technology and was involved in framing and promoting Arizona’s election audit law that was enacted in 2006. Thomas was a member of the Pima County Election Integrity Commission for ten years, serving as Chair for four years. During that time he coordinated discussions and presentations on ballot image audits and directed a pilot study on risk-limiting audits. He has also participated in discussions on implementation of risk-limiting audits as a member of the State Audit Working Group (SAWG), the Colorado Risk-Limiting Audit Working Group (CORLA), and the Rhode Island Risk-Limiting Audit Working Group (RIRLA).

Robert O. Saunooke is an enrolled member and citizen of the Eastern Band of Cherokee Indians and graduate of Washington and Lee Law School whose practice centers on working with Native Americans and tribal governments. For more than 25 years he has worked with tribal governments throughout Indian country assisting them in enacting legislation, state and federal litigation in federal and tribal courts, business development, creation of court systems, and codifying their own laws. Robert has been an instructor and educator for various federal, state, and tribal law enforcement officials throughout the United States on jurisdictional issues relating to the application and enforcement of the Adam Walsh Sexual Offender Act, Violence Against Women Act, and various state and federal laws and their application throughout Indian country. Currently Robert teaches federal Indian law and policies at Emory Law School in Atlanta, Georgia. In 2005, Robert appeared before Congress along with his client José Canseco during the investigation into steroid use in Major League Baseball and has been considered one of the leading legal commentators on the legalities of steroids and performance-enhancing drug use in sports. He was a member of the Brigham Young University football team and the recipient of the Shining Example of America Award for Acts of Heroism relating to his actions
in saving the lives of 11 children. Robert is very active in the ABA and has served in numerous positions including Chairman of the ABA’s Tribal Courts Council, Standing Committee on Minorities in the Judiciary, ABA presidential appointee to the Standing Committee on Federal Judicial Improvement, Future of Legal Services Commission, Lawyers Conference Executive Committee, and Chairman of the ABA Judicial Clerkship Program. He served as President of the National Native American Bar Association in 2019–2020.

Chris Sautter, Founder and President of Sautter Communications and Films, is a nationally recognized political media strategist, award-winning documentary filmmaker, election attorney, and university professor. Sautter is best known for his expertise in election disputes, having worked as an attorney or consultant on nearly every major national recount since helping Democrat Frank McCloskey win a four-vote victory in 1984–1985 in Indiana’s “Bloody 8th” congressional district—a race that remains the closest U.S. House race in modern history. His work on behalf of Al Gore in the 2000 Florida recount was profiled in the *New Republic*, singled out by the late syndicated columnist Robert Novak, and praised by Jeffrey Toobin in his book *Too Close to Call*. Sautter served as a lead attorney in Al Franken’s U.S. Senate 2008 recount in Minnesota. Jay Weiner, author of *This Is Not Florida: How Al Franken Won the Minnesota Recount*, pegged him “unquestionably the most experienced recount lawyer in the country” and “the go-to-guy on the Franken recount team.” Sautter co-authored *The Recount Primer* (1994) with Jack Young and the late Tim Downs and teaches election law, including a course on recounts as an Adjunct Professor at American University. More recently, Chris served as an attorney for Bernie 2016, the Bernie Sanders for President campaign, directing voter protection activities. He also helped direct voter protection for the Hillary Clinton for President campaign in Florida during the 2016 general election campaign. In 2018, he represented the Florida Democratic Party in two statewide recounts. Currently, Chris is counsel to AUDIT Elections USA, a nonprofit working to make elections more transparent, verifiable, and subject to public oversight.

Lucy L. Thomson, CISSP, is the Founding Principal of Livingston PLLC in Washington, D.C. She focuses her practice on cybersecurity, global data privacy, compliance, and risk management. For more than a decade she has worked on election initiatives and voting machine security issues, including problems with voting equipment during key U.S. elections. Appointed Consumer Privacy Ombudsman in 27 major federal bankruptcy cases, she has overseen the disposition of more than 250 million electronic consumer records. Active in the ABA, she served as Chair of the Section of Science & Technology Law and is a member of the House of Delegates and the Cybersecurity Legal Task Force. A career white collar crime prosecutor at the U.S. Department of Justice, Lucy managed and conducted complex litigation in the Criminal and Civil Rights Divisions. She subsequently worked as a senior engineer at CSC, a global technology company, on two of the government’s largest technology modernization projects where she gained extensive experience conducting
risk assessments and developing security plans. She received a master’s degree from Rensselaer Polytechnic Institute (RPI) in 2001, earned the CISSP and CIPP/US certifications, and holds a J.D. degree from the Georgetown University Law Center.

Lauren E. Ward is an attorney with the Griffith Law Firm in Oxford, Mississippi, where her practice revolves around voting rights, school desegregation, government liability, insurance defense, products liability, and premises liability matters. She graduated from the University of Florida in 2011 with a B.A. in political science. Lauren went on to graduate from the University of Mississippi School of Law in 2015 with cum laude honors. While at Ole Miss, Lauren was a member of the school’s Negotiation Board, competing across the country at alternative dispute resolution forums.

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John Hardin “Jack” Young is a past Chair of the ABA’s Senior Lawyer Division and Section of Administrative Law and Regulatory Practice. He is an Adjunct Professor of International and Comparative Election Law at William & Mary Law School, Senior Global Election Dispute Resolution Advisor for the International Foundation for Electoral Systems (IFES), and Senior Counsel at SandlerReiff in Washington, D.C. He is also a former Chair of the ABA’s Standing Committee on Election Law, editor and contributor to *International Election Principles: Democracy and the Rule of Law* (ABA 2008), and an author of “Alternative Dispute Resolution Mechanisms” (with David Kovick) in *Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections* (IFES 2011). He is also the editor of *International Election Remedies* (ABA 2016). He is a former member of the ABA Board of Governors, and is a Life Fellow of the American Bar Foundation and a Life Member of the American Law Institute. He is one of the authors (with Tim Downs and Chris Sautter) of the *Recount Primer* and one of the first attorneys to design and implement a promote and protect the vote/election protection program following the 2000 Florida election. He received his law degrees from University of Virginia (J.D.) and Oxford University (B.C.L.).
About the Peer Reviewers

Nicole Austin-Hillery is Human Rights Watch’s inaugural U.S. Program Executive Director. In this newly created role, Ms. Austin-Hillery leads Human Rights Watch’s efforts to end violations in abusive systems within the United States. Her work focuses on improving the U.S. immigration system, tackling race discrimination and rights problems within the domestic criminal justice system, and advocating for national security policies informed by international human rights standards. Previously, Ms. Austin-Hillery was the first Director and Counsel of the Brennan Center for Justice’s Washington, D.C., office, which she opened in March 2008. At the Brennan Center, she oversaw the growth and development of the Center’s advocacy and policy development work in Washington and served as its chief representative before Congress and the executive branch. Ms. Austin-Hillery has testified before state and local legislative bodies as well as Congress. She has published numerous pieces for major news outlets including Time Magazine, The Hill, CNN.com, and a host of others. She is a frequent speaker on a host of progressive issues. Prior to her time at the Brennan Center, Ms. Austin-Hillery litigated at the law firm of Mehri & Skalet, PLLC as part of the firm’s civil rights employment class action practice and as the George N. Lindsay Civil Rights Law Fellow at the national office of the Lawyers’ Committee for Civil Rights under Law in Washington, D.C., where she focused on housing litigation and policy. She served as the 2018–2019 President of the Washington Bar Association, is a past President and current board member of the Washington Council of Lawyers, serves as an Advisory Committee member of the ABA Standing Committee on Election Law, serves on the Board of Common Cause and as Co-Chair of the ABA Criminal Justice Section’s Defense Function Committee. She has also been an adjunct civil rights professor at the University of the District of Columbia David A. Clarke School of Law and is a former Wasserstein Public Interest Fellow at Harvard Law School. Ms. Austin-Hillery is a graduate of the Howard University School of Law and Carnegie Mellon University.

Charles H. Bell Jr. is a Senior Partner with Bell, McAndrews & Hiltachk, LLP, Sacramento, California, and practices campaign, elections, and constitutional law exclusively. He is past President of the Republican National Lawyers Association, Washington, D.C., founding Chairman of the California Political Attorneys
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Kimberly Demarchi is Senior Associate General Counsel at Arizona State University, where her areas of practice include government and constitutional law. While in private practice, she represented public, private, and nonprofit clients in civil appeals and in government law matters, including compliance with campaign finance, election, and lobbying laws. She has served on the ABA’s Standing Committee on Election Law as Chair of its Advisory Committee, is an elected member of the American Law Institute, and is a fellow of the American Academy of Appellate Lawyers.

Alison Cline Earles, Associate General Counsel, joined Georgia Municipal Association (GMA) in March 2014 after completing five years with the Georgia Department of Community Health, where she served as Information Privacy and Security Officer for Georgia Medicaid and as counsel and Information Privacy and Security Officer for the State Health Benefit Plan. Ms. Earles leads information privacy and security efforts for GMA, which operates major medical, dental, life insurance, workers compensation, and retirement programs for its members. Ms. Earles negotiates business associate agreements and contractual information privacy and security provisions. She coordinates with general counsel, the chief information officer, and executive leadership to complete security assessments and develop information privacy and security policies and procedures and training materials. She delivers information privacy and security training to GMA staff and city leaders. Ms. Earles is a graduate of Princeton University and Duke Law School.

Jason Kaune leads the political law practice at Nielsen Merksamer Parrinello Gross & Leoni, in San Rafael, California, specializing in political, government, and election law. Mr. Kaune advises clients across the regulated community in regard to campaign finance, lobby disclosure, and government ethics laws on the federal, state, and local levels. In addition to serving on the ABA Standing Committee on Election Law, he co-chairs the annual Practising Law Institute Corporate Political Activities conference and is a local elected official. He gratefully acknowledges the assistance of his colleagues, Chris Skinnell and James Barolo, in completing the peer reviews of several chapters. Chris is a partner in Nielsen Merksamer Parrinello Gross & Leoni experienced in litigation related to elections, referenda, redistricting, and voting rights. James is an associate in the firm’s litigation and political law sections with civil litigation experience relating to voting rights and redistricting, elections, constitutional law, and government regulations.

Christopher T. Saucedo serves as the Chair of the ABA’s Standing Committee on Election Law. Mr. Saucedo is a Founder and Shareholder of SaucedoChavez, P.C. He is an AV® Peer Review Rated Attorney and is recognized by Super Lawyers® for an eighth consecutive year. With 20 years of civil litigation experience, Mr. Saucedo has
gained a reputation of being a tireless, ethical advocate for his clients. Mr. Saucedo brings his litigation expertise to his representation of political candidates, elected officials, political parties, and nonprofit organizations. This past year Mr. Saucedo successfully argued before the New Mexico Supreme Court in the matter of *Unite New Mexico v. Oliver*, 2019 WL 475845 (Feb. 7, 2019), on behalf of the Republican Party of New Mexico, the Libertarian Party of New Mexico, and several independent candidates against the use of a straight-party voting option on the 2018 ballot.

He has represented many candidates in petition challenges, recounts, and election challenges and served as counsel for the Republican Party of New Mexico. Mr. Saucedo has litigated multiple redistricting matters, including the five-week trial and subsequent appeal reported as *Maestas v. Hall*, 274 P.3d 66 (N.M. 2012). Mr. Saucedo has been attorney of record in multiple matters for the Honorable Susana Martinez, governor of the state of New Mexico, the Honorable John Sanchez, lieutenant governor of the state of New Mexico, many members of the New Mexico legislature, and nine cabinet secretaries for the state of New Mexico. In addition to his litigation work, Mr. Saucedo tries to serve his community in other ways. Mr. Saucedo serves as the Chairman of the Board of the National Hispanic Cultural Center, a center dedicated to the preservation, promotion, and advancement of Hispanic culture, arts, and humanities. Mr. Saucedo recently completed his term as a member of the Board of Regents of New Mexico State University. (Go Aggies!) He is former President of the Albuquerque Bar Association and has served on several community-related advisory boards.

**Elizabeth M. Yang** is President and Founder of Phoenix Rising Strategies. She is also a member of the ABA Standing Committee on Election Law. She is a national expert in election law, having served as the Director of the Standing Committee from 1995–2018. She is the author of numerous articles on voting rights and election law, as well as a moderator and panelist on election law-related programming. She received her B.A. in rhetoric and communications studies and her J.D. from Syracuse University College of Law.

**Lai Sun Yee** is a Federal Coordinating Officer of Federal Emergency Management Agency (FEMA) Region II, which encompasses the states of New Jersey and New York, the commonwealth of Puerto Rico, the territory of the U.S. Virgin Islands, and the Native American tribal nations in the region. When appointed by the FEMA administrator or deputy administrator, on behalf of the administrator, Ms. Yee deploys to the site of a presidentially declared disaster or emergency to manage response, recovery, and mitigation operations. She establishes the federal presence at the disaster site, and together with the state coordinating officer, implements response and recovery operations. Ms. Yee ensures a coordinated effort with involved federal, state, tribal, territorial, and local governments as well as nonprofit organizations and the private sector. Ms. Yee served as the Acting Deputy Regional Administrator of FEMA Region II from May 2017 to September 2018 where she oversaw regional operations. Earlier, Ms. Yee served as Senior Policy Advisor to the director of the
National Training and Education Division at FEMA headquarters in Washington, D.C., and additionally acted as FEMA Division Supervisor for Manhattan and the Bronx during the Hurricane Sandy response. Ms. Yee was named a Distinguished Fellow of the FEMA National Preparedness Directorate. Before joining FEMA, Ms. Yee was the Principal Advisor, Homeland Security for the Center for Naval Analyses (CNA). CNA is a federally funded research and development center for the U.S. Navy and Marine Corps. Ms. Yee has an extensive record of service to the people of New York. She is the former New York State Assistant Deputy Secretary for Homeland Security, New York State Assistant Deputy Secretary for Criminal Justice, and General Counsel for the New York State Emergency Management Office. As well, Ms. Yee served as the New York City Deputy Commissioner for Legal Services and General Counsel for the New York City Emergency Management, where she worked in support of the city’s response to the September 11, 2001, terrorist attacks. Additionally, she served as the Assistant Fire Commissioner of the Bureau of Investigation and Trials for the New York City Fire Department, and worked as an attorney in the Fire Department Legal Division. Ms. Yee also formerly acted as Counsel to the Bronx Borough president. Ms. Yee holds a B.A. from Cornell University, a J.D. from Cornell Law School, and an M.A. from the Naval Postgraduate School’s Center for Homeland Defense and Security.
A diverse and extraordinarily talented group of authors contributed chapters to this fourth edition of *America Votes!* Each chapter reflects a depth of experience and awareness of the many facets of the political spectrum of our time, leading to a balanced perspective from start to finish. The five-part organization of this book provides a logical pathway to address the current challenges to election law and voting rights:

1. Voter qualification and participation
2. The voting process
3. Voting rights litigation
4. Redistricting
5. Audits and recounts

The broad subject of voter qualification and participation is addressed in six chapters, beginning with veteran Texas redistricting expert Bob Heath's chapter *Immigration, Citizenship, and the 2020 Census*, which includes a very timely discussion of *New York v. U.S. Department of Census* (June 27, 2019) involving an attempt to insert a question about citizenship in the 2020 Census. The National Lawyers' Committee for Civil Rights under Law provided a trio of superb attorneys, President and Executive Director Kristen Clarke, Managing Counsel for Election Protection Julie Houk, and voting rights attorney John Powers, who collaborated in writing the chapter on Georgia's experience in 2018 with strict construction of voter registration laws. The Southern Poverty Law Center's Deputy Legal Director for its Voting Rights Practice Group, Nancy Abudu, authored a chapter on how Florida's felon reenfranchisement law penalizes the poor in *Too Broke to Vote*. Lauren E. Ward and Ben Griffith address the subject of Millennials and electoral access in 2018–2020, concluding that the technologically aware Millennial generation of voters is poised to bring about a major shift in the political climate of a polarized nation, energized in part by increased use of social media, political activism, and distrust of the gridlocked political system. Terry Ao Minnis, Senior Director of the Census and Voting Programs for Asian Americans Advancing Justice, has analyzed section 203 and language minority access in *A Holistic Approach to Assisting Language Minority Voters*. A significant overview of Native American voting is provided by Robert
Saunooke, reflecting his many years of experience in working with tribal governments throughout Indian country and his deep commitment to justice through his service as President of the Native American Bar Association.

The voting process is addressed in the next seven chapters, beginning with Professors Paul Gronke and Peter Miller’s chapter *Early Voting in America: Public Usage and Public Support*, reflecting Gronke’s ongoing research as director of the Early Voting Information Center and Miller’s research work through the Brennan Center for Justice’s Democracy Program. Rachel T. Provencher’s chapter, *Voter ID Laws and Jurisprudence: The Path to 2020*, gives us a detailed and pragmatic perspective on voter identification laws as they have proliferated over the past decade. Cybersecurity expert Lucy L. Thomson has authored a fascinating chapter on cybersecurity threats to election systems, with a very current analysis of best practices that have been developed in this challenging field. Fresh from his successful representation of the plaintiff in *Baber v. Dunlap* that made Maine the first state in the Union to conduct congressional elections using ranked-choice voting, Peter Brann has contributed an intriguing chapter on ranked-choice voting. Allegra Lawrence-Hardy and Maia Cogen with Lawrence & Bundy LLC, a commercial litigation firm, have co-authored a very powerful chapter that provides a historical review of how voter fraud claims have shaped policy and affected voters. Trevor Potter, former Chair of the Federal Election Commission, and Co-Chair of Caplin & Drysdale’s Political Law Practice and associate Olivia N. Marshall, have teamed up to provide a timely chapter, *Potential Legal Pitfalls for the 2020 Elections*. Sean J. Wright, a member of Venable’s Political Law and Nonprofit Practices, has unpacked and explained H.R. 1, the For the People Act of 2019, an extraordinarily detailed proposal and the most comprehensive democracy reform package since Watergate.

Key aspects of voting rights litigation are covered in the next four chapters, starting with a chapter on criminal enforcement of the election laws by Kevin Paulsen, an attorney with the Federal Election Commission’s office of General Counsel—Policy Division. Butler Snow’s Tommie Cardin, a veteran of many legislative and congressional redistricting battles in his home state of Mississippi, and Parker Berry, an exceptionally experienced litigator in the legislative and congressional redistricting field, have co-authored the chapter *Section 2 Vote Dilution in 2018 and Beyond, with Emphasis on State Legislative Redistricting*. Professors Rebecca Green and Margaret Hu have collaborated on an interesting chapter entitled *Digitized Election Administration: Perils and Promise*, in which they emphasize how election administrators are proactively and wisely reviewing when digital tools relating to election security, voter registration, casting ballots, and list maintenance can help and when unintended consequences can lead to trouble on Election Day. Appellate advocate Kurt Kastorf has contributed a chapter that comprehensively addresses the impact of *Shelby County v. Holder* on the election cycles in 2018 and 2020.

Redistricting is addressed in two chapters, one by New York University Acting Assistant Professor Mike Parsons Jr., an Adjunct Fellow at FairVote, in which he provides a current and literally hot-off-the-press analysis in *Partisan Gerrymandering*...
under State and Federal Law. Also contributing a chapter in this area of the law are Southwestern Law School Professor Gowri Ramachandran and Dara Gold, an Associate Mathematician at Rand Corporation, in which the co-authors apply advanced computational techniques to gerrymandering, including partisan gerrymandering that may still be challenged under some state laws and constitutions, and potentially available state and federal legislation adopted post-Rucho.

The final subject covered in this book, audits and recounts, starts with a chapter by Dr. Thomas W. Ryan, Risk-Limiting and Ballot Image Audits, in which he advances compelling arguments about why new computer-aided tabulation systems are nonetheless vulnerable to inadvertent or malicious software problems, user errors, user manipulation of data, chain-of-custody failures, and poor ballot design that could lead to incorrectly reported election outcomes. Ryan provides a clear analysis of the pros and cons of the efficiencies and possible drawbacks of the two principal auditing methods, risk-limiting audits and ballot image audits, either of which could provide a significant improvement in election integrity if done properly and implemented statewide. The final chapter in the fourth edition of America Votes! is Recounts: The New Reality Two Decades after Bush v. Gore, which was co-authored by Sandler Reiff associate Christina E. Bustos; nationally recognized political media strategist Chris Sautter, counsel to AUDIT Elections USA with extensive experience as an attorney or consultant on almost every major national recount for the past 35 years; and John Hardin “Jack” Young, former Senior Global Election Dispute Resolution Advisor for the International Foundation for Electoral Systems and an experienced, talented, and prolific expert in the field of vote/election protection, election remedies, and recounts. The co-authors make a strong case for comprehensive reform, uniform standards, and increased governmental oversight to address declining voter confidence as well as chronic problems of long lines, inaccurate poll lists, and confusing new laws designed to restrict access and voting machine failures.
Introduction

There is no more important right a citizen of a democracy has than the right to vote in elections that determine who will govern the locality, the state, and the nation. It is thus fitting and illuminating that since 2008 the American Bar Association (ABA) has published a series of volumes entitled America Votes!, which explore issues of concern and problems that threaten the security and fairness of the American electoral system.

It was just three years ago, in 2016, that the ABA published the third edition of America Votes! Challenges to Modern Election Law and Voting Rights. That volume, also edited by attorney Benjamin E. Griffith, who among many other distinctions served as co-chair of the ABA Section of International Law’s Task Force on International Election Law, was divided into three sections and 17 chapters. They delved into election administration and technology; challenges to voting rights; and concerns about redistricting.

It is indicative of the current high level of concern about the security and fairness of the electoral system in the United States that this all-new fourth edition, America Votes! Challenges to Modern Voting Rights and Election Law, addresses both new and recurring issues about elections in America. This expanded edition contains five sections and 21 chapters. They address voter qualifications and participation; the voting process itself including the use of early voting; cyber threats to election security; the impact of claims of voter fraud and vote-stealing on confidence in the electoral system; voting rights litigation and the ongoing impact of the U.S. Supreme Court’s decision in Shelby County v. Holder, which gutted the Voting Rights Act of 1965; and continuing concerns about partisan gerrymandering of election districts.

Today, concerns about the security of our electoral system have been given greater weight in light of the revelations in the Mueller report about Russian interference in the 2016 U.S. presidential election. In 2018, the ABA’s Paris Sessions hosted a panel discussion entitled Cybersecurity Best Practices in Elections that Ben Griffith organized, which included two of the authors who are represented in this edition: Lucy Thompson and Jack Young, the latter also serving as co-editor of this fourth edition of America Votes! The panel concluded that more resources must be invested and a greater commitment made by local, state, and national governments.
to insure the security of our elections. Nothing has been done since then to change that conclusion.

In fact, the 21 chapters in this edition of America Votes! make for very sober reading. There is much that needs to be done across a whole host of issues to restore confidence in the fairness, equity, and security of the voting process in communities across America. This volume describes in detail what these issues are. Whether we as a people and a nation have the confidence and the will to reach a consensus on how to address these issues, and then to address them, remains to be seen. In fact, how partisan gerrymandering should be addressed has become more complicated in light of the Supreme Court’s recent decision in Rucho v. Common Cause,1 that partisan gerrymandering claims present political questions that are beyond the reach of the federal courts.

This fourth edition of America Votes! is a necessary and outstanding source of information and insight, presented by a brilliant group of experts in their fields. It will be of value not just to lawyers, but also to all who are concerned about the security and fairness of our electoral process and want to know what can be done to address these problems and improve our system.

—Myles V. Lynk, Peter Kiewit Foundation Professor of Law and the Legal Profession at the Sandra Day O’Connor College of Law at Arizona State University

Notes

PART ONE

VOTER QUALIFICATION AND PARTICIPATION
The census is an essential data source for attorneys specializing in election law. Whether drawing districts to have equal population or measuring vote dilution in a case brought under the Voting Rights Act, the attorney and the courts must rely on the census.

Relying on an apparently pretextual claim of needing the information to enforce the Voting Rights Act, the Commerce Department planned to add a citizenship question to the census over the objections of the experts in the Census Bureau who had determined that the addition will diminish the accuracy of the census count even though there were alternative, more accurate ways of providing the same data without adversely affecting the census count. Following challenges to the plan, the issue quickly made its way to the U.S. Supreme Court, which addressed the issue in a highly fractured opinion on the last day of its term. This chapter explores the background of the controversy and the apparent, but unstated, reason for seeking to make the change.

I. Drawing Districts Is Inherently Political

Carefully constructed legislative districts can artificially inflate a political party’s power. By careful manipulation of district lines, a political party can magnify its electoral strength even to the extent of converting a narrow margin in votes—or even an electoral loss—into a decisive majority of legislative seats. For example, North Carolina, a state that in recent years has been considered a battleground state so that either major political party has a good chance to carry the statewide vote, designed its congressional district map with the express purpose of causing the election of ten Republicans and three Democrats—a configuration the House co-chair of the joint redistricting committee stated was chosen because he “d[id] not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats.” In 2016, Republican candidates, as expected, won ten of the state’s 13 congressional districts while receiving a little more than 53 percent of the statewide vote. In 2018, Democrats received roughly 50 percent of the vote, but still won only three of the 13 seats. Similarly, the 2011 Pennsylvania General Assembly drew a plan that in the
three elections between 2012 and 2016 consistently resulted in the election of five Democrats and 13 Republicans even though the Democrats received, on average, 51 percent of the vote in those elections to the Republicans’ 49 percent.³

While these two examples involve Republicans gaining an advantage by how district lines are drawn, the practice of manipulating the districting process for partisan advantage is practiced by whichever party is in power. In Maryland, where Democrats typically received a majority of the statewide vote, a realized goal of the 2011 redistricting was to convert the makeup of the eight-member congressional delegation from six Democrats and two Republicans to seven Democrats and only one Republican—a margin much greater than the relative electoral strength of the two parties would suggest.⁶ Neither political party is blameless, and when the opportunity presented itself, both have manipulated the electoral system to gain electoral advantage.

Although the fortunes of the two parties may rise or fall as public opinion shifts, as different issues become important, and as the parties’ positions evolve, Republicans currently have a special reason to look for means of locking in electoral advantage because they appear to be facing adverse demographic trends. In recent elections, Republican voters have tended to be older, Whiter, and more likely to reside in rural areas. All of those components of the population are shrinking as the percentage of the population that consists of persons who are younger, more urban, and non-White increases. These trends make it important and beneficial for Republicans to seek advantages that can be obtained through the districting process.

II. Changing the Apportionment Base to the Advantage of One Party

One tactic that has great potential to affect the political balance is to change the composition of the electorate by redefining the type and number of people who will be considered when allocating and drawing districts. Districts are typically drawn to contain equal numbers of people. If the apportionment base is instead changed to consist of equal numbers of citizens or, in a more typical formulation, equal numbers of potential voters (generally represented by citizen-voting-age population, often referred to as CVAP), then the change can produce a reallocation of political power. There are districts—typically in urban areas—that contain large concentrations of noncitizens while other, often more rural, districts may have relatively few noncitizens. Both types of districts may have relatively equal numbers of people but vastly different numbers when CVAP is the measure.⁷ If CVAP rather than total population were the required apportionment base, a district with a large number of noncitizens would have to become larger, while one with few noncitizens would need to shrink. The impact was explained by Hans von Spakovsky, a leading conservative who is active in voting rights debates. He urged that “[a]pportionment within states should be limited to the citizen population,”⁸ and explained that
[drawing districts using a voter-eligible metric] could have had a significant effect on state legislative districts as they currently stand. Democratically controlled legislative seats tend to have larger numbers of noncitizens than do Republican seats. While Evenwel was about state legislative seats and congressional seats may pose a slightly different question, what would happen in Congress is an easily understood parallel to the changes that would ensue in state houses. Of the 50 congressional districts “with the lowest share of adult citizens, 82 percent are represented by Democrats, while Republicans represent 38 of the 50 districts with the highest share of adult citizens.” Stated another way, if the Court had found that using total population—when it unevenly distributes the voting-age eligible population—violates the one-person, one-vote guarantee, legislative districts likely would have been redrawn in parts of the country with large noncitizen populations, with a noticeable shift toward Republicans and away from urban districts.⁹

There are legitimate philosophical arguments on both sides of the issue regarding the proper electoral base. If we are concerned about all votes having equal weight, an electoral equality model (an apportionment base composed of potentially eligible voters) may be the proper measure. On the other hand, if we are more interested in equality of representation and recognize that noncitizens, children, and other persons who are not eligible to vote use government services (e.g., schools, roads, parks, fire and police protection, etc.) and pay taxes, then a representational equality model may be more appropriate. While there are credible arguments for either model, the choice of which model to use is likely to be driven by which produces the greater political benefit to the person or political party drawing the districts. As von Spakovsky points out, using an eligible-voter apportionment base is likely to have the greater benefit for Republicans. Accordingly, support for a voter-eligible model will generally come from Republicans, while Democrats are more likely to support a total-population apportionment metric.

III. The Possibility of an Eligible-Voter Apportionment Base Metric

A concerted effort to obtain a Supreme Court ruling requiring the use of an eligible-voter apportionment base has failed, but it has left open the possibility that a legislative body could choose to use such a metric. Because there can be political advantage in switching from a population-based apportionment system to an eligible-voter system (i.e., one in which noncitizens and children are excluded from the apportionment base), there has been a succession of cases seeking to require that districts be drawn on the basis of voting population rather than total population.¹⁰ Perhaps the first such case involved a jurisdiction—the Los Angeles County Board of Supervisors—that conducted nonpartisan elections.¹¹ The apparent purpose of seeking a citizen-only apportionment base was to protect the existing incumbents rather than to benefit a particular political party. While the panel majority in Garza v. County of Los Angeles accepted a representational equality model, believing that basing apportionment on
the number of eligible voters would be a denial of equal protection, its more narrow
holding was that California statutes required districting on the basis of total popu-
lation. The Supreme Court declined to review the case.

About ten years after Garza, Edward Blum was one of the plaintiffs in Chen v. City of Houston, which challenged the Houston City Council districts as a racial gerrymander. Blum, who had previously been a leader in successfully bringing a Supreme Court challenge to Texas congressional districts as a racial gerrymander, was in the early stages of becoming what the New York Times has described as “a one-man legal factory with a growing record of finding plaintiffs who match his causes, winning big victories and trying above all to erase racial preferences from American life.” Although not a lawyer, Blum has had remarkable success in orchestrating litigation that has made its way to the Supreme Court, including challenges to racial gerrymandering, section 5 of the Voting Rights Act, and racial preferences in college admissions. Chen v. City of Houston challenged a city council redistricting plan, which joined a predominantly White, newly annexed community in the extreme northeastern part of Houston to a predominantly White community in the extreme southeastern part, in an effort to avoid diluting the voting strength of nearby Black and Hispanic districts. While the racial gerrymandering claim was the primary challenge, the suit also included a one-person, one-vote claim arguing that the resulting districts, while relatively equal in total population, had large deviations in CVAP. The plaintiffs lost in the district court and the Fifth Circuit, and the Supreme Court denied the petition for certiorari. Justice Thomas, however, dissented from the denial of the petition for writ of certiorari, saying that the Court had an obligation to decide what the relevant apportionment base was (e.g., total population or CVAP) when measuring compliance with one-person, one-vote principles.

Frustrated in his effort to get the issue to the Supreme Court in Chen, Blum helped bring another case, Lepak v. City of Irving, raising the apportionment-base question in Irving, Texas. The city of Irving’s at-large election system had previously been found to be in violation of section 2 of the Voting Rights Act. To remedy the violation, the city drew a single-member district plan, but one of the districts, which was heavily Hispanic, had much lower CVAP than some of the other districts even though all the districts had roughly the same total population. Some Irving citizens, backed by Blum, challenged the remedial plan claiming that CVAP should be the measure of whether the plan complied with the constitutional one-person, one-vote guarantee, and, if that is the measure, then the votes of the residents of the high-citizenship areas had been devalued. The district court, relying on Chen, granted summary judgment for the city, and the Fifth Circuit affirmed. As with Chen, the Supreme Court declined to hear the case, although this time without a dissent.

In a third attempt to get the apportionment-base issue to the Supreme Court, Blum supported a challenge, Evenwel v. Abbott, to Texas state senate districts. The maximum deviation between the largest and smallest senate districts, when measured by total population, was 8.04 percent, a variance well within the 10 percent
maximum deviation that is considered prima facie evidence that a plan meets the one-person, one-vote standard. When measured by CVAP, however, the maximum deviation exceeded 40 percent. Because this was a challenge to the apportionment of a statewide legislative body, it was required to be heard by a three-judge district court. As such, any review would bypass the court of appeals and be by direct appeal to the Supreme Court. This time, with the case appearing on the appeal docket rather than on the certiorari docket, the Supreme Court noted probable jurisdiction and heard the case. The Court rejected Evenwel’s claim that the Equal Protection Clause required apportionment by a voter-eligible metric such as CVAP. Rather, it held that the state was permitted to choose to district on the basis of total population. Importantly, it left open the issue of whether a voter-eligible apportionment base would similarly be permissible. Although the plaintiffs in Garza, Chen, Lepak, and Evenwel did not achieve their goal of mandating apportionment by voter-eligible population, the suggestion that a legislative body had discretion to choose the apportionment base coupled with the failure to rule that using an eligible-voter metric was prohibited means that the effort to draw districts by CVAP or some similar measure has now moved from the judicial to the legislative branch. It can be expected that there will be attempts in some jurisdictions to convince state legislatures and political subdivisions to use CVAP to draw districts in the post-2020 census and subsequent rounds of redistricting. Before that can happen, however, it will be necessary to have accurate citizenship data for small geographic areas.

IV. When There Would Be a Need to Reconfigure the Census

If CVAP or a similar eligible-voter metric is to be used in drawing legislative districts, it will be necessary to reconfigure the census in order to obtain the necessary information. Districts are drawn using data from the decennial census. In the early 1970s, when, as a law student/legislative aide, the author of this chapter first participated in drawing legislative districts, the census data was printed in large books of tables, maps were so large that that they were unrolled on the floor while the drawers worked on their hands and knees, the census tract was the basic building block, and the total population of each district was computed on an adding machine. The work was tedious and prone to error. As computers and redistricting software became more available and more sophisticated, the data became available in electronic form, the maps were on computer screens, the basic building block was the much smaller census block, and software not only kept a running total of the district size as blocks were added and subtracted but also displayed information on race, voting history, and other useful information. The redistricting task became much easier, much more precise, and much more susceptible to being used to produce a desired policy result.

Because of this increased capability, the census block became the basic unit that is aggregated to form a district. A census block is defined by observable geographic features, is typically the size of a city block, and is the smallest unit for which the
census reports population data. The Census Bureau’s P.L 94-171 file, which is the data source designed for use in redistricting, gives census block-level data on total population and voting-age population and breaks both of those categories down by race and Hispanic origin. All of this data comes from the short-form census questionnaire that is designed to go to every household. As with any endeavor of the magnitude of the U.S. census, its coverage is not perfect, but it is considered to be complete count data.

In 1950 and earlier censuses, the census questionnaire included a question on citizenship. In the past 70 years, though, data on citizenship has come from a statistical sample collected in what was known as the long-form questionnaire that went to only some households, while the short form was sent to all households and asked only basic questions such as the number of persons in the household along with their age, sex, race, and whether they were of Hispanic origin. Beginning in 1960, the long-form questionnaire contained all the questions on the short form, went to about one in six households, and was distributed at the same time as the short form. In addition to questions about citizenship, the long form contained many more questions on housing, employment, income, education, and other matters that were used to develop a statistical picture of the population. The long form was last distributed as part of the decennial census in 2000, and by 2010 it had been replaced by the American Community Survey (ACS), which sends out questionnaires every month rather than once every ten years as part of the decennial census. The ACS is reported each year, but only for areas with at least a 65,000 population. It publishes reports for smaller areas but, in order to have a large enough sample to provide reasonable reliability, the census-block-group report aggregates five years of data. The results are reported showing a margin of error rather than as a hard-and-fast number as would be the case with the complete count data from the short form. The five-year aggregation is a rolling sample as in each five-year report data from the oldest year drops out and is replaced by data from the most recent year. The smallest unit for which the ACS, and thus the citizenship data from the five-year sample, is reported is the census block group.36

While the ACS citizenship data has proved sufficient for demonstrating compliance with the first prong of the Gingles analysis,37 it is not adaptable for actually drawing districts on the basis of CVAP. First, CVAP is not available at the census-block level typically used in redistricting. Second, it is an estimate derived from a statistical sample rather than an actual count. As a result, the results are reported with a margin of error at the 90-percent confidence level. As the Supreme Court amicus brief submitted by four former directors of the Census Bureau in the Evenwel case pointed out by using an example from Titus County, Texas, the home county of Evenwel, all the estimates of CVAP for census block groups in that county had a margin of error ranging from a low of 14.1 percent to a high of 36.6 percent.38 Thus, in that example, if one were to take 330 voting-age citizens from a block group having one of the smaller margins of error at 17.1 percent, the most we could say is that nine times out of ten we could be confident that the geography we chose
had somewhere between 219 and 441 voting-age citizens.\textsuperscript{39} Obviously, that does not equate to the type of precision normally associated with drawing equipopulous districts.\textsuperscript{40} Third, the data produced by the ACS covers a different time period than the population totals reported by the census. If one were to draw districts on the basis of citizen population, it would be necessary to meld total population data from the decennial census with the ACS estimates of the citizen population. The drawer would need the citizenship data at the most granular level possible, which, in the case of the ACS, is the block-group data derived only from the five-year sample. Accordingly, the combined data set would consist of population data from a count of persons conducted on April 1 in a year ending in 0, while the ACS citizen data would come from a sample taken continuously over a five-year period. Additionally, some individuals in the five-year sample would have been too young to vote when sampled, but would be over the age of 18 by the end of the period, causing an ambiguity in the estimate of the voting-age population.\textsuperscript{41} As the former census directors pointed out in their Evenwel amicus brief, these issues "combine to make the ACS voting age citizen estimates an inappropriate source to support the constitutional one-person, one-vote right."\textsuperscript{42}

While there are other uses in the redistricting and voting rights context to which the ACS data is better suited, the conclusion about the unsuitability of ACS data for actually drawing districts appears to be generally accepted. This has led to some persons calling for adding a citizenship question to the census in an attempt to produce CVAP data that can be used as the apportionment base.

\section*{V. A Citizenship Question and the 2020 Census under the Trump Administration}

On March 26, 2018, Commerce Secretary Wilbur Ross issued a memorandum directing the Census Bureau to reinstate a question about citizenship status on the 2020 census questionnaire.\textsuperscript{43} The memorandum indicated that the decision to add the question was in response to a request by the Department of Justice and was for the purpose of facilitating enforcement of section 2 of the Voting Rights Act (52 U.S.C.A. § 10301).\textsuperscript{44} The decision to add the citizenship question to the basic census questionnaire was controversial and resulted in challenges in multiple suits brought by various states, cities, counties, and nongovernmental organizations.\textsuperscript{45}

Persons and entities opposing the addition of the citizenship question likely acted out of concern for one or both of two reasons. First, the availability of citizenship data reported at a granular level is a necessary ingredient if one is to use a citizen-based or voter-eligible apportionment metric. If a state or local governmental body adopts that type of apportionment base, it can result in a shift of political power and of federal funds distributed on the basis of population. Cities and other areas with large noncitizen populations, many of which are predominantly Hispanic, would lose political clout, and areas that are more rural and less diverse would gain it. As noted earlier in the article by von Spakovsky, Democrats could be
expected to lose political clout with Republicans gaining it. To no one's surprise, Democratic attorneys general tended to challenge the secretary of commerce's action, while Republican attorneys general supported it.

The other concern related to the effect the question might have on the accuracy of the census. Although the Census Bureau was not able to pretest the effect of the addition of the citizenship question, it did have data on its inclusion in sample questionnaires such as the ACS. For example, comparison of ACS responses with federal administrative records on naturalization suggested that between 23.8 percent and 30 percent of persons shown by the administrative records to be noncitizens claim on the ACS form that they are citizens. In addition to the problem of inaccurate answers, the bureau estimated that the addition of the citizenship question would depress the response rates as some persons—both citizens and noncitizens—would simply decline to return the census form or would decline to answer that question. This failure would occur disproportionately among noncitizens and among Hispanics. The bureau looked at various alternatives for providing citizenship data at the census-block level (i.e., the geographic level typically used in redistricting and the smallest area for which census data is reported) and determined that the most accurate data would be produced by leaving the citizenship question off of the questionnaire, and instead linking the responses to the questionnaire with administrative records maintained by the Social Security Administration and the U.S. Customs and Immigration Service. It determined that "these tabulations would have essentially the same accuracy as current PL94 and Summary File 1 (SF1) data [i.e., the data sources now used for redistricting]." This was a particularly important finding because federal law requires the secretary to use information from other federal agencies "to the maximum extent possible... instead of conducting direct inquiries." Basically, the same data could be produced more accurately and less expensively by leaving the citizenship question off the questionnaire. On the other hand, including the question would result in an undercount that is disproportionately concentrated in the Hispanic and noncitizen population.

VI. Adding the Question Did Not Conform to Census Bureau Requirements

Since the citizenship question was dropped from the census questionnaire in 1950, the Census Bureau and former census officials have consistently opposed efforts to resume asking the question on the basic census form. Although early census questionnaires changed from year to year, as a greater understanding of statistics and survey design has developed over time, there has been a reluctance to tinker with the questionnaire design generally and, if there are to be changes, to make those alterations only after extensive study and testing. The bureau's data collection procedures are subject to various guidelines. For example, the Office of Management and Budget has outlined various standards that are designed "to maintain public confidence in the relevance, accuracy, objectivity, and integrity of Federal statistics."
Among the relevant principles is the requirement that “a Federal statistical agency must be independent from political and other undue external influence in developing, producing, and disseminating statistics.” Further, Census Bureau guidelines require that “data collection instruments ... must be pretested with respondents to identify problems ... and then refined, prior to implementation, based on the pretesting results.” Pretesting “must be performed when ... an existing data collection instrument has substantive modifications (e.g., ... new questions added).” Pretesting is not a simple process. Testing for the 2020 census began 13 years before the enumeration, culminating in a dress rehearsal in 2018, which began even before Secretary Ross issued his decision to add the citizenship question. There is a recognition that “on rare occasions, cost or schedule constraints may make it infeasible to perform complete pretesting,” but, in those cases, the program manager must follow procedures for obtaining a waiver. Here, prior to the secretary’s memorandum announcing that the citizenship question would be added to the short form that is received by all households, there was no pretesting of the potential effect of that addition. Rather, Secretary Ross, in his March 26, 2018, memorandum announcing his decision to include the citizenship question on the short form, claimed that since it had been included on the long-form sample that went to roughly one in six households in 2000 and earlier censuses and was part of the ACS questionnaire, it “has been well tested.” Yet the Ross memorandum noted:

The Census Bureau and many stakeholders expressed concern that [adding the citizenship question to the census] would negatively impact the response rate for non-citizens. A significantly lower response rate by non-citizens could reduce the accuracy of the decennial census. ... However, neither the Census Bureau nor the concerned stakeholders could document that the response rate would in fact decline materially.

By concluding that the citizenship question should be added to the census questionnaire when there was no documentation that the addition of the question would have an adverse impact on the accuracy of the census, the secretary flipped the burden of proof and circumvented the purpose of and requirement for pretesting of new questions.

Further, to bolster his conclusion that a lower response rate would not cause a problem, the secretary relied on his discussion with the Nielsen Company’s senior vice president for data science, whom he said had noted that no empirical data existed on the impact of a citizenship question on response rate and that Nielsen had noted no appreciable decrease in response rates when it included questions on place of birth and immigration status. That individual testified at the New York trial and stated that she had not made the former statement and that the latter one was taken out of context as Nielsen was not charged with conducting a complete count of the population so that a person who declined to participate could simply be replaced with a willing participant. Also, the company, unlike the Census Bureau, provided cash incentives for filling out its surveys. Tellingly, the Nielsen Company
appeared as an amicus when the New York case was considered by the Supreme Court, arguing that “[t]he addition of a question to the census that will reduce the census’s accuracy will have a lasting and negative impact on the operations of the [American businesses] that rely on Nielsen-provided data [based on the census] to make their most critical business decisions.”

VII. The Secretary’s Stated Rationale for Adding the Citizenship Question Does Not Stand Up to Scrutiny

Secretary Ross asserted in his decision memorandum and in sworn testimony to a congressional committee that the genesis of the decision to add the citizenship question was the request of the Department of Justice that it be added to the census in order to assist the department in enforcing the Voting Rights Act. Testimony, e-mails, and similar documents produced in the New York litigation, though, showed that Secretary Ross began inquiries about adding the question as early as March 2017 and only a week or so after he was confirmed by the Senate. Under pressure from the secretary to add the question to the upcoming census, the Commerce Department staff determined that in order to justify the addition it would need a request from another agency. Both the Department of Justice and the Department of Homeland Security, however, declined the Department of Commerce’s request for either of those departments to ask that the citizenship question be added. It was only when Secretary Ross directly contacted Attorney General Sessions that the Department of Justice expressed its willingness to accede to Commerce’s request. According to the fact findings of the New York court, the letter requesting the addition of the citizenship question was drafted primarily by Justice Department employees with little experience in enforcement of the Voting Rights Act, little knowledge of the technical issues regarding the accuracy of the data, and no input from the Census Bureau. Further, once the letter was released, the Census Bureau proposed meeting with the Department of Justice “to better understand their request and to discuss other ways to satisfy DOJ’s interest in more granular CVAP data.” According to the court’s findings, Attorney General Sessions personally made the highly unusual decision not to permit Department of Justice personnel to meet with the Census Bureau to discuss the request or to consider means of providing the information other than by adding the citizenship question.

The pretextual nature of the assertion that the addition of a citizenship question is necessary to enforce the Voting Rights Act is underscored by an analysis performed by Professor Justin Levitt, who had previously served in the department’s Civil Rights Division and had had supervisory responsibilities over the voting rights docket. He reviewed 18 years of the most recent vote dilution cases brought by the department and was unable to find a single one where having a decennial enumeration of citizenship would have enabled enforcement beyond what was possible using either the long form or ACS data. Further, the one case that a representative of the Department of Justice was able to identify in testimony before the House
Committee on Oversight and Governmental Reform as one where the absence of the citizenship question hampered enforcement was a privately brought case rather than a Department of Justice enforcement action and, more importantly, was one where the inclusion of the citizenship question on the decennial census would not have aided the plaintiff or made any difference in the outcome of the case.

VIII. The Secretary’s Decision to Add the Citizenship Question Is Overturned by the District Court

The court in New York v. U.S. Department of Commerce was the first of three district courts to issue an opinion. In a 178-page opinion, the court determined that the secretary had committed “a veritable smorgasbord of classic, clear-cut [Administrative Procedure Act] violations.” The court vacated the secretary’s decision, enjoined the department from adding the citizenship question to the 2020 census, and remanded the matter to the secretary of commerce. The Supreme Court granted certiorari without requiring that the case first be considered by the Court of Appeals. As other courts ruled against the department, relying on a violation of the Enumeration Clause as well as the Administrative Procedure Act, the Supreme Court expanded the issues to be considered in the New York v. U.S. Department of Commerce case to include that constitutional question.

IX. The Supreme Court Resolves the Issue

On June 27, 2019, the last day of its term, the Supreme Court issued its opinion on the challenge to the inclusion of the citizenship question on the census. The Court’s decision came only three days before the deadline stated by the government for finalizing the 2020 census questionnaire for printing. The opinion was a fractured one comprising four separate combinations of five, seven, or nine justices. The opinion’s author, Chief Justice Roberts, was the only justice who agreed with the entirety of the opinion. Three additional opinions both concurred in part and dissented in part.

Joining Justices Thomas, Alito, Gorsuch, and Kavanaugh, the chief justice determined that the Enumeration Clause of the Constitution did not preclude the inclusion of the citizenship question. Additionally, that combination of justices ruled both that the secretary’s decision was a permissible one based on the evidence before him and that his decision did not violate various census-related statutory provisions, including the one requiring use of administrative records from other agencies when possible. The Court, accordingly, reversed the district court on those points.

In the next section of the chief justice’s opinion, however, the four conservative justices were replaced by the four more liberal justices (Ginsburg, Breyer, Sotomayor, and Kagan), and that portion of the opinion concluded that the secretary’s decision to add the citizenship question was nevertheless required to be set aside because
his claim that the question was required in order for the Department of Justice to enforce the Voting Rights Act was a pretext. As a tenet of administrative law, the secretary was required to provide a reasoned explanation for his action, yet the Court determined that the rationale offered here was contrived. Accordingly, the Court affirmed that part of the district court’s opinion and remanded the case.

Given that only one working day remained between the Supreme Court’s remand order and the end-of-June printing deadline for the more than one billion questionnaires and other documents required for the census, it appeared that the June 27 opinion precluded the opportunity to include the citizenship question on the 2020 census. Indeed, as recently as two days before the Supreme Court’s opinion was issued, the solicitor general advised the Court that “changes to the paper questionnaire after June of 2019 . . . would impair the Census Bureau’s ability to timely administer the 2020 census.” There was an argument, though, that testimony in the case suggested that the deadline could be extended to as late as October if additional resources were allocated. When the Supreme Court opinion determined that the secretary of commerce would have had discretion to include the citizenship question on the census questionnaire if he had provided a non-pretextual reasoned explanation for his decision, the possibility existed that the government might seek to delay printing the questionnaire and advance another rationale that would pass administrative law muster.

Facing the very real time constraints associated with preparing for the 2020 census and the possibility of continued judicial action, including in the equal protection claim that had been remanded to the Maryland District Court by the Fourth Circuit so that discovery could be conducted on the possibility of discriminatory intent behind the decision to include the inquiry, the administration announced that it was proceeding with printing the questionnaires without the citizenship question. The president, however, backtracked from his attorneys’ representations by tweeting that news reports about the administration dropping its quest to put the citizenship question on the census were “FAKE.” The administration attempted to find a way to proceed with the question, but after a little more than a week determined that there was no practical way to do so. Instead, the president issued an Executive Order designed to facilitate the Census Bureau’s ability to use administrative records in combination with the census to produce small-level data on citizenship that could be used for redistricting. This was essentially the same method suggested by the bureau earlier as a way to produce the requested data without adding the citizenship question to the census questionnaire. Thus, the effort to add a citizenship question to the short form of the 2020 census was apparently dead, but the Census Bureau may be able to produce citizenship data for those jurisdictions who desire to use it in redistricting.
Notes


3. Id. at 810.

4. How Gerrymandering Kept Democrats from Winning Even More Seats Tuesday, Wash. Post, Nov. 8, 2018, https://www.washingtonpost.com/outlook/2018/11/08/how-gerrymandering-kept-democrats-winning-even-more-seats-tuesday. One seat, previously held by a Republican and apparently won by a Republican on election night, was still undecided at the time this was written. Due to irregularities in the absentee votes, no winner was declared and a new election was ordered.


7. While this chapter concentrates on the citizenship variable, the number of children (i.e., those persons too young to vote) in a population has a similar impact. In fact, it often reinforces the effect that citizenship has on electoral strength since the concentration of children often coincides with groups that contain disproportionate percentages of noncitizens. For example, the median age of Hispanics in the United States was 28 compared to a median age of 43 for the non-Hispanic White population. Antonio Flores, How the U.S. Hispanic Population Is Changing, Pew Res. Center, Sept. 18, 2017 (tbl. 9 available at https://assets.pewresearch.org/wp-content/uploads/sites/7/2017/09/01143211/PH_Statistical-Portrait-Hispanics-in-United-States-2015_current-data_09.png).


9. Id. (footnotes omitted).

10. Although the immediate discussion is about cases that sought to require reapportionment on the basis of an eligible-voter, as opposed to a total-population, metric, the U.S. Supreme Court has upheld a state’s voluntary use of an eligible-voter base. Burns v. Richardson, 384 U.S. 73, 93–94 (1966) (holding Hawaii could use a registered-voter apportionment base because of its special circumstance such as its substantial temporary military population).

11. Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990).

12. Id. at 776.
13. Id. at 774.
15. Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000).
22. Id. (Thomas, J., dissenting from denial of certiorari).
28. Maximum deviation is the sum of the percentage deviations from the ideally sized district of the largest and smallest districts. Thus, if the largest district is 3 percent larger than the ideal district while the smallest is 4 percent below, the total deviation is 7 percent. Evenwel v. Abbott, 136 S. Ct. 1120, 1124 n.2 (2016).
29. Id. at 1125.
33. Id. § 1253 (2018).
34. Evenwel, 136 S. Ct. at 1132–33.
35. Census blocks can be aggregated to form a district, or they can be aggregated to form some other unit such as a voting precinct that can then be aggregated into a district.
36. Block groups typically consist of contiguous census blocks containing between 600 and 3,000 persons. U.S. Census Bureau, Geography Program, https://www.census.gov/geo/reference/gtc/gtc_bg.html (last visited July 29, 2019). There are a little more than 11 million census blocks in the United States and just fewer than 218,000 census block groups. U.S. Census Bureau, Tallies 2010, https://www.census.gov/geographies/reference-files/time-series/geo/tallies.html (last visited July 29, 2019). Thus, on average, there are about 50 blocks in a block group, although that can vary widely with urban areas having many fewer blocks in a block group and rural areas having many more.
37. Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986), imposes a three-part threshold test for plaintiffs bringing a suit under section 2 of the Voting Rights Act. 52 U.S.C. § 10301 (2015). The plaintiff group must prove that (1) it is sufficiently large and geographically compact to be able to constitute a majority in a single-member district, (2) it is politically cohesive, and (3) the White majority votes as a bloc usually to defeat the minority choice.
The majority in the first prong has been interpreted to be a CVAP majority. E.g., Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848, 853 (5th Cir. 1999). The ACS data will be more useful than data collected in the decennial census when a minority group may not have been sufficiently large at the time of the census but has increased in population so that a plaintiff may be able to show that a group has achieved majority status later in the decade.


39. Id. at 21.

40. Although this discussion focuses on the data used for drawing districts within a state (i.e., districting), the census is also used for apportioning seats in the House of Representatives among the several states (i.e., apportionment). The Supreme Court has held that provisions of the Census Act, specifically 13 U.S.C.A. § 195 (2009), prohibit the use of statistical sampling for purposes of apportionment. Dep’t of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999).


42. Brief of Former Directors, supra note 38, at 22.


44. Ross Memorandum, supra note 43.


47. Id. at 534.

48. Id. at 533. The reason a method based on matching administrative records to basic census data is more accurate than either directly answering the citizenship question without matching administrative records or both asking the question and using administrative-record matching is that the lower response rate produces matching problems that would not exist using data produced by the current form of the census questionnaire. Id. at 539.


50. New York v. U.S. Dep’t of Commerce, 351 F. Supp. 3d at 525 (presenting examples in lawsuits and congressional testimony of the Census Bureau and former Census Bureau directors opposing reinstatement of the question because it would jeopardize the overall accuracy of the population count).

51. Id. at 526–27.


53. Id. at 71,612.
55. Id.
57. U.S. CENSUS BUREAU, supra note 54, at 147–48 (setting out the fairly extensive waiver procedure).
60. Levitt, supra note 56, at 1370.
66. Id. at 550–51.
67. Id. at 551.
68. Id. at 554–55.
69. Id. at 555–57.
70. Id. at 557.
71. Id. at 557–58.
72. Levitt, supra note 56, at 1375.
73. Id. at 1381.
74. The case was Benavidez v. Irving Independent School District, 690 F. Supp. 2d 451 (N.D. Tex. 2010). It was clear that Hispanics were unable to constitute a citizen voting-age majority in a potential single-member district when the census was taken in 2000. The plaintiff attempted to prove that there had been sufficient growth in the Hispanic population so that the necessary majority existed in 2007. Having a once-a-decade citizenship question would not have assisted in demonstrating post-censal growth. Although the plaintiff was unable to prove his case, the ACS data was much more suited to establishing the change in population between 2000 and 2007 than having had citizenship data on the decennial census would have been. The author of this chapter represented the school district in the case. The case is also discussed in Levitt, supra note 56, at 1381 n.117.
76. Id. at 679.
78. See supra note 45.
79. U.S. CONST. art. I, § 2, cl. 3.
82. Id. at 2565.
83. Id. at 2566–67.
84. Id. at 2568–73. See supra note 49.
85. Id. at 2575–76.
86. Id.
87. Printing Giant Has Deadline, but the Job Is Not Yet Set, N.Y. TIMES, June 27, 2019, at A12.
89. Letter from Denise Hulett, Counsel for La Union del Pueblo Entero, to Hon. Scott S. Harris, Clerk of the U.S. Supreme Court, Re: Dep’t of Commerce v. New York, No. 18-966 (June 25, 2019) (a link to the letter is found at https://electionlawblog.org/?p=105784).
92. Donald J. Trump [realDonaldTrump], The News Reports about the Department of Commerce dropping its quest to put the Citizenship Question on the Census is incorrect or, to state it differently, FAKE! We are absolutely moving forward, as we must, because of the importance of the answer to this question (July 3, 2019) [Tweet], https://twitter.com/realDonaldTrump/status/1146435093491277824.
95. See supra note 48 and accompanying text.
CHAPTER 2

STRICT CONSTRUCTION OF VOTER REGISTRATION LAWS: GEORGIA’S EXPERIENCE IN 2018

KRISTEN CLARKE, JULIE HOUK, AND JOHN POWERS

I. Introduction

In the years since the U.S. Supreme Court’s ruling in *Shelby County v. Holder*, state and local officials have resorted to crude tactics to suppress minority voting rights and distort electoral outcomes in areas with significant numbers of minority voters. Georgia presents a prime example of a state that has seen the proliferation of voter suppression tactics at virtually every level of government. In particular, the multi-year effort to impose an “exact match” requirement on Georgians seeking to register to vote provides a powerful example of the kind of change to voting procedures that would have been blocked if the federal review process previously mandated by section 5 of the Voting Rights Act (VRA) had remained in place. This chapter examines the extensive litigation and advocacy efforts surrounding the “exact match” process, which impacted tens of thousands of people in Georgia seeking to register to vote. The unfortunate history of “exact match” demonstrates why Congress must undertake action to restore the protections that had been long afforded by the federal preclearance process under section 5.

The “exact match” voter registration process, a version of which was first implemented in 2007 by former Secretary of State Brian Kemp’s predecessor, Karen Handel, compares voter registration application information against data about the applicant on file with the Georgia Department of Driver Services (DDS) or Social Security Administration (SSA), ostensibly to verify the identity of voter registration applicants. If the data in both fields does not perfectly match, election officials could not process the voter registration application. The state has claimed that the “exact match” process was put in place to comply with the Help America Vote Act (HAVA).

On October 9, 2018, less than a month before the hotly contested Georgia gubernatorial race between Stacey Abrams, the nation’s first African-American female gubernatorial candidate, and Brian Kemp, Georgia’s then-sitting secretary
of state, the Associated Press reported approximately 53,000 Georgia voter registration applications were on hold because they ran afoul of the “exact match” process.\(^3\) Approximately 70 percent of those applications were submitted by African-American applicants, even though African Americans represented only 32 percent of Georgia’s population.\(^4\)

Under Georgia’s “exact match” process in effect for the 2018 gubernatorial election, applicants whose voter registration data did not match information on file with DDS or SSA were denied registration until they produced additional documentation to county election officials verifying their identity or citizenship—even though they had already submitted facially complete and accurate voter registration applications and were eligible to vote.\(^5\) In the past decade, four federal lawsuits challenging various iterations of the “exact match” process were filed by voting rights advocates on the basis that the scheme disproportionately prevents African-American, Latino, and other minority applicants and naturalized citizens from completing the voter registration process.\(^6\)

Kemp ultimately prevailed over Abrams by 54,723 votes in the 2018 gubernatorial election, representing a slim margin of victory of approximately 1.4 percent.\(^7\) Kemp’s narrow victory was tainted by concerns that the “exact match” voter registration process suppressed minority voter participation in a gubernatorial election with historic turnout levels.\(^8\)

This chapter examines Georgia’s voter registration requirements; the evolution of Georgia’s “exact match” voter registration database matching process, including the codification of the process into Georgia law after the Supreme Court’s decision in *Shelby County v. Holder*; and the current state of the “exact match” process in Georgia in the wake of the enactment of Georgia House Bill 316 in 2019,\(^9\) which remedied some, but not all, of the burdens imposed by the process.

## II. Voter Registration in Georgia under State and Federal Law

The Georgia State Constitution expressly recognizes the fundamental right to vote.\(^10\) In order to be eligible to vote under Georgia law, a person must be (1) registered as an elector in the manner prescribed by law; (2) a citizen of Georgia and of the United States; (3) at least 18 years of age; (4) a resident of Georgia and of the county or municipality in which he or she seeks to vote; and (5) possessed of all other qualifications prescribed by law.\(^11\) The county board of registrars for each Georgia county is responsible for determining the eligibility of voter registration applicants.\(^12\)

Georgia voter registration applications require applicants to provide their first name, last name, date of birth, and Georgia driver’s license number, Georgia identification card number, or the last four digits of their Social Security number on the registration form.\(^13\)

Under HAVA, which was first enacted in 2002, Georgia is required to maintain a centralized, computerized statewide voter registration database as the single
system for storing and managing Georgia’s official list of registered voters. All voter registration information obtained by local election officials in Georgia must be electronically entered into the database at the time the information is provided. HAVA also requires Georgia to undertake certain verification activities. Voter registration applicants who have a current and valid driver’s license must provide their driver’s license number on the application. Applicants who lack a current driver’s license must provide the last four digits of their Social Security number. Georgians who have neither a Georgia driver’s license nor Social Security number are issued a unique identifying number serving as the verification of their voter registration.

HAVA requires Georgia’s chief election official to enter into an agreement with DDS “to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.” DDS must, in turn, enter into an agreement with the commissioner of SSA for the same purpose.

However, HAVA does not mandate denying voter registration to applicants if the information contained on the application fails to exactly match information on file about the applicant with DDS or SSA. To the contrary, HAVA provides an alternative procedure for applicants whose information produces a non-match with the DDS or SSA databases. It requires first-time applicants who register to vote by mail and whose identity is not verified by either the match with DDS or SSA to provide proof of identification either with their registration application or when voting for the first time. Satisfactory proof of identification under HAVA (HAVA ID) includes a copy of a current utility bill, bank statement, government check, paycheck, other government document showing the name and address of the voter, or any current and valid photo identification.

Despite the fact that HAVA does not require states to delay or deny voter registration to applicants whose voter registration data does not exactly match information about the applicant on file with DDS or SSA, Georgia nevertheless adopted several database matching requirements that delayed or denied voter registration to tens of thousands of voter registration applicants for more than a decade.

III. Georgia’s First Attempt at Voter Registration Database Matching

Georgia did not begin to comply with HAVA’s voter registration verification provisions until March 2007 because the state previously maintained it was exempt by requiring voter registration applicants to use their full Social Security numbers on voter registration applications. However, as a result of the Eleventh Circuit’s 2006 decision in Schwier v. Cox, which determined Georgia violated the Privacy Act by requiring voter registration applicants to use their full Social Security numbers, Georgia could no longer argue it was exempt from the voter registration verification process mandated by HAVA.
Following the decision, in March 2007, Georgia's then-Secretary of State Karen Handel entered into an agreement with DDS to match the following fields from Georgia voter registration applications against the state's driver's license records: driver's license number, last name, first name, date of birth, last four digits of Social Security number, and citizenship status. DDS also entered into an agreement with SSA to match the voter registration applicant's first name, last name, date of birth, and last four digits of the Social Security number against the same information on file with SSA, and to determine whether its records showed that the applicant was deceased.

During this same period, Georgia created its statewide voter registration database to comply with HAVA’s requirement that states create a centralized database for voter registration information. Once operational, Georgia’s system transmitted newly entered voter registration application information to DDS on a nightly basis so DDS could conduct the HAVA verification process. DDS also sent Georgia’s voter registration application data to SSA, in order to allow SSA to conduct its verification matching process. The following business day, the verification matching results from DDS and SSA were made available to county registrars.

If the data matching process could not verify the applicant was a U.S. citizen, the registrar would be made aware of the discrepancy. However, according to Secretary Handel at the time, the secretary could only suggest, but not require, registrars to challenge the applicant’s eligibility to vote under the Georgia Election Code.

Following Secretary Handel’s implementation of the voter registration database matching process, evidence began to emerge of the impact. Jose Morales, a Cherokee County, Georgia, resident, submitted a Georgia voter registration form in September 2008. Morales obtained a Georgia driver’s license in 2006 prior to becoming a U.S. citizen. He subsequently became a naturalized U.S. citizen in November 2007. Not long after submitting his voter registration form, Morales received correspondence from the county registrar’s office informing him that he might not be qualified to vote because his citizenship status was unclear and he would have to appear at a hearing and produce proof of citizenship in order to vote.

After Morales produced proof of citizenship to the county registrar’s office, he filed a lawsuit in the U.S. District Court for the Northern District of Georgia, Atlanta Division on October 9, 2008, seeking a temporary restraining order and preliminary injunction, contending the voter registration verification matching program implemented by Secretary Handel should be enjoined because it had not been precleared by the U.S. Department of Justice (DOJ) in violation of section 5 of the VRA.

On October 16, 2008, the court denied Morales’s motion for a temporary restraining order, but set a hearing on his motion for a preliminary injunction on October 22, 2008. By the time of the October 22 hearing, the court noted the voter verification processes implemented by Secretary Handel “had identified 50,378 applications with potential data mismatches in any of the listed categories, 4,538 of which involved questions of citizenship.”
On October 27, 2008, the court entered its order on Morales's motion for a preliminary injunction. Because the secretary of state had undertaken efforts to comply with the section 5 preclearance requirements following commencement of the litigation and there was an imminent federal election on November 4, 2008, the court did not entirely enjoin Georgia's database matching process but did order the state to (1) include applicants who failed the matching process in poll books and allow them to cast “challenged” ballots in accordance with existing state law; (2) provide notice to applicants about how they could resolve the matching issue and what steps they would need to take to do that; (3) reasonably ensure all applicants who remained flagged as potentially ineligible were informed they could cast a challenged ballot and the procedures they would need to take to resolve the question of their ineligibility; and (4) meet and confer with DOJ about what additional steps could be taken to ensure applicants who had been flagged as potentially ineligible could resolve the question of the eligibility so they could vote in the November 4, 2008, election.

Thereafter, the *Morales v. Handel* litigation continued while the court’s order on the plaintiffs’ motion for a preliminary injunction remained in place and the state made efforts to preclear the voter registration data matching process.

On May 29, 2009, DOJ declined to preclear Georgia’s voter registration verification program, finding that it relied on error-laden and “possibly improper” usage of SSA’s Help America Vote Verification (HAVV) system and outdated DDS data in an attempt to find noncitizens. In its letter declining to preclear the voter registration verification matching process, DOJ concluded the “flawed system frequently subjects a disproportionate number of African-American, Asian, and/or Hispanic voters to additional and, more importantly, erroneous burdens on the right to register to vote.”

Shortly after DOJ declined to preclear Georgia’s voter registration verification process, the SSA’s Office of the Inspector General issued a report, *Quick Response Evaluation: Accuracy of the Help America Vote Verification Program Responses*, highlighting significant flaws with the SSA’s HAVV system used by states, including Georgia, for the HAVA voter registration verification process when the applicant supplies the last four digits of a Social Security number on the voter registration form. According to the report, the SSA’s Office of the Inspector General found the SSA HAVV program did not always provide states with accurate verification responses for individuals who were registering to vote; had a significantly higher no-match response rate when compared to other verification programs used by states and employers; and the program did not provide consistent verification responses to the states when the same applicant data was entered into the program.

The SSA inspector general concluded the high no-match response rate and the inconsistent verification responses were attributable to the lack of “(1) a unique identifier (full Social Security number), (2) flexible matching criteria, and (3) testing to assess the accuracy of the verification responses.” Because of the limitations
of the matching criteria established by HAVA, the report stated the product of the matching process could indicate a no-match when a match does in fact exist in SSA records. While the report noted SSA alerts states about some of the inherent problems in attempting verifications using only the last four digits of a Social Security number, the report found “the high no-match response rate and the inconsistent verification responses could hinder the States’ ability to determine whether applicants should be allowed to vote.”

Before DOJ declined to preclear Georgia’s voter registration verification database matching process, lawsuits were filed challenging similar processes enacted in Washington and Florida in response to HAVA’s voter registration verification requirement, raising red flags about the accuracy of these processes. In Washington Association of Churches v. Reed, the court granted the plaintiffs’ motion for a preliminary injunction on August 1, 2006, enjoining the state’s voter registration database matching statute, concluding the matching process, which conditioned registration upon a match of voter registration data with driver’s license or SSA records, was inconsistent with and preempted by HAVA and violated the “materiality” provision of the VRA. The parties in Reed subsequently stipulated to an order and final judgment on March 16, 2007, providing for the registration of non-matching applicants who produced an acceptable form of identification under Washington law and were otherwise eligible to vote.

In Florida State Conference of the National Association for the Advancement of Colored People v. Browning, the plaintiff filed suit seeking to enjoin Florida’s voter registration verification process, which conditioned voter registration on an applicant’s voter registration data matching information about the applicant in the state’s driver’s license or Social Security records. The district court granted the plaintiff’s motion for a preliminary injunction, concluding the plaintiff demonstrated a substantial likelihood of success on the merits of its claim that the process was preempted by HAVA and violated the materiality provision of the VRA. The district court did not reach the merits of the plaintiff’s constitutional claims at that time.

The Eleventh Circuit reversed the district court’s order granting the preliminary injunction, concluding the state’s voter registration database matching law was not preempted by HAVA and the matching requirement did not violate the materiality provision of the VRA. On remand, the district court considered the plaintiff’s constitutional claims based upon an amended version of the law passed by the Florida legislature while the litigation was pending. The district court ultimately denied relief to the plaintiff on the constitutional claims, concluding the amended law ameliorated the burden on the applicant by requiring a state-level review of the no-match applications to determine whether discrepancies could be resolved without having to contact the applicant. In addition, Florida’s amended law did not require the cancellation of the voter registration applications due to a no-match.

Additional red flags were raised about the accuracy and utility of “exact match” voter registration verification programs when Pennsylvania and Wisconsin decided to abandon similar processes. The Brennan Center for Justice reported that
Wisconsin, which was considering a “complete match” requirement between voter registration records and the state’s driver’s license and SSA records, decided not to move forward with the program after a test run revealed nearly one in four voters failed the strict match due to typographical errors, missed middle initials, and other minor problems, and the voter registration records of four of the six retired judges sitting on the state’s Government Accountability Board would have failed the strict matching process.61

The Brennan Center for Justice also reported that Pennsylvania election officials reversed a decision to implement a database matching requirement for voter registration that would have denied registration to eligible citizens because of typographical and immaterial errors.62

Despite these red flags, Georgia continued to vigorously defend the Morales litigation and pressed forward with its efforts to obtain preclearance of its voter registration database matching process, including after Brian Kemp was substituted as the named defendant in the Morales case when he was appointed, and later elected, to serve his first term as Georgia’s secretary of state in 2010. On June 15, 2010, the court in Morales issued an order administratively closing the case after denying a motion to dismiss by the defendant and plaintiffs’ motion for summary judgment, as defendant Kemp continued efforts to preclear Georgia’s voter registration verification process.63

IV. Georgia’s Post-Morales Voter Registration Verification Matching Process

On June 22, 2010, the State of Georgia filed a lawsuit in the U.S. District Court for the District of Columbia seeking declaratory relief that Georgia’s voter registration verification database matching process did not violate section 5 of the VRA.64 While that action was pending, Georgia reached an agreement with DOJ to preclear a slightly revised version of Georgia’s “exact match” voter registration database matching process (“Exact Match 2010”) and filed a joint motion to dismiss the declaratory relief action on August 20, 2010.65

Three interveners objected to the dismissal of the declaratory relief action, citing the “unusual circumstances” surrounding the preclearance of the voter registration database matching process that provided for no public notice or opportunity for comment.66 The court overruled the interveners’ objection, concluding the case was moot as a result of the administrative preclearance of Georgia’s voter registration verification process by DOJ and stating “it would not be ‘proper’ to condition dismissal with a requirement that the United States and the State of Georgia ‘explain and justify’ their strategic conduct prior to the case becoming moot.”67 The court did note in its order granting the parties’ joint motion to dismiss that the administrative preclearance of Georgia’s voter registration verification database matching process would not foreclose challenges to enjoin it for other reasons, including in an action under the VRA.68
The precleared version of Georgia’s Exact Match 2010 was an administrative policy created by the secretary of state’s office and was not a state law or regulation.69 Under this process, the information provided on every incoming voter registration application was entered into Georgia’s statewide voter registration system.70 On a nightly basis, this information, except for applications received from DDS, was submitted to DDS for verification. If the applicant supplied a Georgia driver’s license number or identification card number on the application, DDS attempted to verify the following information from the application against the information maintained by DDS: (1) first name, (2) last name, (3) date of birth, (4) driver’s license number or identification card number, (5) last four digits of the applicant’s Social Security number, and (6) U.S. citizenship status.71 In order to be verified, the information in the voter registration database under Exact Match 2010 was required to match exactly the information maintained by DDS.72

If the applicant supplied only the last four digits of a Social Security number on the voter registration application, DDS submitted the application data to SSA; the process would then attempt to verify the following information from the voter registration database against information maintained by SSA: (1) first name, (2) last name, (3) date of birth, and (4) last four digits of Social Security number.73 In order to be verified, the information in the voter registration database was required to match exactly the information maintained by SSA—notwithstanding SSA’s 2009 report that highlighted the shortcomings of this database matching process, including the likelihood that eligible applicants could be denied registration as a result of inaccurate no-match results.74 If the information in the voter registration database did not match exactly the DDS or SSA data, the county board of registrars processing the application was required to mail the applicant a letter75 informing the applicant that the registration information could not be verified. If the applicant did not respond to the deficiency letter in time, the application would be rejected.

Although the voter registration verification process enacted in Florida while the Browning case was pending did not impose an outside deadline to cure the failure to match, Georgia Exact Match 2010 imposed a short and severely burdensome 30-day deadline to cure a failure to match. While the deficiency letters that were issued for a DDS non-match would generally specify the information that did not match (i.e., SSA or DDS number, name, or date of birth of the applicant), the letters for an SSA non-match applicant did not provide any detail as to the reason for the failure to match. The deficiency letters issued to applicants who failed the citizenship match with DDS stated:

One of the pieces of information that did not match up for you was whether you are a United States citizen. When you registered to vote, you said that you were, but the Department of Driver Services record does not match that information. Under state and federal law, you must be a U.S. citizen, so this is a very important question to answer.76
Thus, applicants who failed the citizenship match were not informed the reason for the non-match could be due to the fact they obtained Georgia driver’s licenses before becoming naturalized citizens and were not provided any insight about why their citizenship was being challenged in this way.

For applicants whose deadline to cure the no-match ran before the voter registration deadline for an upcoming election and whose applications were cancelled as a result, this meant these applicants would be required to submit a new voter registration application before the registration deadline to have any hope of voting in that upcoming election. The consequences were less severe if the applicant applied to register to vote before the voter registration deadline for an upcoming election and the application had not yet been rejected before Election Day. Under those circumstances, the voter was allowed to vote so long as the voter provided the necessary information at the time of voting.

V. Litigation Challenging Exact Match 2010

In the aftermath of the preclearance of Exact Match 2010, voting rights advocates grew concerned the process was still preventing eligible Georgia citizens from registering to vote and was continuing to disproportionately deny voter registration to African-American, Latino, and Asian-American applicants.

Those fears were borne out by the demographics of the voter registration applicants whose applications were being cancelled or rejected following the preclearance of Exact Match 2010. Of Georgia applicants whose voter registration applications were cancelled between July 7, 2013, and July 15, 2016, for failing to match DDS or SSA information, 63.6 percent were Black and only 13.6 percent were White. During roughly the same time, the total pool of applicants was 29.4 percent Black and 47.2 percent White. Hispanic applicants made up 7.9 percent of the cancelled applications but were only 3.6 percent of the total pool of applicants. Asian or Pacific Islander applicants were 4.8 percent of the cancelled applications but were only 2.6 percent of the total pool of applicants.

Stated differently, Black applicants were 8.1 times more likely to have their registration applications fail the “exact match” process than were White applicants; Hispanic applicants 7.5 times more likely; and Asian applicants 6.7 times more likely. This same disparity existed for voter registration applications cancelled because information was “Not Verified” against the information in the DDS and SSA databases. Approximately 8,267 applications were rejected between July 7, 2013, and July 15, 2016, because they failed to match information in the DDS database—of which only approximately 1,592 (19.3 percent) identified as White, while 4,228 (approximately 51.1 percent) identified as Black, 1,167 (14.1 percent) identified as Latino, and 640 (7.7 percent) identified as Asian. Even starker were the demographics of the 21,844 applications rejected because they failed to match with information in the
SSA database. Of these, approximately 2,160 (9.9 percent) identified as White, 16,067 (73.6 percent) identified as Black, 1,005 (4.6 percent) identified as Latino, and 380 (1.7 percent) identified as Asian. In fact, Black applicants were 3.5 times more often in cancelled or pending status due to SSA exact match failure (19,642) than DDS failure (5,571). In contrast, White applicants were only 31 percent more likely to be in pending or cancelled status due to a failing SSA match (2,498) than DDS match (1,911). In fact, every minority group, including American Indian or Alaskan Native and Other, had significantly higher failure rates than White applicants.

Disproportionate effects were also seen in the demographics of voter registration applications rejected during this same time frame because of a non-match specifically with the citizenship data at DDS. Approximately 1,299 applications were rejected for this non-match, of which 13.9 percent of the applicants identified as White, 30.4 percent identified as Black, 21.2 percent identified as Latino, and 25.1 percent identified as Asian-American or Pacific Islander.

In the face of large numbers of voter registration applications that were continuing to be rejected under Exact Match 2010 and the fact the process was disproportionately preventing African-American, Latino, and Asian-American applicants from registering to vote, civil rights and civic engagement groups filed suit to enjoin Exact Match 2010 on September 14, 2016, in *Georgia State Conference of the National Association for the Advancement of Colored People v. Kemp*. The plaintiffs alleged two counts in the complaint: count one alleging a violation of section 2 of the VRA (52 U.S.C. § 10301) and count two alleging a burden on the fundamental right to vote under the First and 14th Amendments. The plaintiffs also filed a motion for a preliminary injunction with their complaint and the court set September 26, 2016, as the hearing date for the motion.

Before the plaintiffs’ motion for a preliminary injunction was heard, defendant Kemp agreed to implement interim relief, which included ending the automatic cancellation of voter registration applications failing the Exact Match 2010 verification process; reversing the cancellation of voter registration applications because of a non-match with DDS or SSA databases; and allowing applicants to cure a no-match through Election Day at the polls instead of by the close of voter registration by showing an acceptable form of identification or documentary proof of citizenship. Defendant Kemp further agreed to make efforts to restore applications cancelled as a result of Exact Match 2010 dating back to October 1, 2014, but had concerns the process could prove difficult due to having to import older data into the state’s dynamic voter registration database.

As a result of concessions made by defendant Kemp to implement this interim relief, the plaintiffs’ motion for a preliminary injunction was taken off calendar, the parties continued to attempt to negotiate a final settlement of the action, and a final settlement agreement was executed in early February 2017.
VI. Exact Match 2017 Was Enacted in the Wake of the Supreme Court’s Decision in Shelby County v. Holder

As the plaintiffs and defendant Kemp were finalizing the settlement agreement in the Exact Match 2010 litigation, six Republican members of the Georgia House of Representatives were already working on House Bill 268—a bill that would codify the “exact match” process into Georgia law, a process that had delayed or denied voter registration to applicants who were disproportionately African-American, Latino, and Asian-American, and would impose an automatic 26-month cancellation deadline if the applicant did not cure the no-match within that time frame, including applications that were facially complete and factually accurate.89

By this time, the Supreme Court had rendered its 2013 decision in Shelby County v. Holder, effectively gutting the DOJ preclearance process that had been required by section 5 of the VRA.90 Section 5 of the VRA prohibited certain states with a specified history of voting discrimination, including Georgia, from enacting or administering a change in existing voting practices or procedures without first obtaining preclearance from the U.S. attorney general or the U.S. District Court for the District of Columbia.91 The preclearance process was intended to prevent the implementation of voting changes that had the purpose or effect of denying or abridging the right to vote on account of race.92

Prior to the Shelby County decision, the section 5 preclearance requirement prevented numerous discriminatory voting changes from taking effect. For example, between January 1995 and 2013, DOJ denied preclearance of 113 voting changes submitted by states or local jurisdictions.93 These denials involved 58 redistricting plans; 20 changes to methods of election/selection; 7 annexations or de-annexations; 20 restrictions on ballot access; and 4 changes affecting bilingual procedures.94

In the aftermath of the Shelby County decision, Georgia codified what had previously been an administrative “exact match” process into Georgia law with the enactment of H.B. 268 in 2017, following the lead of other formerly covered states in adopting burdensome and discriminatory restrictions on voter registration and other voting-related processes.95 Indeed, strict construction of voter registration laws and burdensome policies have become a new generation of tactics used by officials to make the voter registration process more difficult for African Americans, Latinos, and other people of color to overcome.96 Georgia provides a particularly stark example of how lawmakers and officials co-opted the voter registration process to make it more difficult for voters of color to successfully register to vote through its “exact match” voter registration process—a process first implemented in violation of section 5 of the VRA in 2007 and formally codified into Georgia law in 2017 after the Shelby County decision, despite overwhelming evidence the process disproportionately denies voter registration to people of color.
On March 30, 2017, H.B. 268 was passed by the Georgia General Assembly along party lines and was signed into law by Governor Nathan Deal on May 9, 2017. It took effect on July 1, 2017.

VII. The Legal Challenge to Exact Match 2017 (H.B. 268)

Following the enactment of H.B. 268, eligible Georgians, unsurprisingly, continued to be denied voter registration because of the same problems plaguing prior iterations of Georgia’s “exact match” voter registration verification database matching processes. As a result, on July 18, 2018, civil rights and civic engagement groups served a notice letter pursuant to section 8 of the National Voter Registration Act of 1993 (NVRA) on Secretary of State Brian Kemp, informing him that the voter registration verification process implemented as a result of the enactment of H.B. 268 violated the NVRA.

Secretary Kemp declined to take any remedial action in response to the notice letter. Instead, Secretary Kemp posted a public response to the notice letter on the secretary of state’s official website, entitled “Statement from Kemp on Litigation Threat by Lawyers’ Committee.” In this statement, Secretary Kemp argued, among other things,

November 6, 2018 is right around the corner, which means it’s high time for another frivolous lawsuit from liberal activist groups. They pulled the same stunt in 2014 and 2016, and it’s no surprise that they’re planning the same tactics this year. If I were a betting man, I’d wager that they’ll file their lawsuit within the next couple of weeks, giving themselves enough lead time to secure favorable coverage with their media allies every day between now and the general election.

Kemp’s response failed to address the fact Georgia’s voter registration verification process was continuing to delay and deny voter registration to eligible Georgians because of problems inherent in matching data across different databases, including problems highlighted in the SSA’s Office of the Inspector General’s 2009 report. Kemp’s response also failed to address the fact that thousands of voter registration applicants were continuing to be inaccurately flagged as noncitizens because voter registration data was being matched against stale DDS records. He also failed to explain why Georgia remained out of step with the majority of states responding to a National Association of Secretaries of State survey that do not deny voter registration to their citizens based upon an “exact match” registration process similar to the one enacted by H.B. 268.

Because Secretary Kemp made it clear he would not take any remedial action in response to the NVRA notice letter, civil rights and civic engagement groups once again filed suit on October 11, 2018, to challenge the latest iteration of Georgia’s “exact match” voter registration verification process resulting from the enactment of H.B. 268.
Plaintiffs’ complaint included three counts alleging violations of (1) section 2 of the VRA, which protects plaintiffs from denial or abridgment of the right to vote on account of race, color, or membership in a language minority group; 106 (2) the First and 14th Amendments due to the burden on the fundamental right to vote caused by Georgia’s “exact match” verification process; and (3) section 8 of the NVRA because Georgia’s “exact match” verification process prevents voter registration applicants who submit timely, facially complete and accurate voter registration forms from being registered as active voters on the Georgia voter registration list for upcoming elections. 107

The complaint alleges defendant Kemp’s administrative “exact match” protocol resulted in the cancellation of tens of thousands of voter registration applications between 2010 and 2018 and that between July 2013 and July 2015 alone, approximately 34,874 voter registration applications were cancelled as a result of a “no-match” against DDS and SSA records. 108 Approximately 76.3 percent of the cancelled applications were submitted by applicants who identified as African-American, Latino, or Asian-American applicants, while only 13.6 percent were submitted by applicants identifying as White. 109

Since the enactment of H.B. 268, the complaint alleges the voter registration verification process and its implementation by the Georgia secretary of state’s office continue to produce a high rate of erroneous “no-matches” that disproportionately impacts African-American, Latino, and Asian-American applicants. 110 Specifically, the plaintiffs allege a preliminary review of data produced by the Georgia secretary of state’s office on July 4, 2018, indicates approximately 51,111 voter registration applicants were in “pending” status for reasons related to the failure to verify against DDS or SSA identity or citizenship data. Approximately 80.15 percent of those pending applications were submitted by African-American, Latino, and Asian-American applicants. Only 9.83 percent of the applications that were placed in “pending” status were submitted by White applicants. 111

On October 19, 2018, the plaintiffs filed an emergency motion seeking a preliminary injunction for approximately 3,143 individuals who were in “pending” status as a result of having been flagged as potential noncitizens. The motion focused on the additional hurdles imposed on that group of applicants when they attempted to cure the no-match at the polls. 112 Unlike applicants whose name, date of birth, driver’s license, or Social Security numbers did not exactly match DDS or SSA database records who were allowed to show proof of identity to a poll worker to cure the no-match to vote a regular ballot, this particular group of applicants were required to show proof of citizenship to a deputy registrar even though deputy registrars are not located at all poll locations in Georgia. 113 This was a burdensome requirement that would have proven fatal for a group composed disproportionately of applicants of color.

On November 2, 2018, the court granted the plaintiffs’ motion, concluding they demonstrated a likelihood of success on their claim that Georgia’s voter registration
verification process, which required applicants who failed the citizenship match to show proof of citizenship to a deputy registrar in order to cast a regular ballot, subjected applicants flagged as potential noncitizens to a severe burden on their right to vote, which was not narrowly tailored to advance a compelling state interest, and that those individuals would suffer irreparable harm if they lost the right to vote as a result of this process.114

In the order, U.S. District Judge Eleanor L. Ross noted the process raised “grave concerns for the Court about the differential treatment inflicted on a group of individuals who are predominantly minorities.”115 Judge Ross ordered defendant Kemp to “allow county election officials to permit individuals flagged and placed in pending status due to citizenship to vote a regular ballot by furnishing proof of citizenship to poll managers or deputy registrars.”116 The court emphasized in the order, “To be clear, once an individual's citizenship has been verified by a deputy registrar or a poll manager, that individual may cast a regular ballot and the vote counts.”117 In a statement issued by Secretary Kemp’s spokesperson about Judge Ross's order, Candice L. Broce characterized the court’s ruling as “a minor change to the current system.”118

VIII. Post-Election Federal Lawsuit Challenging Systemic Voter Suppression in Georgia, Including “Exact Match”

Following the November 27, 2018, gubernatorial election, Fair Fight Action, an organization founded by Stacey Abrams,119 and Care in Action, Inc., an organization supporting domestic workers,120 filed a federal lawsuit seeking declaratory and injunctive relief against then-interim Georgia Secretary of State Robyn Crittenden, Georgia's State Election Board, and individual members of the State Election Board under section 2 of the VRA, HAVA, and the U.S. Constitution.121 The lawsuit challenges various aspects of Georgia's electoral and voting policies and practices, including Georgia’s “exact match” voter registration process, which the plaintiffs contend combine to systematically disenfranchise eligible Georgians, particularly Georgians of color.122

On January 28, 2019, defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6).123 Defendants argued the complaint should be dismissed because of the plaintiffs' failure to (1) allege facts sufficient to confer standing; (2) join proper parties; (3) avoid the preclusive effect of the 11th Amendment; (4) overcome legislative immunity as to the individual members of the State Election Board; or (5) plead sufficient claims for relief under the 14th or 15th Amendments to the U.S. Constitution.124

On February 19, 2019, the plaintiffs filed an amended complaint in which several African-American churches were joined as plaintiffs and additional factual details supporting the plaintiffs’ claims for relief were alleged.125 Defendants renewed their motion to dismiss the plaintiffs’ amended complaint on March 5, 2019.126
The district court granted in part, and denied in part, defendants’ renewed motion to dismiss plaintiffs’ amended complaint on May 30, 2019. The court rejected defendants’ contention that plaintiffs lacked Article III standing, finding plaintiffs’ amended complaint alleged facts sufficient to demonstrate an injury in fact, causation, and redressability. The court also rejected defendants’ contention that plaintiffs’ claims concerning the “exact match” process were rendered moot by the state’s enactment of H.B. 316 after the Fair Fight lawsuit was filed. Specifically, the court determined H.B. 316 did not address plaintiffs’ claims that the “exact match” policy disproportionately impacts minority voters and recently naturalized citizens. The court also found that H.B. 316 did not provide a method to reconcile immaterial discrepancies between registration information and acceptable identification. As of July 2019, the Fair Fight litigation was still pending.

IX. Status of “Exact Match” in the Wake of the Enactment of H.B. 316 in 2019

As a result of the enactment of H.B. 316 in 2019, a voter registration applicant will now be registered to vote even if the applicant’s name, date of birth, driver’s license, or Social Security number does not exactly match information about the applicant on file with DDS or SSA, assuming the applicant is otherwise eligible to vote and the application is accurate and complete. Instead of placing these applications in pending status where they were previously subject to cancellation after 26 months, section 6 of H.B. 316 only requires these applicants to produce an acceptable form of HAVA ID (i.e., a current utility bill, bank statement, government check, paycheck, other government document showing the name and address of the voter, or a valid form of photo identification) when they request a ballot.

However, H.B. 316 did nothing to address the flawed citizenship match. As a result, Georgians who swear or affirm on their registration applications that they are U.S. citizens under penalty of perjury, will nevertheless still face obstacles to the ballot box if they obtained a Georgia limited-term driver’s license as a noncitizen before attaining U.S. citizenship. Applicants failing the citizenship match will not be added to the active voter registration file as in the case of the applicants who fail the identity match, and they will remain at risk of having their applications cancelled after 26 months unless the plaintiffs in one or both of the pending lawsuits challenging the “exact match” process obtain remedial relief from the courts.

X. Conclusion

After Brian Kemp, as Georgia secretary of state, and his predecessor, Karen Handel, spent more than a decade staunchly defending Georgia’s fundamentally flawed “exact match” voter registration process, the sudden decision to abandon the “exact match” process after litigation demonstrates that this process was ultimately
indefensible. The “exact match” scheme created an entirely unnecessary and discriminatory barrier to the ballot box for tens of thousands of Georgians, the vast majority of whom were African American and other Georgians of color. Why the Georgia General Assembly chose not to end the patently flawed citizen match aspect of the “exact match” process with the enactment of H.B. 316 is a question that will likely need to be answered through the discovery process in the two pending federal lawsuits challenging the “exact match” process.

Unanswered questions remain about the extent to which the “exact match” process disenfranchised African-American and other minority voters during the 2018 gubernatorial race and impacted electoral outcomes at the state and local levels. It is difficult to assess the exact impact of the “exact match” process on the outcome of this election since other factors may have also contributed to Kemp’s electoral success. If a lesson can be learned from the decade-long history of Georgia’s “exact match” voter registration process, it is how federal preclearance of voting changes under section 5 of the VRA, such as Georgia’s codification of the “exact match” process into law in 2017, is still very much needed today. Had preclearance been in effect in 2017, it is unlikely H.B. 268 would have been federally precleared given the evidence that shows the “exact match” process disproportionately prevented African Americans and other Georgians of color from completing the voter registration process. Moreover, the circumstances under which H.B. 268 was enacted in the aftermath of Kemp’s settlement of the Exact Match 2010 litigation suggest that the law was enacted for a discriminatory purpose. Georgia’s repeated and brazen attempts to institute the “exact match” process in a state with a growing number of voters of color provide powerful examples of the ways in which voter suppression and voting discrimination have reared their ugly head in the post-Shelby world.

Notes


4. Id.


10. GA. CONST. art. 2, § 1, ¶ 2.


12. Id.


15. Id. § 21083(a)(1)(A)(vi).

16. Id. § 21083(a)(5).

17. Id. § 21083(a)(5)(A)(i)(I).

18. Id. § 21083(a)(5)(A)(i)(II).

19. Id. § 21083(a)(5)(A)(ii).

20. Id. § 21083(a)(5)(B)(i).

21. Id. § 21083(a)(5)(B)(ii).

22. See generally id. § 21083.

23. Id. § 21083(b).

24. Id.

25. Id. § 21083(b)(2)(A).


28. Schwier v. Cox, 439 F.3d 1285, 1286 (11th Cir. 2006).


30. Id.

31. Id.
32. _Id_.
33. _Id_.
34. _Id_.
35. _Id_.
36. _Id_.
37. _Id_. at *1.
38. _Id_.
39. _Id_.
40. _Id_.
41. _Id_. at *2.
42. _Id_.
43. _Id_. at *7.
44. _Id_. at *8.
45. _Id_. at *9–10.
47. _Id_. at 4.
49. _Id_. at 4.
50. _Id_.
51. _Id_.
52. _Id_.
54. _Reed_, 492 F. Supp. 2d 1264.
56. See Browning, 2007 WL 9697653.
57. _Id_.
60. _Id_.


65. Id.; see also Joint Motion to Dismiss, Georgia v. Holder, 748 F. Supp. 2d 16 (D.D.C. 2010).


67. Id. at 18–19.

68. Id. at 17 n.3.


70. Id. at 1.

71. Id. at 1–2.

72. Id. at 2.

73. Id.


75. The letters sent by county registrars to applicants who failed the “exact match” process were written in English only for the entire state until Gwinnett County became a covered jurisdiction subject to the language access requirements of section 203 of the VRA for Spanish in December 2016. Gwinnett County remains the only county in Georgia subject to the language access requirements of section 203 and is the only Georgia county issuing bilingual notices related to voter registration or voter registration verification.

76. First Amended Complaint Revised Exhibit 6, supra note 69.


78. Id.

79. Id. at 10.


81. Id. at 45–46.

82. Id. at 36–37.

83. Brill Report, supra note 77, at 8 tbl. 1.


85. Id.


88. *Id.*
90. As a result of the Supreme Court’s decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), section 5 of the VRA was rendered unenforceable when the Supreme Court held the coverage formula in section 4 of the VRA, used to determine whether a jurisdiction was subject to section 5’s preclearance provision, was unconstitutional.
91. 52 U.S.C. § 10304.
92. *Id.*
94. *Id.* at 49.
95. See generally *Id.* at 41.
96. *Id.*
97. See Georgia General Assembly, supra note 5.
98. *Id.*
100. 52 U.S.C. § 20510(b)(2).
101. *Id.* § 20507.
103. SSA OFFICE OF THE INSPECTOR GENERAL, supra note 48.
107. *Id.* § 20507(a)(1).
109. *Id.*
110. *Id.*
111. *Id.* at 5.
113. Id. at 2.
115. Id. at 28.
116. Id. at 33.
117. Id. at 34.
120. See Care in Action website at https://careinactionvotes.org/ (last visited July 29, 2019).
122. Id.
124. Id.
128. Id. at 5–22.
130. Order, supra note 127, at 23.
131. Id. at 32–33.
132. H.B. 316, supra note 129.
134. See H.B. 316, supra note 129.
CHAPTER 3

TOO BROKE TO VOTE: HOW FLORIDA’S FELON RE-ENFRANCHISEMENT LAW PENALIZES THE POOR

NANCY G. ABUDU

I. Introduction

Our aspirational democracy originally was founded on the concept that if you did not own property (i.e., have some tangible level of wealth) you could not have a voice in the political process. The prohibition on poll taxes proclaimed in the 24th Amendment to the U.S. Constitution was in part a response to the financial barriers that people, especially racial minorities, faced in exercising their right to vote. Unfortunately, one’s economic status continues to be an obstacle for millions of Americans who, but for monetary obligations associated with a past felony conviction, would be voting members of our society. If you are already poor, the likelihood that you can fully satisfy all fines, fees, costs, and victim restitution is very small. Therefore, the continuing intersection between voting and wealth is most vividly seen in felon re-enfranchisement laws, which has essentially led to the creation of a second-class citizenry with no say in how our government and social institutions are run. Moreover, in a nation where poverty and incarceration rates among people of color, youth, and women are disproportionately high, the denial of voting rights based on one’s economic status has an especially significant impact in these communities.

In November 2018, through a voting rights restoration ballot initiative (known as Amendment 4), Florida voters created a real opportunity for those most impacted by unfair and discriminatory laws and policies to play an active role in dismantling those systems. Prior to passage of Amendment 4, more than 10 percent of Florida’s voting age population—disproportionately Black and poor—were permanently banned from voting.\(^1\) The initiative was intended to extend voting rights to an estimated 1.4–1.6 million people.\(^2\) Unfortunately, the Florida legislature was swift in undermining the will of the people and impeding the momentum that the rights
restoration movement has otherwise successfully built. State election laws like Florida's that deny people the right to vote based on a criminal conviction and then condition the restoration of that right on payment of all financial obligations create a permanent underclass. We must remain vigilant in challenging such policies in the courts, state legislatures, and through an inclusive and coordinated grassroots movement.

II. The Historical Use of Poverty as a Barrier to the Ballot Box

Florida's 2000 election drew international attention and criticism not only because of our country's antiquated use of the Electoral College, but also because it exposed the state's continued practice of permanently denying someone the right to vote based solely on a previous criminal conviction. News outlets reported on poor ballot designs that resulted in hanging chads and the tossing of ballots of eligible citizens, even those improperly flagged as felons.3 Although the myriad of voting problems and irregularities highlighted during that election continue to haunt us today, it was the false identification of voters as felons and the financial barriers imposed on rights restoration that outraged many people the most and created the momentum that led to Amendment 4's ultimate passage.

It is understandable that people were shocked by the impact of Florida's felon disenfranchisement law given the passage of the Voting Rights Act of 1965,4 which prohibits the denial of voting rights based on one's race or color, and the 1964 enactment of the 24th Amendment, which bans poll taxes or other taxes that impede one's right to vote. The 24th Amendment provides:

The right of citizens of the United States to vote in any primary or other election for President or Vice President for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.5

In Harman v. Forsennius,6 the U.S. Supreme Court struck down a Virginia law that required people to pay a $1.50 poll tax in order to remain eligible to vote in federal elections. The Court reasoned the law was “repugnant to the Twenty-Fourth Amendment,” which “nullifies sophisticated as well as simple-minded modes' of impairing the right guaranteed.”7 The Court extended its ruling in Harman to all elections, not just federal ones, in Harper v. Virginia State Board of Elections, relying upon the Equal Protection Clause.8 The Court concluded that “[t]he principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.”9

In 1974, the Supreme Court upheld, in a case called Richardson v. Ramirez, California's felon disenfranchisement law under section 2 of the 14th Amendment, which provides:
When the right to vote ... is denied to any of the male inhabitants ... or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.10

According to the Court, “the exclusion of felons from the vote has an affirmative sanction in section 2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which were invalidated [in other cases].”11 Thus, the Court concluded that Congress expressly recognized a state’s right to use one’s criminal history as a barrier to voting. Since then, numerous cases have been brought to either limit the scope of Richardson’s application to state felony disenfranchisement laws or to overturn the Court’s decision entirely.12

Florida’s first constitution was adopted in 1838, but it was the 1845 constitution that allowed for the disenfranchisement of someone convicted of a crime. The disqualification from voting based on a criminal conviction has remained, in some form or fashion, a provision in amended versions of Florida’s constitution ever since. In Johnson v. Bush, which was a challenge to Florida’s felon disenfranchisement law on the grounds that it was racially discriminatory and violative of other federal laws, the Eleventh Circuit relied heavily on the fact that when the state’s 1868 constitution was enacted, Black and White delegates from Florida to the post-Civil War convention voted to include the prohibition.13 According to the court, the fact that the delegation was mixed race helped negate any argument that the provision was proposed and enacted for a racially discriminatory purpose.14 Specifically, the court reasoned that “[t]he existence of racial discrimination behind some provisions of Florida’s 1868 Constitution does not [ ] establish that racial animus motivated the criminal disenfranchisement provision, particularly given Florida’s long-standing tradition of criminal disenfranchisement.”15

The contemporaneous evidence of racial discrimination surrounding the adoption of Florida’s 1868 constitution was not enough for the court to protect the fundamental right from being eroded in this odious manner.16 In order to convert slaves into convicts, several states like Florida, which had a significant Black population, created Black Codes and other laws to specifically target African Americans who for the first time had a real opportunity to play a role in the political arena. Thus, Black Codes were enacted for the very purpose of creating a new system of slavery.17 America has a long history of racism and classism that has seeped its way into the very fabric of our electoral systems. Therefore, even assuming the Johnson court’s rationale was correct in terms of the historical origin and motivation behind Florida’s felon disenfranchisement law, its disparate impact on newly enfranchised former slaves with limited economic opportunities cannot be ignored.

Plaintiffs have relied upon the Court’s decisions in Harman and Harper to argue that felon disenfranchisement laws that require full satisfaction of legal financial obligations are a wealth-based qualification in violation of the Equal Protection
Clause and 24th Amendment. These litigants have drawn upon decisions such as *Gideon v. Wainwright*,18 which affirmed a person's right under the Sixth Amendment to a court-appointed attorney if he or she cannot afford a private attorney. Other cases include *Bearden v. Georgia*,19 which held that a person could not be jailed or imprisoned for failing to pay a fine without at least an evidentiary hearing to determine the person's ability to pay, and *Griffin v. Illinois*,20 in which the Court ruled that a criminal defendant could not be barred from appealing his or her conviction solely because the person cannot afford to purchase a copy of the trial transcript.

Unfortunately, the poll tax argument in the re-enfranchisement context has not always fared well, as demonstrated in the Eleventh Circuit’s decision in the *Johnson* case:

> The State is not constitutionally obligated to return this right to them on completion of their sentence. The victim restitution requirement, then, does not unduly burden the exercise of their right to vote given that that right has already been stripped from them. The victim restitution requirement is not a special fee that they must pay in order to exercise a right already existing in them, but a requirement made within the authority of the State to begin the process of having their civil rights fully restored.21

The Sixth Circuit, in *Johnson v. Bredesen*, adopted a similar rationale and concluded that, “[a]s convicted felons constitutionally stripped of their voting rights by virtue of their convictions, Plaintiffs possess no right to vote and, consequently, have no cognizable Twenty-Fourth Amendment claim.”22 Thus, a state can erect a rights restoration scheme, but then enjoy unfettered discretion in whether, when, and how to actually restore someone’s rights. Sadly, most courts have too narrowly interpreted the 24th Amendment in wrongly concluding it was never intended to prohibit a fuller range of financial obligations that people must satisfy in order to vote.

Prior to the successful 2018 ballot initiative, Florida was one of just a few states that still requires a person with a felony conviction to seek restoration of rights through an executive clemency process. In 2011, then-Governor Rick Scott amended the clemency rules to impose a five- or seven-year waiting period (depending on the crime of conviction) on anyone seeking restoration of their civil rights after having already completed their sentence.23 Moreover, the re-enfranchisement process remained under the total, unrestrained, and unchecked discretion of the governor with no guiding principles as to how those decisions would be made.

In *Hand v. Scott*, people with criminal convictions who had applied for rights restoration and were either denied or still waiting years later to find out whether or not they would even have a hearing sued the state over its clemency procedures.24 The plaintiffs argued that Florida’s restoration scheme violated the Equal Protection Clause and the First Amendment because the state exercised “unbridled discretion” in denying people restoration of their voting rights that impacted not only the physical casting of a ballot, but also their right to engage in political speech.25 They
maintained the State Executive Clemency Board utilized arbitrary standards that resulted in people of color and low-income people being disproportionately denied clemency and without any consistency in how or why they would grant someone’s application. The district court found that the plaintiffs’ “right to free association and right to free expression were denied under a fatally flawed scheme of unchallenged discretion that was contaminated by the risk of viewpoint discrimination.” The court permanently enjoined the board from “enforcing the current unconstitutional vote-restoration scheme” and ordered it to “promulgate specific and neutral criteria to direct vote-restoration decisions” along with “meaningful, specific, and expedient time constraints.” Unfortunately, the Eleventh Circuit stayed the district court’s decision, determining that “[a]ll the appellees have offered in this case is a ‘risk’ that standardless determinations ‘could’ lead to impermissible discrimination; that is not enough to show a discriminatory purpose or effect.”

While it is true that Florida’s felon disenfranchisement law dates back to 1845, before African Americans had the right to vote, the expanded scope and impact of the state’s policy has unquestionably resulted in racial minorities and poor people wield much less political power and, consequently, control over the policies that govern their lives. Exclusion and voter suppression have served as the foundation of our electoral system, which explains why it has been so difficult to root out. For the most part, courts have failed to acknowledge that today’s felon disenfranchisement laws contribute to the underrepresentation of marginalized groups based on their race and socioeconomic status. Therefore, it is arguably dishonest for courts to ignore that race and class remain motivating factors in the proliferation of voter suppression laws.

III. Florida’s Historic Passage of the Voting Restoration Amendment

A. GETTING THE INITIATIVE ON THE BALLOT

The Sentencing Project estimated that, in 2016, around 6.1 million people (about 2.5 percent of the U.S. voting age population) were disenfranchised based on a felony conviction. Florida alone accounted for an estimated 1.6 million of those voters—around 10 percent of the voting-age population in the state. Those numbers alone are alarming, but when coupled with the fact that in Florida elections have been won within a 1 percent margin, the significance is even more stark.

In order to get the initiative on the ballot, supporters of the measure had to secure 766,200 signatures from at least 14 of Florida’s current 27 congressional districts. Petition signatures are only valid for two years from the date of signing, so reaching the numerical threshold in a timely manner is of the essence. Once a sufficient number of signatures are gathered, the state supreme court must review the language to make sure it is not misleading or otherwise confusing to voters. After passing this third crucial hurdle, the initiative is ready for placement on the ballot and the extremely hard work of getting enough votes for it to pass begins.
The Voter Restoration Act ballot initiative (known as “Amendment 4” because of its placement on the ballot) provided that:

(a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability. Except as provided in subsection (b) of this section, any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation;

(b) No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.

Thus, the proposal allowed for the automatic restoration of voting rights to those with felony convictions who had completed their sentences, except for anyone convicted of murder or felony sexual assault. Otherwise, the only alternative remained an executive clemency process\(^3\) that a federal district court deemed to be “a fatally flawed scheme of unfettered discretion.”\(^4\) The Florida Rights Restoration Coalition (FRRC) and other organizations raised millions of dollars in order to mount the necessary public education campaign, recruit enough petition gatherers, both paid and volunteer, secure advertisements on television and billboards, organize community meetings, and do whatever else was necessary to get out the vote and make sure people ultimately voted “yes” on Amendment 4. Community activists and other volunteers gathered the necessary signatures for the petition and approval from the state supreme court to put the measure on the November 2018 ballot. In approving the language, the state supreme court held that

the ballot title and summary clearly and unambiguously inform the voters of the chief purpose of the proposed amendment. Read together, the title and summary would reasonably lead voters to understand that the chief purpose of the amendment is to automatically restore voting rights to felony offenders, except those convicted of murder or felony sexual offenses, upon completion of all terms of their sentence.\(^5\)

After hosting numerous community town halls, tabling at every kind of public event, running multiple television advertisements and other public service announcements, and engaging in deep canvassing, almost 65 percent of Floridians voted “yes” on Amendment 4.\(^6\) Notably, in that election, Republicans won the governorship and a majority of legislative and judicial seats.\(^7\) And, despite efforts to paint the rights restoration initiative as a partisan issue, a significant enough number of Republican voters also supported the amendment, which resulted in a tremendous number of people—estimated at 1.4–1.6 million—being enfranchised though a single law and policy change. The display of voters, regardless of political affiliation, rallying behind the rights restoration effort was also perhaps why people from all over the country
celebrated this historic victory; it evidences that even those with different political ideologies can jointly support a commonsense approach to re-enfranchisement.

B. THE FLORIDA LEGISLATURE’S CALCULATED UNDERMINING OF THE PEOPLE’S WILL

Over the past 15 years, numerous bills have been introduced to automatically re-enfranchise voters with felony convictions, but the legislature has done nothing to advance, let alone pass, these measures. In November 2018, Florida citizens decided they had had enough with waiting on the legislature to enact a rights restoration law that reflected the values of most voters, Republicans and Democrats alike. National and state-based civil rights groups, working under the umbrella of the FRRC, launched a successful multi-year campaign for a ballot initiative to amend Florida’s constitution. More than a million formerly convicted individuals can now participate in our democracy. Unfortunately, in an undisguised, blatant attempt to undermine the will of the people, the state legislature passed Senate Bill 7066 and materially changed the meaning and enforcement of Amendment 4.

Even though the initiative was always considered to be self-executing without the need for any implementing legislation, Senate Bill 7066 redefines the term “completion of sentence” to include restitution and monetary obligations even when a court has converted them to a civil lien. The law also places extreme burdens on county supervisors of elections by requiring them to personally verify whether any voter applicant has been convicted of a felony and, if so, has completed the terms of the sentence. Although other state agencies such as the Department of Corrections and secretary of state can offer assistance, the ultimate responsibility is on the supervisor of elections to determine the criminal history of anyone registering to vote, confirm the completion of a criminal sentence, and then track down any and all civil liens to corroborate whether those have been satisfied as well. Meanwhile, supervisors across the state are known to adopt varying internal policies and practices when it comes to the enforcement of election laws, most recently highlighted in the varying treatment of vote-by-mail ballots in different counties. Therefore, relying solely on supervisors of elections when it comes to administering Senate Bill 7066 is even more frightening.

The legislature knew exactly what it was doing when it required the full satisfaction of all monetary obligations as a voter qualification. Senate Bill 7066 imposes exorbitant financial barriers to the ballot box that many have decried as a modern-day poll tax. The average citizen who completes prison, parole, and probation faces steep challenges in securing gainful employment, safe and secure housing, and financial assistance to attend college, graduate school, or obtain a professional license. If enforced, the likelihood that most people who were eligible to vote under Amendment 4 can overcome those additional financial hurdles is much smaller. Therefore, Senate Bill 7066 runs afoul of the plain language and meaning of Amendment 4, now enshrined in the state constitution, as recognized by the state supreme court and understood by the voters.
In addition to being unconstitutional, Senate Bill 7066 creates a world of confusion for impacted individuals and the agencies and grassroots organizations that serve them. For those who benefitted from Amendment 4’s passage and have already registered to vote, they now face the loss again of their voting rights. Despite voters’ best intentions in passing Amendment 4, the legislature has craftily found a way to keep Florida’s disenfranchised population ever so high. Not only is this a huge setback, it also feeds into the growing distrust of the political system.

IV. Conclusion

Florida’s Amendment 4 victory was not just a major milestone for the state, but an incentive for other southern states still grappling with the lingering effects of institutionalized racism and cycles of poverty. Like the movement to secure the rights of indigent defendants to publicly funded defense counsel and cases that recognize a due process right when it comes to determining one’s ability to pay, Florida’s felon disenfranchisement law demands a concerted, organized movement to expand the 24th Amendment’s prohibition on poll taxes to apply in the re-enfranchisement context. That movement should include support for passage of federal legislation like the Democracy Restoration Act that would guarantee voting rights in federal elections upon release from prison, and continued advocacy at the state level for policy changes. The stakes are very high in Florida, especially for social justice organizations working to decrease the number of people in the criminal justice system and, consequently, those disenfranchised in the first place. Moreover, given the state legislature’s inability or outright refusal to contend with these challenging issues, we need to amplify, not silence, the political voices of those most directly impacted by the state’s current disastrous policies. Failure to do so is anathema to what true democracy looks like. The more than five million Floridians who voted in favor of Amendment 4 made their position clear—if legislators cannot move the state into the 21st century, the voters will.

Notes


4. The Voting Rights Act states, in pertinent part, that “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any
3. Too Broke to Vote

State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . .” 42 U.S.C. § 1973(a) emphasis added).

5. U.S. Const. amend. XXIV, § 1.
7. Id. at 534, 541–42 (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).
9. Id. at 668.
12. See, e.g., Harvey v. Brewer, 605 F.3d 1067 (9th Cir. 2010) (challenging “other crime” provision in section 2 of 14th Amendment on grounds that Congress never intended prohibition to apply to plethora of criminal offenses that exist in modern times); Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010) (arguing that Washington’s felon disenfranchisement law, when coupled with racial bias and disparities in the criminal justice system, result in the denial of voting rights based on race in violation of section 2 of the Voting Rights Act); Muntaqim v. Coombe, 396 F.3d 95 (2d Cir. 2004) (raising similar Voting Rights Act section 2 claim).
14. Id. at 1219.
15. Id.
16. Id. at 1219–20.
17. See Hunter v. Underwood, 471 U.S. 222 (1985) (striking down Alabama’s felon disenfranchisement scheme on the ground that its adoption was motivated by racial animus as evidenced in part by the fact that crimes associated with Blacks were made disfranchising, but not those associated with Whites).
25. Id.
26. Id.
27. Id.
28. Id. at 1255.
29. Hand v. Scott, 888 F.3d 1206, 1210 (11th Cir. 2018). The plaintiffs have since conceded that with the passage of Amendment 4, their case is moot.

31. *Id.*


35. **Fla. Const.** art. IV, § 8(a).


41. *Id.*

42. *Id.*


44. **Fla. Const.** art. IV, § 4(a).


48. CNN, supra note 38.
CHAPTER 4

MILLENNIALS AND ELECTORAL ACCESS IN 2018–2020

LAUREN E. WARD AND BENJAMIN E. GRIFFITH

I. Introduction

“Millennial” has been defined as “[a]nyone born between 1981 and 1996.” This definition finds a basis in such political, economic, and social factors as the 9/11 terrorist attacks, the wars in Iraq and Afghanistan, the election of America’s first African-American president, coming of age during the 2008 economic recession, and the explosion of the Internet and life-changing technology. Millennials face stiff accusations related to changing the culture and the world around them, including killing chain restaurants and crippling the diamond, bar soap, napkin, and American cheese industries.

Unwarranted as these tropes may be, Millennials can shape economies and political landscapes if they choose to and are given the tools to do so. Economically, they face different challenges than their Baby Boomer or Generation X counterparts. They place experiences over possessions and replace mortgages with student loan debt. Politically, Millennials are the most diverse generation in American history and the “most Democratic generation” out of those living. This chapter explores the power of the Millennial vote and analyzes tactics used to suppress the ever-strengthening Millennial voting voice and power.

II. Millennials, Baby Boomers, and Voter Turnout

Millennials are poised to surpass in sheer numbers the Baby Boomers, the largest existing generation, with the Millennial generation’s continued growth expanded by young immigrants and the aging of the Boomers. Millennials are projected to swell to 73 million while Boomers shrink to 72 million in 2019, making Millennials the largest share of the voting-age population.

Voter turnout for Millennials has evolved. Based on census estimates from respondent self-reports, Millennial voter turnout in most recent presidential elections declined and then increased. Fifty percent of eligible Millennial voters voted in 2008, declining to 46 percent in 2012, and then rising to 51 percent in 2016.
The 2018 midterms had an overall voter turnout of 50.3 percent, the highest turnout since 50.4 percent turnout in the 1914 midterm elections. The 18–29 age group had an estimated 31 percent voter turnout in 2018, a promising increase from the 21 percent turnout reported for the same age group in the 2014 midterms. On the cusp of becoming the largest portion of the population, Millennials have yet to fully flex their voting strength, in part due to obstacles standing in their way. The current rise in participation from the 2016 and 2018 elections, however, suggests promising potential for Millennials dominating future elections.

III. Millennial Voter Suppression Tactics: A Review of Recent Case Law and Statutory Authority

In 2013, the U.S. Supreme Court immobilized Voting Rights Act section 5 preclearance in *Shelby County v. Holder*, declaring unconstitutional the outdated section 4 formula for determining the applicability of section 5 to specific jurisdictions. The Court’s majority freed formerly covered jurisdictions from the constraints of section 5 preclearance and allowed them to enact or amend election-related laws without federal oversight. Post-*Shelby County* cases opened the door to tactics suppressing the Millennial vote, to which we now turn.

A. LIMITATIONS ON EARLY VOTING

Early voting has origins with our nation’s founding, when elections were held over several days to provide voters with time to travel to polling locations. In 1845, early voting met a challenge when the federal government set a single, uniform day for the presidential election. Convenience aided early voting’s return during the Civil War for soldiers and later through use of absentee ballots for civilians. After the normalization of absentee ballots, some states took further steps in the name of convenience and access, including absentee ballots without excuses, mail-in ballot systems, and in-person early voting.

States vary their implementation of early voting methods. Currently, 35 states and the District of Columbia provide for in-person early voting, 28 states and the District of Columbia allow for early voting by mail through no-excuse absentee voting, and 19 states offer absentee ballots but require excuses for the same. Colorado, Oregon, and Washington offer all-mail election voting. Even with differences on how early voting methods are used or implemented, early voting offers clear benefits to the voters and the electoral system:

1. Reduction in Election Day stress on the voting system
2. Shorter lines on Election Day
3. Improved poll worker performance based on experience gained through early voting
4. Prevention and correction of errors discovered during the early voting period and prior to polls closing
5. Greater access to voting and increased voter satisfaction

Nonetheless, some states have created early voting roadblocks that potentially disenfranchise certain voters. Florida is one example, where early voting limitations and restrictions overlapped in a manner affecting the rights of Millennial voters.

1. Florida

a. Early Voting Statutory Authority
In 2012, Florida law allowed supervisors of elections to designate their office, city halls, or public libraries as early voting sites. The state legislature amended statutory provisions for early voting in May 2013, expanding early voting after the “curtailment of early voting . . . in 2012, when President Barack Obama was seeking re-election.” Eligible sites for early voting were expanded to include “the main or branch office of the supervisor . . . any city hall, permanent public library facility, fairground, civic center, courthouse, county commission building, stadium, convention center, government-owned senior center, or government-owned community center.” The state legislature also rejected attempts to identify universities and colleges as eligible early voting sites.

b. January 2014 Division of Elections Opinion
Under the amended early voting statute, the Gainesville city attorney requested a formal opinion from the Division of Elections to determine if the University of Florida student union building constituted “a government-owned community center or a convention center” under statute. University of Florida students approached the Gainesville City Commission about placing early voting sites on campus, which spurred this request, and a formal opinion by the director of the Division of Elections concluded that “convention center” and “government-owned community center” could not “be construed so broadly as to include . . . any college- or university-related facilities that were rejected by the Legislature as additional early voting sites.” This eliminated early voting sites on college and university campuses within the state. This meant “none of the 830,000 students enrolled in a public university or college [could] vote on campus,” a brutal result since Florida college students voted early at higher rates than the national average.

c. Federal Litigation in Florida’s Northern District
Six students from the University of Florida and Florida State University and others challenged the director’s formal opinion as unduly burdensome to their own and their peers’ voting rights. Their motion for preliminary injunction was granted, based in part on the finding that the director’s opinion “categorically [barring] early voting on any university or college campus” also “[violated] the First, Fourteenth,
and Twenty-Sixth Amendments.” Various preliminary and substantive defenses were addressed by the court.

i. Alleged Violations of the First and 14th Amendments

Based on the Anderson-Burdick balancing test, the court found the plaintiffs’ burdens were “more than de minimis” because the formal opinion “categorically prohibited” Florida’s public college and university students from “on-campus early voting,”28 and it:

1. “[L]opsidedly [impacted] Florida’s youngest voters”
2. Created “a secondary class of voters who [Secretary of State Detzner prohibited] from even seeking early voting sites in dense, centralized locations where they work, study, and in many cases, live”
3. Prohibited “a discrete class of individuals . . . from even the possibility of an alternative, reasonable early voting location,” especially where “this class of voters [was] the only class in Florida facing such a prohibition”

What the director deemed “mere inconveniences” were transformed to “an abridgment of the right to vote.” The court addressed transportation times to polls for dense university populations in Florida and disproportionate access to cars in light of factors such as convenience, crowded on-campus voting locations on Election Day, and pitfalls of other voting alternatives that led younger voters to early voting.29

The court concluded that the director failed to articulate sufficient regulatory interests with any precision to explain why it was necessary to place specific burdens on the plaintiffs’ rights.30 The director’s proffered interests in following state law, preventing parking issues, and avoiding on-campus disruption created by an early voting site were found insufficient for the following reasons:

1. The early voting statute did not prohibit early voting sites on college campuses, making the formal opinion a “broad answer to a narrow question” that inserted “a prohibition into an otherwise flexible authorizing statute.”
2. Local supervisors of elections are in a better position to evaluate parking at potential early voting sites and adding early voting sites would alleviate long lines and parking problems at other sites.
3. Local supervisors of elections are in a better position to evaluate potential disruptions and early voting sites would likely alleviate the disruptions occurring on Election Day.31

Plaintiffs thus established the necessary likelihood of success on the merits for their First and 14th Amendment claims.

ii. Alleged Violations of the 26th Amendment

Applying the Arlington Heights standard to the plaintiffs’ 26th Amendment claims, the court found that the director’s opinion was “unexplainable on grounds other than age,” and that it revealed “a stark pattern of discrimination” because it
bore more heavily on younger voters than all others. The director's stated interests were pretextual and its opinion was held intentionally and facially discriminatory. Noting that “addressing intentional discrimination does not require kid gloves,” the court compared the director’s opinion to a 1910 Oklahoma constitutional amendment seeking to exclude African Americans from voting, finding both were “clear abridgements of voting rights justified by, at best, weak interests.” The plaintiffs thus established a substantial likelihood of success on their 26th Amendment claims.

iii. Further Findings Supporting Injunctive Relief
Plaintiffs showed irreparable injury based on their having to travel longer and farther to vote early and showing that their threatened injury outweighed the potential disruption to early voting site lists for the upcoming primary elections. Injunctive relief was thus in the public interest because “[t]hrowing up roadblocks in front of younger voters does not remotely serve the public interest.”

iv. Court’s Order
The director was barred from implementing or enforcing the early voting statute “in any way prohibiting or discouraging the use of any [facility] for early voting because that facility is related to, designed for, affiliated with, or part of a college or university,” and was required to “issue a directive to the supervisors of elections advising them that the interpretation of the early voting statute [excluding] . . . any facilities related to, designed for, affiliated with, or part of a college or university, is unconstitutional.”

d. Further Developments and Takeaways
Young voters in Florida, including Millennials, won the first battle. The use of the Anderson-Burdick balancing test for a review of First and 14th Amendment claims and the court’s application of Arlington Heights to 26th Amendment claims signals that young voters are not without recourse for laws, opinions, and other decisions infringing upon their right to vote and to vote early.

B. STUDENT VOTER IDENTIFICATION AND REGISTRATION LIMITATIONS
Many states have adopted some form of voter identification (ID) requirement as a condition precedent to allowing voters to cast a ballot. Some of these rise to the level of voter suppression. Voter ID laws vary depending on the jurisdiction, with seven states strictly requiring photo ID and three additional requiring at least non-photo ID. Other states allow voters to cast a ballot without presenting ID, as long as they sign an affidavit, have a poll worker vouch for the voter, or return within a few days to present the requested ID. Ten states have a non-strict photo ID requirement, while 15 have a non-strict general, non-photo ID requirement. The remaining 15 states have no document ID requirement for voters and choose to verify voter identities using other methods. A discussion of voter ID laws employed in a manner negatively affecting electoral access for Millennials and other young voters is illuminating.
1. North Carolina


Prior to 2016, North Carolina relied on a signature attestation system to prevent voter fraud, under which poll workers asked the name and address of voters voting in person. If a registration could be located for the provided name and address, the voter was required to sign an authorization to vote form affirming his or her identity and residence at the registration address. Poll workers did not have access to the voter registration database containing the registrants’ signatures, and were unable to verify that the signatures matched, unless they knew the individual voter.

b. North Carolina’s Proposed Voter ID Laws

In 2008, President Obama became the first Democrat to carry the state of North Carolina in more than 30 years. In 2013, for the first time in more than a century, Republicans gained control of the North Carolina governorship and the state legislature, allowing Republican leadership to propose several bills regarding elections and voting. These included North Carolina House Bill 589, the Voter Information Verification Act, which implemented voter ID requirements in 2016 and addressed procedures for absentee ballots. H.B. 589, in its original form, included student ID cards as an acceptable form of voter ID and made special exceptions for voters over 70 by allowing them to use expired forms of ID.

H.B. 589 passed the North Carolina House, with minimal Democratic support and no support from African-American legislators. It stalled in the Senate because many in the Senate believed it required preclearance by the Department of Justice pursuant to section 5 of the Voting Rights Act. During this stall, the Supreme Court issued its opinion in Shelby County, eliminating section 5 preclearance.

Post-Shelby County, the North Carolina Senate expanded the scope of H.B. 589 to call for broader reform of North Carolina’s election law. One change omitted student ID cards as an acceptable form of voter ID, even though the initial form of the bill included it. Protections for citizens over 70 remained. Circulation of the revised H.B. 589 occurred the night before its consideration by the Senate’s Rules Committee, catching many legislators off guard. After much debate, H.B. 589 passed the Rules Committee and was approved along party lines by the Senate. The House voted along party lines to concur in the Senate’s amended version of H.B. 589. The governor signed H.B. 589 into law on August 12, 2013, over the recommendation from his Democratic attorney general. As passed, the law excluded student ID cards as an acceptable form of voter ID.

c. Enactment of North Carolina H.B. 836

On the day H.B. 589 was signed into law, several groups brought suit to invalidate it as unconstitutional. Less than a month before trial in that suit, the North Carolina legislature passed H.B. 836 and modified the H.B. 589 photo-ID requirements by (1) expanding the category of acceptable photo ID to IDs expired for up to four years; (2) allowing poll workers to inform early voters without acceptable ID that they can...
request an absentee ballot at an early voting site until the Tuesday before Election Day; and (3) permitting voters without acceptable ID to cast a provisional ballot, as long as they declared a reasonable impediment preventing them from obtaining a required form of ID. Student ID cards were still omitted as acceptable forms of ID. H.B. 836 “was proposed with little notice” and a short legislative record. As a result of H.B. 836’s unusual, fast-track consideration, it received immediate consideration and passage by a wide margin.

d. Federal Litigation in North Carolina’s Middle District
Following H.B. 589’s enactment, the district court permitted a group of young voters to intervene. They challenged the implementation of a voter ID requirement as violative of the 14th and 26th Amendments, as was done by young Florida, Tennessee, and Michigan voters. They also challenged the laws as infringing on young people, a group tending to vote Democratic, and alleged that omitting student ID cards created a disproportionate burden, as young voters were less likely to have a state-issued ID and/or the means to travel to obtain one.

Following appeals to the Fourth Circuit and Supreme Court, the district court issued a preliminary injunction in favor of the plaintiffs and denied the defendants’ motion to dismiss the voter ID claims as moot, based on the argument that H.B. 836 resolved any issues in H.B. 589, and trial proceeded on the other claims.

With respect to their 14th Amendment claims, the young voter plaintiffs decided not to participate in the second trial held on the voter ID issue, opting to rely only on the discriminatory intent evidence presented during the initial trial. Following the two trials, the court entered an exhaustive opinion based on a record of several tens of thousands of documents. It upheld the voter ID requirements, finding they (1) were not tenuous, (2) served legitimate state interests, like security and voter fraud prevention, and (3) with the addition of the reasonable impediment exception, did not deprive minority voters of an equal opportunity to participate in the political process.

On the young voters’ 26th Amendment claims, the court punted, determining there was no certainty as to what test applied to the 26th Amendment claims. Plaintiffs failed to demonstrate North Carolina acted with discriminatory intent in drafting the new legislation, and the legislature offered “plausible reasons” for omitting student ID cards from the allowed forms of ID, including the inconsistency in the way colleges issued IDs. The court thus found a lack of discriminatory intent as to young voters and held the challenged legislation did not impose a heavier burden on young voters.

e. Subsequent Appeal to the Fourth Circuit Court of Appeals
The Fourth Circuit Court of Appeals reversed, finding that discriminatory intent was evident in the legislative record and the legislation did not achieve the state’s purported justifications. It permanently enjoined the challenged legislation, focusing mostly on the racial minority plaintiffs, with only passing references to the
young voter plaintiffs. While a positive result for young voters in North Carolina, 
the appeal does not illuminate the issues in a helpful way for young voters facing 
similar issues elsewhere. Subsequent to the ruling by the Fourth Circuit, the U.S. 
Supreme Court denied the defendants’ request for a stay and denied certiorari.\textsuperscript{51}

\textbf{f. Post-Appeal Developments}

After the Fourth Circuit’s decision, the North Carolina legislature in 2017 sought 
to amend the state constitution in H.B. 1092 by requiring certain voter IDs and 
allowing the legislature to dictate acceptable forms of ID.\textsuperscript{52} North Carolina voters 
approved the amendment during the November 2018 election, with 55.5 percent of 
the approximately 3.7 million votes cast on the measure.\textsuperscript{53}

The new legal battle challenging this amendment has just begun. In early 2019, 
a Wake County Superior Court invalidated the amendment, finding the North Car -
olina General Assembly so gerrymandered “that its members don’t truly represent 
the people of the state and thus should never have proposed constitutional amend-
ments in the first place.”\textsuperscript{54} The North Carolina legislature’s effort to breathe life into 
a voter ID requirement conflicts with the trial court’s invalidation of the law based 
on representatives being from gerrymandered districts.

\section*{2. Legislation and Litigation in Tennessee and Michigan}

North Carolina is not alone in facing litigation for legislation excluding young vot-
ners. Similar issues are being addressed in Tennessee and Michigan, as briefly dis-
scussed below.

\textbf{a. Tennessee}

As of January 1, 2012, Tennessee law requires voters to supply ID to vote, but 
excludes “[a]n identification card issued to a student by an institution of higher 
education containing a photograph of a student” as proper voter ID.\textsuperscript{55} While the 
reasoning behind this exclusion seems clear (i.e., ability to exclude students’ often-liberal 
votes), legislators tried to disguise it. Tennessee Senator Bill Ketron, outspoken proponent of voter ID requirements, stated at the time that “student IDs are 
frequently forged so students can lie about their age,” despite the fact that student 
ID cards generally do not display birth dates\textsuperscript{56} and that forgery concerns did not 
apply to faculty ID cards issued by Tennessee universities, which are acceptable 
forms of voter ID.\textsuperscript{57}

\textbf{i. Federal Litigation in Tennessee’s Middle District}

In 2015, Tennessee students challenged the state’s voter ID requirements, assert-
ing claims under 42 U.S.C. § 1983 and the 14th and 26th Amendments, seeking a 
declaratory judgment invalidating the Tennessee voter ID law, and seeking a perma-
nent injunction requiring the state to accept student ID cards as proper voter ID.\textsuperscript{58}

The court dismissed the students claims, based on the legislature’s expressed 
justification to exclude student ID cards “based on the desire to prevent voter ident-
fication fraud.”\textsuperscript{59} The court ruled that the plaintiffs were not a protected class and
that their claims failed under *Crawford v. Marion County Election Board*, and determined that the Tennessee voter ID law did not impinge on a fundamental right and did not violate the 14th Amendment. 60

Absent controlling case law in the Sixth Circuit or the Supreme Court, the court barred plaintiffs’ 26th Amendment claims because the state voter ID law did not impose any unique burdens on students alone, reasoning that “everyone is required to obtain some form of acceptable photo identification in order to vote.”61 Whether that holding, from which no appeal was taken, would have been different if the court applied the *Arlington Heights* standard, as in the *League of Women Voters of Florida, Inc. v. Detzner* case, is an open question.

ii. Further Developments and Takeaways

A similar challenge to Tennessee’s exclusion of student ID cards was denied when the Green Party was dismissed for lack of standing and where the court granted the defendants’ summary judgment motion, noting “the Tennessee Voter ID Law does not violate the Fourteenth Amendment on the grounds that it impinges on a fundamental right.” 62

Introduced in 2018, Tennessee H.B. 2457 proposed dropping the student ID card exclusion from Tennessee’s voter ID law, but died in the Tennessee House Local Government Subcommittee.63 Following the bill’s death, students plan to continue the fight, threatening additional litigation after seeing similar voter ID laws struck down in other states and planning to educate “their fellow students about the bill’s opponents,” all of whom were up for reelection in 2018.64 In their words, “[i]f our votes were not powerful, they would not be trying to stop us.”

b. Michigan

In 1999, passed statutory amendments requiring matching addresses for voter registrations and driver’s licenses, nicknamed “Rogers’ Law,” provided that an application for a driver’s license shall advise of the requirement that these addresses match65 and required voter registration and driver’s license addresses be identical.66 Michigan also requires first-time voters who registered by mail or an electronic voter registration application to vote in person.67 This law previously applied only to first-time voters registering by mail,68 but an amendment taking affect on February 13, 2019, added the language “or by submitting an electronic voter registration application.”69

i. Litigation in Michigan’s Eastern District

Prior to the 2018 midterms, Michigan college students filed suit challenging Rogers’ Law and the first-time/in-person requirement as violative of their First, 14th, and 26th Amendment rights.70 Their claims included allegations that statements made by legislators showed they expressly sought to inhibit voting by younger generations71 and that Michigan’s young voters are “particularly vulnerable to restrictive voting laws and uniquely susceptible to voter confusion” because “the difference between overall turnout and youth turnout . . . [are] larger in Michigan than in any other state.”72
The plaintiffs attacked Rogers' Law (1) as violative of the First and 14th Amendments because it made voting unduly confusing and difficult for Michigan's young voters, (2) as violative of the 26th Amendment by targeting and burdening young voters' right to vote, (3) for causing students to be turned away from the polls, and (4) because legislative commentary and reports showed vote suppression and outright hostility by Republicans on repeal efforts. The collective confusion caused by Rogers' Law was alleged to have made young voters wary of registering to vote at their campus addresses due to worry over violating the address reporting requirements that could lead to civil and criminal penalties.

Plaintiffs further alleged there was no legitimate or compelling interest in the state upholding them, classifying the state's interests as mere pretexts, seeking a declaration that Rogers' Law and the first-time/in-person requirement violated the First, 14th, and 26th Amendments, and sought to enjoin their implementation and enforcement.

This case, which is currently stayed, should be an informative challenge to decades-old statutory provisions. If plaintiffs are successful, thousands of Michigan students could find it easier to vote in communities where they spend most of their academic years. Otherwise, the state will be able to retain the confusing and onerous requirements it places on student voters.

3. Other States
The problems in North Carolina, Tennessee, and Michigan are the tip of the iceberg. Several other states have voter ID and registration restrictions that could be viewed to exclude students and other young voters, including Millennials. Texas's voter ID law allows voters to use their license to carry a handgun as an acceptable form of photo ID but excludes student ID cards. Arizona provides for a variety of forms of voter ID. However, none of these forms includes or affords for student ID cards. Ohio, North Dakota, and South Carolina, likewise, do not provide for student ID cards in their voter ID laws. These laws are in stark contrast to those states that explicitly allow student ID cards within the bounds of their voter ID laws. However, it is unknown if, or better yet when, these laws might come under scrutiny for excluding student ID cards.

C. PERCEIVED STUDENT POLL TAXES
Historically, poll taxes were used as a legal fee to keep African Americans from voting. Many White voters were exempt from such taxes because of grandfather clauses, excusing them if they had an ancestor that voted prior to the Civil War. No exemption was available for African Americans. In 1964, the 24th Amendment outlawed such taxes, by providing “the right of citizens . . . to vote . . . shall not be denied or abridged . . . by reason of failure to pay poll tax or other tax.” Subsequent to the implementation of the 24th Amendment, the U.S. Supreme Court upheld the content of the amendment and found poll taxes to be unconstitutional. While poll taxes were associated with racial minorities, potential poll taxes are in effect
reaching America’s younger voters through fees associated with obtaining documents and information required during the voter registration process. One such recent example is found in New Hampshire.

1. New Hampshire

a. New Hampshire Residency Statutes Prior to H.B. 1264

New Hampshire’s statute regarding domicile for voting purposes, in effect since 2012, allowed someone who has “established a physical presence and manifests an intent to maintain a single continuous presence for . . . purposes relevant to participating in democratic self-government” but does not intend to remain for the indefinite future, to be considered a domiciliary, not a legal resident.84 Such a person would be eligible to vote in the state but would not be required to get a New Hampshire driver’s license or register his or her car in New Hampshire (both statutorily required of residents).

In Guare v. State, the New Hampshire Supreme Court held the state’s addition of language on a voter registration form conflating the statutory definitions of “residence” and “domicile” violated citizens’ constitutional right to vote.85 Specifically, the state added language to the voter registration forms requiring registering voters to obtain a driver’s license and to register their car within 60 days of becoming a resident.86 Applying intermediate scrutiny, the court found the challenged language (1) inaccurately stated New Hampshire law regarding residents and domicile, (2) was confusing because of its susceptibility to different interpretations, and (3) could cause a qualified voter not to register to vote. Overall, the court determined the language posed an unreasonable burden on the fundamental right to vote and violated portions of New Hampshire’s constitution.

These definitions stood until July 2018, when the general definitions were amended by New Hampshire H.B. 1264, affecting the voter domicile requirements.

b. H.B. 1264

On January 1, 2018, Republican state senators introduced H.B. 1264, seeking to amend statutory definitions associated with resident, inhabitant, residence, and residency by eliminating the phrase “for the indefinite future.”87 Supporters of the bill asserted the removal of that language ensured the “equal right to vote by aligning the definitions of domicile, resident, and inhabitant”88 and cleared “decades of confusion and conflation of common terms used in our statutes: resident, domicile, and inhabitant.” They further added that “someone who is domiciled in our state will be considered a resident” because “those residents living and voting in New Hampshire should follow our laws and statutes.”

Those opposing H.B. 1264 argued the amendment sought to deem a voter domiciled in New Hampshire without plans to stay in the state for the indefinite future a resident upon the act of registering to vote and made those domiciled for purposes of voting subject to provisions of state law they were not subject to by way of domicile.
Opponents argued the bill would implement a poll tax resulting from state laws placing requirements on residents after they established residency on those domiciled for voting purposes, but not previously seeking residency, particularly the laws requiring residents to register their car and obtain driver's licenses within 60 days after becoming a legal resident. The fees associated with obtaining a driver's license were approximately $50.00, while registration could be in the hundreds of dollars. A failure to pay these fees could result in a voter being charged with a misdemeanor punishable by up to one year in jail. This process was burdensome on college students who established domicile during school years but did not wish to take steps to becoming a resident to vote.

The New Hampshire House Election Law Committee considered both views in reviewing the bill and recommended it by a party-line vote. It passed the entire House before being recommended to the state Senate. The state senate amended the bill to reflect an effective date of July 1, 2019, and then passed it. The state house passed the bill as amended on May 10, 2018.

c. Opinion from the Supreme Court of New Hampshire

After H.B. 1264 passed New Hampshire's legislature, the state's governor requested an opinion regarding its constitutionality from the New Hampshire Supreme Court, which rejected the poll tax argument since, in its view, payment of the associated fees was not conditioned on voting, but “because the person owns or drives a motor vehicle and is a resident of [the] state.” Finally, the court dismissed the argument that H.B. 1264 discriminated on the basis of age by finding it facially neutral and applicable regardless of age or student status.

The court concluded that, if H.B. 1264 became law, “out-of-state students who come to New Hampshire to attend a postsecondary institution . . . will have a choice,” to either become a resident and pay the associated fees of residency to vote, or to maintain their domicile elsewhere and vote there when the time comes.

d. Further Developments and Takeaways

New Hampshire Governor Chris Sununu signed H.B. 1264 into law, issuing a statement in support of H.B. 1264 and the court's July 12, 2018, opinion confirming that he signed it into law pursuant to his duty to uphold the New Hampshire State Constitution.

The H.B. 1264 amendments took effect on July 1, 2019. On February 13, 2019, the American Civil Liberties Union New Hampshire chapter filed suit on behalf of Dartmouth College students affected by the alleged poll tax. The complaint included claims pursuant to the First, 14th, 24th, and 26th Amendments, alleging that H.B. 1264 unreasonably burdens the fundamental right to vote and effectively imposes a poll tax for young voters in New Hampshire. The case is in its infancy with no final judgment or order on the horizon as of early 2019.

This litigation could provide a road map for other young voters facing similar poll taxes or other requirements placing a financial burden on their ability to register and vote. Otherwise, the case could lead to yet another court affirmation
of the contents of H.B. 1264 and continued hindrance on the young vote in New Hampshire.

IV. Conclusion

The Millennial generation has reached voting age, a fact legislators are becoming painfully aware of during their campaigns and their work on electoral reform. As one of the most technologically aware generations in the United States, its political participation, voter turnout, and voter registration rates are poised to bring about a sea of change in the political system. Coupled with increased social media political activism and distrust of that political system, Millennials may be the generation that helps bring about a major shift in the political climate of a polarized nation. Legislatures standing in the way of this wave have faced and will continue to face fierce fights from Millennials, as obstruction of their voting rights does not sit well with this diverse and ever-growing generation.

Notes


8. Id.


13. Id.


15. Id.

16. Id.


25. Id. at 1209 (emphasis in original).

26. Id. (stating “[i]n the 2012 election, 16 percent of college students across the country voted early; that number increased to 18 percent in 2016” and “[i]n Florida, 29 percent of college students voted early in 2012 . . . [and i]n 2016 43 percent of Florida’s college students voted early”).

27. Id. at 1211.

28. Id. at 1216 (emphasis in original).

29. Id. at 1217–18.

30. Id. at 1220 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).

31. Id. at 1220–21.
33. *Id.* at 1224.
34. *Id.* at 1225.
35. *Id.*
38. *Id.* at 337.
39. *Id.* at 338.
42. *Id.* at 340.
44. N.C. State Conference of the NAACP, 182 F. Supp. 3d at 346.
45. *Id.* at 348.
47. N.C. State Conference of the NAACP, 182 F. Supp. 3d at 350.
48. *Id.* at n.231.
49. *Id.* at 521–25.
55. TENN. CODE ANN. § 2-7-112(c) (2018).
69. Id. at 2, ¶ 1.
70. Id. at 9, 38–39, ¶¶ 12, 83–91.
71. Id. at 48–52, ¶¶ 120, 124–129, 132.
72. Id. at 60, ¶ 154.
73. TEX. ELEC. CODE ANN. § 63.0101 (2018).
75. OHIO REV. CODE ANN. § 3505.18 (2018).
86. Id. at 660.
90. Id. § 263.48.
93. Id. at 147.
94. Id. at 149.
I. Introduction

Our country is becoming more diverse every day, including those who speak a language other than English at home (“language minority community”). Between 1980 and 2010, the country saw an increase of 158 percent in its language minority community population while the overall national population growth was only 38 percent. In 2017, more than 66.5 million people over the age of five spoke a language other than English at home, representing an 11.8 percent growth since 2010. Today, 21.8 percent—or more than one in five—of the population speaks a language other than English at home. Of this population, more than a third (39 percent) report being limited-English proficient (LEP), meaning they have some difficulty with the English language.

Asian Americans and Latinos are both most likely to speak a language other than English at home (74.4 percent and 72 percent, respectively) and those most likely to have difficulty with the English language (32.6 percent and 29.8 percent, respectively). Language barriers facing these communities likely impede their ability to participate equally in the voting process. While eligible electorate and voting populations for Asian Americans and Latinos continue to increase from election to election, there continues to be a significant gap between non-Hispanic White voters and Asian-American and Latino voters in participation rates. Asian-American and Latino voters continually lag behind non-Hispanic White voters in both voter registration and turnout by 15–19 percent. In fact, even with the increase in voter turnout for Asian-American and Latino voters in 2018 of 49 percent and 50 percent, respectively, there remained a 17 percent gap between non-Hispanic White voter turnout and turnout for Asian-American and Latino voters. A significant portion of the American Indian and Alaska Native population as well as the Native Hawaiian and Pacific Islander communities also speak a language other than English at home (26.9 percent and 38.8 percent, respectively). And for those who speak a language other than English at home, more than a quarter—that is more than one in four—of
both communities have difficulty with the English language (26.6 percent and 31.7 percent, respectively) and lag behind non-Hispanic Whites in political participation. For example, almost 40 percent of eligible American Indian and Alaska Natives and 43 percent of eligible Native Hawaiian and Pacific Islanders were not registered to vote during the 2008 elections, compared to 27 percent of non-Hispanic Whites. Voter turnout rates for these communities in the 2008 elections followed suit, with a 15–18 percent discrepancy as compared with non-Hispanic White voter turnout.

The inability to speak or read English very well is a major barrier to voting for language minority voters. Voter materials, including voter registration and ballot measures, across the board are consistently written at high grade levels and use complex English (e.g., they contain longer sentences and words as well as complicated vocabulary and grammar). Overlaying that complexity with the fact that some language minorities come from countries with no democratic system, language minorities can be overwhelmed when faced with the need to learn the daunting, complex election processes in America. They can also experience additional discrimination when attempting to vote at the polls. For example, during the 2012 general elections, poll workers at a precinct in Minnesota asked a group of elderly Hmong American voters to provide identification but when a White male in line behind the Hmong American voters was in the process of getting out his wallet to provide his ID to the poll worker, the poll worker told him that he did not need to provide identification. These barriers and experiences can turn language minorities away from participating in the political process.

The Voting Rights Act (VRA) through sections 203, 208, and 2 provides rights to assistance and protections for language minority voters. These federal statutes have been utilized to protect the rights of language minority voters and increase access to the ballot. States and local jurisdictions have also gone beyond the federal law to increase access for language minority voters, such as providing voluntary language assistance for sizeable populations with language assistance needs. At the same time, there are more opportunities to ensure equal access to the ballot for language minority voters by considering their needs up front in all election administration processes, such as during the design of ballots and other voting processes.

II. Enforcement of Federal Laws Protecting Language Minority Voters

A. SECTION 203

Section 203 of the VRA requires covered jurisdictions (i.e., a state or single political subdivision (usually a county, but a township or municipality in some states)) to provide language assistance during elections for groups that meet certain population and literacy requirements. Applying to four covered language groups—Latinos, Asian Americans, American Indians, and Alaska Natives, Congress enacted section 203 in 1975 to remedy racial discrimination in the voting process that led to the disenfranchisement of language minorities from these groups. A jurisdiction becomes covered under section 203 for a particular language when:
The section 203 determinations are made by the director of the Census Bureau and are effective upon publication in the Federal Register (i.e., jurisdictions must begin providing language assistance in the covered group’s language). The director’s determinations are final and not subject to review in any court.17

The most recent section 203 determinations were made in December 2016, with 263 political subdivisions in 29 states covered. Language assistance must be provided in Spanish statewide in California, Florida, and Texas, as well as in a total of 214 political subdivisions in 26 states; in Alaska Native languages in 15 political subdivisions of Alaska; in American Indian languages in 35 political subdivisions in nine states; and in Asian languages in 27 political subdivisions in 12 states.18 Under the newest coverage determinations, 31.3 percent of the total U.S. citizen voting-age population lives in covered jurisdictions.19

A jurisdiction covered under section 203 must also provide whatever English-language information it offers in the covered language. Information that must be translated includes any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots.20 Covered jurisdictions must also provide bilingual poll workers at polling sites as well as publicize the availability of language assistance at polling sites prior to Election Day.21 In-language materials and assistance must be provided in a way that “allow[s] members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities” throughout the entire voting process.22 Both the Department of Justice (DOJ) and private parties have litigated violations of section 203.23

### B. SECTION 208

Section 208 applies everywhere and allows voters requiring assistance to vote by reason of blindness, disability, or inability to read or write the right to have someone of their choice assist them in the voting process as long as the assistor is not one’s employer or union representative.24 Section 208 was added to the VRA by Congress in 1982 to ensure that “blind, disabled, or illiterate voters could receive assistance in a polling booth from a person of their own choosing.”25 The importance of the voter’s freedom to choose his or her assistor rather than having a stranger appointed by elections officials to assist is paramount as Congress found that citizens with language barriers were more susceptible to having their votes unduly influenced or

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**Voting-Age Citizens of a Single Language Minority**

- Make up more than 5 percent in a jurisdiction
- Number more than 10,000

**OR**

- Exceeds 5 percent of all reservation residents on an Indian reservation

The illiteracy rate of the citizens in the language minority is higher than the national illiteracy rate.16
manipulated, and thus more likely to face discrimination.\textsuperscript{26} Congress determined that the right to choose who the voter wanted to assist them was the only way to ensure voters can exercise their right to vote without intimidation or manipulation.\textsuperscript{27} Section 208 is particularly important as it provides an opportunity for all language minority voters across the country to choose who they take with them into the voting booth to help them understand the ballot regardless of whether their jurisdiction is covered under section 203 or if they are from a language group not covered by section 203 (e.g., Haitians or Russians).

Unfortunately, many poll workers are unaware of voters’ rights under section 208 and refuse to allow language minority voters to take an assistor of choice into the voting booth in violation of the VRA. Poll workers also often express suspicion toward the voter for even asking to bring a person in to assist them. DOJ and private parties have filed numerous lawsuits to enforce section 208.\textsuperscript{28}

C. SECTION 2

Section 2 also applies nationally and prohibits any voting standard, practice, or procedure that results in the denial or abridgement of the right of any citizen to vote on account of race, color, or membership in a language minority group.\textsuperscript{29} Because of section 203’s limitations, voters of other, uncovered language groups as well as LEP voters of the covered language groups living in jurisdictions that do not meet the section 203 coverage threshold have needs that are not being met. Section 2 is a tool that can protect the voting rights of all language minorities.

Section 2 enforcement has resulted in language assistance for communities whose population has not yet become large enough to meet the section 203 thresholds. For example, in 2005, DOJ brought a section 2 lawsuit on behalf of Chinese- and Vietnamese-speaking voters, who were not covered under section 203, alleging that Boston discriminated against Latino (who were covered by section 203), Chinese, and Vietnamese voters, denying them the equal opportunity to participate in the political process.\textsuperscript{30} The city of Boston agreed to provide additional language assistance in Chinese and Vietnamese to remedy the section 2 violations.\textsuperscript{31}

Section 2 has also been used to secure language assistance for language minority voters whose language is not covered under section 203. For example, DOJ brought a section 2 case in Hamtramck, Michigan, on behalf of Arab-American voters in 2000, when voters who allegedly “looked” Arab, had Arab- or Muslim-sounding names, or had dark skin were challenged at the polls. As a result of DOJ’s engagement, the city agreed to appoint at least two Arab Americans or one Arab-American and one Bengali-American election inspector to provide language assistance for each of the 19 polling places where the voter challenges occurred.\textsuperscript{32}

III. State and Local Expansion of Language Assistance

The VRA has been instrumental in increasing access for language minority voters in jurisdictions where it applies and when it has been properly implemented.
Section 203 has successfully increased voter participation by Latino, Asian-American, American Indian, and Alaska Native citizens. For example, after DOJ brought an enforcement action against San Diego County, there was an increase in voter registration among Latinos and Filipinos of more than 20 percent and 40 percent for Vietnamese voters. Navajo voter turnout increased by 26 percent between 2000 and 2004 after Apache County, Arizona, entered into a consent decree with DOJ to resolve the lack of language assistance in voting activities.

Recognizing that many language minority voters are not numerous enough to meet the section 203 threshold or will never qualify for section 203 coverage because their language group is not covered, some states and local jurisdictions have taken proactive steps to ensure that their language minority communities are able to equally and freely access the voting process, such as providing voluntary assistance and expanding state and local laws.

A. VOLUNTARY LANGUAGE ASSISTANCE

Many jurisdictions have proactively, and voluntarily, provided language assistance to any size group of language minority voters that they believe has a need for such assistance. For example, in 2015, after engagement by community advocates, the Cook County Clerk's Office initially, and the Chicago Board of Elections subsequently, agreed to provide Korean language assistance in Chicago's highest areas of need. This voluntary language assistance benefitted 37,000 Korean Americans in Cook County, more than 40 percent of whom are LEP.

Jurisdictions that were just a few individuals short of meeting the section 203 coverage threshold in the 2016 section 203 determinations, which are likely to be covered during the next determination (currently planned for 2021), can implement proactive efforts now to provide language assistance. Fairfax County, Virginia, did just that after the 2016 determinations were released and they realized that they just missed the section 203 coverage threshold for Korean. As a result, the Fairfax County Electoral Board decided to voluntarily provide Korean language assistance in addition to the section 203-covered Vietnamese language assistance, resulting in assistance being made available to the county's 35,000 Korean-speaking residents, half of whom were LEP. Analysis of the U.S. Census Bureau's December 5, 2016, Section 203 Determinations Public Use Data shows that 176 language groups across 28 states just missed coverage (i.e., had 7,500 to 9,999 or 3.9 to 4.99 percent LEP of a single language group). Further breakdown of this analysis shows that 6 Alaska Native-, 70 American Indian-, 24 Asian-, and 76 Spanish-language jurisdictions just missed coverage that are ripe for providing voluntary assistance today.

Jurisdictions can also choose to provide language assistance to those who are not near the section 203 threshold as well as to groups outside of the four covered section 203-language groups. For example, the number of African language speakers more than doubled during the past decade and those speaking Russian at home increased by almost 400 percent, Armenian-speakers by almost 140 percent, and Persian-speakers by almost 260 percent between 1980 and 2010. Anywhere there
is a sizeable population of language minority speakers who need language assistance, jurisdictions can and should take steps to ensure these populations can effectively vote. For example, in 2016, Mayor de Blasio announced that New York City had translated the state voter registration form into 11 new languages—Russian, Urdu, Haitian Creole, French, Arabic, Albanian, Greek, Italian, Polish, Tagalog, and Yiddish—bringing the total number of translated forms to 15 languages in addition to English.\(^{40}\) This means that 90 percent of the state’s LEP population is now covered by the translated voter registration forms. In Florida, the Miami-Dade Board of County Commissioners passed a county ordinance requiring Haitian Creole translations of the ballot be posted in voting booths, which prompted neighboring Broward County to enact similar Haitian Creole translation requirements.\(^{41}\)

### B. STATE LAWS AND ELECTION CODES REGARDING LANGUAGE ASSISTANCE

States can make sure their laws and election codes expand the provision of language assistance to those who need it beyond the federal protections currently provided to help address the needs of their own specific communities. For example, California has taken steps to expand language assistance to more of their LEP communities.\(^{42}\) California state law requires language assistance be provided for precincts in which at least 3 percent of voting-age citizens are LEP, or where stakeholders can otherwise demonstrate to the satisfaction of county elections officials or the secretary of state the existence of significant local need for materials and assistance in languages other than English. Counties of those precincts must make reasonable efforts to recruit bilingual voting registrars and poll workers for covered precincts who are fluent in the language or languages spoken by residents, which must be conducted in conjunction with community stakeholders and through public service announcement (PSA) placements. In addition, election officials in those counties and precincts that meet the 3 percent threshold must both post and make available ballot translations, with additional materials made available at specific precincts determined to meet a 20 percent threshold of voting-age residents who are members of a language minority who lack the English skills to vote without assistance. California’s secretary of state must conduct a reevaluation at least once every four years of precinct-level voting-eligible populations in order to produce updated lists of precincts subject to language assistance requirements imposed by state law.\(^{43}\) Finally, California legislation has also expanded the pool of potential bilingual poll workers by allowing legal permanent residents to serve as poll workers through passage of Assembly Bill 817 in 2013\(^{44}\) and A.B. 554 in 2015.\(^{45}\)

States have also taken steps to ensure some form of language assistance is made available in languages not covered by section 203, either by explicitly naming the language to be served or by having broader language. For example, in Minnesota, state law gives the secretary of state authority to produce voting instructions in languages other than English, while requiring the state demographer to “determine and report to the Secretary of State the languages that are so common in this state that there is a need for translated voting instructions.”\(^{46}\)
IV. Election Administration: Up Front Planning for Language Minority Voters

Deliberate, thoughtful planning, along with modest investments up front, in developing election administration processes that can support the needs of language minority voters will go a long way to meeting the needs of the dynamic, and ever growing, language minority community for decades to come. The Center for Civic Design has published a series of reports around how to best design election processes and materials for the language minority community, which should be referenced for more in-depth discussion and guidance on this topic. This section primarily lays out some of their recommendations and considerations for decisions regarding voting machines, vote centers, and ballot design.

A. VOTING MACHINES

The voting system chosen by a jurisdiction could either effectively service language minority voters or impede their ability to vote. The Election Assistance Commission (EAC) is responsible for certifying voting systems under the Help America Vote Act of 2002. The EAC has developed the Voluntary Voting System Guidelines (VVSG), which are a “set of specifications and requirements against which voting systems can be tested to determine if the systems meet required standards. Some factors examined under these tests include basic functionality, accessibility, and security capabilities.” The most recent version of the federal standard is VVSG 1.1, adopted in 2015, and includes the following requirements of voting systems for non-English languages under section 3.2.7:

- Be “capable of presenting the ballot, contest choices, review screens, vote verification records, and voting instructions” in all languages supported by the system
- Allow the voter to “select among the available languages throughout the voting session while preserving the current votes”
- Present language choices using the “native name of each language”
- Present any information provided to English-speaking voters in non-English languages as well, regardless of whether the language is a written or historically unwritten language
- Present all vote records in English to support auditing by poll workers and others

As the EAC works to update the VVSG again, it is imperative that the needs of language minority voters are again reflected and addressed in both the VVSG 2.0 Principles and Guidelines as well as the requirements.

B. VOTE CENTERS

There has been a trend by jurisdictions to move from using neighborhood polling locations to vote centers. Vote centers are central polling locations that combine multiple precincts into one larger location, thereby allowing a voter to cast a ballot...
anywhere in the county. There are currently 13 states that allow jurisdictions to use vote centers on Election Day, with additional states allowing for their use during early voting. Jurisdictions are moving towards vote centers because they are more convenient for voters, who can vote near their home, their job, their school, or any place of convenience, can be more cost effective with fewer locations to staff, and can lead to increased turnout due to the convenience factor. However, it is important to note that vote centers can, at the same time, disrupt the tradition of a collective voting experience, cause confusion without the proper voter education (including in language as required), and increase the need for equipment and technology upgrades in order to handle producing the appropriate ballot for each voter (either through touchscreen machines or “print-on-demand” equipment) and to support all the voters that might visit each vote center through an investment in “electronic poll books.”

For language minority voters, vote centers, and how they are set up, can either enhance the ability to exercise their right to vote or make it more difficult for them. California’s approach to vote centers provides a good case study in how a state can thoughtfully include addressing the needs of language minority voters in their design and planning for vote centers. The legislation creating vote centers in California incorporates the needs of serving the language minority community throughout the bill. Some of the highlights of the California legislation that should be considered for other vote centers include:

- Ensuring each vote center provides language assistance in all languages required under section 203 for that jurisdiction “in a manner that enables voters of the applicable language minority groups to participate effectively in the electoral process”
- Ensuring that vote centers located in, or adjacent to, a precinct, census tract, or other defined geographical subsection required to provide language assistance under section 203, or identified as needing language assistance through the public input process, are staffed by election board members who speak the required language; or, in the case where they are unable to recruit election board members who speak the required language, alternative methods of effective language assistance must be provided
- Establishing a language accessibility advisory committee that is composed of representatives of language minority communities
- Detailing how the county elections officials will educate and communicate to communities covered under section 203, including the requirement that at least one bilingual voter education workshop for each language covered be held and that at least one PSA in ethnic media service each of the language communities covered by section 203

C. BALLOT DESIGN

Before even contemplating the translation process for a ballot, decisions can be made about ballot design that will improve or inhibit the usability of a translated
ballot. First and foremost, the English version of the ballot should be written in plain language. As previously noted, voting materials are consistently written at high grade levels and use complex English. This is problematic as complex English text makes it much more difficult to properly translate into other languages. Even when properly translated, it can still be difficult for LEP voters to understand if it is written at a high, complex level in their native language. In a study by Georgia Tech Research Institute, English, Spanish, and Chinese LEP voters showed an “overall preference for ballots written in plain language in their own native language because the language was simpler, and the numbering of tasks and use of paragraphs made instructions easier to follow.” The study further found that “voters using the plain language ballot made fewer errors in undervotes, write-ins, and overvotes compared to the traditional language ballot.” These findings were mirrored in a study focused on the use of plain language in electronic ballots, which showed that it “improves the experience of all voters but especially low-literacy voters, many of whom are also LEP voters.”

Another consideration is how many languages to include on a paper ballot. A jurisdiction could offer paper ballots that (1) are monolingual, (2) include two languages (English plus one additional language), or (3) include more than two languages. An EAC study, *Effective Designs for the Administration of Federal Elections*, recommends English and one additional language on printed materials. Going this route means that every ballot can be used by voters who only speak English, which can reduce the number of ballots that need to be printed and can help meet audit requirements. One drawback with this model is that poll workers may have difficulty recognizing which non-English language is on a particular ballot. To ameliorate that, a jurisdiction could put more than two languages on a ballot, such as the suggestion made by advocates in New York State to include Korean and Chinese along with English on the ballot when the state switched to paper ballots in 2010. Of course, as more languages are added to the ballot, the more cluttered it appears, the smaller the font may need to be, the longer the ballot may physically be, and thus the more difficult it can be for voters to read and use the ballot. Another solution to the issue of poll workers’ inability to recognize different languages is to include some type of indicator for the languages on the ballots. For example, the EAC recommends having a language identifier at the bottom right hand corner of a non-English monolingual ballot. That can also be expanded to include bilingual or multilingual ballots, which could include all languages presented on the ballot in the bottom right hand corner.

Another issue that arises in using more than one language on a ballot is determining how the languages are presented so as to ensure no one language is seen as the primary, or more important, language. Consistency can help ensure this equity—election materials should follow the same design guidelines across languages. LEP voters will be able to better find their own language quickly and consistently on a bilingual or multilingual ballot. Some examples of differences and nuances that jurisdictions need to be aware of in order to develop ballots that present the same information and meaning between the different languages include using the
absolute and not point size value of font sizes, which can increase readability and equality of both languages; understanding how the text wraps and line breaks of non-English languages (i.e., typography) can influence a voter’s ability to read and understand the material; and understanding how to convey emphasis where, for example, a method used in one language, such as bolding text, is not available in another (Asian character fonts generally do not support bolding). 66

In order to ensure multilingual ballots are usable by the broadest range of voters, the Center for Civic Design offers the following guidelines regarding cover layout, typeface, use of color, and instructions for marking the ballot: 67

• Simplicity and compatibility with a single font family (such as Univers) is recommended. Recommended font families may need to be purchased to ensure legibility across languages (e.g., Arabic, Chinese, and Vietnamese).
• VVSG 1.1 guidelines suggest using font sizes measured in millimeters, not points, to maintain legibility across alphabet scripts.
• It is recommended to supplement English with graphic elements on a bilingual ballot or expand the overall text size and layout spacing for better readability and increased candidate recognition with high-quality imagery—but the tradeoff is potentially increasing length and complexity of the ballots.
• The use of color must be accompanied by another distinguishing element such as shape, an icon, text style, and other design elements both for purposes of making distinctions and for accessibility.
• On ballots, shading can be used to make information and headings distinct from ballot choices, without conveying any additional meaning.

Digital ballots require unique considerations as they offer LEP voters the opportunity to select their language on their own at the beginning of the voting session and are commonly displayed one language at a time with a “toggle” to switch between languages. One commonality with paper ballots, though, is the need to keep the processes simple and accessible. Designing a digital interface that provides for plain interaction (i.e., “voters should be able to easily understand the information they see and read, know what actions are expected of them, and what the results of their actions will be”) will ensure all voters can engage regardless of literacy levels.

The Center for Civic Design offers the following recommendations for digital interface that can help ensure access by language minority voters:

• One language at a time should be used for rolling direct-recording electronic ballots and the language section options must also use the native name of each language.
• After selecting a language, all screens are then displayed in that language, including all interface buttons, instructions, and ballot text.
• At any point during voting, the voter should be able to change the language choice, preserving all voting choices already made. This is called “toggling”
between languages—which is often included in a “Help” or “Settings” button visible on each page—which continues to display only one language at a time on the screen. This has both design and accessibility benefits:

– A single language display is visually simpler to follow, especially for monolingual non-English users.
– Repeating the same information on a screen in two languages creates an accessibility problem for people relying on audio to navigate.

V. Conclusion

It has been well documented that language assistance, when properly provided, results in increased civic engagement by language minority voters. Continued compliance and enforcement of the VRA is an integral part of ensuring adequate language assistance to LEP voters. However, it is not enough on its own. States and localities have been doing more to address the needs of language minority voters, either through legislative or administrative action to proactively provide language assistance to a diverse set of voters with different language needs. The other critical aspect of ensuring language assistance is optimized, is to prioritize the needs of language minority voters throughout the election administration process and not simply silo the provision of language assistance. Such proactive prioritizing will ensure systems are developed to be the most efficient and cost effective as the needs of language minority voters will be seamlessly integrated into the election process, instead of having a system designed for only one language being forced to support more. Such a holistic approach to language assistance will help us fulfill the promise of our American democracy by ensuring language minority citizens are able to fully access our political process.

Notes

2. U.S. Census Bureau, Table S1601: Language Spoken at Home, 2017 American Community Survey 1-Year Estimates.
3. Id.
5. See U.S. Census Bureau, Tables B16005(B-I): Nativity by Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over (by Race), 2017 American Community Survey 1-Year Estimates (tables are for racial and ethnic groups). The LEP rates of those who speak a language other than English at home increase for both communities to almost half of that population (46.1 percent for Asian Americans and 45.5 percent for Latinos). Id.


7. For the 2016 elections, 56.3 percent of eligible Asian Americans and 57.3 percent of eligible Latinos registered to vote compared to 73.9 percent of non-Hispanic Whites, with 49 percent, 47.6 percent, and 65.3 percent turning out to vote, respectively. U.S. Census Bureau, Voting and Registration in the Election of November 2016 tbl. 2, Reported Voting and Registration, by Race, Hispanic Origin, Sex, and Age, for the United States (2016).


10. Id.


14. Section 203 applies only to these four groups because Congress has continually found that these groups have faced and continue to face significant voting discrimination because of their race and ethnicity.

15. Two other provisions of the VRA that impact language minority voters are sections 4(e) and 4(f)(4). Section 4(e) was enacted in 1965 and requires that language materials and assistance be provided to Puerto Rican voters who attended schools in which the predominant language of instruction was not in English. 52 U.S.C. § 10303(e). Section 4(f)(4) was added to the VRA in 1975 in response to Congress finding that pervasive voting discrimination against citizens of language minorities was national in scope and that English-only elections excluded language minority citizens from participating in the electoral process. 52 U.S.C. § 10303(f)(4). The specific requirements for language assistance under sections 4(e) and 4(f)(4) have generally been the same as those under section 203 of the act. In light of the U.S. Supreme Court’s decision in Shelby County v. Holder, which invalidated the coverage formula found in section 4(b), the Department of Justice is no longer enforcing section 4(f)(4) as coverage under this section was dependent on a part of the section 4(b) formula. See U.S. Department of Justice, Fact Sheet on Justice Department’s Enforcement Efforts Following Shelby County Decision (2016), available at https://www.justice.gov/crt/file/876246/download.
16. 52 U.S.C. § 10503(a), (b)(2). The Census Bureau defines “illiteracy” for section 203 threshold purposes as having less than a fifth-grade education. The levels of English literacy necessary to pass naturalization tests, or possessed by many native-born citizens, are far below the level necessary to fully understand election materials.


21. The provision of minority language materials and assistance includes ensuring that the following are accessible to the applicable language minority group(s): materials provided by mail (or by some comparable form of distribution), public notices, registration system, polling place activities (such as providing bilingual poll workers and translated signage and materials at the polling place), and publicity (of the availability of language assistance to the applicable language group(s) through effective means, such as using ethnic media). 28 C.F.R. § 55.18 (2011).

22. Id. § 55.2(b)(1).


24. 52 U.S.C. § 10508. The assistor can even be a teenage child or a non-U.S. citizen.


26. Id. at 62.

27. Id.
28. See, e.g., United States v. Berks County, Pennsylvania, 250 F. Supp. 2d 525 (E.D. Pa. 2003) (DOJ brought a section 208 enforcement action against Berks County, Pennsylvania, on behalf of Latino voters); Consent Order, United States v. Miami-Dade County, No. 02-21698 (S.D. Fla. June 17, 2002), available at https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/miamidade_cd.pdf (DOJ brought a section 208 lawsuit against Miami-Dade County on behalf of LEP Haitian-American voters who were denied assistance from persons of their choice); OCA-Greater Houston v. Texas, 867 F.3d 604 (5th Cir. 2017) (section 208 lawsuit was brought in Texas by AALDEF on behalf of Williamson County, Texas, voter Mallika Das in 2015, alleging that state law differentiating between individuals providing voting assistance and interpreters was a violation of section 208).


32. Id.

33. H.R. REP. NO. 109-478, at 18–19 (2006). For example, the House Committee report notes that the number of registered Latino voters grew from 7.6 million in 2000 to nine million in 2004. Id. at 19–20.


37. Id.


40. The translated forms are available at New York City Campaign Finance Board, Registering to Vote, http://www.nycfcc.info/nyc-votes/registering (last visited July 29, 2019). Also, New York City is required to provide the translation in Russian pursuant to state law. N.Y. Elec. LAW § 3-506.

5. A Holistic Approach to Assisting Language Minority Voters

available at https://d3n8a8pro7vhmx.cloudfront.net/naleo/pages/1433/attachments/original/1533764841/electionofficial-full-6.pdf.

42. Id.
43. Id.


48. This section relies primarily on the Civic Design Language Access Paper, supra note 47.


51. A departure from previous VVSG efforts, it has been proposed that “the VVSG 2.0 Principles and Guidelines will be accompanied by a separate document that details the Requirements for how systems can meet the new Principles and Guidelines in order to obtain certification.” The EAC solicited public comments between February 28, 2019, and May 29, 2019 (84 Fed. Reg. 6,775 (Feb. 28, 2019), available at https://www.govinfo.gov/content/pkg/FR-2019-02-28/pdf/2019-03453.pdf).


53. The 13 states are Arizona, Arkansas, California, Colorado, Indiana, Iowa (for some elections), New Mexico, North Dakota, South Dakota, Tennessee, Texas, Utah, and Wyoming. See National Conference of State Legislatures, supra note 52.


55. Id. (section 3 (adding section 4005 to the Elections Code, including section 4005(a) (6), which lays out language requirements for vote centers)).
56. Id.
57. Id. (section 3 (adding section 4005 to the Elections Code, including section 4005(a) (9), which discusses the creation of advisory committees)).
58. Id. (section 3 (adding section 4005 to the Elections Code, including section 4005(a) (10), which discusses what must be included in the plan for the administration of elections)).
59. In addition to using plain language, it is important to utilize human translators and avoid the use of computer-generated translations. While computer-generated translations are appealing to jurisdictions facing limited budgets and limited time, they are not an acceptable substitute for proper translation protocol. For proper translations, the EAC recommends that jurisdictions utilize “an expert on simple language who can ‘edit final English-language content for low-literacy voters[,]’ a human translator (rather than translation software)[, and] an alternative language/cultural expert who can review the translations for cultural accuracy and relevance.” See CIVIC DESIGN LANGUAGE ACCESS PAPER, supra note 47.
60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
70. The Center for Civic Design notes that more research is needed on effective design for two languages on a single screen that also supports audio for accessibility as interaction is more complicated with full-face direct-recording electronic ballots in more than one language.
CHAPTER 6

NATIVE AMERICAN VOTING RIGHTS

ROBERT O. SAUNOOKE

The right to vote is often considered a fundamental part of the American governmental system. The impetus to break away from England and declare independence sprung from a lack of representation in governmental decisions, thus the fundamental right to participate in what became the U.S. system of governing and representation of its system was of utmost importance. Early on there was the hope that the Constitution would clarify, unify, and expand voting rights on a national level; unfortunately it did not, and instead the Constitution left local and national voting standards in the hands of the states. In the process entire groups of people were excluded from the right to participate in the electoral process, including women, African Americans, non-property owners, and of course Native Americans.

Of these excluded groups, the Native American voter faced the longest fight for recognition and inclusion in the election process. Unlike the other groups initially excluded from early voting in the United States, the Native American communities’ challenges were unique and continue to plague Indian country voting today.1

The early interactions of the United States with Native Americans was rooted in misunderstandings about native culture and a fundamentally race-based view that tribes and their members were nothing more than savages and unable to understand, live, or participate in a civilized society. Many early amendments to the Constitution specifically excluded inclusion of Native Americans or granting to tribes and their members any rights automatically given to other persons similarly situated. From the passage of the Civil Rights Act of 18662 and the citizenship clause of the 14th Amendment3 through the Civil Rights Act of 19644 it was clear that Native Americans were not and could not be considered citizens of the United States and afforded any protections or rights set out in the Constitution.

Senator Jacob Howard, considered to be the author of the 14th Amendment’s citizenship clause, stated clearly: “I am not yet prepared to pass a sweeping act of naturalization by which all the Indian savages, wild or tame, belonging to a tribal relation, are to become my fellow-citizens and go to the polls and vote with me.”5

Any question of inclusion of Native Americans in any legislation guaranteeing participation in voting or other equal rights that was not expressly stated was interpreted by the U.S. Supreme Court to be considered exclusionary. In Elk v. Wilkins,6 the Supreme Court determined that even members of Indian tribes born in the
United States after passage of the 14th Amendment were not U.S. citizens, even if they were born in the United States after the passage of the 14th Amendment and quit or disassociated themselves from their tribes.7

It was not until the passage of the Indian Citizenship Act of 19248 that Native Americans, the original citizens of the United States, were acknowledged as having a right to participate in the election process. Still, in spite of this clear statement, Native American citizens faced discrimination, lack of inclusion, disenfranchise-ment, and a host of other problems within the states responsible for conducting the election process that hindered and, in some instances, prevented them from voting. Many states refused to follow the clear language of the Indian Citizenship Act and it was not until 1962 that the last state, New Mexico, finally permitted and recognized Native Americans as citizens of the United States and permitted them to vote in state and national elections.

Even with the lawful right to vote in every state, when Native Americans tried to register or actually vote they suffered the same hurdles experienced by other disenfranchised groups such as poll taxes, literacy tests, refusal to acknowledge citizenship, lack of proper identification (ID), fraud, and intimidation.9

In 1965, the Voting Rights Act (VRA) put an end to individual states’ claims on whether or not natives were allowed to vote through a federal law. Section 2 of the VRA states that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure, shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.” It further included Native Americans as a “language minority group,” thus requiring that local election offices distribute and populate registration and election information in the language of Native American tribes within their jurisdictions. Further sections describe the measures taken if violations to this act are discovered.10

However, efforts by states and municipalities to disenfranchise Native Americans are ongoing and continue. Since the passage of the VRA there have been 74 cases brought by or on behalf of Native American tribes and their citizens. These in the most part have proved to be successful to upholding the rights of Native Americans as citizens of the United States, with most of these cases centered on states that have large reservations, or native populations, such as New Mexico, Arizona, and Oklahoma.

I. Issues Impacting Native Voting

A. HIGH POVERTY RATES

Native Americans have the highest poverty rate of any population group and it is nearly double the national poverty rate.11 Within reservations and tribal lands the rate is even higher. Complicating this is the fact that even those Native Americans who are gainfully employed are employed at half the national median household
income levels. Couple this with unemployment rates for Native Americans that continue to stay at 12 to 13 percent and you see a huge impact on basic living conditions that hinder access to voting information and desire to vote.

B. ISOLATING CONDITIONS

Native Americans live in some of the most rural areas of the United States. In Alaska, the native and aboriginal population lives in hard-to-count census tracts. A recent study indicates that almost 14 percent of Native American households do not have access to a vehicle. Given the tremendous distances between tribal and urban areas it is very difficult to get transportation to polling locations. Many politicians, voting registrants, and candidates do not even attempt to travel to the reservation, thereby excluding access to ideas, culture, and inclusion. It is disenfranchisement by indifference.

In addition, due to barriers such as rivers, mountains, and canyons, especially in Alaska where much of the year villages are inaccessible except by snowmobile or plane, the ability to access polling locations is almost an impossibility. For many reservations the closest polling place is more than 360 miles round trip from the reservation. Often there are limited and impassible roads between the reservation and the place where votes are cast. In South Dakota, the only polling location for the Crow Creek Reservation and its 2,500 adult members is a non-native community with just 12 voters. In spite of repeated requests for a polling location within the capital of the Crow Creek Reservation at Fort Thompson, the state of South Dakota and Buffalo County have refused to grant such a request.

It should be noted that aside from the logistics of isolation, lack of access, and polling locations, there is an ever-present language barrier that contributes to voting issues involving Native Americans. More than 25 percent of Native Americans speak a language other than English in their homes. Sixty-six percent of native language speakers reside on tribal lands. Almost 500,000 Native Americans live in a jurisdiction where section 203 of the VRA requires language assistance for all phases of the voting process. However, in states like Arizona, New Mexico, and Alaska, which account for almost 87 percent of the Native American population, there is little to no language assistance.

Finally, technological isolation also impacts Native American communities and the ability to access voting information. Technology in all forms is limited or totally absent from tribal lands. A recent report from the Federal Trade Commission estimated that less than 10 percent of tribal communities had access to broadband communication and Internet. Even where broadband communication and technology were available, many Native voters cannot afford to access it due to limited funds or lack of cell phones, computers, or other access points.

When it comes to technology and ease of access to advertising, video blogs, hearings, and political speeches, there is also a generational divide in native communities. It is no surprise that younger generation tribal members will know how to access information through various technological mediums when they are available;
however, tribal elders are unfamiliar with, have limited access to, and do not under-
stand how to use technology.

With many states moving to and considering online voting registration, the lack
of access to broadband technology and unfamiliarity of the technological world fur-
ther limits participation as a voter and access to information, and increases disen-
franchisement of the native community.15

C. LACK OF RESOURCES AND FUNDING
It is no secret that county and local governments work on limited budgets. Often
there is nothing set aside, appropriated, or earmarked as resources for Native Ameri-
can constituents residing on tribal lands. To combat this lack of inclusion, tribes
and tribal members often find themselves providing self-help to ensure that they get
at least basic voting services that are freely given to non-native voters.

D. EXAMPLES OF SELF-HELP
Alaska authorized early voting locations in dozens of Alaska Native villages only
after tribal governments agreed to provide volunteers who were not paid the same
rate as election workers at existing urban early voting locations.

The New Mexico Zuni Tribe rented a recreational vehicle in 2012 to use as a
mobile polling place to improve voter access, but discontinued it because there were
no funds for the next election.

In addition to the logistical issues associated with lack of resources within the
state, Native Americans have unequal access to in-person registration opportunities;
unequal funding for voter registration efforts on tribal lands; and no permanent voter
registration sites, county clerk offices, elections offices, or Department of Motor Vehi-
cles (DMV) sites located on any reservations. Local jurisdictions often deny requests
for satellite offices located on reservations and few, if any, election offices recruit,
train, and pay tribal members to serve as voting registrars on tribal lands.

E. RESIDENTIAL FEATURES OF TRIBAL RESERVATIONS
Basic necessities such as having a place to live and homeownership continue to
hinder Native American populations. Native Americans have higher rates of home-
lessness than any other population group. Although tribal members comprise
1.2 percent of the total population, they represent almost 5 percent of all sheltered
or homeless families. Urban Indians, or those living off of their traditional reserva-
tion lands, have an even higher rate of homelessness.

Native American veterans also suffer higher rates of homelessness than other
veteran population groups. While only 0.7 percent of all veterans are American
Indian or Alaska Native, more than 2.5 percent of all sheltered or homeless veterans
are Native American, a number that is almost four times the national average.

The lack of affordable housing or any housing within reservation boundaries
complicates the problems. One tribe, the Navajo Arapaho Tribe in Wyoming, has
only 230 reservation homes for more than 11,000 members. Often the solution is couch surfing or simply moving from home to home on a regular basis. The U.S. Department of Housing and Urban Development found that if couch surfing did not occur in the Navajo Nation there would be between 42,000 and 85,000 Navajo people living on the reservation and homeless.

Obviously the lack of permanent housing and residential solutions contributes to the lack of participation in the election process. Having no permanent residence, and the priority of where you will live, sleep, and eat each day, becomes tantamount to who is running for office. It also creates an additional problem with identifying mailing addresses in order to both register and participate in elections.

Nontraditional mailing addresses have recently presented unique issues for Native Americans. The Census Bureau defines nontraditional mailing addresses as “noncity style addresses” such as those “that do not include a house number and/or a street name.” These would include rural route and box numbers, general delivery, highway route and box number, and post office box only delivery. All of these are present throughout tribal lands where traditional 911-identifiable addresses are simply not present.

In addition to recognized nontraditional mailing addresses, mail carriers on tribal lands often deliver to nothing more than a descriptive address such as “third brick house on the right” or “next to the large oak tree” or other types of geographical landmarks and locations.

Having a nontraditional address damages not only the ability for an accurate count of Native American population under census polls but may also preclude Native Americans from registering to vote or at the very least make it more difficult for them to register to vote. Mail is often delayed, including mail-in ballots, absentee ballots, and polling information. Couple this with the fact that many Native Americans in rural areas do not regularly check their mail, delaying critical election information. For those residences that have multiple families but only one address they may only receive one voter information pamphlet or registration packet.

In addition to the easily identifiable problems associated with nontraditional mailing addresses, the Native American communities often have no post offices, mailboxes, or if there is a post office or mailbox it is only open for minimal hours. In at least one community the postal mailbox is located inside the post office, which closes at 3:00 p.m. On Election Day, such practices disenfranchise Native American voters by failing to let them participate as other citizens are able to do.

In recent years, there have been a number of states that have prevented Native Americans from voting due to nontraditional mailing addresses, including the following:

• In South Dakota, members living on the Crow Creek Indian Reservation were not permitted to register to vote due to nontraditional mailing addresses. Although efforts were made by tribal officials to register members locally using 911 county addresses, it did not resolve the issue.
• In North Dakota, state officials initially refused to accept tribal ID cards for voter registration even though the federal government and Department of Homeland Security have long recognized tribal ID cards for Transportation Security Administration purposes and travel. North Dakota was enjoined from not recognizing tribal ID cards but imposed a caveat that required the cards to be associated with a traditional residential address, thereby further preventing registration.

• Washington State refused to permit members of the Colville and Yakama Reservations to register to vote in the state’s vote-by-mail system because tribal members used post office box addresses and not physical addresses where they actually lived.

• California saw disenfranchisement of Native American voters from the Torres Martinez Desert Cahuilla Indian Tribe, which is located west of the Salton Sea, due to nontraditional mailing addresses. Although efforts were made to correct this issue, many tribal members simply gave up due to the time and distance necessary to file an appeal of the registrant’s denial.

The examples here are a snapshot of issues faced by Native Americans just to register to vote, which is further complicated by the lack of polling places and methods available for their vote to be counted. Once an election is concluded, native voters face further issues of being purged from election rolls, having to re-register all over again due to their nontraditional mailing addresses.

F. VOTER ID REQUIREMENTS
Identification of voters is tied to mailing addresses and registration and is particularly difficult for Native Americans who are substantially less likely to have a qualifying ID.

As previously referenced, Native Americans are less likely to have access to or ownership of a vehicle, thereby obviating the necessity of obtaining a driver’s license. Even for those members who are able to secure or have access to transportation, they often operate those vehicles primarily within tribal lands and do not obtain state-issued driver’s licenses.

Lack of transportation and the often long distance required to drive or travel to a state DMV office further hinders obtaining traditional qualifying ID. Often, native voters are challenged when they do not have ID and have insufficient time to return to tribal lands and back to the polling place prior to its closing.

Many states refuse to accept or recognize tribal membership cards and identification as proof of ID. Even though the courts have struck down such practices, states continue to question tribal ID cards or require additional information or ID prior to registering to vote or being allowed to vote.

G. FELONY DISENFRANCHISEMENT LAWS
There is a disproportionate impact of felon disenfranchisement laws on the Native American community. In states like South Dakota where the Native American
population represents only 9 percent of the state population, more than 30 percent of its prison population is Native American. Statistics are similar in other states such as Minnesota and Montana where the Native American prison population is two to three times that of the native tribal population in the state.

Aside from the disparity in convictions for Native Americans as compared to other population groups, Native Americans are often charged at higher charging levels for crimes that are often misdemeanors in the state. This is a result of criminal jurisdiction laws that prosecute crimes within tribal lands at a federal level, thereby eliminating any misdemeanor convictions.

Upon Native Americans’ release from prison, many states continue to deny convicted natives the right to vote. Parole officers often inaccurately inform native parolees that they cannot register to vote even after their sentence is fully served or fail to inform the native parolees that they are eligible to register to vote.

H. THRESHOLD REQUIREMENTS FOR POLLING LOCATIONS

A mention should be made of the failure of state laws to adequately identify and make allowance for tribal lands’ participation in the election process. Specifically, state laws often give discretion to the state as to where to place polling locations and minimum standards for placement.

Although many states have provisions for allowing rural and tribal areas to act or participate in elections as vote-by-mail locations, if they do not meet minimum threshold voter registration, it is a rare occurrence when the state actually permits it to happen. This creates a cycle of vote by mail, which depresses voter registration rates on tribal lands, thereby suggesting that there are not enough registered voters within the tribal lands to meet threshold requirements for vote by mail. The end result is the elimination of a polling place closer to or within easy driving distance of the reservation.

The opportunity to eliminate polling places is often used to disenfranchise native voters. For the Duck Valley Shoshone-Paiute Tribe, voters in tribal elections often result in approximately 700 to 800 voters participating. However, in state elections only 147 tribal members were considered to be active voters in Elko County, Nevada. This number represented only a 7 percent participation in state elections by native voters compared to 55 percent of the rest of the state. The end result was to remove the polling station closest to the reservation, thereby further hindering native voter participation.

In addition, we have seen issues of redistricting, which fractures and divides tribal lands, creating division in native voters to vote for one person to represent them in state and general elections. In Washington State, the Colville and Yakama Reservations were divided into two separate legislative districts. Native voters were not asked or permitted to participate in the redistricting process and instead non-natives, who claimed native ancestry, stepped in and approved the redistricting. Now the Colville and Yakama Reservations have two representatives for one reservation instead of one.
I. DISTRUST OF FEDERAL AND STATE GOVERNMENTS
Historically, the treatment of the Native American community by the United States and state governments has been a tale of broken treaties, broken promises, forced removal, and termination. This history continues to be present today and is reflected in the apathy and distrust of any political process that may impact the native voter.

Recent actions by the federal government, including reduction of sacred protected native lands and approval of the Dakota Access Pipeline and the Keystone XL Pipeline, have fueled distrust and anger towards the federal government. Some native voters view themselves only as citizens of their own tribe and not a member of the state or federal population. Add to this the fact that criminal and civil jurisdictional issues in state and federal courts continue to limit or not recognize tribal court authority, and native voters see no point in participating in any elective process.

J. RACIALLY MOTIVATED IMPEDIMENTS
Preconceived notions of the Native American community continue to plague interaction and participation of tribal members in the voting process. Most perceptions of Indian country center on the media's portrayal through film, television, and advertising. Historically, Native Americans were portrayed by persons of Hispanic, Italian, and European descent. The images of tribes and tribal members were romanticized or misrepresented factually and over time became what was viewed as a palatable Native American.¹⁹

In addition, the lack of educational accuracy in schools, and in some cases the total elimination of the history and interaction of the United States with Native Americans, has fed the misperception of tribes and tribal culture. This continues a long history begun with the first encounter between Native Americans and European explorers, wherein tribes were viewed as uneducated savages lacking structure and recognizable or familiar foundations similar to those in the European community.

The perceptions and misunderstanding of the Native American community and culture results in behaviors and treatment by those conducting elections that reflect implicit biases that manifest in disparate treatment of native voters. Some examples of racially motivated discrimination have included:

• Voters in South Dakota being forced to vote in a repurposed chicken coop
• Water to the reservation and polling locations regularly shut off or blocked in Arizona on tribal border lands
• Heavy police presence at tribal polling offices where the officers were writing down license plates and doing random ID checks in Wisconsin
• Complaints and invalidation of registration cards from native communities, specifically questioning the amount of registrations as being “not normal” in Montana
Native voters being greeted with blank stares and being told by poll workers that they could not understand what the Native voters were saying, thereby not answering any questions or turning away voters

Different treatment and opportunities for access to registration and early or mail-in voting for tribal members living on reservations

Implicit bias towards native behavior and interaction leading to misinformation and incorrect beliefs about native communities

II. Resolution

The issues impacting the Native American community and its inclusion and participation in the voting and election process share similar hurdles faced by other minority communities. While the biggest hurdles continue to be funding and information for all minority communities, tribes have unique issues given the fact that they are already removed from those major cities and populations over which elected officials legislate and govern.

No one solution will correct or make immediate differences in the Native American community; however, in March 2019, Senator Tom Udall (D-N.M.) and Representative Ben Lujan (D-N.M.) introduced the Native American Voting Rights Act of 2019.

The legislation, if passed, would enact key measures, such as increasing native access to voter registration sites and polling locations, and authorizing tribal ID cards for voting purposes. The bill would also bolster native voter registration, education, and election participation efforts in tribal communities by authorizing a first of its kind Native American Voting Rights Task Force. Finally, the bill addresses the devastating effects of *Shelby County v. Holder* by prohibiting states from undertaking discriminatory actions without Department of Justice agreement and government-to-government consultation.

In addition to this new legislation, there is a need for a concerted effort to adequately fund those who oversee and conduct the election process. This would include sufficient funding to provide rural polling locations, training, and alternate forms of voting other than in-person ballot casting. It should also include local polling offices within reservations and at the very least access to registration on reservation boundaries.

Also, it is time for Congress to pass legislation that would treat tribes on the same level as states for voting rights. Similarly, there is a need for states and tribes to work with one another to foster a better understanding of tribal culture and the unique issues present in the voting process. In North Carolina, the state passed legislation acknowledging the Eastern Band of Cherokee Indians and providing full faith and credit to tribal court decisions and to the authority of the tribe, its elected officials, and inclusion in the state process. Similar statutes in heavily Native American-populated states should be implemented.
Finally, there is a need for education and outreach between the native communities and the non-native governments they interact with and through. State and local governments need to treat tribes as more than a footnote. Efforts to invite tribes to appoint liaisons in local and state governments for the purpose of inclusion in the legislation process should be considered. Inclusion of Native American appointees to state and local government councils and administrative boards would permit at the very least a consideration of native concerns in proposed legislation.

Prioritizing the inclusion of the Native American community in the election process through outreach programs and legislation mandating funding and Native American participation in all aspects of state and local government will not solve all the problems but will take initial steps to including the first Americans in this most important process.

Notes

1. The term “Indian country” is defined in 18 U.S.C. § 1151 and 40 C.F.R. § 171.3 (1982) as follows:

   (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

7. Id. at 109.
9. Section 4(f)(4) and section 203(c).
11. The national poverty rate is 12.3 percent, while the Native American poverty rate is 26.6 percent and on reservations the rate jumps to 38.3 percent. Kayla Fontenot et al., U.S. Census Bureau, Income and Poverty in the United States: 2017 (2018).
12. Hard-to-count census tracts are those where census returns are so low that the return rate is not applicable and the Census Bureau simply uses estimated numbers.
13. Nye County, Nevada’s closest polling place to the reservation is 180 miles each way by the only existing road.


17. Navajo witnesses testified that when they return their ballots by mail, instead of going straight to the Coconino County elections office in Flagstaff, it is routed through Phoenix, which often delays the ballot and may result in it not being counted at all because it was not received in time.

18. In Apache County, Arizona, the county purged 500 Navajo voters because the county recorder claimed their addresses were “too obscure” and could not be assigned to a precinct. The county recorder failed to accept post office boxes and the applicants’ drawings on the registration forms as to their home location.

19. Some examples of media influence include the Land O’Lakes butter portrayal of a native woman on their packaging; tribal-based sports mascots; Johnny Depp as Tonto in Walt Disney’s 2013 movie *The Lone Ranger*; or Anthony Quinn as the Seminole Indian Chief Osceola in the 1953 Universal Pictures movie *Seminole*.

20. Shelby County v. Holder, 570 U.S. 529 (2013). The U.S. Supreme Court declared unconstitutional the provisions of the VRA requiring certain states and local governments to obtain preclearance approval from the federal government prior to implementing any changes to voting laws and practices.
PART TWO

THE VOTING PROCESS
CHAPTER 7

EARLY VOTING IN AMERICA: PUBLIC USAGE AND PUBLIC SUPPORT

PAUL GRONKE AND PETER MILLER

Early or convenience voting—the laws, rules, and procedures that allow citizens to cast ballots at a place and time other than at the precinct on Election Day—has grown dramatically in the United States over the past 35 years to a point where it is a permanent part of the American election ecosystem. Although—or perhaps because—more than two-thirds of the states (39 plus the District of Columbia) offer some form of early voting, it remains a popular target for election reformers, who often identify higher turnout as a goal and early voting as a tool to reach it. It also continues to be a venue for bitter partisan and legal disputes.

In this chapter, we describe the growth of early voting and how it has erupted into a major site for America’s “Voting Wars.” First, we focus on the early voting policy regime, detailing the legal requirements and administrative procedures associated with each ballot method. Second, we review the history of early voting, starting with the relatively placid adoption of convenience voting starting in the late 1970s, accelerating after the 2000 election, and the dramatic turn after 2010, when state legislatures began to chip away at early voting reforms and civil rights organizations responded with legal claims. Through this section, we highlight major events and the main arguments made by proponents and opponents of early voting. Next, we examine in detail changing rates of early voting, public attitudes about the reform, and public attitudes about early voting, and close with a critical examination of a common narrative: that early voting is associated with voting fraud. While there are important issues of security and equity associated with all voting methods, early voting included, the narrative about fraud, we show, is largely specious.

I. A Typology of Early Voting Law and Procedures

What is early voting? Most generically, early voting is an umbrella term encompassing any mode of balloting that a voter can use to cast a ballot prior to Election Day. This may mean filling out a ballot in person at a local election office, a satellite location, or a vote center; or “voting at home” and returning the ballot via the post office or at a designated “drop box.” The general term masks enormous variety across the three major modes of early balloting and among the 50 states and the District
of Columbia. For example, anyone may cast a ballot as early as 46 days before the election in Minnesota and 45 days before in Mississippi, New Jersey, South Dakota, and Vermont, but the early voting period begins only 12 days before the election in Maryland, 10 days in Florida, 7 days in Kansas, and 5 days in Oklahoma. Twenty states end early voting on Monday prior to the election, one ends it on Sunday, seven on Saturday, four on Friday, and three on Thursday. Some states, such as Illinois, provide specific rules governing the times and locations of early polling while other states leave the number and hours up to the discretion of local clerks. Overall, the average starting time for early voting is 22 days before the election and the average length of time for early voting is 19 days. Given its diverse forms, “early voting” captures a wide variety of times, places, and manners of voting. Some voters may have cast ballots more than six weeks before Election Day while others may have returned their “early” ballots on Election Day and thus are not really voting “early” at all. Table 7.1 provides an overview to the different modes of voting.

### TABLE 7.1 The Three Primary Types of Early Voting

<table>
<thead>
<tr>
<th>Early Voting System</th>
<th>AKA</th>
<th>Mechanics</th>
<th>Where Used</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vote by Mail</td>
<td>“Postal voting”</td>
<td>Voters receive a ballot in the mail, approximately two weeks before the election. Ballots can be returned via mail or dropped off at satellite locations.</td>
<td>Three states for all elections (CO, OR, WA); 18 more for some elections. Switzerland is a notable comparative example.</td>
</tr>
<tr>
<td>In-Person Early Voting</td>
<td>“In-person absentee balloting,” “one-stop absentee balloting”</td>
<td>Voters have the option of casting a vote early at a satellite location or at the county elections office. In most localities, the voter simply shows up and no prior notification is required.</td>
<td>Thirty-six states plus the District of Columbia. Comparative examples include Australia, Canada, Finland, New Zealand, Norway, and Sweden.</td>
</tr>
<tr>
<td>No-Excuse Absentee</td>
<td>“Voting by mail,” “absentee voting by mail”</td>
<td>Voters have to apply for an absentee ballot, but no excuse is required. Voters receive the ballot as early as 45 days before Election Day and must return it by Election Day, although a small number of states only require an Election Day postmark.</td>
<td>Twenty-eight states plus the District of Columbia. Eight states and D.C. also provide for “permanent absentee voting.” Comparative examples include Australia, Germany, and New Zealand.</td>
</tr>
</tbody>
</table>

A. ABSENTEE VOTING

Absentee voting rules give voters the opportunity to vote wherever they want—even when they are absent from the voting booth. An important feature of absentee voting is that voters are required to register to vote absentee on top of normal voter registration requirements (except North Dakota, where voter registration does not exist). Even this basic definition glosses over a crucial administrative fact about absentee voting: the distinction between domestic absentee voting and absentee voting for uniformed and overseas civilians (often referred to as UOCAVA).

Introduced during the Civil War, absentee voting expanded along two parallel tracks for most of its history: first military and, later, civilian. It was first used to allow soldiers and sailors who were physically absent from home to avoid being disenfranchised while fighting for the Union.7 The soldier vote has traditionally not been a pivotal segment of the electorate, having voted overwhelmingly for Lincoln in 1864 and for Roosevelt in 1944.8 However, extending the franchise to members of the military established the administrative framework that later allowed for absent civilians to participate in elections.9 Concerns about security and privacy of votes, familiar today, were already evident in the 1860s. Once the war ended, state laws allowing for absentee voting expired or were repealed. During World War I, soldiers were again posted far from home (this time overseas), and states responded by adopting absentee laws, most of which expired after 1918. By the time of World War II, there was substantial sentiment that there should be some guarantees of voting rights for uniformed personnel, yet federal legislation remained hampered by ongoing disputes over federal and state authority, with a not very well hidden backstory of voting rights for African-American soldiers from the Jim Crow South.10 It was not until the Korean War that states passed absentee legislation for soldiers that did not expire at the termination of a specific conflict. Following closely behind, the 1955 Federal Voting Assistance Act consolidated federal support for voting in the Defense Department but contained no other mandates.11

It took three more decades for an actual federal mandate to emerge. The 1986 Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. § 1973ff, popularly referred to as UOCAVA) created comprehensive absentee voting rights for members of the military, their families, and to U.S. citizens living abroad. The 2009 Military and Overseas Voter Empowerment (MOVE) Act made additional modifications to those portions of the U.S. code that refer to overseas and military voting.12 These acts define how “UOCAVA voters” can register for, receive, and cast a ballot—requiring states to provide federal postcard applications and federal write-in absentee ballots. These acts lay out rules for the Federal Voting Assistance Program, which provides resources for military voters, and require states to keep UOCAVA voter records and to distribute absentee ballots to UOCAVA voters.13 Some believe that efforts to modernize UOCAVA absentee voting will help to establish methods such as online voter registration and barcode balloting that can be extended to a national electorate.14 Running parallel to absentee developments for military voters was a series of expansions for civilian voters. The introduction of the “Australian ballot” in the late 19th
century ensured voters the protections we think of as common sense now: privacy and a uniform ballot containing all the names of eligible candidates, and election officials (not party employees) who are responsible for printing the ballots. These regulations presented problems for absentee balloting: if voters are supposed to be protected from coercion and fraud, how are these protections ensured for ballots cast outside of the polling place? It is revealing that some of the same concerns animate political and legal wrangling over early voting nearly a century later.

Between the World Wars, many states introduced legislation allowing civilian voters with very specific reasons for not voting on Election Day to cast ballots early. They often attempted to create Australian ballot-like protections by requiring voters to have witnesses, and restricted absentee voters in other ways (e.g., to railroad workers only, or to others including the bedridden, the hospitalized, etc.). Where these laws conflicted with the Australian ballot or other protections, the new laws were struck down. Throughout the following decades, states expanded their absentee laws to include similar rosters of qualifying excuses; 1955’s Federal Voting Assistance Act added citizens living overseas, and the 1970 Voting Rights Act firmly established short residency requirements and absentee provisions for those who moved close to the time of an election.

When the 26th Amendment extended the franchise to 18-year-olds in 1971, millions of students attending college away from home had to be accommodated. Most states and local jurisdictions developed regulations to deal with this new demand.

The present era of “non-precinct voting reform” was inaugurated in 1978, when California became the first state to waive the need for an excuse to cast an absentee ballot, hence the term no-excuse absentee voting. Oregon and Washington adopted similar legislation. No-excuse absentee voting has been more widely adopted in the western states and appears to be motivated not by partisan considerations as much as by a desire to facilitate participation. As citizens farther from home acquired the right to vote, many requirements initially present in state laws—such as the witnessing of ballots by an official—were abandoned.

State laws continue to regulate domestic absentee voting. Absentee voting rules differ in four crucial ways. First, some states require a citizen to register to vote absentee before every election, while other states have “permanent” absentee voter lists, which allow a citizen to receive absentee ballots forever (or an extended length of time). Second, a few states require absentee voters to both receive their ballots in the mail and also return their ballots in the mail, though most states allow voters to receive and cast absentee ballots at election offices. Third, some states require that absentee ballots be received at an election office before Election Day ends, while others only require ballots be postmarked by Election Day, but can arrive at the election office several days or even two weeks after the election ends. Finally, and certainly most important when it comes to the size of the absentee voting electorate, 28 states plus D.C. have “no-excuse absentee voting” regimes while 19 continue
to have “excuse-required absentee voting” regimes (the three remaining are fully vote-at-home).

UOCAVA and domestic absentee voting are legally and administratively distinct. On a practical level, however, the two overlap in important ways that affect both election administration and the voter’s experience. For example, the MOVE Act requires states to send out UOCAVA absentee ballots 45 days before the election. In the years following this change, however, many states now send out their domestic absentee ballots around 45 days before the election, simply because it is easier to process the first batch of absentee ballots at the same time.

B. VOTE BY MAIL/VOTE AT HOME

Vote by mail (VBM) or vote at home (VAH) is in some practical respects no different than no-excuse absentee voting, since in both modes voters receive ballots in the mail. However, administratively, VAH is an enormous change. Citizens have no choice in their mode of balloting and must receive a ballot in the mail.20 The obverse side of the coin is that every registered voter receives a ballot for every election and this likely increases voter turnout, particularly in sub-presidential contests.21 While Oregon is thought to be the pioneer in voting by mail, in fact, California local elections were the first to go fully VBM. Oregon became the first state to run all of its elections this way, starting in 2000 following the passage of a ballot measure in 1998. Washington State incrementally adopted VBM on a county-by-county basis between 1994 and 2011, as Utah has been doing since 2014. Colorado in 2014 became the third fully VBM state.

Voting by mail dramatically alters election administration. The three VBM states send out ballots approximately three weeks before Election Day and allow voters to return ballots in the mail or to state-mandated drop off locations, such as county election offices, libraries, and city halls. In recent elections, states that use VBM have also located election drop boxes for voters who want to quickly drop off their ballot while going to work, close enough to the street so that voters need not leave their car. You can even vote while waiting to buy a Big Mac!22

Thus far, election administrations have diverged from traditional VBM systems in only a few ways. As noted above, Colorado has a hybrid VBM/vote center regime. At a voter service and polling center, citizens can register, receive help, and cast ballots. Many other states allow VBM elections at the county or municipal level under certain circumstances, for example, if the number of registered voters is below a certain threshold. Finally, many states permit administrations to run VBM elections in emergency circumstances—such as in case of a natural disaster or re-balloting due to illegal activity.

C. EARLY IN-PERSON VOTING

Early in-person voting allows voters to both receive and cast a ballot prior to Election Day at an election office, vote center, or other location. For the voters, it is most similar to traditional polling place voting, which means that legislators and
administrators face many of the same challenges when establishing early in-person voting as when preparing for Election Day.

For example, to successfully run an early in-person voting center, administrators need poll workers to check in and register voters, answer questions, and address technical or procedural problems. Administrators need to make sure that early in-person voting centers comport with federal voting rights regulations that protect voters with disabilities or limited-English proficiency. They need to make sure that sufficient parking is available and that proper signage (in multiple languages) is in place. More voters may participate on Election Day compared to any particular day while early in-person voting is available, but it is just as critical for administrators to have these resources and safeguards in place during early in-person voting.

Early in-person voting is distinct from Election Day voting in a crucial way. The amount of time to vote on Election Day is constant. Administrators use all remaining allocated resources to manage the Election Day surge. The early in-person voting period occurs when the election is still days or weeks away. Voters have fewer incentives to vote, and legislators and administrators must decide how to allocate resources, trying their best to project how efficiently these resources will be used.

State laws, therefore, typically focus on the length of time for the early in-person voting period, and, less frequently, place some sort of boundaries (floors and ceilings) on the number of locations. The laws typically specify a required number of days, whether it includes weekends, and when the period ends. The laws may allow or require a certain number of hours and whether voting must be available outside of the traditional workday.

Or, of course, the statewide law may say nothing of the sort, leaving these decisions to county or local jurisdictions. Disputes over laws that determine the time available for early voting are a flashpoint for controversy and litigation, with particular focus on the potential partisan effects of convenience voting and, relatedly, the available window for early and absentee voting.

II. Three Periods of Reform

For three decades, a quiet revolution was taking place in American elections. Convenience voting, known of but little used since the 19th century, took on new life after California extended absentee voting to all registered citizens in 1978. Before 1978, fewer than half a dozen states offered either early in-person voting or no-excuse absentee voting and usage was not even monitored. Over the next 30 years, from the early 1980s to the late 2000s, state adoption of early voting reforms steadily increased. The raw numbers speak volumes: today, 36 states and the District of Columbia offer early in-person voting. Twenty-eight states and D.C. offer no-excuse absentee, 15 states plus D.C. offer both options, and 3 administer all elections by mail. In the 2018 general election, more than 27 million ballots—a bit less than one-third of all ballots—were cast early. The early voting totals were even higher in 2016: more than 46 million ballots, nearly 36 percent of ballots cast. These rates are more than double the best estimates of early voting rates in 2000.
While early voting is more popular among administrators and voters than ever before, it has remained controversial. Contentious legislation passed since 2010 in Florida, Ohio, North Carolina, Texas, and most recently in Wisconsin that limit the amount of time to vote early in person, has led civil rights groups to argue in court that the cutbacks disparately impact minority voters. Proponents argue that the cutbacks are necessary for financial and administrative reasons, and that more than sufficient time exists within the reduced early voting period so that everyone has a chance to cast a ballot.

While it is impossible to capture all the nuances of legal and administrative reform in a short chapter, a broad historical overview identifies three distinct periods of early voting reform. The first period, ending in the 1980s, witnessed only a few changes in early voting laws and administrative regulations, other than absentee ballots and overseas and military voting. The second period of reform began in the 1990s and accelerated after the 2000 election. During this period, the number of states offering some method of convenience voting grew enormously, as did the numbers of citizens casting early ballots. Regional differences in usage rates emerged, and an already hyper-federalized election system became even more complex. The final period began in 2010 and continues today, as some states began to ratchet back early voting options, proposing shorter time periods for early in-person voting and, in some cases, tightening related legal requirements. Early voting became a major front in what Rick Hasen has called America’s “Voting Wars”—the rise of intense partisan and legal battles over the laws and procedures used to administer American elections.

A. 1860S–1978: LITTLE INTEREST, LOTS OF AGREEMENT

As reviewed in the opening of this chapter, absentee voting was America’s first method of convenience voting, and remained so for more than a century. Absentee balloting was introduced during the Civil War for soldiers stationed far from home, but as Alex Keyssar has argued, the change was put in place as much for partisan advantage as it was because of any principled desire to see soldiers cast ballots. Also made available during both World Wars, state legislation enacting absentee voting was promptly either repealed or allowed to expire once the wars ended, often due to concerns about ballot security and privacy for voters. Hence, support for alternative voting methods during this first period—limited to uniformed military and absent civilian voting—was relatively tepid. Concerns about ballot security were prevalent a century ago, just as they are today.

In summary, there was widespread agreement during this first period that the only segment of the electorate that was in need of any accommodation was soldiers serving abroad during wartime, and little interest in enacting any additional reforms.

B. 1978–2008: LOTS OF INTEREST, LOTS OF AGREEMENT

The legal and behavioral changes that took place in the next three decades, from 1978–2008, stood in stark contrast to the quiescence of the previous century. The
1960s were, of course, a period of enormous social and political turmoil in the United States. In the field of election law, passage of the federal Voting Rights Act in 1965 marked a historic watershed in federal involvement in local and state administration of elections, and transformed American politics in innumerable ways. Interestingly, however, access to the ballot box outside of Election Day was not an issue until a decade later, when California passed the first no-excuse required absentee ballot law. However, the historical record makes clear that the California law, and changes in balloting requirements that immediately followed it, were motivated by the same spirit that animated the voting rights battles of the 1960s: free, equal, and easy access to the ballot box for all citizens of the United States. The expanding pool of states providing some sort of convenience voting option is displayed, decade by decade, in Table 7.2.

The no-excuse required method of absentee ballot moved slowly but inexorably across the country, seemingly in a west to east direction, but with many exceptions that indicated more than just a regional trend. Iowa and Vermont, for example, were relatively early adopters, leading possibly to a hypothesis that states with liberal and populist political cultures would be more likely to adopt no-excuse absentee balloting. That hypothesis is quickly belied by the case of Wyoming, one of the more reliably conservative states, which adopted no-excuse absentee voting relatively early in 1991 (and was the first to legalize voting for women in 1869).

Oregon is an instructive example of how parties shift their interest in VBM (and reform more generally). There were two legislative attempts to adopt VBM in the state before the passage of Measure 60 in 1998. The Republican-controlled state house and senate sent a bill to John Kitzhaber, the Democratic governor in 1995, but the bill was vetoed. In part Kitzhaber based his decision on concerns the voting regime had not been adequately tested, that the new regime might disenfranchise some voters, and that there was potential for fraud and intimidation. There were clear indications that party interests weighed on the veto decision. Republicans in the 1982 gubernatorial contest in California, for example, more “effectively fostered and marshalled their absentee supporters” than the Democrats. News coverage of the veto referenced concerns that Democrats might lose votes under VBM. It appeared that full VAH would never be adopted.

The events following the veto, however, changed the partisan context. In September 1995, Bob Packwood, one of Oregon's senators, resigned his seat. The then-Secretary of State Phil Keisling opted to conduct the replacement elections for the vacant seat using mail voting. The conventional wisdom that Republicans would do better under VBM was disproven when Ron Wyden, a Democratic representative, won the seat in early 1996. A second effort to adopt voting by mail in the state legislature stalled when the Republican-controlled Senate refused to hold a vote on the bill. This ultimately sparked the successful ballot measure in the 1998 election.
TABLE 7.2 The Growth of Early Voting Options since 1980

<table>
<thead>
<tr>
<th>Decade</th>
<th>Early Voting Options</th>
<th>States as of January</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980s</td>
<td>Only traditional absentee voting</td>
<td>47 states</td>
</tr>
<tr>
<td>No-excuse absentee</td>
<td>CA, OR, WA</td>
<td></td>
</tr>
<tr>
<td>No-excuse absentee and permanent absentee</td>
<td>(none)</td>
<td></td>
</tr>
<tr>
<td>In-person early voting</td>
<td>TX</td>
<td></td>
</tr>
<tr>
<td>No-excuse absentee and in-person early voting</td>
<td>(none)</td>
<td></td>
</tr>
<tr>
<td>1990s</td>
<td>Only traditional absentee voting</td>
<td>45 states</td>
</tr>
<tr>
<td>No-excuse absentee</td>
<td>AK, CA, IA, ND, VT, WA, WY</td>
<td></td>
</tr>
<tr>
<td>No-excuse absentee and permanent absentee</td>
<td>KS,* WA</td>
<td></td>
</tr>
<tr>
<td>In-person early voting</td>
<td>NV, TN, TX</td>
<td></td>
</tr>
<tr>
<td>No-excuse absentee and in-person early voting</td>
<td>AZ, CO, HI, ID, NM, OK, OR**</td>
<td></td>
</tr>
<tr>
<td>Voting by mail</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2000s</td>
<td>Only traditional absentee voting</td>
<td>27 states</td>
</tr>
<tr>
<td>No-excuse absentee</td>
<td>29 states plus D.C.</td>
<td></td>
</tr>
<tr>
<td>No-excuse absentee and permanent absentee</td>
<td>8 states plus D.C.</td>
<td></td>
</tr>
<tr>
<td>In-person early voting</td>
<td>32 states plus D.C.</td>
<td></td>
</tr>
<tr>
<td>No-excuse absentee and in-person early voting</td>
<td>27 states plus D.C.</td>
<td></td>
</tr>
<tr>
<td>Voting by mail</td>
<td>OR</td>
<td></td>
</tr>
<tr>
<td>2010–2019</td>
<td>Only traditional absentee voting</td>
<td>19 states</td>
</tr>
<tr>
<td>No-excuse absentee</td>
<td>28 states plus D.C.</td>
<td></td>
</tr>
<tr>
<td>No-excuse absentee and permanent absentee</td>
<td>8 states plus D.C.***</td>
<td></td>
</tr>
<tr>
<td>In-person early voting</td>
<td>36 states plus D.C.</td>
<td></td>
</tr>
<tr>
<td>No-excuse absentee and in-person early voting</td>
<td>29 states plus D.C.****</td>
<td></td>
</tr>
<tr>
<td>Voting by mail</td>
<td>CO, OR, WA</td>
<td></td>
</tr>
</tbody>
</table>

Notes: Data collected by the authors. Totals may not add up to 50 because some states changed voting options during the decade.
* Kansas instituted an “absentee in-person” voting period in 1998, and added permanent absentee voting at the same time.
** Oregon voters approved full VBM in a statewide initiative in 1998, although the state experimented with full VBM earlier. Full VBM was implemented starting in 2000.
*** No states removed no-excuse absentee voting after 2010; CO and WA moved to become “full” VBM states.
**** The 29 states that provide for no-excuse absentee and in-person early voting also include states that allow for “in-person absentee” voting.
Regardless of why, the what is clear: a steady growth over three decades in the number of states that allow no-excuse absentee voting. What started in California, Oregon, and Washington in the late 1970s grew to 29 states plus the District of Columbia by 2008. Permanent absentee voting first became available in Washington and Kansas, followed by another six states plus D.C. by 2008 (Oregon essentially superseded both categories). In addition, in many of the states that still required an excuse to vote absentee, there were so many excuses that there was de facto if not de jure no-excuse absentee voting. It was an era of rapid adoption, with minimal controversy, and, particularly on the West Coast, high use. Already by 1996, 20.2 percent of voters in the West voted absentee, while less than 5 percent voted absentee across the remaining states. By 2008, almost half of all ballots cast in the western states came in by mail, compared to 19 percent of ballots nationwide.35

The second major convenience voting method—early in-person voting—first appeared on the scene during this same period. In 1987, less than a decade after California’s innovation, Texas became the first to explicitly allow early in-person voting.36 As is still the case today, Texas established an early voting period starting 20 days and ending four days before Election Day.37 As Table 7.2 shows, early in-person voting proved even more popular among the states than no-excuse absentee voting. While only a few states provided for early in-person voting at the end of the 1990s, by 2008, 32 states plus the District of Columbia offered this method. Early in-person voting proved to be enormously popular. By the late 1990s, early in-person ballots constituted more than 40 percent of all ballots cast in Texas.38 Early in-person voting totaled just 4 percent of all ballots cast in the 2000 presidential election, but climbed rapidly to 9 percent in 2004 and 15 percent in 2008.39 Early in-person voting, like no-excuse absentee, was adopted with little fanfare.40 It was truly a quiet revolution.

This quiescence would slowly give way to political and partisan conflict. Though not directly related to convenience voting, the U.S. Supreme Court case Foster v. Love41 would cast a long shadow over debates about early and absentee voting. The case itself dealt with the constitutionality of Louisiana’s open primary system, wherein the general election was not held if a candidate in the open primary won an outright majority of the vote. The Court, in a unanimous decision, overturned Louisiana’s open primary on the grounds that it is an obvious violation of the Elections Clause (the “time” of an election). In so doing, the Court also provided a definition of an “election”: “the combined actions of voters and officials meant to make a final selection of an officeholder.”42

Foster would provide grounds for legal challenges to Texas’s early in-person and Oregon’s voting by mail systems, in 2000 and 2001.43 In both cases the Voting Integrity Project challenged the convenience voting systems in these states on the grounds that they violated federal statutes by allowing for voting to take place on more than just Election Day. In both cases these challenges were unsuccessful. Courts in Texas and Oregon found convenience voting to be consistent with federal
requirements. The court in Oregon found that, “[a]lthough voting takes place, perhaps most voting, prior to election day, the election is not ‘consummated’ before election day because voting still takes place on that day.” In short, convenience voting is consistent with federal election statutes, but, as we shall see, questions related to the details of how convenience voting can be implemented give way to additional legal disputes.

If the quiet revolution had proceeded with little pomp and circumstance from 1978 to 2000, it became far more visible over the next eight years even as political and legal controversy remained muted. The national debate over election administration that was sparked by the 2000 presidential election culminated in the 2002 Help America Vote Act, designed to eliminate many of the problems revealed in the 2000 election. Even though the act was not intended to encourage no-excuse absentee voting and early in-person voting, the trajectory of state adoptions increased, as is evident from Table 7.2. Many state legislatures responded in this new political and fiscal environment by passing non-precinct place voting laws. Because these laws gave voters more convenient options for casting ballots and more control over their voting process, many argued that they should increase turnout. In addition, an analysis of legislative debates and public discussion shows that some states believed the early in-person voting and no-excuse absentee balloting might make Election Day crises less likely. Early voting gave election officials more time to work out the problems with new voting machines and put less pressure on polling places, the hope being that this would improve election administration overall.

C. 2010–PRESENT: LOTS OF INTEREST, LITTLE AGREEMENT

This brings us to the present: the early “Voting Wars.” The seemingly inexorable increase in the number of states providing for no-excuse absentee and early in-person voting has stalled—the only changes shown in Table 7.2 are because Colorado and Washington became fully VBM, although passage of the Voter’s Choice Act in California in 2016 will very likely add California to the full VBM list by 2024, possibly earlier. Early voting, which was a relatively nonpartisan issue during the first three decades of reform, has become a new front in the “Voting Wars.”

After the 2010 election and Republican takeover of many state legislatures, a number of states proposed changes in early in-person voting, notably reductions in the number of days, reduction of the number of hours during each day, and removal of Sunday early voting in some instances. In general, Republicans argue for greater election security and shorter periods for early in-person voting while Democrats argue for sustaining or increasing opportunities to vote early. Ironically, or perhaps predictably, only early in-person voting has been under legislative scrutiny, even though no-excuse absentee balloting is much more likely to be a source for voting problems and voter fraud. Unfortunately, or perhaps predictably, it is difficult to avoid the voting patterns that likely underlie partisan wrangling over early in-person and no-excuse absentee voting: African Americans are more likely to vote
early in person than are White voters in a number of key states, while no-excuse absentee ballots trend older, higher income, and more Republican. While overall there appears to be a trend toward more liberalized early voting arrangements, legislative efforts to reduce early voting continue, most notably as part of a set of laws passed—but ultimately halted by court action—during an all-night lame duck session of the 2018 Wisconsin legislature. Many of these recent efforts to cut back early voting have sparked successful legal challenges that eliminated or reduced the cutback.

III. Early Voting Today: Wide Public Usage and Wide Public Support

While political elites may bicker back and forth about the merits or pitfalls of convenience voting reforms, these reforms are broadly popular with the general public. Oregonians, for example, were nearly unanimous in their preference for voting by mail four years after VBM was adopted in 2000, including 85 percent of Democrats, 81 percent of Independents, and 77 percent of Republicans. In 2018, the Pew Research Center included a question in the American Trends Panel poll asking if voters should be permitted to vote early or absentee without needing to document a reason, and 71 percent of respondents agreed that early and absentee voting should be permitted on an unrestricted basis.

What do we know about the rate of early voting in American elections? To answer this question, we must first address a question of data accessibility. American election administration is a decentralized process. County offices remain the locus of most election-centered activity. As an unintended consequence, however, indicators of election-related performance can be difficult to obtain. The practical result is that many elements of American elections (other than the winning candidate) may not be collected and reported in a uniform format. Early voting is one of these indicators that has been unevenly reported. There is no authoritative source for early voting totals. States report these data in different ways, using different categories (although the quality of reporting has improved enormously in the past 15 years). Thus, estimating the early voting rate in American elections is a fraught endeavor, requiring one to reconcile state election returns, state voter history files, county-level reports, federal data such as the Election Assistance Commission’s Election Administration and Voting Survey, and public opinion surveys (discussed below).

The decentralized system of American election administration is atypical when examined in comparative perspective. Consider, for example, the alternative case of election administration in Finland. The Finns elect members of the Eduskunta (parliament) using an open-list proportional representation electoral system. In short, a voter selects an individual candidate within a party list and that vote is used to count how many seats a given party will have within the parliament and the vote is used to identify which candidates within a party are seated. The Finns also vote for the office of president, the European Parliament, and for municipal councils. If we
wanted to know the rate of advance voting in Finnish elections, all we would need to do is call up the results produced by Statistics Finland of advance voting between 1978 and 2003 and then consult reports from subsequent elections.56

One alternative approach to accumulating state-level reports is to consult national surveys of the American electorate. Academic surveys, such as the American National Election Survey, the National Annenberg Election Study (NAES), and the Cooperative Congressional Election Survey (CCES) have been deployed in past elections and used in many studies of voting behavior. Questions about early voting are also asked in the November supplements to the Current Population Survey (CPS), a survey administered by the Census Bureau and the Bureau of Labor Statistics, which is, among other things, the source of the monthly unemployment estimate. We plot the early voting rate in these four surveys in Figure 7.1.

While the surveys may show slightly different rates of early and absentee voting in a given election, the trend over time is clear: early and absentee voting has increased over time,57 and particularly in and after the 2008 general election. About one in five ballots cast in 2004 were cast prior to Election Day; that rate nearly doubled in 2008 and has continued to increase in subsequent elections. Presidential elections tend to exhibit higher rates of early voting than in midterm elections. We also find early voting rates tend to be lower in the CPS than the CCES data.
FIGURE 7.2 Early In-Person and Mail Voting Rates: 1996–2018

FIGURE 7.3 State-Level Early Voting Rates in 2018
We can also separate the early in-person from the absentee by-mail voters. In Figure 7.2, we show these rates in the CPS and CCES data in the available election surveys. When we disaggregate early voting by mode, we see absentee and mail voting has increased monotonically over time, while early in-person voting surges in presidential elections (most notably in 2008) and declines in midterm elections. The declines in early voting rates in midterm elections we observe in Figure 7.1, then, appear to be entirely due to declines in early in-person voting. Similarly, we also see the CPS rates are lower than those reported in the CCES data.

The rate of early voting is not uniform across the states. We show in Figure 7.3 that early voting, whether in the form of early in-person or absentee by-mail, is far more common in the West and Southwest than the Midwest, South, or New England states. Among the southern states (e.g., Arkansas, Georgia, North Carolina, Tennessee, and Texas) early in-person voting is far more prevalent than mail voting. As we ponder what the future holds with regard to the shift away from casting ballots at the polling place, we expect the national early voting rate to surpass 50 percent in the next two to three electoral cycles. California appears to be close to shifting entirely to a mail voting regime, which should add considerably to the segment of the American electorate that can cast a ballot before the end of a campaign.

IV. Convenience Voting and Election Fraud: A False Narrative

Many observers—and even the former governor of Oregon—have suggested absentee ballots are susceptible to fraud.58 The former and late Arkansas Supreme Court Justice Tom Glaze once remarked:

If you want to steal an election, the absentee box is the place to begin, and if you want to calculate the likelihood of fraud in a county, first figure the percentage of its total vote that is cast in absentia. The higher the percentage, the greater the chance that bogus votes are being cast in substantial numbers.59

While it is true that there are notable cases of election fraud, broadly construed, that involved absentee ballots and recent efforts to identify and eliminate election fraud, we observe, consistent with most social science research, that election fraud is vanishingly rare in the United States.60 Absentee ballots are not some sort of malignant vector by which elections can be stolen. More pertinent, perhaps, is the “ballot leakage,” a term coined by Professor Charles Stewart to describe absentee ballots that leave the hands of election officials yet never return to elections offices.61 Here we review three notable cases of absentee ballots being used in an attempt to steal an election, drawing attention to the importance of signature verification and other security protocols and data reporting devices as a means to detect election fraud.

Perhaps the best example of misuse of absentee ballots for the purposes of stealing an election is the 1997 mayoral election in Miami, Florida. In that race, incumbent Mayor Joe Carollo ran for reelection against former Mayor Xavier Suarez.
Carollo challenged the result when Suarez was declared the winner of the election. A trial judge found “a pattern of fraudulent, intentional, and criminal conduct” with regard to absentee voting efforts of the Suarez campaign. One expert testified during the trial to the following: that 225 absentee ballots had forged signatures, that 14 ballots were stolen and 140 ballots were improperly witnessed, and that an additional 480 ballots were witnessed by 29 individual “brokers,” 27 of whom invoked Fifth Amendment protections during the trial. An appeals court declared the absentee ballots void and reinstated Carollo as mayor on the basis of the vote cast on Election Day without requiring a second election be held.

A second case where absentee ballots were used to steal an election comes from local elections in the United Kingdom. The British government allowed for no-excuse absentee voting in 2000. Local elections in Birmingham in 2004 were found to be tainted by fraudulent absentee ballots and overturned. The scale of this operation was larger than in the Miami mayoral election, but followed the same general pattern: First, 1,600 declarations of identity were signed by the wrong person, and an additional 280 declarations of identity were signed by the same witness who used different addresses. More than 350 votes were witnessed with the same names and addresses but with different signatures, and in more than 400 votes, the signature of both the voters and the witness matched. There were cases where the same persons appeared to write different signatures of different voters. In each of these instances, a signature verification program would have detected these anomalies.

Finally, a recent and high-profile example is the 2018 race for North Carolina’s ninth congressional district. In this case, a consultant to the Republican campaign “harvested” absentee ballots and sought to conceal these actions from election officials. After an investigation, the North Carolina State Board of Elections concluded that “[t]ampering, obstruction, and disguise have obscured the precise number of votes either unlawfully counted or excluded, but substantial evidence supports our conclusion that the absentee ballot scheme and other irregularities warrant calling a new election in this district.

In each of these cases, putting in place a robust signature verification program, following best practices for request and return of absentee ballots, and having rapid reporting of election returns might have avoided or, in the North Carolina case in particular, might have detected the anomalous pattern of absentee ballot requests and returns.

Post-election investigations in Birmingham focused on the lack of a signature verification process as an invitation to tamper with postal votes. The Miami and North Carolina incidents were detected in part because the signatures on the ballot envelopes did not match the signatures from voter registration forms, and in the North Carolina case, because of anomalies in absentee requests and returns that became obvious to analysts a few weeks after the election. The data was there to reveal the North Carolina anomaly in live time, but apparently no one was looking. The point remains that, while some may claim absentee ballots are an invitation to steal elections, history suggests otherwise. It is easy to secure the absentee vote and ensure electoral integrity at the same time.
V. Conclusion

As a consequence of the controversies surrounding the 2000 election, major innovations in voter registration and election administration are well underway. Early voting, however, is a much more important change in elections administration that has been occurring for at least a decade, with little fanfare or critical examination.

The map of early voting in the United States shows a varied quilt of laws, with some states providing a virtual smorgasbord of voting options, others offering just early in-person or no-excuse absentee, and a third set serving up just a thin gruel of excuse-required absentee balloting. Not surprisingly, voters have responded to this varied menu of choices, voting at different times and at different places. America’s election system, already one of the most decentralized and complex in the world, has only become more so as a result of early voting.

Early voting systems have become a permanent part of the American electoral landscape, impacting candidates, campaign organizations, election administrators, and voters. There has been frequent litigation over early voting rules and regulations, particularly since cutbacks first started appearing after 2010, and early voting is part of the election law curriculum. As a consequence of these changes, voting in America is becoming an individualized rather than a community act. Early voting may undermine the role of elections as “civic events” that bring together a community in political dialogue and participation. By individualizing voting, early voting could dissuade participation by newly naturalized citizens and those from traditionally disempowered communities. Finally, it is clear that voters who opt to vote early cannot draw upon all the information provided by campaigns and the news media. There seems little question, then, that “(e)lection day in the United States is rapidly turning into an anachronism . . . waiting in line to cast our ballots will become the quaint notion of a bygone era.” Early voting and extended “election weeks” are here to stay.

This chapter provides the interested reader with a road map to the legal changes, focusing more on explaining the details of the process than on examining the potential consequences. Surprisingly little empirical research has examined the consequences of early voting reforms for how campaigns take advantage of the early voting system or how early voting alters the decision-making calculus of individual voters. Those questions remain on the agenda for future scholars, activists, and citizens.

Notes

1. All interpretations and conclusions are the responsibility of the authors and do not reflect the institutional positions of Reed College or the Brennan Center for Justice at New York University School of Law.

2. The “election ecosystem” description was first used by Huefner and colleagues, and conceptualizes election systems where each component part (institutional arrangements,
voter registration, voting technology, early and absentee voting, polling place operations, provisional voting, and vote counting and post-election procedures) is fundamentally interdependent. Steven F. Hufner et al., The Ohio State University, From Registration to Recounts: The Election Ecosystems of Five Midwestern States (2007). Li, Pomantell, and Schraufnagel include convenience voting regimes in a principal component analysis of state election laws along with registration procedures, voter identification requirements, and polling place accessibility to create a Cost of Voting Index, which the authors find is inversely related to turnout. Quan Li et al., Cost of Voting in the American States, 17 Election L.J. 234–47 (2018), available at https://doi.org/10.1089/elj.2017.0478.


18. Some states, such as New Jersey, do not have an early in-person voting regime, but do have a “no-excuse absentee in-person” voting regime. We do not consider these regimes identical, however, since traditional early in-person voting does not require additional registration requirements, making the voters’ experience in the two regimes significantly distinct.


20. This does not necessarily include, however, registered citizens with disabilities who require an alternative and assisted balloting mode.


23. The import of early in-person voting to legislators is perhaps best represented in the fact that many states now inscribe their early in-person voting rules in legislation, rather than allowing administrators to define the rules in state administrative code.


25. This number, again, does not include those states that only provide in-person absentee voting, though many other valuable sources, such as the National Conference of State Legislatures, include those states in their numbers on early in-person voting.

27. This data draws on the Associated Press Elections Unit’s post-election reports. Other sources are the Election Assistance Commission’s Election Administration and Voting Survey, the Current Population Survey’s Voting and Registration Supplement, and data assembled from state reports by Professor Michael McDonald at the United States Elections Project (http://www.electproject.org (last visited July 29, 2019)).


31. Hasen, supra note 3.


34. See, e.g., Jeff Mapes, Kitzhaber Gets Cold Feet, Says He’s Undecided on Mail Voting, OREGONIAN, July 7, 1995, at C01.


36. Robert M. Stein, Introduction: Early Voting, 62 PUB. OPINION Q. 57–69 (1998). Depending on how you interpret the laws, some states allowed individuals to request and cast an “in-person absentee ballot” prior to Texas’s law, but the number of states and usage rates were extremely low, so it is reasonable to identify Texas as the innovator.


42. Id. at 71.

43. See, respectively, Voting Integrity Project v. Bomer, 199 F.3d 773 (5th Cir. 2000), and Voting Integrity Project v. Keisling, 259 F.3d 1169 (9th Cir. 2001).

44. Voting Integrity Project, 259 F.3d at 1176.


49. John Fund, *Stealing Elections: How Voter Fraud Threatens Our Democracy* (2004). It is important to note that the actual occurrence of voter fraud is extremely low, and most charges of voter fraud have been proved to be illusory. Lorraine C. Minnite, *The Myth of Voter Fraud* (2010).


60. Minnity, supra note 49.

61. Stewart, supra note 48.


69. Gronke, supra note 40.
As the 2020 election nears, concerns surrounding voter identification (“voter ID”) laws such as how certain laws or court decisions will impact individuals who wish to vote in the next presidential election are increasingly imminent. While the term “voter ID” has become generally understood by the public to mean laws that require individuals to provide some form of official ID during the voting process (e.g., when registering, receiving a ballot, or going to the polls to vote), courts continue to grapple with their analyses of these politically heated laws.

In the 2008 seminal voter ID case, *Crawford v. Marion County Election Board*, the U.S. Supreme Court was split but generally agreed that the so-called *Anderson-Burdick* balancing test would apply under an equal protection analysis. However, even in *Crawford*, the justices could not agree on what the test means or how to apply it. First, as explained by Justice Stevens in *Crawford*’s plurality opinion, the balancing test means there is a “sliding scale of scrutiny” where the strength of a state’s justification required to uphold a law depends on the severity of the burden that the law imposes on the recognizable population of eligible voters. If that population of eligible voters is subject to a severe burden on their opportunity to vote, then the balancing test indicates the court should apply strict scrutiny of the state’s justification; if the burden is light, then the court may apply a lesser form of scrutiny that “must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” Comparatively, in a concurring opinion, Justice Scalia explained *Anderson-Burdick* to be a “two-track approach” instead of a sliding scale, where strict scrutiny would apply in instances of heavy burdens and “deferential” scrutiny would apply for lesser burdens.

Voter ID jurisprudence started to change course shortly before the 2016 presidential election as a result of the Supreme Court’s landmark decision in *Shelby County v. Holder*, which effectively permitted certain jurisdictions to pass voter ID laws without having to get the government approval they previously needed in advance. Since *Shelby County*, there has been a spark in both voter ID cases and vote denial claims brought under section 2 of the Voting Rights Act (VRA) of 1965. Section 2 prohibits in part any practice that “results in a denial or abridgement of the right . . . to vote on account of race.” Section 2 has a long history in U.S.
courts, more commonly in the area of vote dilution claims as opposed to vote denial claims. While vote dilution “refers to practices that diminish minorities’ political influence in places where they are allowed to vote,” vote denial “refers to practices that prevent people from voting or having their votes counted.” Thus, since Shelby County, courts have continued to grapple with the unsatisfying precedent in Crawford with respect to how the Anderson-Burdick balancing test should apply to voter ID cases, and with how to analyze the new vote denial claims brought under section 2 of the VRA.

As this chapter will provide, current voter ID precedent has failed to offer bright-line tests for application in future cases. Additionally, an underlying challenge is the unresolved issue of partisanship that plays a role in the formulation and passing of voter ID laws. This chapter will provide a broad overview of the state of affairs for voter ID laws by (1) providing a general overview of the VRA; (2) discussing relevant events of the early 2000s, including the landmark Crawford Supreme Court decision; (3) explaining the Shelby County decision; (4) examining key voter ID cases across the country; and (5) considering the state of affairs of voter ID jurisprudence as the 2020 elections approach.

I. Voting Rights Act

During the civil rights movement in the 1960s, Congress concluded that existing federal antidiscrimination laws were unable to overcome the actions of state officials who resisted enforcement of the 15th Amendment. Congressional hearings found that the Department of Justice’s efforts to end discriminatory election practices were leading to somewhat of a whack-a-mole effect; as one practice or procedure was struck down, another discriminatory law would pop up, and new litigation would start all over again. In an effort to end discriminatory voting practices, President Johnson signed the VRA into law. As adopted in 1965 and still at the time of this publication, section 2 of the VRA prohibits voting practices or procedures that discriminate on the basis of race or color.

In 1980, the Supreme Court in Mobile v. Bolden held that state action “that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.” This was a high standard, and some have described the discriminatory purpose standard to be “nearly impossible” for a minority plaintiff to prevail on in a vote dilution claim. Then, in 1982, Congress amended the VRA and extended certain provisions such as section 5 and amended section 2 to depart from the discriminatory purpose test. Amended section 2 provides in part that a plaintiff may establish a violation of the section if the evidence shows that based on the “totality of circumstances” the political processes leading to nomination or election have the result of denying a racial or language minority an equal opportunity to participate in the political process.
Factors”) that may be considered in a “totality of the circumstances” test, and the Supreme Court recognized these factors in a seminal redistricting case in 1986.  

Section 5 has been included in the VRA since 1965, initially applying to covered jurisdictions identified by a formula prescribed under section 4 to have a history of discrimination. Before Shelby County, under section 5, “covered” jurisdictions were required to obtain preclearance (i.e., approval from federal officials) before changing “any voting qualification or prerequisite to voting, or standard, practice, or procedure.” In order to obtain preclearance, a covered jurisdiction had to show that the proposed change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.” Thus, section 5 served as a gatekeeper where laws that demonstrated the presence of either discriminatory purpose or discriminatory effect were not given the right of passage.

II. Change on the Rise in the 2000s

The year 2000 was a defining time in American politics and election law jurisprudence. The dispute as to whether George W. Bush or Al Gore won the presidency highlighted administrative challenges in elections when the Florida recount exposed issues as basic as the fact that certain ballots were so confusing that some voters did not vote for the candidates they intended to vote for. As the nation’s confidence in the electoral system decreased in the wake of the 2000 election, attention turned to voter ID laws. In 2005, the Commission on Federal Election Reform made a bipartisan recommendation for voter ID at the polls. Also in 2005, both Indiana and Georgia “pioneered” strict new voter ID laws where voters were required to have their photo ID at the polling place. If a voter did not have the ID, then he or she would be required to vote a provisional ballot that would only be counted if the voter returned to the designated elections office within a few days with the required ID.

Indiana’s voter ID law went all the way to the Supreme Court in Crawford v. Marion County Election Board in 2008. In a plurality decision in Crawford, the Supreme Court upheld the law against a facial challenge, but also failed to offer a bright-line test for future voter ID cases. Although a majority of the justices agreed that the so-called Anderson-Burdick balancing test was the proper standard to apply, the fractured Court disagreed on how the test should be applied. The Anderson-Burdick balancing test is generally known to provide a sliding scale of scrutiny, where the severity of a law’s burden on a recognizable population of eligible voters determines the strength of the state’s justification to defend the law. However, the disagreement among the justices has made this a flexible test with no majority decision in Crawford.

In Crawford, one of the state’s justifications for the law was to prevent voter fraud, despite having little evidence to support an argument that this was a problem. Nevertheless, Justice Stevens joined by Justices Roberts and Kennedy found that the Indiana voter ID law imposed “only a limited burden on voters’ rights” and that
the state’s interests were sufficient to defeat the facial challenge. However, the plurality opinion also did not shut out the possibility that the law could be struck down with more evidence presented regarding the burdens of the law on Indiana’s voters. Comparatively, Justices Souter and Ginsburg dissented together, and Justice Breyer dissented separately, and all three justices would have invalidated the law under the Anderson-Burdick balancing test. Further, in a concurring opinion, Justices Scalia, Thomas, and Alito would have upheld the law under the reasoning that the voter ID requirement was not severe and “the State’s interests are sufficient to sustain that minimal burden.”

III. Shelby County v. Holder: The Floodgate Opens

In 2013, the Supreme Court in Shelby County v. Holder found that it was unconstitutional to use criteria under section 4 of the VRA as the basis for subjecting jurisdictions to preclearance. Previously, section 4 had identified certain jurisdictions that would be subject to the section 5 preclearance requirement. Under section 5, covered jurisdictions from section 4 were required to preclear any changes to voting laws with the attorney general of the United States or a three-judge panel of the U.S. District Court for the District of Columbia. Thus, while Shelby County did not invalidate section 5, it did make the preclearance requirement ineffective as it released jurisdictions from the requirement.

As a result of the Shelby County holding, nine states and 55 smaller jurisdictions were released from the requirement under section 5. States’ release from preclearance requirements triggered a wave of change across the country in voting rights legislation and jurisprudence. By 2018, at least 23 states had enacted newly restrictive statewide voter ID laws and at least 61 section 2 cases had been filed since the Shelby County decision.

Shelby County also marked a change in how plaintiffs brought claims under the VRA, and, in particular, a change in voter ID claims. With section 5 no longer in place to prevent the passage of laws that have discriminatory electoral practices, plaintiffs have relied on section 2 in order to challenge those laws as they are passed. Prior to Shelby County, most section 2 claims had been vote dilution claims; from 1982 to 2013, there were reportedly 322 lawsuits involving section 2 claims for which rulings are available, and 266 of those can be characterized as vote dilution as opposed to vote denial cases. Thus, as an increasing number of vote denial cases have been brought under section 2 of the VRA after Shelby County, courts have been forced to quickly adapt and, in doing so, have frequently turned to methods used to analyze vote dilution claims.

IV. Wave Two: Voter ID in the Courts Post-Shelby County

Since Shelby County, the courts have grappled with both the uncertain precedent under Crawford and how to analyze voter ID cases in the context of vote denial
claims. This section will provide an overview of case law in three states that have experienced significant voter ID litigation in the wake of Shelby County. Additionally, this section will identify instances in which courts have acknowledged the overlapping issue of whether there was a discriminatory purpose or effect based on race and/or partisanship.

A. WISCONSIN
Frank v. Walker, a Wisconsin voter ID case, was one of the first cases after Shelby County in which courts started to consider section 2 claims in voter ID cases. The district court in Frank v. Walker explained that, to date, section 2 jurisprudence had been more focused on vote dilution as opposed to vote denial cases and, thus, there was no comprehensive test to govern section 2 voter ID cases. Accordingly, as one of the first courts to grapple with the analysis, the district court explained that it would focus on the text of section 2 and concluded in part that the Wisconsin law had a “disproportionate impact on Black and Latino voters because it is more likely to burden those voters with the costs of obtaining a photo ID that they would not otherwise obtain.”

The district court in Frank also explained that because a majority of the Supreme Court agreed that Anderson-Burdick was proper to analyze a voter ID law, the district court would apply it to the Wisconsin law. However, the court also noted that because a majority of the Supreme Court in Crawford could not agree on how to apply the test, Crawford would not be binding precedent. The record in Frank was more developed than the record in Crawford, and included evidence to indicate that when compared to voters affected by the Indiana law in Crawford, six times as many registered voters would be affected by the Wisconsin law. Thus, the district court applied the Anderson-Burdick balancing test to find that the law violated the 14th Amendment and accordingly enjoined its enforcement.

On appeal, the Seventh Circuit reviewed the case de novo and reversed the district court’s decision, finding that the statute neither violated the Equal Protection Clause nor the VRA. The Seventh Circuit found that the district court’s findings did “not justify an outcome different from Crawford.” Additionally, with respect to the section 2 claims, the Seventh Circuit explained that while the district court’s findings showed a “disparate outcome” of the voter ID law, they did not show a “denial” of anything by Wisconsin, as [section 2] requires; unless Wisconsin makes it needlessly hard to get photo ID, it has not denied anything to any voter.

In subsequent litigation, the plaintiffs in Frank challenged the law as applied and argued that the voter ID law was unconstitutional for those who were unable to get the ID. The Seventh Circuit held that plaintiffs may bring an as-applied claim against the Wisconsin law, explaining that the “right to vote is personal” and confirming that this opinion is “compatible with our opinion and mandate, just as it is compatible with Crawford.” On remand, the trial court issued an order to provide that voters without a photo ID must be able to cast a regular ballot as long as they signed an affidavit.
Judge Posner, who also wrote the Crawford opinion that the Supreme Court plurality decision upheld in 2008, wrote a dissenting opinion in 2014 when Wisconsin’s voter ID law was upheld in Frank. Judge Posner discussed the prevalence of partisan intent behind voter ID laws such as the one at hand, stating that “[t]here is only one motivation for imposing burdens on voting that are ostensibly designed to discourage voter-impersonation fraud, if there is no actual danger of such fraud, and that is to discourage voting by persons likely to vote against the party responsible for imposing the burdens.” Further, Judge Posner also acknowledged evidence that “restrictive voter access policies such as photo ID requirements are . . . highly correlated with a state’s having a Republican governor and Republican control of the legislature and appear to be aimed at limiting voting by minorities, particularly blacks.” Although some of this language may indicate a pointed view on the topic that could be cited to bypass critical vote denial claims based on race-based discrimination, Judge Posner’s dissent evidences that judges acknowledge partisanship is an issue in voter ID cases.

B. TEXAS
A Texas law and series of court rulings in Veasey v. Abbott also demonstrates the effect of Shelby County on state laws and voting rights litigation. Texas’s voter ID law was initially signed into law in 2011 but was not effective because the law did not pass the mandatory section 5 preclearance review. When the Supreme Court issued its decision in Shelby County on June 25, 2013, Texas was released from the preclearance process, and began enforcing its voter ID law immediately. Plaintiffs were quick to file a complaint against the Texas voter ID law, leading to a long battle in the courts. In 2014, a district court found that the voter ID law placed an unconstitutional burden on the right to vote under the First and 14th Amendments, had a discriminatory effect against Hispanics and African Americans that violated the VRA, and had an unconstitutional discriminatory purpose under the 14th and 15th Amendments.

Then, the Fifth Circuit in 2015, among other things, found that the district court’s finding that the law was passed with a racially discriminatory purpose was based on infirm evidence and remanded the case for further consideration. Later, when the case came back to the Fifth Circuit in July 2016, the full panel of the court found that remand was necessary for the district court to reweigh the factors regarding discriminatory purpose, explaining in part “that the absence of direct evidence such as a ‘let’s discriminate’ email cannot be and is not dispositive.” Additionally, the Fifth Circuit rejected the district court’s argument that Crawford would mandate upholding the voter ID law “simply because the State expressed legitimate justifications for passing the law” and clarified that Crawford did not reference section 2 or the VRA and the case only considered a First and 14th Amendment challenge. While the case was pending with the district court on remand, Texas enacted a new voter ID law that loosened some of the prior restrictions. Ultimately, in April 2018, the Fifth Circuit upheld Texas’s new voter ID law.
In a concurring opinion to the Fifth Circuit’s 2018 decision, Judge Higginbotham discussed the challenge of “disentangling partisan advantage and racial purpose when a party controls the legislature and racial minorities are heavily invested in the opposite party.” Judge Higginbotham also suggested that a partisan purpose “may well be fatal under a traditional equal protection analysis, race aside.” Thus, although Judge Higginbotham did not offer a resolution, he did notably take advantage of his concurrence to get on the record that partisanship is an issue impacting voter ID laws and one that may be challenging to tackle in court.

C. NORTH CAROLINA

In 2016, the Fourth Circuit found in North Carolina State Conference of the National Association for the Advancement of Colored People v. McCrory that North Carolina electoral reforms had “target[ed] African Americans with almost surgical precision” and violated the 14th Amendment and section 2 of the VRA. The Fourth Circuit reversed the decision of the district court in part by rejecting the state’s argument that Crawford applied, explaining that in Crawford the challengers to the voter ID law did not allege intentional discrimination. Further, the Fourth Circuit explained that the deference the Supreme Court offered in Crawford to Indiana’s choice of law on how best to serve its legitimate interests did not apply here because “the evidence in this case establishes that, at least in part, race motivated the North Carolina legislature.” The Fourth Circuit decision also sharply criticized the district court’s analyses and conclusions related to whether there was discriminatory purpose or effect of the North Carolina laws. For instance, with regard to the district court’s discriminatory purpose analysis, the Fifth Circuit asserted that the district court “clearly erred,” which in part was due to the district court’s “consideration of each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis.”

The Fourth Circuit clarified that its finding of discriminatory purpose did not suggest that individual members of the General Assembly had racial hatred or animosity. Instead, the Fourth Circuit explained that under a totality of the circumstances, the General Assembly had used the bill to entrench itself by “targeting voters who, based on race, were unlikely to vote for the majority party” and “[e]ven if done for partisan ends, that constituted racial discrimination.” The Fourth Circuit further explained:

Using race as a proxy for party may be an effective way to win an election. But intentionally targeting a particular race’s access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose. This is so even absent any evidence of race-based hatred and despite the obvious political dynamics. A state legislature acting on such a motivation engages in intentional racial discrimination in violation of the Fourteenth Amendment and the Voting Rights Act.
Thus, although the Fourth Circuit did not offer a solution to the issue of partisanship playing a role in voter ID laws being passed, the court did take the opportunity to confirm that partisanship is a problem and is particularly intertwined with race-based discrimination.

V. Looking Ahead to 2020

With the 2020 Election Day fast approaching, debate over voter ID laws will likely only become more heated. During his presidency, President Trump has alleged that millions of individuals voted illegally in the 2016 election. After creating an Advisory Commission on Election Integrity to look into voter fraud, the panel was shut down amid a series of lawsuits, and, reportedly, court filings showed that the panel did not uncover any evidence of voter fraud. Regardless of the panel's failure, state legislatures presumably will continue to point to voter fraud and preserving election integrity as state interests for which voter ID and more restrictive registration laws are passed.

In a post-Shelby County world where preclearance requirements have been lifted from certain jurisdictions, courts should continue to analyze whether a given law has a racially discriminatory purpose or effect. However, with voter ID laws, the elephant in the room is the entanglement of partisanship and voter ID laws. This chapter does not suggest that analyses of whether voter ID laws have a racially discriminatory purpose or effect are not critical given race-based discrimination persists in the United States; instead, this chapter recognizes that there are cases where courts are unable under the current equal protection standard and section 2 analyses to find that racial discrimination has occurred, and it may still be in the public's best interest to have other viable claims against voter ID laws.

As 2020 approaches, the time is likely not ripe for a voter ID case to be brought under an overt partisan claim, but it may still be possible to bring another claim to address the issue of partisan overreach. In the related area of partisan gerrymandering, in June 2019, the Supreme Court held in a 5–4 decision that “[p]artisan gerrymandering claims present political questions beyond the reach of the federal courts.” Although gerrymandering and voter ID laws are separate matters, they both deal with overlapping issues in alleging violations under section 2 of the VRA, and voter ID case law has previously relied on gerrymandering precedent. However, despite this decision, it is noteworthy that by May 2019 at least four separate lower court decisions had found in favor of plaintiffs in partisan gerrymandering cases while adopting a partisan vote dilution test. Further, as this chapter has evidenced, judges in lower court decisions have frequently acknowledged that partisanship plays a role in voter ID laws.

Courts may soon be receptive to certain claims that seek to address the issue of excessive partisan overreach in election laws, and it is possible that these claims may serve as an additional claim that plaintiffs may allege in addition to those of
race-based discrimination. Professor Foley of the Ohio State University Moritz College of Law has offered an analysis in favor of due process as an alternative to equal protection, explaining that due process “embodies the principle of fair play, and fair play is an appropriate concept to employ as a constraint on excessive partisanship.”

A due process approach may be more familiar to courts than a new claim based exclusively on partisanship, and ultimately could prove to be a useful method for plaintiffs in voter ID cases as they seek relief while operating under the unclear standards from Anderson-Burdick and vote denial claims under section 2.

VI. Conclusion

As this overview of voter ID laws and jurisprudence indicates, voter ID laws and judicial precedent have evolved quickly throughout the 2000s, with increasingly more laws passed and the courts continuing to lack bright-line tests as the 2020 elections approach. Before Shelby County, courts did not have a clear framework when considering voter ID cases because the Anderson-Burdick balancing test is flexible by the nature of its “sliding scale,” and then is further open to interpretation due to the plurality decision in Crawford. After Shelby County, the Crawford confusion has remained, and now courts are also grappling with new voter ID claims brought under section 2. Because of how entangled voter ID laws are with partisanship, plaintiffs may find courts receptive to addressing issues of excessive partisan overreach, which may be well presented through a due process claim. These issues may be further shaped by the 2020 election but history suggests that these issues and concerns related to courts’ analyses of these issues will extend well into the future.

Notes

3. Crawford, 553 U.S. at 191; Foley, supra note 2, at 675 (citing Burdick, 504 U.S. at 434, 440).
4. Foley, supra note 2, at 677–78.
7. Tokaji, supra note 6, at 691–92 (writing in 2006 and explaining that “[w]hile a substantial body of case law and academic commentary addresses the application of Section 2 to vote dilution cases, there has been much less focus on the statute’s application to vote denial cases”).

8. Id. at 691, 708.


10. Id.


21. Voter ID History, supra note 20; see also Austin-Hillery, supra note 19.

22. Voter ID History, supra note 20; see also Austin-Hillery, supra note 19.


24. See id. at 184–203 (Stevens, Kennedy, Roberts, JJ.), 203–09 (Scalia, Thomas, Alito, JJ., concurring), 209–36 (Souter and Ginsburg, JJ., dissenting), 236–41 (Breyer, J., dissenting); see also Foley, supra note 2, at 673–86 (explaining the Anderson-Burdick balancing test).

25. Foley, supra note 2, at 675 (citing Burdick v. Takushi, 504 U.S. 428, 434, 440 (1992)).


27. Id. at 209–36 (Souter and Ginsburg, JJ., dissenting), 236–41 (Breyer, J., dissenting).

28. Id. at 203–09 (Scalia, Thomas, Alito, JJ., concurring).


30. For general background information, see U.S. Department of Justice, supra note 16.

32. *Shelby County v. Holder*, 570 U.S. at 549; U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States* 10, 82 (2018), available at https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf. At the time of the 2018 report, the Department of Justice had filed only four of the 61 section 2 cases that have been filed since *Shelby County*. Id. at 10.


35. Id.

36. Frank v. Walker, 17 F. Supp. 3d 837, 870 (E.D. Wis.), rev’d, 768 F.3d 744 (7th Cir. 2014).

37. Id. (explaining in a footnote: “There is one appellate case applying Section 2 in the photo ID context, Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012) (en banc). However, that case does not set out a comprehensive test governing Section 2 photo ID cases.”).

38. Id. at 879.

39. Id. at 846.

40. Id.

41. Matthew R. Pikor, *Voter ID in Wisconsin: A Better Approach to Anderson/Burdick Balancing*, 10 Seventh Circuit Rev. 465, 489–90 (2015), available at https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1096&context=seventhcircuitreview (providing that in *Crawford*, the district judge “estimated that as of 2005, when the statute was enacted, around 43,000 Indiana residents lacked a state-issued driver’s license or identification card” and in *Frank*, the district judge found “that approximately 300,000 registered voters in Wisconsin, roughly 9% of all registered voters, lack a qualifying ID”) (citing *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 188–89 (2008); *Frank*, 17 F. Supp. 3d at 854).

42. Frank v. Walker, 768 F.3d 744, 745 (7th Cir. 2014).

43. Id. at 753.

44. Frank v. Walker, 819 F.3d 384, 386–87 (7th Cir. 2016).

45. Frank v. Walker, 196 F. Supp. 3d 893, 916 (E.D. Wis. 2016). The state filed an emergency appeal, which the Seventh Circuit stayed, and then on August 26, 2016, the Seventh Circuit declined to reconsider the decision. The case later proceeded to the Seventh Circuit on appeal; oral argument was held in February 2017 and the case was terminated in 2018.


47. Veasey v. Perry, 71 F. Supp. 3d 627, 664 (S.D. Tex. 2014), aff’d in part, vacated in part, remanded sub nom. Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015), on rehe’g en banc, 830 F.3d
216 (5th Cir. 2016), and aff'd in part, vacated in part, rev'd in part sub nom. Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (explaining the “draconian voting requirements” imposed under the law).

48. The law required voters to present one of seven forms of ID, with the option to obtain an election identification certificate if an individual was unable to obtain one of the seven options. The election identification certificate was free for some, but others had to pay a fee to obtain it.


50. Veasey v. Abbott, 796 F.3d 487, 496 (5th Cir. 2015), on reh’g en banc, 830 F.3d 216 (5th Cir. 2016) (stating that the law became effective on June 25, 2013, and further providing that previously, a three-judge district court had “declined to grant judicial preclearance to override the United States Attorney General’s denial of preclearance” and citing Texas v. Holder, 888 F. Supp. 2d 113, 144–45 (D.D.C. 2012), vacated and remanded, 570 U.S. 928 (2013)).


55. Id. at 274 (“To be sure, Crawford established that preventing voter fraud and safeguarding voter confidence are legitimate and important state interests. . . . But it does not follow that assertion of those interests immunizes a voter ID law from all challenges, or that courts should be deterred from examining, as part of the Section 2 totality-of-circumstances inquiry, the tenuousness of the reasons given for the law.”) (citing League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 246 (4th Cir. 2014); cf. Ohio State Conference of the NAACP v. Husted, 768 F.3d 524 (6th Cir. 2014)).


57. Id.

58. Id. at 805 (Higginbotham, J., concurring) (citing 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, 61 (2014)).


61. Id. at 235.
62. Id.
63. Id. at 233.
64. Id.
65. Id. at 222–23.
67. Id.
69. See, e.g., N.C. State Conference of the NAACP, 831 F.3d at 221 (citing Thornburg v. Gingles, 478 U.S. 30 (1986)).
71. Foley, supra note 2, at 660.
I. Hacking Democracy: Threats to Free and Fair Elections

Our adversaries and strategic competitors probably already are looking to the 2020 US elections as an opportunity to advance their interests. More broadly, US adversaries and strategic competitors almost certainly will use online influence operations to try to weaken democratic institutions, undermine US alliances and partnerships, and shape policy outcomes in the United States and elsewhere.

Adversaries and strategic competitors also may seek to use cyber means to directly manipulate or disrupt election systems—such as by tampering with voter registration or disrupting the vote tallying process—either to alter data or to call into question our voting process.

—2019 Worldwide Threat Assessment

Free and fair elections are a bedrock of our democracy. The threat to election systems is a growing concern. Hackers and foreign governments have demonstrated the ability to successfully penetrate election systems and potentially change voter rolls or even votes on Election Day, as well as influence elections through the use of social media and the spread of disinformation. Trust and confidence in democratic processes and elections are at stake.

The Report on the Investigation into Russian Interference in the 2016 Presidential Election by Special Counsel Robert Mueller explains in detail how the Russian government interfered in the 2016 presidential election in a “sweeping and systematic fashion.” It confirmed a January 2017 Intelligence Community (IC) report that concluded: "We assess Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the US presidential election." The Russians conducted cyber operations that targeted election infrastructure, as well as political organizations, campaigns, and public officials. The July 2019 Report of the Senate Select Committee on Intelligence (SSCI) concluded that the Russian government directed extensive activity, beginning in at least 2014 and carrying into at least 2017, against U.S. election infrastructure at the state and local levels.
**Global threats.** Election interference is not an issue for the United States alone. Russia has targeted the Baltic states, Britain, France, Italy, and other countries with its covert influence operations. European Union officials published a report accusing Russia of orchestrating a “continued and sustained” misinformation campaign during the May 2019 elections. It used fake stories to “promote extreme views,” stoke political tensions, and, sometimes, discourage voter turnout.7

Russia is the largest, but not the only threat. U.S. intelligence agencies and law enforcement have expressed concern “about ongoing campaigns by Russia, China and other foreign actors, including Iran, to undermine confidence in democratic institutions and influence public sentiment and government policies. These activities also may seek to influence voter perceptions and decision making in the 2018 and 2020 U.S. elections.” The Federal Bureau of Investigation (FBI) director called Russia’s interference in American elections a “significant counterintelligence threat.”10

**Focus on battleground states.** Control of state legislatures has hung in the balance in states with razor thin vote margins in recent elections. The Mueller report found that the Russians focused on key battleground states, including Minnesota, Wisconsin, Pennsylvania, and Michigan. Attackers scan/probe networks in swing states, identify weakly protected systems, and choose the weakest targets in the closest states. Carefully targeted interference in only a small number of key precincts where the vote is very close can sway entire elections. Very few precincts or counties have to be targeted to cause grave harm.11 Disruption of an election is not caused by technology alone or attributed only to a cyberattack. Foreign influence through social media and targeted text messages can cause confusion and uncertainty in polling places. Faced with long lines, many voters have limited ability to wait or return to the polling place to vote.

**A. COMPLEX ELECTION INFRASTRUCTURE**

The election process in the United States is highly decentralized and it is regulated state by state. More than 9,000 jurisdictions of varying size administer the country’s elections, with voters casting ballots in 185,000 precincts. Elections involve much more than the Election Day activities voters see when they cast their votes. Election administration includes pre-election responsibilities such as voter registration, qualifying candidates, preparing voting equipment, and absentee voting; Election Day voting and vote counting; and post-election certifying of results, audits, and recounts. Table 9.1 provides an overview of the entire complex election ecosystem. Understanding the many points at which elections and election systems are vulnerable is essential for developing appropriate and effective solutions for maintaining public trust and confidence.

Developing strategies to protect the integrity of elections and address cybersecurity threats and risks, secure critical election systems, and respond to incidents when appropriate requires collaboration and coordination between and among multiple stakeholders, election officials, and policy makers with authority to effect change at the federal, state, local, and tribal levels and even internationally.12
### TABLE 9.1 The Election Ecosystem: 9,000 U.S. Jurisdictions Administer Elections in ~ 175,000 Precincts

<table>
<thead>
<tr>
<th>Laws, Policies, Procedures &amp; Standards</th>
<th>Candidates &amp; Campaigns</th>
<th>Voting</th>
<th>Election Administration</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Policy Makers</strong></td>
<td></td>
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<tr>
<td><strong>Federal</strong></td>
<td>• Candidate Filing System/Qualifications</td>
<td>• Voter Information System</td>
<td>(Re)Districting</td>
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<tr>
<td>• Congress</td>
<td><strong>Campaigning</strong></td>
<td><strong>Ballot Questions</strong></td>
<td></td>
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<tr>
<td>• DHS, EAC, Justice, IC</td>
<td><strong>Debates</strong></td>
<td><strong>Voter Registration</strong></td>
<td></td>
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<tr>
<td><strong>State</strong></td>
<td>• Social Media</td>
<td>• Local: DMV/ Post Office</td>
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<tr>
<td>• Secretaries of State</td>
<td>• Platforms</td>
<td>• Online</td>
<td></td>
</tr>
<tr>
<td>• State Legislatures</td>
<td>• Monitoring (Facebook, Twitter, Instagram)</td>
<td>• Voter Registration/Authentication</td>
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<tr>
<td><strong>Local</strong></td>
<td>• “Fake News”/Deepfakes</td>
<td>• Electronic Pollbooks</td>
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<td>• Election Officials</td>
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<td><strong>Voting</strong></td>
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<td><strong>Private</strong></td>
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<td>• Early, Absentee, and Election Day)</td>
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<tr>
<td>• Election System Manufacturers, Software Developers</td>
<td></td>
<td>1. Onsite</td>
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<tr>
<td>• 3P Technology Contractors</td>
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<td>• E-Pollbooks/Barcode Scanners</td>
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<td><strong>International</strong></td>
<td></td>
<td>• Paper Ballots</td>
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<td>• DRE Voting Machines</td>
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<td></td>
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<td>• Optical Scanners</td>
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<td></td>
<td>2. Mail (OR, WA, CO + 19 States)</td>
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<td>• Ballot Delivery/Return</td>
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<td>3. Internet (30 States)</td>
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<td><strong>Election Management System</strong></td>
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<td>3P Tech Contractors</td>
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<td>• Ballot Creation System</td>
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<td>• Voting Equipment</td>
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<td>• Configuration</td>
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<td>• Ballot Tracking System</td>
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<td>• Central Tabulators/Vote</td>
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<td>• Tallying</td>
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<td>• Election Night Reporting</td>
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<td>• (ENR)—Statewide/Unofficial</td>
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<td>• Certify: Final Election Results</td>
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<td>• Canvas</td>
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<td>• Audits</td>
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<td>• Recounts</td>
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</tbody>
</table>
B. VOTING SYSTEM VULNERABILITIES AND COMMON CYBERATTACK VECTORS

Russian cyber operations targeted election infrastructure in order to undermine the integrity and availability of election-related data. The Center for Strategic and International Studies (CSIS) Election Scorecard concluded that the “2016 election was a wake-up call for the United States that our largely digitized election systems are vulnerable.”13 While some election officials and commentators have argued that the decentralized U.S. election system provides adequate protection from cyberattacks, elections are still at risk for many reasons.14

The distributed architecture of elections presents myriad vulnerable points where sensitive voter and candidate data can be stolen or altered and hackers have successfully targeted state election systems. Furthermore, the election management systems used to design computer ballots and program voting machines are highly centralized—run by only a few companies nationwide that work for multiple states. If an attacker could hack into one of those companies, voting software and equipment across the states could be compromised. The July 2018 indictment of 12 Russian intelligence officers detailed how Russian operatives stole voter data, targeted state boards of election, and hacked a voting equipment vendor. It illustrates how future attacks on election infrastructure may occur.15

In recent elections, 99 percent of votes in the United States were cast or counted on computers.16 Many of the core election systems—voter registration databases (VRDBs), election management systems, voting machines, and vote counting systems—are aging computer equipment. They employ software that can no longer be updated or patched, include databases with known vulnerabilities, or are managed by third-party vendors where supply chain risks exist. Some voting equipment may be vulnerable by being connected to the Internet.17

1. Voter Registration Databases and E-pollbooks

Electronic pollbooks are electronic versions of the voter rolls that can be used to process voters at the polls instead of a paper-based list.18 According to the FBI, in 2016, voter registration systems in nearly half of the states were targeted by foreign hackers, and four systems were successfully breached.19

Two states, Illinois20 and Arizona,21 provided voters with details about those cyberattacks, where hackers used two of the most common attack vectors.22 The breach of the Illinois Voter Registration System database was the result of a SQL injection attack23 that exploited a well-known software vulnerability in databases; thousands of individual voter records and personal information such as driver’s license numbers were accessed.

An Arizona county election official was targeted in a “phishing” attack that led to a breach. Phishing attacks are among the attack vectors used most often by hackers to launch cyberattacks.24 During the critical summer voter registration period, the voter registration system was shut down, causing a significant problem for voters and election officials alike.
Russian spies gained access to Florida’s local election systems by compromising the computers of VR Systems, a U.S. vendor that supplies software to verify voter registration information. Hackers sent phishing e-mails to election officials impersonating VR Systems to trick them into opening the e-mails. The attackers were “in a position” to alter records.25

2. Direct-recording Electronic Voting Machines
Direct-recording electronic (DRE) voting machines were adopted years ago following passage of the 2002 Help America Vote Act. They are used to tally votes and record them. Voters select their candidates using a push-button or touchscreen system with vote counts stored on an internal hard drive or removable storage.26

DRE voting machines are becoming less secure with each passing year and do not have proper auditing mechanisms.27 Through its survey of election officials, the Brennan Center for Justice has confirmed that seven states are using discontinued voting machines exclusively, and 38 states use discontinued voting machines in one or more jurisdictions.28 Aging voting systems use outdated hardware and software with vulnerabilities and are not patched (e.g., Windows XP has not been supported since 2014).

3. Optical Scan Voting Systems
Used to scan and tabulate votes from paper ballots, optical scanners were adopted by states to replace DRE machines. Scanners are difficult to calibrate and defects because of configuration and programming errors cause apparent over-voting and some votes are not counted. On this aging equipment, vintage-era software now lacks tech support.

4. Vote Counting—Election Night Reporting
Election results do not become official until certified by the state after an official post-election canvassing process. Many jurisdictions use a separate election night reporting (ENR) system to display unofficial election night results to the public through a web-based application. These machines may have embedded or externally connected modems to transmit unofficial results rapidly on election night. These modems present cyber risks unless properly secured. Because the public does not perceive the ENR as unofficial, providing assurance that the data is accurate and protected is of the utmost importance.

5. Internet Voting
More than 30 states use some form of electronic system for ballot delivery and Internet voting for overseas, military, and absentee voting.29 The National Academies of Sciences, Engineering, and Medicine (NAS) has concluded that “Internet voting should not be used at the present time, and it should not be used in the future until and unless very robust guarantees of secrecy, security, and verifiability are developed and in place.”30

**Outsourcing.** Private companies play an integral role in elections, from manufacturing voting machines and developing software to designing ballots and hosting results websites. Third-party vendors have provided the entry point for hackers to target election systems.

**Supply chain risks.** Voting machines do not need to be connected to the Internet to be hackable. At points along the supply chain, hackers can infect machine parts and software with malware before they reach the United States. The small number of companies responsible for the centralized election management systems that control voting and vote counting machines are prime targets for attackers seeking to impair an election. Experts have shown that an attacker could hack into the company’s systems, install malware on the memory cards used to load ballot design software on voting machines, and potentially change the results of state elections.31

**Election management company financed by Russian oligarch.** The FBI notified the state of Maryland that a technology company responsible for keeping electronic information on voter registration, election results, and other sensitive data in state elections is “connected to a Russian oligarch who is ‘very close’ to Russian President Putin.”32 Such operations need not change votes to be effective. Deleting voter registration information or slowing vote counting could easily undermine confidence in elections.

7. Insider Threats
Malicious insider attacks are on the rise and pose a serious security threat. Criminals are using the dark web to recruit employees who have access to corporate networks to become “rogue insiders.”33 Poll workers and other local election officials who are recruited from local communities to work at offices and polling places could pose a security risk.

C. CANDIDATES AND CAMPAIGNS
In the *Election Scorecard*, CSIS concluded that “the greatest overall risk in 2018 is to campaigns and candidates, where cybersecurity practices remain inconsistent but our adversaries have focused their attacks.”34 Russian operatives targeted political organizations, campaigns, and public officials to compromise individuals’ private information and use it to embarrass or discredit candidates and public officials, and to undermine political organizations.35 In July 2018, 12 Russian intelligence officers, members of the Main Intelligence Directorate (GRU), a Russian Federation intelligence agency within the Russian military, were indicted for engaging in a sustained effort to hack into the computer networks of the Democratic Congressional Campaign Committee, the Democratic National Committee, and the presidential campaign of Hillary Clinton, and released that information on the Internet under the names “DCLeaks” and “Guccifer 2.0.”36

Protecting campaign computer systems is critical. The FBI has launched an initiative named Protected Voices to help political campaigns address cybersecurity
threats by raising awareness about the best ways to fend off attempts to infiltrate their technology infrastructure.37

D. DISINFORMATION OPERATIONS: EXPLOITING SOCIAL MEDIA

Between 2014 and 2018, Russia systematically exploited social media platforms to interfere in democratic elections in the United States, France, Germany, Finland, the Netherlands, and other democracies.38 In February 2018, 13 Russian nationals and three Russian companies were indicted for allegedly conducting what they called “information warfare against the United States,” with the stated goal of “spread[ing] distrust towards the candidates and the political system in general.”39

The Russians conducted covert operations to influence public opinion and sow division. They used false U.S. personas, and covertly created and operated social media pages designed to attract U.S. audiences and spread disinformation or divisive messages. In addition, they sought to depress voter turnout, encourage third-party voting, or convince the public of widespread voter fraud to undermine confidence in election results.40

Twelve of the defendants worked for the Internet Research Agency where they established hundreds of accounts on social media, making it appear that the accounts were controlled by persons in the United States. They used stolen or fictitious American identities, fraudulent bank accounts, and false identification documents. The defendants posed as politically and socially active Americans, advocating for and against particular political candidates. They also purchased political advertisements on social media.

CSIS Beyond the Ballot named the tactics “new generation warfare,” in which Russia used a combination of propaganda channels to maximize the effectiveness of their disinformation campaigns.41 Exploiting social media platforms is effective because attribution is difficult. CSIS concluded that domestic audiences contribute to the spread of disinformation, and these “‘unwitting amplifiers’—unknowingly falling for and spreading propaganda—play a large role in fueling the Russian propaganda machine and giving legitimacy to certain claims made by Russian state-sponsored media, inauthentic domains, and fake online accounts. Increasingly, domestic voices are actually the originators of content repurposed by Russia.”42

1. Overt Influence Efforts

The February 2018 indictment alleged that the Russian operatives used lobbyists, foreign media outlets, and other organizations to influence policy makers and the public, promoting divisive narratives and political positions helpful to foreign objectives. Subsequently, in 2019 a U.S. entertainer and businessman and a Malaysian financier were indicted for their international efforts to influence U.S. elections by funneling campaign contributions through straw donors. The two were charged with conspiring to make and conceal foreign and conduit campaign contributions during the 2012 presidential election.43
II. The Path Forward: Steps to Strengthen Election Systems and the Development of Best Practices

Ensuring trust and confidence in the election system is critical. Immediate steps are required on multiple fronts to strengthen election systems and combat foreign interference, including securing the election infrastructure, addressing the spread of disinformation, and increasing transparency for voters and election officials. Combating foreign influence through social media requires new and innovative solutions.

A. PRIORITIES FOR THE 2020 ELECTION AND BEYOND

Dozens of thought leaders from the private sector, academia, think tanks, and government have published recommendations to address this complex problem. In brief, the following proposed solutions have emerged and should be implemented to strengthen the election system:

- Continue the designation of election systems as critical infrastructure
- Address chronic underfunding of elections
- Enhance cybersecurity protection of election systems
  - Secure voter registration systems and e-pollbooks
  - Replace outdated voting machines and databases
  - Develop security standards for voting equipment and infrastructure
- Develop the capacity to respond to and recover from cyber incidents
- Enhance cybersecurity resources and expertise, and increase training
- Increase resilience and ensure any attacks are detectable—use voter-verified paper ballots
- Conduct post-election audits—audit the paper trail to high confidence
- Expand and learn from coordinated information sharing
- Create a public campaign to promote election security awareness
- Create international cybersecurity norms
- Develop effective mechanisms to address the spread of disinformation
- Create effective U.S. deterrence to foreign election interference

B. COMPREHENSIVE INFORMATION SECURITY PROGRAM AND RISK ASSESSMENT

Security is only as strong as its weakest link. Most hacker attacks are opportunistic and target not only the largest organizations but all those that are unprepared. Governments, election officials, and their private-sector partners must build strong information security programs to prevent, detect, and address risks of data loss or changes to votes, tabulations, or voter information, and build resilient systems capable of responding to incidents that occur.5

“Confidentiality,” “integrity,” and “availability” (CIA) are the cornerstones of information security.6 In the election context, CIA encompasses critical aspects of
election systems, all of which must be protected in order to ensure integrity of the voting process, as illustrated in Table 9.2.

Conducting a risk assessment is an essential first step to determine how much risk is present in a particular election operating environment and what can be done to mitigate it. Assessing risk requires organizations to identify their threats and vulnerabilities, the harm to the organization that may be caused, and the likelihood that adverse events arising from those threats and vulnerabilities may actually occur. Election officials can then select appropriate security controls and develop a plan to mitigate risks to all components of the electoral process so that the risks will be reduced to a reasonable and appropriate level.

### TABLE 9.2 Election Systems: Threats and Key Security Pillars

<table>
<thead>
<tr>
<th>Confidentiality</th>
<th>Integrity</th>
<th>Availability</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cybersecurity Threats</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Russian attacks on VRDBs and campaigns show the potential for theft of confidential data of voters and candidates around the country.</td>
<td>Cyberattacks that successfully change or manipulate election records could paralyze voting on Election Day, bring operations to a halt, and undermine trust and confidence in elections.</td>
<td>Hackers have launched distributed denial of service (DDoS) attacks to overwhelm targeted systems, and infected systems with ransomware that encrypts data; they demand ransom payments to restore access.</td>
</tr>
<tr>
<td><strong>Protection Objectives</strong></td>
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<td></td>
</tr>
<tr>
<td>Protect personal data and sensitive information.</td>
<td>Ensure accuracy and completeness of data and information.</td>
<td>Information and systems can be accessed and used when needed.</td>
</tr>
<tr>
<td><strong>Voters</strong></td>
<td><strong>Candidates</strong></td>
<td><strong>Votes</strong></td>
</tr>
<tr>
<td>Personal data in voter registration systems (some personal data is public)</td>
<td>Filing systems</td>
<td>Secret ballots</td>
</tr>
<tr>
<td><strong>Voter registration records</strong></td>
<td><strong>Candidate filings</strong></td>
<td><strong>Votes cast</strong></td>
</tr>
<tr>
<td><strong>Election results</strong></td>
<td><strong>Media and messaging</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Voter registration</strong> (in person, online, mail)</td>
<td><strong>Voting</strong> (early, absentee, and on Election Day)</td>
<td><strong>e-Pollbooks</strong> <strong>Voting machines</strong> <strong>Vote counting</strong></td>
</tr>
</tbody>
</table>

To minimize the effects of cyber intrusions and disinformation campaigns, it is necessary to plan a response. This is particularly important with elections. Officials need to be able to respond to threats and any incidents that may occur, including events on Election Day.
C. FRAMEWORKS, STANDARDS, AND BEST PRACTICES

While cybersecurity challenges may seem daunting, existing frameworks, standards, and best practices provide a road map that election officials can follow to reduce the risks to election systems substantially. The National Institute of Standards and Technology (NIST) Cybersecurity Framework enables organizations to apply the principles and best practices of risk management to improve the security and resilience of election systems.50

The U.S. Department of Homeland Security (DHS) Cybersecurity and Infrastructure Security Agency (CISA) published Best Practices for Securing Election Systems in May 2019.51 This guidance, which can be implemented at little or no cost, focuses on these important steps election organizations can take to harden their enterprise networks and strengthen election infrastructure: software and patch management; log management; network segmentation; block suspicious activity; credential management; baseline for host and network activity; organization-wide information technology guidance and policies; and notice and consent banners for computer systems. Videos developed by the FBI for the Protected Voices initiative address the most urgent cybersecurity issues that may leave a political campaign or other election organization’s computer networks vulnerable to attacks.52

In this time of scarce resources, it is important to prioritize security resources so the most critical and vulnerable aspects of the system are addressed first.53 Focusing on the most common attacks such as phishing, ransomware, and stolen credentials, as well as known vulnerabilities in websites, databases, and servers that can put VRDB at risk, is critical.54 Election officials should not purchase or implement devices, software, or systems with known vulnerabilities. The procurement process is an opportunity to strengthen election security by specifying cybersecurity requirements that third-party vendors must meet.55

D. INCREASING RESILIENCE: VOTER-VERIFIED BALLOTS AND POST-ELECTION AUDITS

Replacing aging, outdated, vulnerable voting machines with voter-verified paper ballots or records for every vote cast is a high priority. NAS Securing the Vote recommends that voter-verifiable paper ballots be used everywhere by 2020.56 Existing state requirements for the use of paper ballots and the conduct of post-election audits vary widely across the country.57

Post-election audits check to see that the equipment and procedures used to count votes during an election worked properly and that the election yielded the correct outcome.58

Traditional post-election audits are usually conducted by hand counting a portion of the paper records and comparing them to the electronic results produced by an electronic voting machine. A paper trail is needed to conduct a post-election audit, and it is of concern that 13 states use voting machines that do not have paper backup.
Risk-limiting audits (RLAs) employ statistical models to provide a high level of confidence in the election results. Effective RLAs can go a long way toward identifying any potential inaccuracies, whether accidental or purposeful, and providing assurance that a software vulnerability or malware did not produce an incorrect outcome.59

Further, if the use of paper ballots becomes more widespread, election officials should reexamine current practices for securing the chain of custody of all paper ballots and verify that no opportunities exist for the introduction of fraudulent votes.

E. COMBATING FOREIGN INFLUENCE OPERATIONS

CSIS has made the following recommendations to combat foreign influence in elections:60

- Raise threat awareness and invest in impact-oriented research.
- Improve rapid response and communications capabilities between institutions such as the justice system, appropriate federal entities, and social media platforms.
- Expand civics and media literacy trainings as a national security imperative (build resiliency in the face of national security threats).

In Defending America from Foreign Election Interference, the Council on Foreign Relations has proposed a three-pronged approach to ensure both the technical integrity of the voting system and that voters are not subjected to foreign influence operations that violate U.S. campaign laws.61 It recommends that the United States take the following actions:

- Adopt an unambiguous declaratory policy on election interference to make clear that a cyberattack on America would be met with a robust retaliatory response, including economic sanctions, diplomatic isolation, and counter cyberattacks.
- Improve U.S. defenses against election interference by creating a new agency for cybersecurity to make safeguarding elections a top priority.
- Impose costs on countries that meddle in democratic elections. Just as the fight against terrorism requires a mixture of offensive and defensive measures, election security also needs to include an offensive component. To begin, the United States should automatically sanction countries that interfere with elections.

Deepfakes. The emergence of “deepfake” technology—tools with the potential for not only increasing foreign interference in elections, but also for domestic actors to spread disinformation and disrupt elections across the nation—is cause for alarm.62 The harm could be significant, as it would not be difficult to create a deepfake of an emergency alert warning that an attack was imminent or disrupt a close election by releasing a fake video or audio recording of one of the candidates days
before voting began. Technological deepfake detection solutions, no matter how good they are, will not prevent all of them from being distributed. Improved public awareness must be part of the strategy for combating deepfakes and the complex issues associated with them.

Steps by social media platforms to counter foreign influence. Operators of social media platforms have begun to take action to protect their users from disinformation operations through three types of initiatives: preventing or suppressing inauthentic behavior, improving political advertising transparency, and investing in forward-looking partnerships. For example, Twitter has developed a dedicated reporting tool for users to flag posts with misleading details about voting and has created an Ads Transparency Center. Facebook is focusing on (1) “increasing transparency” with advertising; (2) “strengthening enforcement” by removing fake accounts and updating policies and operations; and (3) “supporting an informed community” by adding context, fighting false news, and reducing clickbait (inauthentic stories).

F. ENSURING ELECTION INTEGRITY

The threat to democratic elections is imminent, adversaries are relentless, and election officials, policy makers, and security experts face complex challenges. Effective solutions require an end to the chronic underfunding of elections. Everyone has a stake in the nation’s elections, and a commitment by all stakeholders to taking immediate action to combat foreign influence operations is required.

Notes


AU: In notes, we changed dates to set in parentheses, except in the one place where a newspaper article was cited to the print version, to conform with Bluebook style.


13. CSIS Election Scorecard, supra note 8.


16. CSIS Election Scorecard, supra note 8; see Verified Voting, The Verifier—Polling Place Equipment—November 2018 (interactive map by state and county), https://www.verifiedvoting.org/verifier.

17. Election security experts believe nearly three dozen backend election systems in ten states were connected to the Internet over the last year, including some in critical swing states. Kim Zetter, Exclusive: Critical U.S. Election Systems Have Been Left Exposed Online Despite Official Denials, MOTHERBOARD TECH BY VICE (Aug. 8, 2019), https://www.vice.com/en_us/article/3kxzk9/exclusive-critical-us-election-systems-have-been-left-exposed-online-despite-official-denials.


25. The Senate Select Committee on Intelligence (SSCI) report states that the Russian-aligned actors targeted state government and vendor systems and “scanned databases for vulnerabilities, attempted intrusions, and in a small number of cases successfully penetrated a voter registration database,” all designed to undermine the election process. Russian Targeting of Election Infrastructure during the 2016 Election: Summary of Initial Findings and Recommendations, U.S. SENATE SELECT COMMITTEE ON INTELLIGENCE (May 8, 2018) [hereinafter SSCI Report on Russian Targeting of Election Infrastructure], https://www.intelligence.senate.gov/publications/russia-inquiry.


32. *Surprise, Maryland—Your Election Contractor Has Ties to Russia*, WASH. POST, July 22, 2018, at A12. According to Nikki Charlson, deputy administrator for Maryland’s State Board of Elections:

   The vendor—ByteGrid LLC—hosts the statewide voter registration, candidacy, and election management system, the online voter registration system, online ballot delivery system, and unofficial election night results website. According to the FBI, ByteGrid LLC is financed by AltPoint Capital Partners, whose fund manager is a Russian and its largest investor is a Russian oligarch named Vladimir Potanin.


34. CSIS Election Scorecard, supra note 8.


41. CSIS, BEYOND THE BALLOT, supra note 38.

42. “The disinformation campaigns rely on frames to level more direct attacks on the justice system.” The last frame, that the “justice system is a tool of the political elite,” was used to undermine the Mueller investigation. \textit{Id.} at 19–32.


46. \textit{Confidentiality}—Protection of information against unauthorized disclosure, whether intentional or accidental. \textit{Integrity}—Protection of information against corruption, tampering, or other alteration; safeguarding the accuracy and completeness of information. \textit{Availability}—Ensuring that information and systems can be reliably and promptly accessed and used when they are needed.

47. The effect of the Mirai botnet 2016 DDoS attack was particularly serious and widely publicized.


49. The Multi-State Information Sharing & Analysis Center (MS-ISAC) provides assistance to election officials in the event of a breach, https://www.cisecurity.org/ms-isac/ (last visited July 29, 2019).


52. FBI, Protected Voices, supra note 37.


56. NAS, supra note 30.


59. Three states have statutory requirements for an RLA: Colorado, Rhode Island, and Virginia. Ohio and Washington allow election officials to select from a list of audit types, one of which is an RLA. In 2020, California counties may conduct an RLA in lieu of a traditional post-election audit.


CHAPTER 10

RANKED-CHOICE VOTING: MAINE’S EXPERIENCE

PETER J. BRANN

I. Introduction

In 2018, Maine became the first state in the country to conduct congressional elections using ranked-choice voting. Ranked-choice voting immediately made a difference in one hotly contested election.

In Maine’s Second Congressional District, four candidates appeared on the 2018 general election ballot—incumbent Republican Bruce Poliquin; Democrat Jared Golden; and two independent candidates, Tiffany Bond and William Hoar. When the Maine secretary of state tabulated the first-round votes, Poliquin received a plurality, but not a majority, of the first-place votes cast, and Golden finished second. Applying ranked-choice voting because no candidate received a majority, once the two independent candidates were mathematically eliminated and their supporters’ second-place choices were allocated between Poliquin and Golden, Golden received a majority of the votes and was declared the winner.

For proponents of ranked-choice voting, it was the best of times. For opponents, it was the worst of times. This chapter will consider the nature and history of ranked-choice voting, and the litigation in Maine challenging the constitutionality of ranked-choice voting.

II. Explanation of Ranked-Choice Voting

Before turning to the history of ranked-choice voting, and the litigation challenging its use, we define what constitutes ranked-choice voting, also known as instant runoff voting. In one of the legal challenges in Maine, the federal district court described ranked-choice voting as follows:

Under ranked-choice voting, the first round proceeds much in the same way it did under the plurality system: Each voter’s first choice vote is counted, and if any candidate captures an outright majority of the first choice votes that candidate wins. But, if no candidate captures a majority of the first choice votes, there is an instant
run-off. The candidate with the fewest first choice votes is eliminated, and all of the ballots that listed him or her as the first choice candidate are counted for their second choice candidate. The process repeats and eliminates more last place candidates until one candidate receives a majority of the votes.5

Proponents contend that ranked-choice voting addresses the leading criticisms of the two most popular voting systems—plurality voting and runoff voting—in elections in which there are more than two candidates. We address each system in turn.

“Plurality voting is the most commonly used voting system for single-member districts in the United States.”6 In such a system, each voter selects one candidate, and the candidate receiving the largest number of votes (i.e., a plurality) is declared the winner.7 This means, of course, that a majority of the voters could oppose the candidate who wins the plurality election.

Plurality voting has its critics. A leading political scientist argued almost 60 years ago that “the simple-majority single-ballot system favors the two-party system.”8 Other critics claim that “the first-past-the-post system ‘effectively disenfranchises a great number, and sometimes even a majority, of the voting population’” because their votes only count if their preferred candidate wins.9 One of the leading criticisms is that plurality voting often places third-party and independent candidates in the role of “spoiler,” which may discourage people from voting for the candidate they actually prefer.10 This occurs when people realize that voting for their preferred candidate could increase the chance of a candidate winning whom they like even less than another leading candidate, which, in turn, causes people to vote not for their preferred candidate but rather for the proverbial lesser of two evils.11 Based upon these and other criticisms, “a majority of political scientists agree that the first-past-the-post, winner-take-all voting system ‘is a peculiarly bad system of democratic self-governance.’”12

Ranked-choice voting aims to address the shortcomings of plurality voting if a contest has more than two candidates. Because voters rank all of their choices, candidates opposed by a majority of the electorate cannot win the election.13 Likewise, voters do not have to worry about “throwing their vote away” on a candidate who is unlikely to win the election; they can vote for their preferred candidate, and then if their preferred candidate is eliminated, their back-up choice of the “lesser of two evils” among the frontrunners is counted.14 Similarly, voters do not have to worry about “spoiler” candidates who may draw votes away from a frontrunner and allow a less popular candidate to win with a plurality, but not majority, of the votes.15

“Runoffs are a well-established feature of the American political system: they are the most common single-winner election method in the United States after the simple plurality vote.”16 “As of 1992, 12 states and hundreds of local governments used runoff voting.”17 Many states in the South use runoff elections to elect state and federal candidates.18 Runoff voting starts with a plurality election. If a candidate receives a majority of the vote, he or she is declared the winner. Otherwise, on a subsequent date, a second election is held between the two candidates receiving
the largest numbers of votes in the first election, and the winner of the runoff election is declared the winner.19

One of the leading criticisms of runoff voting is the cost of conducting two elections instead of one.20 “Runoff voting would probably be used more frequently if not for the time and expense of holding a second election.”21 Critics also complain that voter turnout usually declines in runoff elections.22 A study conducted by ranked-choice voting proponents found that the average reduction in turnout in runoff elections for U.S. Senate and U.S. House seats was more than 35 percent.23 Based on these and other criticisms,24 runoff voting is used far less often than plurality voting in single-member district elections.

Ranked-choice voting also is intended to address the shortcomings of runoff voting. Because the voters rank the candidates in a single ballot, there is not the cost and delay of holding a second election.25 Because it is an instant runoff and not a second election, there also is no drop-off in voter participation in the runoff election unless a voter affirmatively chooses to rank only one candidate.

To be sure, ranked-choice voting has its critics. In addition to cost, complexity, and confusion,26 some commentators have argued that “the complicated counting scheme involved in instant runoff voting can result in unintended consequences, because ranking a candidate higher can actually cause the candidate to lose, and ranking a candidate lower can cause the candidate to win.”27 “In addition, it is possible for a candidate to lose even if he or she is preferred over each of the other candidates by a majority of the voters.”28

This problem violates one of the five normative criteria developed by the Nobel Prize winning economist Kenneth Arrow that he argued any voting system should satisfy, known as “monotonicity,” namely, that if a voter changes his or her ballot by raising the ranking of a candidate, then it must help that candidate.29 No voting system, however, satisfies all five of Arrow’s normative criteria.30 In other words, “[n]o perfect election system has been devised.”31

III. Ranked-Choice Voting Outside of Maine

The use of ranked-choice voting started slowly in the early 20th century, and recently accelerated, culminating in Maine’s adoption in 2016 of ranked-choice voting for all state and federal elections (other than U.S. president). Florida, Indiana, Maryland, Minnesota, and Wisconsin used ranked-choice voting in the early 20th century.32 Ann Arbor, Michigan, used instant runoff voting beginning in 1975.33 San Francisco used instant runoff voting for the first time in 2004.34 Many municipalities have passed referendums to implement instant runoff voting, including large cities such as Memphis, Tennessee, and St. Paul, Minnesota.35

This trend has recently accelerated. Although later repealed, in 2010, North Carolina held three ranked-choice elections for local judges and one statewide ranked-choice election for an appellate judge, making North Carolina the first state to use
ranked-choice voting in a statewide race. Mississippi and Georgia now both use a form of instant runoff voting for overseas or military ballots for all races, including statewide and congressional races, which is different from the runoff elections they use for other voters.

With increased use of ranked-choice voting comes increased litigation. No case decided outside of Maine has invalidated the use of ranked-choice voting for any election.

In an unreported trial court decision from a Michigan Circuit Court in 1975, the court upheld the use of ranked-choice voting in the mayoral election in Ann Arbor. In that case, the plaintiff received a plurality, but not majority, of the first-choice votes, and then lost the election when the second-choice votes of the third-place candidate were allocated between the two leading candidates. In addition to rejecting challenges based on state law, the court rejected an equal protection challenge to the use of ranked-choice voting.

In 1996, Massachusetts's highest court upheld the use of ranked-choice voting to select members of Cambridge's city council. The court rejected a losing candidate's equal protection challenge to the use of ranked-choice voting to fill a vacancy on the city council.

Similarly, in 2009, Minnesota's highest court upheld the use of instant runoff voting for municipal elections in Minneapolis. The court held that instant runoff voting did not violate the voters' federal constitutional right to vote, right to political association, or right to equal protection under one-person, one-vote principles.

Finally, in 2011, the Ninth Circuit upheld the use of instant runoff voting for most municipal elections in San Francisco. Due to limitations in the election equipment at the time, San Francisco's version of instant runoff voting only counted the first three choices of voters, regardless of the total number of candidates. In addition to rejecting challenges to this unique aspect of San Francisco's instant runoff voting system, the court rejected voters' First and 14th Amendment challenges, finding that the system did not unconstitutionally burden the right to vote or the right to equal protection. In sum, before Maine embarked on the ranked-choice voting experiment, no court had invalidated the use of ranked-choice voting.

IV. Ranked-Choice Voting in Maine

Given the prominence of independent and third-party candidates in Maine, it is not surprising that Maine became the first state to adopt ranked-choice voting for state and federal elections. Maine was the first state to elect an independent governor, followed by Minnesota, Connecticut, and Alaska. In 1974, Independent James Longley defeated Republican Attorney General James Erwin and future Democratic U.S. Senate Majority Leader George Mitchell. In 1994, Independent Angus King defeated former Democratic Governor Joseph Brennan and future Republican U.S. Senator Susan Collins. In 1998, Independent Governor King coasted to re-election with nearly 59 percent of the vote. In 2012, and again in 2018, Independent Angus
King was elected to the U.S. Senate over Democratic and Republican candidates, receiving more than 50 percent of the vote each time. In short, independent candidates often defeated prominent major party candidates in Maine, sometimes decisively.

Even when independent candidates do not win Maine elections, they frequently are major players receiving a substantial portion of the vote. From 1974 through 1998, ten independent candidates ran for governor, and three of them, plus Angus King, received more than 14 percent of the vote. In 2006, Independent Barbara Merrill received more than 21 percent of the vote and Green Party candidate Patricia Lamarche received more than 9 percent of the vote. In 2010, Republican Paul LePage won the election with 38.2 percent of the vote, with Independent Eliot Cutler close behind at 36.5 percent (and Democratic State Senate President Libby Mitchell lagging far behind). In 2014, Republican Governor LePage won re-election with 48.2 percent of the vote, with Democratic U.S. Representative Mike Michaud trailing at 43.3 percent, and Independent Eliot Cutler receiving 8.4 percent. In short, since 1974, only the 1982 Maine gubernatorial election did not feature a significant independent or third-party candidate. Because of the prominence of independent and third-party candidates in virtually every election, it is not surprising that when Democratic Governor Janet Mills won in 2018, she became the first non-incumbent Maine governor since 1966 to win a majority of the vote.

As this thumbnail history demonstrates, Republican, Democratic, and Independent candidates all have won Maine gubernatorial races in the past 45 years, sometimes with less than 40 percent of the vote. Likewise, Republican, Democratic, and Independent candidates all have finished third or lower in such races, thereby earning the title of “spoiler” in the eyes of the second-place finisher and his or her supporters. With this history as a backdrop, after numerous false starts, Maine adopted ranked-choice voting for state and federal elections.

For years, the Maine Legislature considered—and failed to approve—ranked-choice voting. Voters then took matters into their own hands and, in 2016, enacted citizen-initiated legislation by referendum to implement ranked-choice voting for general and primary elections beginning in 2018 for the offices of U.S. senator, U.S. representative, governor, state senator, and state representative. In 2017, before the voter-approved ranked-choice voting system could be implemented, the Maine Senate sought an advisory opinion from the justices of the Maine Supreme Judicial Court concerning the constitutionality of ranked-choice voting under the Maine Constitution.

After concluding that it was proper to issue an advisory opinion, the justices opined that the citizen-initiated statute authorizing ranked-choice voting would be unconstitutional as applied to the general elections for governor, state senator, and state representative. The justices reasoned that the Maine Constitution provisions governing those offices only required a plurality to win, whereas the Ranked-Choice Voting Act required a majority. Because the Maine Senate did not request an opinion concerning primary elections for governor, state senator, and state representative,
which are governed entirely by statute, the justices did not opine that the use of
ranked-choice voting for such primary elections was unconstitutional. Likewise,
the Maine Constitution says nothing about the election of U.S. senator or U.S. rep-
resentative, so the justices were not asked, and did not opine, about the constitut-
ionality of using ranked-choice voting in either the primary or general elections for
such offices.

In sum, the justices opined only that the use of ranked-choice voting in the gen-
eral election—but not the primary election—for the offices of governor, state sena-
tor, and state representative was unconstitutional under the Maine Constitution.
Spoiler alert: this is the only opinion in the country that has ever invalidated the use
of ranked-choice voting for any office on any legal theory.

Initially, the Maine Legislature was unable to address the fallout of the Opinion
of the Justices that invalidated some, but not all, of the Ranked-Choice Voting Act. Efforts in early 2017 to send to the voters a proposed constitutional amendment
to implement ranked-choice voting for the general election of governor, state sena-
tor, and state representative failed, as did the mirror efforts to repeal ranked-choice
voting altogether. Later in 2017, the Maine Legislature passed a statute to “imple-
ment” the Ranked-Choice Voting Act, which delayed implementation of ranked-
choice voting until December 1, 2021, and repealed ranked-choice voting entirely
if the Maine Constitution was not amended by that time to impose ranked-choice
voting for the general election of governor, state senator, and state representative.

Once again, voters took matters into their own hands, and, in February 2018,
proponents submitted enough signatures to place a people’s veto on a referendum
ballot to veto the “implementing” statute. The Maine secretary of state certified
the signatures and placed the people’s veto on the ballot in June 2018 at the same
time that ranked-choice voting was going to be used for the first time for all state
and federal primary elections. Meanwhile, under the Maine Constitution, the por-
tions of the “implementing” statute subject to the people’s veto referendum were
“suspended” pending the outcome of that vote.

Given the confusion over a ballot containing both ranked-choice voting and
another referendum about whether to use ranked-choice voting, further litigation by
proponents and opponents of ranked-choice voting was perhaps inevitable. In Feb-
uary 2018, voters and some gubernatorial and congressional candidates filed suit
seeking a court order requiring the Maine secretary of state to implement ranked-
choice voting in the upcoming primary election. As the case unfolded, the critical
issue became whether there was a conflict among the state laws regulating primary
elections. On the same day in April 2018 that the trial court declared that ranked-
choice voting must be used in the upcoming primary elections, the Maine Senate
sued the secretary of state to halt the implementation of ranked-choice voting in
the upcoming primary elections. The issue, once again, was whether the Ranked-
Choice Voting Act, as applied to primary elections, conflicted with other provisions
of Maine law. In a decision issued less than three weeks after the lawsuit had been
filed, Maine’s highest court concluded that the later-passed Ranked-Choice Voting
Act had impliedly repealed the earlier, allegedly conflicting statute governing determining the winner of primary election contests, clearing the way for the use of ranked-choice voting in the upcoming June primary.  

This, however, was not the end of the litigation before the June primary. In May 2018, the Maine Republican Party filed suit in federal court seeking to enjoin the use of ranked-choice voting in the Republican primary elections scheduled for June 2018.  

The Maine Republican Party argued that the use of ranked-choice voting in the Republican primary election would violate its First Amendment right to freedom of association. Because the Maine Republican Party had adopted a rule at its recent state convention opposing the use of ranked-choice voting, it claimed that the state would violate its right to freedom of association by foisting this voting system on it in a primary election. The district court denied the motion for a preliminary injunction principally because it concluded the plaintiff was unlikely to succeed on its legal theory.  

The district court acknowledged that “[t]he right to associate with the political party of one’s choice is an integral part of this basic constitutional freedom.” The court also stated: “What is more, the Supreme Court has repeatedly ‘affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party “select[s] a standard bearer who best represents the party’s ideologies and preferences.”’”  

On the other side of the ledger, however, the district court observed that, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” Thus, “when a party avails itself of a state-administered election, it compromises some of its self-governance in exchange for access to the state apparatus.”  

Turning to the impact of ranked-choice voting on the Maine Republican Party, the district court concluded that it “would not interfere with the internal governance or processes of the Maine Republican Party” and thus was “unlikely to impose a severe burden on a party’s associational rights.” Taking into account the state’s interests, namely, conducting statewide elections in an orderly manner, and establishing a uniform set of rules governing the process of casting and counting ballots at the primary election for all parties, the court concluded that the Ranked-Choice Voting Act did not violate the party’s associational rights.  

On June 12, 2018, after three trips to state court and one trip to federal court, Maine finally conducted its first election with ranked-choice voting in the primary elections for the offices of U.S. senator, U.S. representative, governor, state senator, and state representative. In four primary election contests, there were three or more candidates, and thus votes might be counted using ranked-choice voting. In two of those elections (Republican gubernatorial and Republican House District 75 primaries), one candidate received more than 50 percent of the first-choice votes, and thus counting using ranked-choice voting was unnecessary. In the other two
elections (Democratic gubernatorial and Democratic Second Congressional District primaries), the Maine secretary of state collected the ballots and counted the votes using ranked-choice voting, declaring the winners on June 20, 2018 (i.e., eight days after the election). Meanwhile, Maine voters also approved the people’s veto, which scuttled the attempt to delay the use of ranked-choice voting in state and federal Maine elections.

In light of the Opinion of the Justices invalidating the use of ranked-choice voting for state general elections, only the federal elections were eligible to use ranked-choice voting in the November 2018 general election. In the races for U.S. Senate and the First Congressional District, there were more than two candidates, but the winning candidate received more than 50 percent of the first-choice votes, and thus it was unnecessary to count the votes using ranked-choice voting. That leaves the Second Congressional District.

As noted at the outset, there were four candidates in the general election for the Second Congressional District: incumbent Republican Bruce Poliquin; Democrat Jared Golden; and two independent candidates, Tiffany Bond and William Hoar. The Maine secretary of state instructed voters how to mark the ballot. See Figure 10.1.

**FIGURE 10.1 Second Congressional District Ranked-Choice Ballot 2018**

<table>
<thead>
<tr>
<th>Rep. to Congress</th>
<th>1st Choice</th>
<th>2nd Choice</th>
<th>3rd Choice</th>
<th>4th Choice</th>
<th>5th Choice</th>
</tr>
</thead>
<tbody>
<tr>
<td>District 2</td>
<td></td>
<td></td>
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<tr>
<td>Bond, Tiffany L.</td>
<td></td>
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<tr>
<td>Portland Independent</td>
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<tr>
<td>Golden, Jared F.</td>
<td></td>
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<tr>
<td>Lewiston Democratic</td>
<td></td>
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<td></td>
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</tr>
<tr>
<td>Hoar, William R.S.</td>
<td></td>
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<tr>
<td>Southwest Harbor Independent</td>
<td></td>
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<td></td>
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<tr>
<td>Poliquin, Bruce</td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Oakland Republican</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Write-in</td>
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<td></td>
</tr>
</tbody>
</table>

On November 6, 2018, Maine conducted its general election. Based upon unofficial results, Poliquin received a plurality, but not a majority, of the votes cast (130,916 votes, or 46.3 percent); Golden came in second (128,915 votes, or 45.6 percent); Bond came in third (16,088 votes, or 5.7 percent); and Hoar came in fourth (6,717 votes, or 2.4 percent). Because no candidate won a majority of the votes, the Maine secretary of state officially announced on November 13, 2018, that the ballots would be collected and counted using ranked-choice voting.
Immediately following that announcement, Poliquin and three supporters who voted only for Poliquin filed a federal lawsuit seeking a temporary restraining order to prevent the secretary of state from counting the votes using ranked-choice voting.96 Two days later, on November 15, 2018, in a prelude to its more extensive decision denying the motion for a preliminary injunction, the district court denied the motion and refused to stop the counting process primarily on the grounds that the plaintiffs were unlikely to prevail on any of their legal theories.97

On November 26, 2018, the secretary of state counted the ballots using ranked-choice voting.98 Because it was mathematically impossible for either Bond or Hoar to win the election, they were eliminated together, and their voters’ ballots were examined to count second choices for the two remaining candidates, Golden and Poliquin.99 Once those second-choice votes were added to the first-choice votes that Golden and Poliquin had received already, Golden was declared the winner with 142,440 votes and 50.62 percent of the total, and Poliquin lost with 138,931 votes and 49.38 percent of the total.100 In other words, the plurality leader lost the race when the secretary of state counted what a majority of the voters preferred under the ranked-choice voting system.

The plaintiffs then returned to federal court challenging this result on numerous grounds and seeking a preliminary injunction (converted into a trial on merits at the preliminary injunction hearing) to prevent the secretary of state from certifying the election.101 On December 13, 2018, the district court squarely rejected each of the plaintiffs’ legal theories.

First, the plaintiffs argued that ranked-choice voting violated the Voting Rights Act.102 The district court held that the Voting Rights Act was limited to racial discrimination and thus had nothing to do with ranked-choice voting.103

Second, the plaintiffs contended that ranked-choice voting violated two provisions of Article I of the U.S. Constitution. The plaintiffs pointed first to the Qualifications Clause, which provides: “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States.”104 The plaintiffs then pointed to the Elections Clause, which provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”105 The plaintiffs argued that “the force of history calls for the Court to interpret Article I as requiring a plurality or ‘first-past-the-post’ standard for deciding election results.”106 The district court found, however, that “[t]here is no textual support for this argument and a great deal of historical support to undermine it.”107

The district court conducted an exhaustive historical analysis of the meaning of these clauses at the time of the Constitutional Convention, and concluded that they provided no support for the plaintiffs’ historical argument that the U.S. Constitution enshrined plurality voting for congressional elections.108 Coupled with the Supreme Court’s broad statements for many years that states have wide latitude in designing and operating their voting systems under the Elections Clause, the court emphatically rejected the plaintiffs’ structural constitutional argument.109
Third, the plaintiffs contended that ranked-choice voting violated the Equal Protection Clause of the 14th Amendment because it violated the principle of one person, one vote. Although “Plaintiffs insist that their votes received less weight,” the district court found that was simply not true. The court further found that there was nothing insidious about Maine insisting on a majority, instead of a plurality, to win an election.

Fourth, the plaintiffs’ next arrow in their quiver was that ranked-choice voting violated the Due Process Clause of the 14th Amendment because it would produce “arbitrary or irrational election results” based on the assertion that a significant portion of the electorate cannot comprehend ranked-choice voting sufficiently to cast a meaningful vote. “To put it generously, Plaintiffs have not demonstrated persuasively that the inferences that they draw from the ballot data are more likely true than false.” Indeed, the court refused to credit the plaintiffs’ expert testimony that voters were confused by ranked-choice voting, or to give the expert’s testimony “any weight” in evaluating the constitutional issues at hand. In short, the court concluded that the ranked-choice voting in Maine was “not so opaque and bewildering that it deprives a class of citizens of the fundamental right to vote.”

Fifth, the plaintiffs argued that ranked-choice voting violated their right to free speech under the First Amendment because “Maine is giving other voters disproportionate expression.” Consistent with every other court that has considered any federal constitutional challenge to ranked-choice voting, the district court found that this voting system was not subject to strict scrutiny. The court then administered the coup de grâce to the plaintiffs’ final legal argument: the Ranked-Choice Voting Act “actually encourages First Amendment expression, without discriminating against any voter based on viewpoint, faction or other invalid criteria.” In sum, the district court deconstructed and then demolished every legal roadblock thrown up by the plaintiffs, enabling Jared Golden to win the first congressional election conducted using ranked-choice voting.

V. Conclusion

The outcome of this litigation was everything ranked-choice voting proponents desired and opponents feared—the candidate supported by a majority of the voters won the election, and the candidate supported by a plurality of the voters, but opposed by a majority of the voters, lost the election. Maine became the first state in the country to conduct congressional elections using ranked-choice voting, and it made a difference.

Maine only adopted ranked-choice voting after passing two popular referendums, setting aside legislative efforts over many years to bury, delay, repeal, or gut ranked-choice voting as an option. Opponents then took to the courts again, and again, to try to stop ranked-choice voting. Opponents lodged a kitchen sink of arguments in state and federal court against ranked-choice voting, alleging violations of the Maine Constitution; Maine statutes; the Appointments Clause and the
Elections Clause of Article I to the U.S. Constitution; the Free Speech Clause and the Free Association Clause of the First Amendment to the U.S. Constitution; the Equal Protection Clause and the Due Process Clause of the 14th Amendment to the U.S. Constitution; and the Voting Rights Act. Other than the state constitutional argument governing the general election of state officers, the opponents to ranked-choice voting came up empty. Maine’s state motto is Dirigo, which means “I lead.” Whether others will follow remains to be seen.

Notes

2. Id. at 129.
3. Id. at 130.
4. Id. at 131.
5. Me. Republican Party v. Dunlap, 324 F. Supp. 3d 202, 205 (D. Me. 2018) (citations omitted); see also G. Scott Edwards, Empowering Shareholders or Overburdening Companies? Analyzing the Potential Use of Instant Runoff Voting in Corporate Elections, 68 Vand. L. Rev. 1335, 1339–40 (2015) (describing mechanics of instant runoff voting). As implemented by the Maine secretary of state, when more than one candidate was mathematically eliminated (i.e., it was mathematically impossible for those candidates to obtain a majority of the votes), the Maine secretary of state would conduct a “batch elimination” of all of the candidates who had been mathematically eliminated. See Baber, 376 F. Supp. 3d at 131.
7. Id.
10. Id.
11. Id.
14. See id. at 1581.
15. Id.
17. O’Neill, supra note 6, at 333 (footnote omitted).
19. O’Neill, supra note 6, at 333 (footnote omitted).
20. One commentator noted that San Francisco, Alabama, and North Carolina each spent $2–4 million apiece to administer a single runoff election. See Langan, supra note 13, at 1583.
23. FairVote, Federal Primary Election Runoffs and Voter Turnout Decline, 1994–2002, at 4 (2013). The study found that decline was even more significant, 48.1 percent, if the runoff election was more than 30 days after the first election. Id. at 6.
24. Some commentators have argued that the use of runoff voting in the South was used to disenfranchise racial minorities. See Matthew G. McGuire, Assessing the Legality of Runoff Elections under the Voting Rights Act, 86 Colum. L. Rev. 876 (1986).
25. See Langan, supra note 13, at 1583–84.
27. Id. at 1593–94 (emphasis in original and quotation omitted).
28. Id. at 1594.
29. See O’Neill, supra note 6, at 339 (citing Kenneth J. Arrow, Social Choice and Individual Values 59 (2d ed. 1963)). Arrow’s five normative criteria for any voting system are (1) “Universal Admissibility: All possible rankings of candidates must be admissible”; (2) “Nonimposition: The winner must be determined from the voters’ preferences”; (3) “Nondictatorship: One voter cannot always determine the winner of the election”; (4) “Monotonicity: If a voter changes his ballot by raising the ranking of a candidate, then it must help that candidate”; and (5) “Independence from Irrelevant Alternatives (Independence): If a losing candidate is taken out of an election (or added to an election) and the ballots recounted, then the winner of the election must not change.” Id. (footnote omitted).
30. Id.
31. Dudum v. Arntz, 640 F.3d 1098, 1100 (9th Cir. 2011) (upholding the use of instant runoff voting in San Francisco); see also Minn. Voters Alliance v. City of Minneapolis, 766 N.W.2d 683, 695 (Minn. 2009) (“Arrow proved mathematically, in what is known as Arrow’s Theorem, that no voting system can satisfy all of the desired conditions that he identified.”) (upholding the use of instant runoff voting in Minneapolis).
32. O’Neill, supra note 6, at 333.
33. Id.
34. Id.
35. Edwards, supra note 5, at 1343.
36. Id. at 1342–43.
38. Stephenson v. Ann Arbor Bd. of City Canvassers, No. 75-10166-AW (Mich. Cir. Ct. 1975). Although unpublished, a copy of this decision was submitted as an exhibit in the Maine litigation concerning ranked-choice voting, and thus is available on Pacer. See Baber v. Dunlap, No. 1:18-cv-465-LEW, ECF No. 43-1 (D. Me.).


40. See id. at 4–7.


42. See id. at 15–17.

43. Minn. Voters Alliance v. City of Minneapolis, 766 N.W.2d 683 (Minn. 2009).

44. See id. at 689–98.

45. Dudum v. Arntz, 640 F.3d 1098 (9th Cir. 2011).

46. See id. at 1101.

47. See id. at 1107–14.

48. An “independent” candidate is one who is not enrolled in a recognized political party on and after March 1 of the election year. Me. Rev. Stat. tit. 21-A, § 353. In addition to the Republican and Democratic Parties, at various times the Libertarian and Green Parties have been recognized political parties in Maine.


50. Id. at 171–72.

51. Id. at 165–66.

52. Id. at 203.


54. Potholm, supra note 49, at 203. In 1986, two independent candidates received a total of 30 percent of the vote, while the winning Republican John McKernan only received 40 percent of the vote. See id. at 139, 203.


60. See, e.g., L.D. 518, 126th Leg., 1st Reg. Sess. (Me. 2013); L.D. 1126, 125th Leg., 1st Reg. Sess. (Me. 2011); L.D. 1344, 124th Leg., 1st Reg. Sess. (Me. 2009).


62. Maine’s Constitution allows the justices of the Maine Supreme Judicial Court to issue advisory opinions under certain circumstances. See Me. Const. art. VI, § 3.

63. See Opinion of the Justices, 162 A.3d 188, 198–208 (Me. 2017).

64. See id. at 209–11 (interpreting Me. Const. art. IV, pt. 1, § 5; id. pt. 2, § 4; id. pt. 1, § 3). One commentator presciently predicted that state constitutions would likely be the biggest barrier to adopting ranked-choice voting. See Langan, supra note 13, at 1573.

65. See Me. Senate v. Sec’y of State, 183 A.3d at 752 n.5.

66. See generally Opinion of the Justices, 162 A.3d 188.

67. See Me. Senate v. Sec’y of State, 183 A.3d at 752.

68. See id. (citing L.D. 1256, 128th Leg., 1st Reg. Sess. (Me. 2017); L.D. 1624, 128th Leg., 1st Reg. Sess. (Me. 2017); L.D. 1625, 128th Leg., 1st Reg. Sess. (Me. 2017)).

69. See id. at 752–53 (citing 2017 Me. Laws ch. 316, §§ 1–14 (effective Feb. 5, 2018)).

70. See id. at 753. Under Maine’s Constitution, if the voters submit sufficient signatures, a referendum vote is held on whether to veto a statute passed by the Maine Legislature and the statute’s implementation is stayed until the vote is held. See Me. Const. art. IV, pt. 3, §§ 17, 20; Me. Rev. Stat. tit. 21-A, §§ 901–906.

71. Me. Senate v. Sec’y of State, 183 A.3d at 753.

72. See id. (citing Me. Const. art. IV, pt. 3, § 17(2)).


74. See id. at 754.

75. Id.

76. See id. at 755–59.

77. Id.


79. Id.; see U.S. Const. amend. I (Free Association Clause).


81. Id. at 213.

82. Id. at 207 (brackets added by court and quoting Cool Moose Party v. Rhode Island, 183 F.3d 80, 82 (1st Cir. 1999); Kusper v. Pontikes, 414 U.S. 51, 56–57 (1973)).

84. Id. (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).
85. Id. (citing N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196, 202–03 (2008)).
86. Id. at 210.
87. Id. at 212–13.
89. Id. In both cases, the leader after the counting of the first-choice ballots ultimately won the primary election. In the Democratic gubernatorial primary, there were seven candidates, and it took four rounds of counting under the ranked-choice voting system for Janet Mills to obtain more than 50 percent of the votes and be declared the winner. See Maine Secretary of State, Tabulations for Elections Held in 2018, https://www.maine.gov/sos/cec/elec/results/results18.html (last visited Oct. 15, 2019). In the Democratic congressional primary, there were four candidates, one of whom withdrew about a month before the election, and it took two rounds of counting under the ranked-choice voting system for Jared Golden to obtain more than 50 percent of the votes and be declared the winner. See id.
90. Maine Secretary of State, supra note 89.
91. Id.
93. Id.
95. Id. at 72.
96. Id.
97. See id. at 75–80.
98. Baber, 376 F. Supp. 3d at 131.
99. Id.
100. Id.
101. Id. at 128.
103. See Baber, 376 F. Supp. 3d at 133.
104. U.S. Const. art. 1, § 2, cl. 1. In their motion for a temporary restraining order, the plaintiffs’ primary argument was that this constitutional provision implied that plurality voting was required, relying upon a Nixon-era Second Circuit decision. See Phillips v. Rockefeller, 435 F.2d 976, 980 (2d Cir. 1970) (“the provision has always been construed to mean that the candidate receiving the highest number of votes at the general election is elected, although his vote be only a plurality of all votes cast”). After the district court debunked this argument as dicta describing historical practice but not a constitutional mandate, see Baber v. Dunlap, 349 F. Supp. 3d 68, 75 (D. Me. 2018), the plaintiffs deemphasized this argument.
106. Baber, 376 F. Supp. 3d at 134.
107. Id.
108. See id. at 135–38.

109. See, e.g., id. at 134 (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)) (“It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.”); see also id. at 134 & n.13, 136 (citing Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 8 (2013), and Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n, 135 S. Ct. 2652, 2676 (2015), respectively).

110. See id. at 138; see also U.S. Const. amend. XIV, § 1 (Equal Protection Clause).

111. Baber, 376 F. Supp. 3d at 140–41. In this regard, the court also relied upon the uniform case law from elsewhere discussed above that had reached the same conclusion. See id. at 141 n.21 (collecting cases).

112. See id. at 141–42.

113. Id. at 143; see also U.S. Const. amend. XIV, § 1 (Due Process Clause).

114. Baber, 376 F. Supp. 3d at 143.

115. Id. at 144.

116. Id. at 145.

117. Id.; see also U.S. Const. amend. I (Free Speech Clause).

118. Baber, 376 F. Supp. 3d at 145.

119. Id.
CHAPTER 11

VOTER FRAUD CLAIMS IN AMERICA: A HISTORICAL REVIEW OF HOW VOTER FRAUD CLAIMS HAVE SHAPED POLICY AND AFFECTED VOTERS

ALLEGRA LAWRENCE-HARDY AND MAIA COGEN

Since the adoption of the 15th Amendment in 1870, which gave the right to vote to all male citizens of the United States regardless of “race, color, or previous condition of servitude,”¹ a myriad of suppressive tactics have kept people from the polls. Although the days of more overt tactics—such as poll taxes, literacy tests, grandfather clauses, and acts of violence—meant to intimidate and disenfranchise primarily communities of color from exercising their right to vote are (arguably) over, communities of color, immigrants, young voters, and other often-marginalized groups continue to be targeted by tactics aimed at keeping them from the franchise.² But, today’s suppressive tactics are more subtle, more calculated, and often designed to hide beneath the guise of necessary “state action” or camouflaged as a concern for voter security.³ Like their statutory predecessors, including the poll tax and grandfather clause, today’s tactics are also often legal maneuvers with the effect of making the franchise less accessible to certain targeted groups of the electorate.

One tactic used to engender fear amongst some members of the electorate has been the spread of unfounded claims of voter fraud and vote stealing. Some experts narrowly define voter fraud as the “intentional, deceitful corruption of the electoral process by voters.”⁴ According to experts, such as Dr. Lorraine Minnite, the “[i]ntent to commit fraud is essential” for a finding of voter fraud, and differs from voter error.⁵ Voter fraud includes allegations of in-person voter fraud, noncitizen voting, double voting, and voter-registration rolls that contain ineligible voters who should be removed.⁶ Voter fraud differs from claims of election fraud, or election/vote stealing, as such crimes cannot be perpetrated by individual workers, but require the involvement of elected or election officials, candidates, political parties, campaign workers, or other individuals or entities with access to the inner workings of the elections process and machinery and who can manipulate election outcomes due to their access.⁷ Notably, the distinction between voter fraud and election fraud is significant, because while some commentators may use the concepts of voter fraud and
election fraud interchangeably to garner support for legislation and policies that can allegedly counteract such crimes, the measures normally enacted usually can only counteract voter fraud, and, thus, work to impact individual voters.8

Claims of voter fraud and election fraud have been used by politicians and political pundits for decades, often as a tool to enact laws that make it more difficult for certain eligible voters to vote, or to oppose laws that could remove barriers to voting and make the process more fair for all.9 For example, in 2018, 35 states had laws in force requesting or requiring voters to show some form of identification at the polls.10 Yet despite numerous reports that voter fraud is rare,11 and studies that demonstrate that voter fraud is not only illogical, but also risky for those people who would attempt to commit such a crime,12 claims of voter fraud and vote stealing continue to grow. As a result, legislation and policies that disenfranchise eligible voters continue to find credibility in jurisdictions across the United States. And while competing studies exist on whether such legislation and policies may affect voter turnout, what has been proven is that some legislation and policies create less access or higher barriers to political participation for certain voters.13

This chapter will summarize the history of voter fraud claims, and how such claims have been used historically for political gains, and review how such claims have been used to fuel legislative and policy efforts with the intention of curbing voter fraud and vote stealing. Next, this chapter will review the reality of voter fraud and vote stealing claims, and what the evidence demonstrates regarding the veracity of such claims. The chapter will end with a review of the impact of such claims on voter turnout.

I. History of Voter Fraud Claims and Legal Maneuvers to Counteract Alleged Claims

Claims of voter fraud and election fraud have existed for centuries. Unsurprisingly, lawmakers have been able to use such claims of fraud to enact policies and legislation that disenfranchise certain communities of the electorate, particularly the poor, immigrants, people of color, and women. Even before passing the 15th Amendment in 1870, politicians used the idea of fraud to diminish guaranteed rights and maintain political power. For instance, New Jersey, which near the beginning of the 19th century extended the franchise via the state’s constitution to free African Americans and was the first state to extend the vote to single women managing a household, removed the right to vote for both groups in 1807.14 Black people and women at the time were more likely to favor politically the Federalist Party over the competing Republican Party.15 The state legislature’s reinterpretation of the state constitution to exclude African Americans and women was packaged as an effort to combat fraud: the Republicans had lost a state legislative seat to the Federalists in 1802 by a single vote, and Republicans claimed that a married woman and a female slave had voted for the Federalist candidate.16 The first woman was separated from her husband, and thus allowed to vote, and the second woman was a free woman
also allowed to vote. A year before the state legislature revoked the right to vote for women and African Americans, one politician even claimed that men were voting in men’s clothes, and then changing into dresses to vote again as women. The claims of voter fraud were unsubstantiated, but rather a ploy by the party in political power to maintain that power in a manner that is now all too familiar—by disenfranchising groups that did not support their political views.

Some of the nation’s first voter registration laws were enacted under the guise of quelling fears of voter fraud, but also had a disproportionate negative impact on poor and immigrant voters. For example, Pennsylvania passed its first voter registration law in 1836, which required elections officials to compile the list of eligible voters by going door to door. Yet the elections officials often conducted their compilation during hours when poor members of the electorate frequently were not home, and the poorer citizens also could not afford nameplates on their doors to provide elections officials with name information. In 1866, California passed a restrictive voter registration requirement that openly targeted immigrants. According to historian Alexander Keyssar:

To register, naturalized citizens had to present to the county clerk their original, court-sealed naturalization papers. In the absence of such papers, an immigrant’s eligibility could be established only through the testimony of two “householders and legal voters” and by residence in the state for a full year, double the normal requirement. The deadline to register was three months before the general election.

In 1866 and 1867, New Jersey passed voter registration laws requiring electors to register in person by the Thursday before each general election. Democrats opposed the law, arguing that the laws discriminated against the poor who could not take time off work to register. New Jersey also passed “sunset laws,” which closed voter rolls at sunset based on the assumption that voter fraud would occur after dark. Democrats also opposed this law, arguing that the sunset laws prevented the working class from voting.

Political corruption and claims of voter fraud and election fraud in the 19th and early 20th centuries were not all unfounded, however. For example, there are documented cases (albeit rare) of in-person voter fraud. Political machines in large cities such as Chicago and New York run by well-known and well-paid bosses, such as Tammany Hall’s William Marcy “Boss” Tweed, who notoriously allegedly provided votes in bulk for candidates who paid the right money, have been portrayed in various forms of media, and have painted a picture that 19th and 20th century voter fraud ran rampant across the entire country. But outside of such well-known instances in large cities, evidence of such fraud is scarce.

In 1865, following the Civil War, the federal government instituted Reconstruction, a period intended to rebuild the South and help ensure the rights of the newly freed slaves. During Reconstruction, mostly due to the occupation of federal soldiers in the southern former-Confederate states, political participation saw a new increase as newly freed slaves enjoyed the right to vote and to hold political office.
for the first time in relatively large numbers. More than 700,000 Black voters voted for the first time in the 1868 presidential election. During Reconstruction, and with protection from federal soldiers, Black voter participation exceeded 90 percent in many elections. Black people used their political rights to run for elected office, and won seats in unprecedented numbers, even in the South. For instance, Black legislators constituted the majority of the lower house in South Carolina’s state legislature. In 1869, 20 Black people, some former slaves, were elected to the U.S. Congress. For the first time since this country’s inception, former slaves relied on, and believed in, the protection provided by the Reconstruction Amendments—the 13th, 14th, and 15th Amendments—to provide them with the equality that the Constitution promised, but had never delivered.

1877 saw an abrupt end to the political progress that Black people had enjoyed during Reconstruction. The Hayes-Tilden Compromise, or the Compromise of 1877, resulted from negotiations between Republicans and Democrats stemming from the presidential election of 1876, in which Republicans (the party of Abraham Lincoln) agreed to remove federal troops from the South in exchange for the solidification of Republican candidate Rutherford B. Hayes as president over Democratic candidate Samuel Tilden. Although southern Democrats promised to protect the civil rights of Black Americans, they quickly reneged on that promise, and instituted sweeping oppressive laws—Jim Crow laws—designed to further subjugate and oppress Black people, despite constitutional protections. Besides acts of physical intimidation and violence, Jim Crow laws caused a dramatic decline in the political participation and enfranchisement that Black people enjoyed during Reconstruction. Many southern states implemented legal mechanisms, including poll taxes, literacy tests, grandfather clauses, and White primaries, that all burdened, and usually prevented, the Black vote.

In addition to the overt Jim Crow tactics used in post-Reconstruction southern states, claims of voter fraud were still used as a basis to implement suppressive voter mechanisms throughout the United States that covertly affected minority groups disproportionately. Many states instated restrictive voter registration systems. In Illinois, for example, voters in some cities had to register in person and on a few days’ notice. Election clerks accompanied by the police would then conduct a door-to-door canvass and list suspects who registered improperly. Suspects were then required to prove their eligibility to vote on the Tuesday two weeks before a general election. New Jersey also instituted a restrictive voter registration system, but only in cities with more than 5,000 inhabitants. Voters were purged from the voter registration rolls if they moved or chose not to vote, and were required to reregister. Voter registration occurred only four days per year, and required prospective voters to provide their name, occupation, spouse’s name, parents’ names, landlord’s name, and a “satisfactory description of the dwelling in which he lived.” In New Jersey, voter turnout decreased among African Americans and immigrants.
During the 20th century, and even after passing the 1965 Voting Rights Act (VRA), claims of voter fraud continued, accompanied by a tremendous number of legislative acts allegedly aimed at combating voter fraud. In particular, the 20th century saw the implementation of voter identification, or voter ID laws. South Carolina was the first state to implement a voter identification law in 1950, although the law did not require a photo ID. Many states followed, and between 1970 and 2000, 14 additional states enacted voter ID laws. These states were controlled by both Democratic and Republican majorities. In the wake of the 2000 presidential election, Congress enacted the Help America Vote Act (HAVA). Besides other reforms, HAVA requires that anyone who registers to vote present ID when the voter registers to vote at that time, or at the polls, if the person is a first-time registrant in that jurisdiction. HAVA, however, does not require photo ID, and acceptable forms of ID include government-issued photo IDs, utility bills, bank statements, and paychecks. And while HAVA requires that states provide voters with the opportunity to vote provisionally if a voter has no acceptable form of voter ID, HAVA does not require that states count provisional ballots. HAVA permits states to enact their own, and more strict, voter ID rules.

Following the enactment of HAVA, from 2000 to 2016, 34 states enacted new voter ID legislations, and some opted to enact laws stricter than the HAVA requirements. For instance, Georgia and Indiana implemented a new stricter form of voter ID law that required voters to present at the polls an unexpired, state-issued photo ID that included a voter’s name and address. Indiana’s photo ID law was challenged as violating the 14th Amendment in the U.S. Supreme Court case Crawford v. Marion County Election Board. The Supreme Court upheld Indiana’s law, and held that the law did not violate the Constitution because the state had “identified several state interests that arguably justify the burdens” that the photo ID law imposed on voters and potential voters. Relevantly, the Supreme Court acknowledged that, regarding in-person voter impersonation—the voter fraud that photo ID can most likely address—“[t]he record contains no evidence of any such fraud actually occurring in Indiana at any time in its history.” Despite this acknowledgement, the Supreme Court held that Indiana had a legitimate interest in only counting the votes of eligible voters, although “the most effective method of preventing election fraud may well be debatable.”

In 2013, the Supreme Court heard Shelby County v. Holder. In Shelby County, the plaintiff county sought a declaratory judgment that the formula and preclearance requirement found in section 4 of the VRA was unconstitutional. Importantly, the preclearance formula found in section 4(b) of the VRA determined which jurisdictions had to comply with the preclearance restrictions found in section 5 of the VRA. If a jurisdiction had to comply with section 5 preclearance requirements, the jurisdiction had to submit any changes in voting procedures to the Department of Justice (DOJ) or a federal court for approval before enactment to ensure that the changes would not be discriminatory. Jurisdictions subject to preclearance requirements were jurisdictions identified as having a history of discrimination in voting,
and criteria used to determine the existence of a discriminatory history included the previous use of discriminatory tests and devices and low minority voter turnout.\footnote{64}

Before 2013, nine states and 56 local jurisdictions met the VRA’s preclearance formula found in section 4 and were subject to preclearance restrictions found in section 5 of the VRA.\footnote{65} In a 5–4 decision, the \textit{Shelby County} Supreme Court held that the preclearance formula found in section 4(b) of the VRA did not fit “current conditions,” and was unconstitutional.\footnote{66} The Court did not rule on the constitutionality of the preclearance requirement found in section 5, and also held that Congress could draft a new section 4 preclearance formula based on “current conditions.”\footnote{67} The Court maintained section 2 of the VRA, which allows plaintiffs to bring private causes of action for discrimination in the electoral process.\footnote{68} Despite the remaining availability of section 2’s protections, without section 4’s formula driving the preclearance requirements in section 5, the DOJ or private plaintiffs must now wait until after the enactment of discriminatory legislation and bring a private lawsuit instead of the DOJ disapproving discriminatory legislation before enactment. Plaintiffs must now bear the time and financial expense of combating discriminatory voting mechanisms. In addition, while plaintiffs wait for the ordinary, time-consuming legal process to run its course to potentially obtain relief from discriminatory practices, thousands of voters remain subject to discriminatory legislation that jeopardize their right to vote.\footnote{69}

In the wake of the Supreme Court’s historic dismantling of this nation’s primary preemptive federal legislation protecting voting rights, and reminiscent of the removal of federal troops from the former Confederate states that signaled the end of Reconstruction, states and jurisdictions previously subject to the VRA’s preclearance requirements enacted discriminatory legislation, often in the name of protection from voter fraud. For example, within two hours after the announcement of the Supreme Court’s \textit{Shelby County} decision, the Texas state attorney general issued a public statement indicating that the state would immediately reinstate a photo ID law struck down by a federal court under prior preclearance requirements.\footnote{70} The day following the \textit{Shelby County} decision, North Carolina, which had been subject to section 5 preclearance restrictions, amended a pending bill to make voter ID laws stricter, and also enacted additional provisions that burdened the right to vote for minority voters.\footnote{71} After years of litigation brought by private plaintiffs, federal courts eventually held that both the North Carolina and the Texas photo ID laws violated both the 14th Amendment and section 2 of the VRA.\footnote{72} The time between passing the North Carolina and Texas laws and judicial relief, however, demonstrate the cumbersome task that private plaintiffs must now undertake to combat discriminatory voting practices.

Besides the removal of the preclearance formula, without preclearance protections, neither the DOJ nor voters have the right to receive notice of changes in voting procedures.\footnote{73} Thus, some jurisdictions have instituted policies to combat alleged fraud without voters’ knowledge of the policies, with voters only unearthing the existence of such policies after the discovery of wholesale disparate and discriminatory
effects of such policies. For example, following Georgia’s November 2018 general election, in which the state’s then-secretary of state and chief elections official, Brian Kemp, was also running as a candidate for governor, private plaintiffs sued the state’s secretary of state and the State Election Board claiming that numerous discriminatory policies disparately impacted voters of color in violation of the First Amendment, 14th Amendment, 15th Amendment, section 2 of the VRA, and various provisions of HAVA. One of the discriminatory policies plaintiffs claim have a disparate impact on voters of color is the “exact match” policy, which is the Georgia secretary of state office’s interpretation of a Georgia statute requiring a match between a voter’s voter registration information and information maintained by the state’s Department of Driver Services (DDS). As history demonstrates, states have long used strict voter registration procedures to counteract alleged voter fraud, even absent evidence that voter fraud exists. The result of such procedures is often the exclusion of eligible voter candidates from the voter rolls, the impact of which often disproportionately affects voters of color. The *Fair Fight* plaintiffs allege that Georgia’s voter registration procedures are no different.

According to the *Fair Fight* plaintiffs, Georgia’s policy required an “exact match” between information on a voter’s registration file and DDS information, and the state would reject voter registration applications if there was not an exact match of all information without regard to insignificant mismatches such as “typographical errors or other inconsequential differences.” Plaintiffs also alleged that before the November 2018 general election, this policy resulted in approximately 53,000 voter applications being rejected, a disproportionate number of which belonged to minority registrants. Plaintiffs claimed that the policy disparately impacts recently naturalized citizens, immigrants, and voters of color more likely to have names with hyphens, spacing, and spelling that DDS employees are less likely to be familiar with, and such voters and potential voters are more likely to have names entered incorrectly in the DDS system and rejected from the voter registration rolls due to the policy. According to plaintiffs, voters of color are more likely to be excluded from the electoral process through no fault of their own.

Importantly, Georgia was subject to preclearance requirements before 2013. Post-*Shelby County*, and without preclearance or the requirement to provide notice of changed policies, Georgia implemented policies such as exact match with no one noticing until thousands of voter registration applications were rejected due to the policy.

Georgia is not alone in its implementation of exact match voter registration policies. In 2007, Florida passed a law similar to Georgia’s that required an exact match between a voter registration applicant’s driver’s license or Social Security information and the voter registration application before a voter could be registered. Challengers of the law claimed that the law resulted in more than 11,000 citizens whose registrations were held invalid, with a disparate impact on minority voters. After court intervention, more than 14,000 citizens were placed back on the voter registration rolls. After Florida amended the law, the law’s challengers dismissed the legal suit against the state.
Similar to former Confederate states’ implementation of repressive Jim Crow laws after the removal of federal troops from the South after Reconstruction, the discriminatory legislation and policies implemented by Georgia, Texas, North Carolina, and other states previously subject to preclearance requirements demonstrates how history often repeats itself. Although these states have used an alleged interest in protecting election integrity and combating voter fraud as a reason to enact what are often facially neutral legislation and policies, the results make clear that the true effect of such state-sanctioned acts is to repress the vote of people of color. The following section will further demonstrate that, given the empirical evidence showing the virtual nonexistence of voter fraud, states’ claims of voter fraud are often mere pretext to enact strict, repressive, and discriminatory laws.

II. The Reality of Voter Fraud and Vote Stealing Claims

Cases of individual voter fraud of the kind that legal mechanisms such as voter ID and voter registration laws are allegedly designed to protect against are rare. The evidence shows that stiff criminal penalties, including federal prison time, thousands of dollars in fines, and potential discovery and deportation (in the case of undocumented immigrants, who are often accused of being perpetrators of voter fraud) are effective deterrents for committing a crime where the individual benefit to a would-be perpetrator—the casting of a single vote—is comparably low.

Yet, claims of widespread voter fraud espoused by some of this country’s most publicized and outspoken politicians continue to fuel the implementation of ineffective, but discriminatory legislation. For example, throughout his presidential campaign, President Donald Trump made repeated claims that, if he lost the election, it would be because the election was “stolen” by organized acts of voter fraud and election rigging. Even after he won the election, President Trump continued to claim—with no supporting evidence—that he lost the popular vote to Hillary Clinton because of three to five million illegal votes. Although President Trump’s claims were debunked and disputed, even by Republican lawmakers and officials, President Trump created the Presidential Commission on Election Integrity to investigate voter fraud. Shortly after its creation, President Trump disbanded the commission after it found no evidence of voter fraud.

Numerous studies have shown that voter fraud perpetrated by individual voters is not a threat. One study pursued every allegation of voter impersonation between 2000 and 2014 and found only 31 credible allegations of fraud out of one billion ballots cast. A 2011 study by the Republican National Lawyers Association found that from 2000 to 2010, 21 states had only one or two convictions each for voter irregularities. An independent study by News21 found that from 2000 to 2010, there were 2,068 cases of alleged fraud nationwide, of which only ten cases were allegations of in-person fraud. The News21 study was updated in 2016, and data from five states in which politicians had made claims of widespread voter fraud revealed that no prosecutions had been brought for in-person voter fraud.
In 2014, the U.S. Government Accountability Office (GAO) issued a report to Congress entitled Elections: Issues Related to State Voter Identification Laws. For the section of the report pertaining to voter fraud, GAO reviewed five research studies, five studies by state agencies, and information provided by the DOJ. Although GAO acknowledged the limitations of each of the studies, GAO found that all five studies found very few instances of in-person voter fraud. One state study found that out of about 200 questionable votes cast in a 2010 general election, all but five were attributable to errors made by state or local officials, and officials could not determine whether fraud occurred with regard to the five remaining questionable votes. And in July 2014, the DOJ’s director of the Elections Crimes Branch of the Public Integrity Section of the Criminal Division submitted a declaration to GAO stating that a review of DOJ data “indicated that there were no apparent cases of in-person voter impersonation charged by DOJ’s Criminal Division or by U.S. Attorney’s offices anywhere in the United States, from 2004 through July 3, 2014.” These studies demonstrate that despite public rhetoric surrounding the prevalence of voter fraud, widespread voter fraud simply does not exist.

III. Impact of Voter Fraud Claims on Voter Turnout

This chapter has highlighted how claims of voter fraud in this county have historically served as an impetus for the enactment of policies and legislation with a stated purpose of combating alleged voter fraud, but have the consequence of disproportionately impacting certain groups of eligible voters. But do the policies affect voter turnout? Some politicians believe so. Although the data does not support claims of widespread voter fraud, Americans still strongly believe that such fraud is occurring often. And some politicians and people of influence knowingly prey on this fear for political gain knowing that claims of voter fraud are unsupported, and also that certain policies and legislative mechanisms to counteract claims of fraud will deprive voters of the right to vote, while simultaneously decreasing voter turnout and increasing these politicians’ chances for political victory.

For example, leaked e-mails between top Republican politicians and conservative strategists in Wisconsin showed strategists stating, “[d]o we need to start messaging widespread reports of election fraud so we are positively set up for the recount regardless of the final number.” The e-mail exchanges were shortly followed by public rumors of election fraud, and finally the enactment of voter ID laws in Wisconsin that two federal courts later found to unconstitutionally disenfranchise citizens who could not obtain approved forms of ID. In Pennsylvania, the state’s former chairman of the Republican Party stated in an interview that the state’s voter ID law helped to lower President Obama’s margin of victory over the Republican presidential candidate, Mitt Romney, in the state’s 2012 presidential election. And in 2013, a county precinct chairman of the North Carolina Republican Party told an interviewer that North Carolina’s voter ID law would “kick Democrats in the butt.” As these public and private statements demonstrate, proponents of legal
mechanisms such as voter ID laws that are allegedly used to combat voter fraud, know of, and are hedging on, the lower voter turnout amongst certain groups that can result from implementing such legal mechanisms.

But, regardless of what the politicians believe, does the data actually support a claim that legal mechanisms used to allegedly counteract claims of voter fraud negatively affects voter turnout? The U.S. Commission on Civil Rights conducted a study of voter turnout data from 2000 to 2016, and determined that turnout amongst African Americans increased, but decreased in 2016. In addition, increases in turnout occurred despite ongoing discrimination. Amongst Latino and Asian/Pacific Islanders, the fastest growing group of eligible voters in the country, however, overall turnout for these groups remain low when compared to both Black and White voters. Experts have attributed low turnout among Latinos and Asian/Pacific Islanders to lack of effective language accommodations, discrimination at polling locations, and a lack of engagement from political parties and candidates.

GAO, however, reviewed ten studies that attempted to quantify the effect of state voter ID requirements on voter turnout. All ten studies reviewed general elections prior to 2008, and one of the studies also included general elections from 2004 through 2012. Five of the studies found that voter ID requirements had no statistically significant effect on turnout, four of the studies found the voter ID laws decreased voter turnout, and one study found that voter ID laws increased voter turnout.

GAO also conducted its own analysis to compare voter turnout in Kansas and Tennessee, two states that changed voter ID requirements between the 2008 and 2012 presidential elections, to four states that made no changes to voter ID requirements between 2008 and 2012. GAO’s study found that voter turnout between the 2008 and 2012 general elections decreased in both Kansas and Tennessee to a greater extent than in the four comparison states (Alabama, Arkansas, Delaware, and Maine) during that same analytical period. GAO attributed the larger decrease in voter turnout between the 2008 and 2012 general elections in both Kansas and Tennessee to changes in state voter ID requirements.

Although the empirical data on whether legal mechanisms to counteract alleged voter fraud, such as voter ID laws, appears to have mixed results, there is sufficient evidence to suggest that such mechanisms impact voter turnout. And statements made from proponents of such laws indicate that the laws were enacted with discriminatory intent and with the purpose to repress the franchise for certain groups of people. Some studies have shown gains in voter turnouts for African-American voters. But, in keeping with the entire history of minorities and marginalized groups, any access to this country’s revered institutions, particularly the institution of voting, is achieved despite both overt and subtle efforts to exclude and repress such groups of citizens.
Notes

1. U.S. CONST. amend. XV.
2. U.S. COMMISSION ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES, 2018 STATUTORY REPORT 17, 18.
3. See, e.g., Crawford v. Marion County Election Bd., 553 U.S. 181, 204 (2008) (“The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting the integrity and reliability of the electoral process.”) (citations omitted).
5. Id.
6. U.S. COMMISSION ON CIVIL RIGHTS, supra note 2, at 102.
7. MINNITE, supra note 4, at 19, 36.
11. U.S. COMMISSION ON CIVIL RIGHTS, supra note 2, at 102–03.
12. MINNITE, supra note 4, at 80–83.
15. Litt, supra note 14, at 2; Klinghoffer & Elksis, supra note 14, at 184.
16. Litt, supra note 14, at 3.
17. Id.
18. Id.
20. See id.
21. Id.
22. See id.
23. See id.
24. See id.
25. See id.
27. MINNITE, supra note 4, at 37.
28. Id.
29. LEVITT, supra note 8, at 7.
30. Finlay, supra note 26.
31. See U.S. Commission on Civil Rights, supra note 2, at 15–16.
32. Id. at 16.
33. Id.
34. Id.
35. Id.
36. See id.
37. Id.
38. Id.
40. See id. (both citations).
41. See U.S. Commission on Civil Rights, supra note 2, at 17–20.
42. Id. at 17–18.
43. Levy, supra note 9.
44. See id.
45. See id.
46. Id.
47. Id.
49. See id.
50. Id.
51. U.S. Commission on Civil Rights, supra note 2, at 86.
52. Id.
53. Id. at 86–87.
54. Id. at 87.
55. Voter ID History, supra note 48; U.S. Commission on Civil Rights, supra note 2, at 87.
56. U.S. Commission on Civil Rights, supra note 2, at 87.
58. Id. at 194.
59. Id. at 195.
61. Id.
62. U.S. Commission on Civil Rights, supra note 2, at 44.
63. Id.
64. Id. at 48.
65. Id.
66. Shelby County v. Holder, 570 U.S. at 557.
67. Id.
69. See U.S. COMMISSION ON CIVIL RIGHTS, supra note 2, at 58.
70. Id. at 60.
71. See id.
72. See N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 230–31 (4th Cir. 2016) (holding that the impact of North Carolina’s voter ID requirements disproportionately burdened African Americans and was motivated by discriminatory racial intent in violation of the 14th Amendment’s Equal Protection Clause and section 2 of the VRA); Veasey v. Abbott, 830 F.3d 216, 256 (5th Cir. 2016) (holding that district court did not err in finding that Texas voter ID law imposed a significant and disparate burden on the right to vote).
73. See U.S. COMMISSION ON CIVIL RIGHTS, supra note 2, at 59.
75. Id. ¶¶ 83–85.
76. See, e.g., Levy, supra note 9; U.S. COMMISSION ON CIVIL RIGHTS, supra note 2, at 121–35.
77. U.S. COMMISSION ON CIVIL RIGHTS, supra note 2, at 121.
78. See generally Amended Complaint, supra note 74, ¶¶ 69–93.
79. In 2019, the Georgia state legislature amended the match statute, and otherwise eligible voters whose applications have a discrepancy are placed in a pending list, and must present eligible identification prior to voting or at the polls on Election Day. See H.B. 316, 236 Gen. Assem., Reg. Sess. (Ga. 2019).
80. Amended Complaint, supra note 74, ¶ 85.
81. See id. ¶ 86.
82. See id. ¶ 90.
83. See id. ¶ 85.
86. U.S. COMMISSION ON CIVIL RIGHTS, supra note 2, at 146.
87. Id.
88. Id. at 147.
89. Id.
90. LORRAINE C. MINNITE, DEMOS, AN ANALYSIS OF VOTER FRAUD IN THE UNITED STATES 6.
91. See LEVITT, supra note 8, at 7; MINNITE, supra note 4, at 83 (”[T]he calculus of illegal voting suggests it is irrational for the average voter to cast an illegal ballot.”); MINNITE, supra note 90, at 7.
92. See LEVITT, supra note 8, at 6.


100. Id. at 103.

101. See id.


103. Id.

104. Id. at 69.

105. Id. at 70.

106. See discussion supra pp. 3–12.


109. Id.

110. Id.

111. Id.

112. U.S. COMMISSION ON CIVIL RIGHTS, supra note 2, at 206.

113. Id.

114. Id. at 212.

115. Id.

116. GAO, supra note 102.

117. Id.

118. See id.

119. Id.

120. Id.
CHAPTER 12

POTENTIAL LEGAL PITFALLS FOR THE 2020 ELECTIONS

TREVOR POTTER AND OLIVIA N. MARSHALL

Federal campaign finance law, the Federal Election Campaign Act of 1971, as amended (FECA), can be enormously complicated. The legal landscape is filled with pitfalls that could trap candidates, tax-exempt organizations, and corporations participating in the political process. With the 2020 elections for president and Congress looming on the horizon, it is important for these participants to familiarize themselves with certain significant facets of federal campaign finance law to ensure they are in full compliance. This chapter explores some of the snags that three particular types of political actors can get caught up in if they are not careful. Specifically, this chapter explains:

- Candidates running for federal office in 2020 should structure their campaigns’ interactions with outside groups to be sure there is no impermissible coordination with these groups to create or disseminate electoral communications.
- Corporations must be careful to avoid making prohibited in-kind contributions.
- Tax-exempt organizations have new donor disclosure responsibilities after a recent district court ruling.

These three issues are discussed in turn in the sections below.

1. Candidate Campaigns: Coordination with Outside Groups

“Outside groups,” such as super political action committees (PACs), labor unions, and social welfare organizations, play an increasingly large role in federal elections. They may make unlimited expenditures on behalf of candidates only if their activities are legally “independent” of the candidates they support. The amount of money these groups spend on federal elections has grown considerably in the past 20 years, with outside groups spending more than $1 billion in the 2018 election cycle.\(^1\) It is likely that candidates will interact with outside groups interested in their election at some point—however, candidates must be mindful that they are legally prohibited from “coordinating” certain activities with these groups. Whenever an outside
group spends funds on a communication to benefit a candidate’s campaign, the campaign could receive a prohibited excessive in-kind contribution if the communication is determined to have been “coordinated.”

A. WHEN IS AN OUTSIDE GROUP’S SPENDING “COORDINATED” WITH A CANDIDATE?

Federal Election Commission (FEC) regulations define “coordinated” as “made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or a political party committee.” It is important to understand the two components of the FEC’s coordination regulations: (1) the “content” of the communication and (2) the “conduct” of the candidate and campaign staff—for example, interactions with outside groups.

1. Content
Communications that satisfy the content prong of the coordination standard include public communications that

- are “electioneering communications”;
- republish or disseminate campaign materials;
- expressly advocate the election or defeat of a candidate for federal office;
- are the functional equivalent of express advocacy; or
- identify federal candidates or political parties and are distributed in proximity to federal elections.

Put more simply, candidates and campaigns should assume the content prong will be met if the communication refers to the candidate or his or her campaign opponents in the lead-up to an election.

2. Conduct
The conduct prong has several subparts; if any of these are met, the communication will be considered coordinated.

- **Request or suggestion.** The “request or suggestion” prong is satisfied if the person creating or distributing the communication does so at the request or suggestion of a candidate or candidate’s committee and the request or suggestion is made to a select audience, not to the public generally. A request made in a speech to an audience at an invitation-only dinner, for example, would qualify as a request made to a “select audience.” The request or suggestion may be either explicit or implicit.

- **Assent.** An outside party’s communication is a contribution to the candidate if the outside party suggests the creation, production, or distribution of the communication and the candidate or committee staff “assent.” Assent is “an expression of desire to some person for something to be granted or done.” If the candidate or committee rejects the suggestion, there is no improper coordination.
• Material involvement. “Material involvement” means that the candidate or committee staff are materially involved in decisions regarding specific aspects of a public communication paid for by someone else.9 “Material” does not include all interactions, just those “important” to the communication.10 The candidate or committee staff need not even be included in the formal decision-making process, but if he or she participates to the extent the candidate assists the ultimate decision maker, he or she is materially involved.11 Because of this, candidates and campaign staff should be careful not to advise on any aspect of an outside party’s communication.

• Substantial discussion. An outside party’s communication counts as a contribution to a candidate or campaign if the candidate or campaign staff have “one or more substantial discussions about the communication” with the outside party.12 A discussion is substantial if information about the plans, projects, activities, or needs of the candidate or campaign that is material to the creation, production, or distribution of the communication is conveyed to a person paying for the communication.13

• Common vendor and former employee/independent contractor. The use of a common vendor in the creation, production, or distribution of a communication also satisfies the conduct standard if the person paying for the communication contracts with a “commercial vendor” to create, produce, or distribute it, and this vendor has a previous or current relationship with a candidate or campaign that puts the vendor in a position to acquire information about the campaign plans, projects, activities, or needs, and the vendor uses or conveys that information to the person paying for the communication, and the information is material to the creation, production, or distribution of the communication.14 Additionally, communications paid for by a person who has previously been an employee or independent contractor of a candidate or campaign committee can satisfy the conduct standard.15 The person must have been an employee or independent contractor during the 120 days before the purchase or public distribution of the communication.16 If the former employee or contractor uses or conveys information about plans, projects, activities or needs of candidate, candidate’s opponent, or political party committee, and the information is material to the creation, production, or distribution of a communication, then the activity falls under the “conduct” prong of the test.17

While all these moving parts may seem complicated, there are a few exceptions in the regulations that provide a safe harbor.18 A candidate’s or committee’s response to an inquiry about its positions on legislative or policy issues that does not include discussions about campaign plans or needs is not conduct that constitutes a coordinated communication.19 Additionally, implementing a “firewall” between those providing services to the person paying for the communication and those providing services to the candidate or campaign can avoid the kind of coordination
that might result in an impermissible in-kind contribution.\textsuperscript{20} Also, a candidate endorsing another candidate is not a coordinated communication for the endorsing candidate unless the communication promotes, supports, attacks, or opposes the endorsing candidate or another candidate who seeks election to the same office as the endorser.\textsuperscript{21} Finally, if the information material to the creation of the communication was obtained from a publicly available source, it is not a coordinated communication.\textsuperscript{22}

B. WHAT CAN A CAMPAIGN DO TO AVOID COORDINATION?

There are also steps a candidate can take to avoid coordination. For example, the campaign can train staff on coordination and send out an office-wide memorandum outlining the conduct restrictions. In personnel agreements for employees and contractors, campaigns can include representations and warranties that the employee will not engage in activity constituting coordination. A campaign should also make sure that any vendors it shares with outside groups have firewall policies to separate campaign work from the work of these groups. A firewall should be designed to “prohibit the flow of information” between employees and consultants working for the campaign and those working for the group paying for the communication.\textsuperscript{23} A requirement that the vendor implement a firewall should be included in the campaign’s contracts with consultants and vendors who may have potential coordination issues.

The campaign should also designate certain people to communicate with outside groups exclusively, such as the campaign manager or counsel. Other campaign staff should have no campaign-related discussions with the staff of any outside groups making election-related communications.\textsuperscript{24} That way, the campaign has control over its interactions with outside groups and can ensure there is no improper coordination.

Federal candidates generally may attend, speak at, or be a featured guest at a fundraising event hosted by an outside group (e.g., a fundraising event for a state candidate) without running afoul of the coordination prohibition.\textsuperscript{25} They may also solicit donations to the outside group at these events, subject always to contribution limits and source restrictions.\textsuperscript{26} The solicitations should be explicitly limited by displaying a clear and conspicuous written notice or making an oral statement that the solicitation does not seek funds in excess of contribution limits or from prohibited sources such as corporations, labor organizations, or foreign nationals.\textsuperscript{27}

II. Corporations: In-Kind Contributions

Corporations have long been permitted to have PACs of their own, and corporation PACs and their executives in certain circumstances may raise funds for candidates. Additionally, corporations may invite candidates to make appearances at corporate premises, provided the applicable rules are followed. Since the U.S. Supreme Court’s decision in \textit{Citizens United} that the government could not ban independent expenditures by corporations in elections, some corporations engage in independent
spending campaigns, often through trade associations or other nonprofit organizations. However, contributions from corporations to a campaign remain strictly prohibited by FECA, and the use of corporate resources to benefit a campaign may be considered an in-kind contribution. Corporations risk making an in-kind contribution when employees run for office or volunteer for campaigns, or when they host fundraising events or solicit donations for candidates.

A. VOLUNTEERS AND CANDIDATES

How do corporations typically address the prospect of employees who wish to volunteer for campaigns or even run for office themselves? Employees using company time or resources to work on a campaign could be considered an in-kind contribution from the corporation to the campaign. An in-kind contribution is a donation of a good or service—for example, donating office supplies or paying for polling services provided to a candidate. The key is to keep campaign activities separate from the employee’s regular job duties. Generally, a company should have a written policy about the permissible political activities of employees. More specifically, creating a memorandum of understanding (MOU) between the company and the employee is a good way to avoid the problem of in-kind contributions. The MOU functions as an agreement detailing the parameters of the employee’s participation in campaign activities as it relates to the company. A typical MOU explains that any compensation the employee receives from the company, including salary and fringe benefits, will be prorated to the extent that the time the employee spends on campaign-related activities causes any reduction in his or her services to the company. It should also mention that employees may use earned leave and personal time to do campaign-related activities without reduction in compensation.

Such an MOU also explains that the employee is restricted in using corporate resources for campaign purposes, including office space, equipment, and support staff. The employee should not use any corporate resources for fundraising, as corporations are prohibited even from facilitating contributions. However, the employee may use corporate resources that incur no increased costs—for example, making local telephone calls or simply occupying his or her personal office space where the use is “occasional, isolated, or incidental.” This means that the amount of activity does not prevent the employee from completing a normal amount of work. Use of a resource for four hours per month or less is considered occasional, isolated, or incidental per se. If an employee uses his or her office to conduct a substantial amount of campaign activity during a month, the employee must pay the company the “usual and normal rental rate” for the space on a pro rata basis for those hours of use; otherwise, this could be considered an in-kind contribution from the company. The employee should also not use the company’s client lists, letterhead, or corporate logo while volunteering or campaigning for office. Further, the “occasional, isolated, or incidental” activity must truly be voluntary and not directed by a superior at the company. If a superior asks the employee to do the volunteer work as part of the employee’s regular duties, this exception does not apply.
By ensuring there is a formal record of the arrangements agreed to between the employee and the employer, corporations can avoid making impermissible in-kind contributions to campaigns when their employees volunteer or run as candidates.

B. FUNDRAISING EVENTS

While corporations may not contribute to campaigns, they or their employees may organize fundraising events to benefit candidates and solicit donations from certain employees without making an in-kind contribution to the candidate. If a corporation decides to sponsor a fundraising event for a federal candidate, only members of the “solicitable” or “restricted” class may attend. The company can then pay for the costs of the event without limit. One thing the company cannot do is coerce individuals in the solicitable class to make contributions; it must inform them they have the right to refuse to contribute without reprisal.

The restricted class consists of the corporation’s executive and administrative personnel, the stockholders, and the families (i.e., immediate household residents) of those two groups. On the invitations to fundraising events, the company can solicit voluntary contributions to be sent directly to the candidate’s campaign or brought by contributors to the event, for delivery to the candidate’s staff. Contributions at the event itself must also be given directly to the candidate, either mailed to the candidate’s campaign address or brought by the contributors to a fundraising event; the corporation may not collect contributions or otherwise facilitate the making of the contribution. If the company hosts an event where a federal officeholder or staffer attends, food and beverages must be of nominal value and presented in a “reception style” to comply with federal gift rules.

Corporations themselves may not sponsor fundraising events at which individuals outside of the solicitable class are present (i.e., anyone who is not part of the corporation’s executive and administrative personnel or a stockholder). However, a corporation may form a PAC to sponsor a fundraising event. The PAC should serve as the event’s host and may only pay event-related expenses up to the $5,000 federal contribution limit. Both the PAC and the campaign may collect contributions at the event. Contributions that the PAC collects at the event, as opposed to those the campaign collects, are considered earmarked contributions (contributions that the contributor directs, either orally or in writing, to a clearly identified candidate or candidate’s committee through the PAC). These earmarked contributions do not count against the limits of the PAC’s own contributions, unless the PAC exercises direction or control over the contributor’s choice of the recipient candidate or unless the earmarked contribution was solicited by the corporation. If contributions are collected at the event by the PAC and forwarded to the candidate, they are counted as a contribution from the PAC and count against the contribution limit. It is important to reiterate that only the PAC, not the company with which it is associated, may act as a conduit for earmarked contributions from individuals not in the solicitable class. The corporation’s associated PAC must pay the full costs of the
event and any expenses associated with it to avoid a prohibited contribution from the corporation itself.\textsuperscript{51}

Employees acting voluntarily in their personal capacity may solicit contributions for candidates, but they must make clear that their activities are entirely personal and not on the company's behalf or at its direction.\textsuperscript{52}

\textbf{III. Tax-Exempt Organizations: New Donor Disclosure Requirements}

Certain tax-exempt organizations should be aware that donor disclosure rules have changed following a recent U.S. district court decision. Organizations like 501(c)(4)s ("social welfare" organizations) and 501(c)(6)s (chamber of commerce and trade association organizations), and other entities, do not register as federal political committees and therefore do not report the names of their donors to the FEC. Many of these groups do, however, make independent expenditures in federal elections, which may have to be reported to the FEC. There has been an ongoing dispute about when the sources of funding for those expenditures also have to be disclosed in FEC reports, which are then on the public record.

Many politically active 501(c)(4) and (c)(6) organizations solicit contributions on the basis that they will not disclose their donors' names. But a recent district court ruling on the statutory requirements for disclosure of the sources of funding for certain independent expenditures in elections means that these groups may have to start disclosing more donors. The decision could have a substantial impact on the flow of money to these organizations.

The case arose when Citizens for Responsibility and Ethics in Washington, a watchdog organization, challenged the FEC’s dismissal of its complaint that Crossroads GPS, a conservative 501(c)(4), failed to properly disclose contributions it received for its independent expenditures.\textsuperscript{53} Crossroads GPS had reported spending more than $17 million in independent expenditures in 2012 without identifying the names of the donors who provided these funds.\textsuperscript{54}

The district court held that the FEC regulation impermissibly narrowed the underlying provision of FECA.\textsuperscript{55} The FEC regulation specified that contributions over $200 made for the purpose of furthering the “reported independent expenditure” were required to be reported, meaning that unless a donor earmarked a donation for a specific reported independent expenditure, they were not required to be disclosed. However, the underlying provision of FECA conditions disclosure on intent by the donor to further “an independent expenditure,” and contains an additional requirement that the sponsor of the independent expenditure also disclose “all contributions” received by them, including by identifying donors of more than $200. The district court held that the FEC regulation “impermissibly narrows the mandated disclosure . . . which requires the identification of such donors . . . even when the donor has not expressly directed that the funds be used in the precise manner reported.”\textsuperscript{56} The regulation, said the court, went against the “broad disclosure” that
Congress had intended in enacting amendments to FECA. The court ruled that FECA requires identification of all donors who contribute more than $200 for the purpose of influencing federal elections, even when the donation is not earmarked for a particular communication. In September 2018, the Supreme Court rejected a request to stay the district court’s decision. Crossroads GPS has appealed the district court’s decision, contending in part that FECA’s language permits the construction adopted by the FEC’s regulation because the FEC worked closely with Congress during the process of passing FECA and the regulation stood for decades with Congress’s ratification. Because the appeal reiterates arguments already rejected by the district court, it appears unlikely to succeed.

The FEC’s recently issued guidance confirms that nonprofit groups must now publicly disclose the names of donors who have given more than $200 “for the purpose of furthering any independent expenditure,” whether or not the contributions are earmarked for specific communications. While the final rulemaking on the issue will take several months or years, tax-exempt groups will need to follow the FEC’s guidance in the meantime and disclose donors who donate more than $200 toward influencing a federal election.

What does this mean for organizations like 501(c)(4)s and (c)(6)s? Organizations that want to avoid this donor disclosure will likely cease all “independent expenditure” advertising in federal elections. Such advertising specifically urges the election or defeat of named federal candidates through words such as “support oppose elect defeat.” Instead, nonprofits are likely to resort to less specific communications that avoid such “magic words” of electoral advocacy and instead run more general issue ads mentioning federal candidates (what the law calls “electioneering communications,” i.e., any television or radio communication that refers to a clearly identified federal candidate, is distributed within 30 days of a primary or 60 days of a general election, and is targeted to the relevant electorate). A donor to a group funding electioneering communications does not have to be disclosed unless the donation is earmarked for electioneering communications, under previous court decisions.

Moreover, even with entities that do continue to sponsor independent expenditures, donations must only be disclosed if given for the purpose of influencing a federal election. Thus, these organizations might alter their fundraising solicitations to be more general in nature and refer to projects other than efforts to influence federal election, such as lobbying advocacy efforts and state and local election campaigns, or electing “progressive” or “conservative” candidates in general. Such groups might then take the position that any donor responding to the solicitation would not have to be disclosed because donations only need to be disclosed to the FEC if solicited for federal elections, which were not mentioned specifically. However, donor disclosure requirements vary widely across the country, and while these groups might avoid disclosure under federal law, they should be aware that if they get involved in state and local elections, state laws may have heightened donor disclosure requirements.
IV. Conclusion

With 2020 presidential campaigns already in full swing and other campaigns gearing up, participants in the process will need to avoid the common pitfalls we have described. Candidates must avoid impermissible coordination with outside groups, corporations will need to be careful not to make in-kind contributions, however inadvertent, and tax-exempt organizations should understand their new donor disclosure requirements.

Notes

2. 11 C.F.R. § 109.20(a) (Jan. 1, 2006).
3. Id. § 109.21(a) (Jan. 1, 2009).
4. “Electioneering communications” are broadcast, cable, or satellite advertisements that (1) refer to a clearly identified candidate for federal office; (2) are publicly distributed either within 60 days before a general election for the office sought by the clearly identified candidate or within 30 days before a primary election, preference election, convention, or caucus of a political party that has authority to nominate the clearly identified candidate for the office he or she seeks, and the candidate is seeking the nomination of that political party; and (3) in the case of a House or Senate candidate, can be received by more than 50,000 people in the district or state the candidate seeks to represent, and in the case of an advertisement that refers to a candidate for president or vice president, can be received by 50,000 or more persons anywhere in the United States during the 60 days before the presidential general election. Additionally, an advertisement’s distribution to 50,000 or more persons (1) anywhere in the United States within the period from 30 days before a national nominating convention to the conclusion of the convention, or (2) in a state holding a presidential primary election, within 30 days of that primary, would render the ad an “electioneering communication.” Id. § 100.29 (Jan. 1, 2016).
5. Id. § 109.21(c). Specifically, a public communication that (1) refers to a House or Senate candidate and is publicly distributed in the candidate’s jurisdiction 90 days or fewer before the candidate’s election; (2) refers to a presidential or vice presidential candidate and is publicly distributed in a jurisdiction during the period of time beginning 120 days before the candidate’s election up to and including the day of the general election; and (3) refers to a political party, does not refer to a clearly identified federal candidate, and is publicly distributed in a jurisdiction in which one or more candidates of that political party will appear on the ballot, and (1) is coordinated with a candidate and publicly distributed in that candidate’s jurisdiction within 90 days prior to a House or Senate candidate’s election or within 120 days before a presidential or vice presidential candidate’s primary election until the date of the general election; (2) during a midterm election cycle, is coordinated with a political party and is publicly distributed within 90 days of a primary or general election; (3) during
a presidential election cycle, is coordinated with a political party, and is publicly distributed within 120 days before the primary and ending on the date of the general election; or (4) refers to both a political party and a clearly identified federal candidate and is publicly distributed in a jurisdiction in which one or more candidates of that party will appear on the ballot, and: (1) is coordinated with a candidate and publicly distributed in that candidate's jurisdiction within 90 days prior to a House or Senate candidate's election or within 120 days before a presidential or vice presidential candidate's primary election until the date of the general election; (2) is coordinated with a political party and is publicly distributed in that candidate's jurisdiction within 90 days prior to a House or Senate candidate's election or within 120 days before a presidential or vice presidential candidate's primary election until the date of the general election; or (3) is coordinated with a political party committee and is publicly distributed outside the clearly identified candidate's jurisdiction within 90 days of a primary or general election during a midterm election cycle, or within 120 days before the primary and ending on the date of the general election during a presidential election cycle.

6. Id. § 109.21(d)(1).
8. Id. at 432.
11. Id. at 434.
15. Id. § 109.21(d)(5).
16. Id.
17. Id..
18. Id. § 109.21(f)–(i).
19. Id. § 109.21(f).
20. Id. § 109.21(h).
21. Id. § 109.21(g).
22. Id. § 109.21(d)(5).
26. 11 C.F.R. § 300.64(b) (Feb. 3, 2003).
27. Id. § 300.64(b)(2).
33. 11 C.F.R. § 100.54(c) (June 1, 2016).
34. Id. § 114.2(f) (Jan. 1, 2012).
35. Id. § 114.9(b)(2)(ii) (Jan. 1, 2012).
36. Id. § 114.9(f)(2)(i).
37. Id. § 114.9(b)(3).
38. Id. § 114.2(f)(2)(i)(C).
41. Id. § 114.1(j) (Jan. 1, 2009).
42. Id. § 114.3(2)(iii).
43. House Rule XXIII cl. 5(a)(3)(U); Senate Rule XXXV cl. 1(c)(22).
47. FEC, supra note 45.
48. 11 C.F.R. § 110.6 (Jan. 1, 2016).
51. FEC, supra note 45.
52. 11 C.F.R. § 114.2(f).
54. Id. at 359.
55. Id. at 387–91.
56. Id. at 423.
57. Id.


64. 11 C.F.R. § 104.20(c)(9) (Dec. 27, 2018).
CHAPTER 13

FOR THE PEOPLE ACT OF 2019 (H.R. 1): UNPACKING THE MOST COMPREHENSIVE DEMOCRACY REFORM PACKAGE SINCE WATERGATE

SEAN J. WRIGHT

I. Introduction

On the first day of the 116th Congress, House Democratic lawmakers introduced House Resolution 1 (H.R. 1)—the For the People Act—a comprehensive democracy reform package that sought to expand voting rights, limit partisan and racial gerrymandering, strengthen ethics rules, and limit the influence of money in politics. According to the House Committee on Administration report, “H.R. 1 would amend and reform federal statutes governing voting rights, elections, election security, campaign finance, lobbying, and ethics, among numerous other provisions.” ¹ H.R. 1 would also “reauthorize several federal agencies that oversee those statutes and provide new enforcement powers. Additionally, the bill would create new voluntary programs to provide public financing for elections and authorize appropriations for grants related to election systems and security.”² E.J. Dionne Jr. of the Washington Post called it “perhaps the most comprehensive political-reform proposal ever considered by our elected representatives.”³

On March 8, 2019, H.R. 1 passed the U.S. House of Representatives along a party-line vote 234–193.⁴ The bill awaits consideration in the Senate, but Majority Leader Mitch McConnell (R-Ky.) has been clear publicly that he has no intention of permitting a vote on the measure.⁵

Critics of the bill decry a “massive Democratic takeover of state elections laws” and claim that the bill “attempts to suppress free speech.”⁶ Senate Majority Leader McConnell has nicknamed the bill the “Democrat Politician Protection Act.”⁷ Following the passage of H.R. 1 in the House, Senator McConnell spent a significant amount of time on the Senate floor railing against the bill. As reported by CBS News, conservatives “have pointed to the fact that the [American Civil Liberties Union] opposes portions of the bill, warning that they unconstitutionally impinge
on Americans’ free speech rights by forcing more disclosure of donors by special interest groups," as a reason to oppose the bill.

This chapter provides an overview of the major provisions of the bill, which spans more than 700 pages, and describes how proponents and opponents of the measure responded to its introduction and passage. While there is no immediate anticipation that the Senate will consider H.R. 1, the range and scope of the bill provide a forecast for possible future reform efforts by its proponents.

II. Major Elements of H.R. 1

Sponsored by Rep. John Sarbanes (D-Md.), and co-sponsored by every single democratic member serving in the house, H.R. 1 is a wide-ranging piece of legislation that in its words seeks “to expand Americans’ access to the ballot box, reduce the influence of big money in politics, and strengthen ethics rules for public servants and for other purposes.”

More than 706 pages, H.R. 1 proposes reforms to election administration, election security, voting rights, campaign finance rules, and ethics laws. It also includes significant changes to the operation of federal elections run by the states, which has led critics to complain of a government takeover of election administration.

H.R. 1 is divided into three divisions: (1) Division A—Voting, (2) Division B—Campaign Finance, and (3) Division C—Ethics. Division A would require states to offer online voter registration and automatic voter registration through state agency records (such as education enrollment), to expand early voting opportunities and permit unrestricted voting by mail, to offer same-day voter registration on election days, and to use voting systems that produce individual and auditable paper ballots.

Division A would also “authorize additional appropriations for the Election Assistance Commission (EAC), authorize state grant programs, and designate election infrastructure as a critical infrastructure subsector under the Homeland Security Act.”

Division B addresses several campaign finance and transparency issues, specifically by combining a series of bills that have been introduced by democratic lawmakers over the past few congresses. H.R. 1 also proposes a restructuring of the Federal Election Commission (FEC), which would reduce the size of the FEC to five commissioners, and invest the chair with new powers. Further, the bill would amend the Federal Election Campaign Act (FEEA) to extend contribution and expenditure restrictions on foreign-controlled corporations and super political action committees (PACs), to broaden FECA disclosure and reporting requirements to cover entities not subject to contribution limits, and to apply disclosure and disclaimer requirements to paid online and digital communications.
Finally, Division C would amend certain ethics statutes, particularly concerning conflicts of interest and federal lobbying, and impose a code of conduct for Supreme Court justices. The next three sections of this chapter are devoted to looking at these divisions in greater detail.

A. VOTER ACCESS REFORMS

H.R. 1 contains numerous provisions designed to improve access to the franchise for all Americans. According to the House Committee Report, H.R. 1 aspires to “set[] an important nationwide standard of online voter registration, automatic voter registration, and same day voter registration that will reduce unjustified and unnecessary barriers to voting.” H.R. 1 also includes provisions to protect against voter purges, provides for redistricting reform, and announces a commitment to restore the Voting Rights Act, which was gutted by the U.S. Supreme Court’s 2013 decision in Shelb County v. Holder. This section of the chapter will review a few of the major provisions that seek to improve access to the polls.

1. Automatic Voter Registration (Title I, Subtitle A, Part 2)

An essential component of H.R. 1 is a combination of sections dedicated to updating and modernizing the process of voter registration. The keystone of those proposals is a plan to provide for automatic voter registration (AVR). According to Wendy Weiser, the director of the Democracy Program at the Brennan Center for Justice, “[t]his bold, paradigm-shifting approach would add tens of millions to the rolls, cost less, and bolster security and accuracy.” AVR is currently used in 15 states and the District of Columbia.

Under AVR, “every eligible citizen who interacts with designated government agencies is automatically registered to vote, unless they decline registration.” If adopted nationwide as part of H.R. 1, it could add as many as 50 million new eligible voters to the rolls. Weiser describes AVR as shifting “registration from an ‘opt-in’ to an ‘opt-out’ approach,” which occurs “[w]hen eligible citizens give information to the government—for example, to get a driver’s license, receive Social Security benefits, apply for public services, register for classes at a public university, or become naturalized citizens—they are automatically signed up to vote unless they decline.” This approach primarily removes the burden of registering to vote from the voter and ensures that eligible voters coming into contact with government services will be provided the additional benefit of registering. AVR also requires that voter registration information is electronically transferred directly to state election officials. This addresses concerns of delayed delivery through traditional mail or the rejection of paper forms submitted by the eligible voter.

A major concern of AVR is ensuring that only eligible voters are registered. Addressing this concern directly, H.R. 1 provides several measures to safeguard against ineligible voters registering. For example:
The government agencies designated for AVR regularly collect information about individuals’ citizenship and age, and they must obtain an additional affirmation of U.S. citizenship during the registration transaction. Before anyone is registered, agencies must inform individuals of eligibility requirements and the penalties for illegal registration and offer them the opportunity to opt out. Election officials too are required to send individuals a follow up notice by mail.20

Indeed, most election officials report that AVR’s elimination of paper forms enhances the accuracy of the rolls.

2. Same-Day Registration (Title I, Subtitle A, Part 3)
In addition to AVR, H.R. 1 provides for same-day registration (SDR), which allows eligible citizens to register and vote on the same day at the polls. Same day registration has been permitted in several states since the 1970s. Today, “seventeen states and the District of Columbia offer some form of same day registration, either on Election Day, during early voting, or both.”21 And, “[i]t has been shown to increase turnout by upwards of 10 percentage points.”22

Proponents of SDR argue that “[b]ecause it provides eligible Americans an opportunity to vote even if their names are not on the voter rolls, SDR safeguards against improper purges, registration system errors, and cybersecurity attacks.”23 Moreover, as indicated by the 17 states and the District of Columbia currently employing SDR, there is no meaningful risk that ineligible voters will register and cast a ballot.

3. Online Registration (Title I, Subtitle A, Part 1)
Finally, H.R.1 requires states to offer secure and accessible online registration. The online registration provisions in H.R. 1 permit voters to register, update registration information, and check registrations online. Online voter registration is “offered by at least 37 states plus the District of Columbia as of October 2018, according to the National Conference on State Legislatures.”24

B. REFORMS BEYOND VOTER ACCESS
In addition to these three core measures of AVR, SDR, and online registration, H.R. 1 implements several provisions that permit more Americans to vote, transform the voting process to make it easier to cast a ballot, and seek to create more representative districts through redistricting reform.

1. Nationwide Early Voting (Title I, Subtitle H)
H.R.1 provides for a two-week period of early voting before Election Day. This degree of flexibility helps address the underenfranchisement of voters—like minorities, lower-income earners, and young people—who are not able to take off time to vote on Election Day.25 According to Weiser, “[h]olding elections on a single workday in mid-November is a relic of the nineteenth century; it was done for the convenience
of farmers who had to ride a horse and buggy to the county seat in order to cast a ballot."26 Currently, 39 states offer voters some type of opportunity to vote in person before Election Day.27 Further, more than a dozen of those states already provide for a period of early voting that is equal to or greater than the two-week period leading to Election Day imposed by H.R. 1.28

2. Addressing Voter Identification Laws That Restrict Voting
   (Title I, Subtitle N, Part 1)

States across the country have imposed onerous voter identification (ID) laws. “Before 2006, no state required photo identification to vote on Election Day,” but “[t]oday 10 states have this requirement.”29 Currently 33 states, representing more than half the population, have some version of voter ID rules on the books.30 Studies have shown that voter ID laws impact minority voting. For example, as Zoltan Hajnal and his co-authors note, “[s]cholars have been able to show that racial and ethnic minorities have less access to photo IDs, and extensive analysis reveals almost no evidence of voter fraud of the type ostensibly prevented by these laws.”31

In fact, a new study by Hajnal and his co-authors found that voter ID laws also have a partisan impact. They found that “[a]ll else [being] equal, when strict [voter] ID laws are instituted, the turnout gap between Republicans and Democrats in primary contests more than doubles from 4.3 points to 9.8 points,” and, “likewise, the turnout gap between conservative and liberal voters more than doubles from 7.7 to 20.4 points.”32

Supporters of voter ID laws highlighted conflicting findings, including a recent report by the National Bureau of Economic Research, which found that between 2008 and 2016, voter ID laws had “no negative effect on registration or turnout, overall or for any specific group defined by race, gender, age or party affiliation.”33 This finding replicated the results of a 2007 study by the conservative Heritage Foundation.34

To address the impacts on minority voting rights and to lower barriers to accessing the polls, H.R. 1 would allow voters to submit sworn written statements in lieu of other forms of voter ID that would otherwise be required to cast a ballot.35

3. Voting Rights Restoration (Title I, Subtitle E)

The Democracy Restoration Act in title I, subtitle E of H.R. 1 purports to restore federal voting rights to citizens with past criminal convictions. According to Weiser, “H.R. 1 adopts a simple and fair rule: if you are out of prison and living in the community, you get to vote in federal elections. It also requires states to provide written notice to individuals with criminal convictions when their voting rights are restored.”36 Several states have recently adopted felon restoration policies, including Florida, where “more than 64 percent of the state’s voters approved Amendment 4, which guaranteed restoration for nearly all felons upon completion of all terms of sentence including parole or probation.”37
4. Independent Redistricting Commissions (Title II, Subtitle E)

Finally, the Redistricting Reform Act of 2019 contained in title II, subtitle E of H.R. 1 requires states to use independent redistricting commissions—like those employed in California and Arizona currently—for congressional redistricting. Under H.R. 1, if a state fails to provide a plan developed by an independent redistricting commission, congressional district lines will be drawn by a three-judge federal district court. Proponents of this provision state: “It would require states to use independent redistricting commissions to draw congressional maps and impose a uniform set of rules for how districts should be drawn, prioritizing criteria like keeping communities together, and expressly ban partisan gerrymandering. It would also open the process to public oversight and participation.” Federal law currently lacks rules governing how districts are to be drawn. H.R. 1 provides map-drawing rules and lists the rules in order of application and priority. The importance of requiring independent redistricting commissions to address partisan gerrymandering has drawn renewed attention after the Supreme Court determined that partisan gerrymandering claims were nonjusticiable political questions in *Rucho v. Common Cause*.

C. CAMPAIGN FINANCE

In addition to reducing barriers to voting and providing for more representative congressional districts, collectively, H.R. 1 seeks to address the role of money in politics and to strengthen the oversight and enforcement of campaign finance violators. As the House Committee on Administration report notes, many “Americans are concerned with the real and perceived power of wealthy special interests in campaigns and the decisions of government.” Moreover, the 2010 Supreme Court decision in *Citizens United*, which permitted corporations to spend their general treasury funds to influence elections, “remains deeply unpopular among Americans of all political stripes.”

Division B, which focuses on campaign finance reform, brings together previously introduced legislation meant to provide greater transparency to spending in federal elections with new provisions meant to bolster the FEC’s enforcement and oversight capabilities.

1. Reforming the FEC (Title VI, Subtitle A)

The FEC has been criticized as a toothless tiger. Structurally, the FEC is composed of six commissioners, evenly divided between Democrats and Republicans. As Daniel Weiner of the Brennan Center for Justice has observed, the FEC is “notoriously dysfunctional” because “it deadlocks on whether to pursue most significant campaign finance violations—often after sitting on allegations for years without even an investigation.” Further, the FEC’s rulemaking process has stalled for the past decade. A report by former Commissioner Ann Ravel laid bare the depths of this dysfunction. According to the report, the commission has seen a dramatic increase in the number of split votes on enforcement matters, drastically reduced the fines imposed on violators, and failed to promulgate regulations to address the rise of
“secret campaign spending,” also known as dark money, following the Supreme Court’s Citizens United decision. For example, in 2006, the commission split on 4.2 percent of enforcement cases. By 2016, the number of split votes rose to 37.5 percent of all enforcement cases.

Several provisions of H.R. 1 seek to overhaul the FEC. H.R. 1 would accomplish this by addressing several structural problems with the FEC. First, H.R. 1 reduces the number of commissioners from six to five. With an odd-numbered commission, without abstentions or absences, there will no longer be split votes. The bill also limits the number of commissioners from a specific political party to no more than two from each major party. H.R. 1 now also requires that one commissioner be a political independent. This is a significant change. Reflecting on this provision, the House Committee report observed that “[a]n odd number of commissioners will avoid the inaction and dysfunction that comes with the current partisan split, as well as provide for an independent or minor party commissioner to break partisan ties.”

H.R. 1 also seeks to create an empowered chair accountable to the president. Deviating from the current structure of the commissioner, which has provided for a “first-among-equals” role for the chair, H.R. 1 provides that the president will designate one of the five commissioners as chair. In this newly empowered role, the chair would be “responsible for hiring the agency’s staff director, submitting its budgets, and running it on a day-to-day basis.” As Weiser notes, “[t]hese changes would bring the FEC more in line with how most independent federal agencies run, except that, unlike those bodies, the president’s party would never have a majority.” Finally, H.R.1 mandates a bipartisan, blue-ribbon panel to consider and recommend to the president potential commission nominees.

Congressional Republicans have called H.R. 1’s FEC reform provisions “perhaps the greatest threat to our political discourse.” The bill’s critics argue that creating a newly powerful chair, who is appointed or designated by the president, will permit one of the major political parties to “weaponize the FEC.” As described by Daniel Weiner, the critics “suggest that the independent on the Commission would likely be a wolf in sheep’s clothing—that is, nominally independent but really a partisan.”

David Keating of the nonprofit Institute for Free Speech (IFS) amplified this concern, noting that “[u]nder H.R. 1, the Commission would be radically transformed from its historic and deliberately bipartisan structure to one under partisan control of the president,” with “[t]he likely impact [being] to shrink public confidence in the impartial enforcement of campaign finance laws, weaponize these regulations for partisan gain, and silence much political speech through new rules on groups that speak about public affairs.”

In addition to strengthening the oversight and enforcement capabilities of the FEC, H.R. 1 also includes provisions to bring greater transparency to federal elections.

2. Amending Federal Disclosure Laws (Title IV, Subtitles B, C, and D)

H.R. 1 provides updates to the campaign disclosure rules addressing long-made critiques. These provisions were included to address the main perceived loopholes in
the disclosure regime that has given rise to the proliferation of dark money and to address the developing role of digital political spending.

These subtitles integrate several long-standing bills introduced to improve transparency in federal elections. Title IV, subtitles B (DISCLOSE Act), C (Honest Ads Act), and D (Stand by Every Ad Act) of H.R. 1 each intend to address different loopholes in the disclosure regime.

The DISCLOSE Act intends to close the loopholes that have permitted dark money groups to refrain from disclosing their donors. The DISCLOSE Act “requires covered organizations—corporations, non-profit organizations, section 527 organizations, and others—to report their campaign-related spending if they spend more than $10,000 in an election cycle.”54 Those organizations spending money to influence elections are further required to disclose donors who gave $10,000 or more during an election cycle. The DISCLOSE Act defines covered campaign-related spending as any independent expenditure, electioneering communication, or advertisements that promote, attack, support, or oppose the election of candidates.

The Honest Ads Act seeks to extend the disclosure and disclaimer requirements of “electioneering communications”55 to paid Internet or digital communications. It does this by importing traditional disclaimer and disclosure requirements to online ads, while “providing regulatory flexibility for new forms of digital advertising.”56 Further, “it requires the largest online platforms, with over 50 million unique visitors per month, to establish a public file of requests to purchase political ads akin to the file broadcasters have long been required to maintain.”57

Finally, the Stand by Every Ad Act extends the candidate-only requirement to indicate the sponsor approved certain political messages to “election-related advertisements purchased by outside entities such as corporations, 527 organizations and nonprofit organizations.”58 The act further requires “such advertisements to include a list of the Top Five funders of the entity (in video advertisements) or the Top Two funders of the entity (for audio advertisements).”59

Critics of these provisions argue that they “would violate the privacy of advocacy groups and their supporters, stringently regulate political speech on the Internet, and compel speakers to include lengthy government-mandated messages identifying some of their supporters by name in their communications.”60

3. Small-Donor Matching for Congressional Races (Title V, Subtitle B, Part 2)

Attempting to address the outside role money plays in federal elections, the Government by the People Act of 2019 in title V, subtitle B, part 2 of H.R.1 provides for a small-donor matching program for congressional elections. In the small-donor matching program, “[c]andidates [can] opt into the system by raising enough small start-up donations to qualify and accepting certain conditions such as lower contribution limits.”61 Candidates who receive acceptable small-dollar contributions will have those funds matched with public money.62 “As established in H.R. 1, the small dollar financing of Congressional campaigns will provide a 6-to-1 match of contributions of $200 or less for participating candidates.” For candidates to qualify for
the matching program, they must raise at least $50,000 in small-dollar contributions from at least 1,000 individuals during a specific qualifying period.63

Supporters of small-donor matching systems point to empirical research that has shown that in jurisdictions employing a matching program—like New York City—the program increased the proportional role of small donors, increased the total number of smaller donors, and diversified the donor pool.64

On the other hand, critics of the provision “see a potentially huge expense for taxpayers with no guarantee that it would curb the influx of outside money into campaigns.”65 For example, David Keating of IFS observed that while small-dollar matching programs succeed at providing candidates campaign funds, according to IFS’s research, they fail “to reduce special interest influence, fail to reduce the dominance of businessmen and lawyers in politics, fail to increase the number of women elected to legislatures, fail to change legislative voting behavior, fail to make elections more competitive, and fail to increase voter turnout.”66

D. ETHICS
Division C of H.R. 1 establishes stronger ethics rules for all three branches of government. Of note, H.R. 1 provides for new congressional ethics rules. This includes requiring “Members of Congress to reimburse [the U.S.] Treasury for amounts paid as settlements and awards under the Congressional Accountability Act of 1995 in all cases of employment discrimination acts by Members.”67 H.R. 1 codified conflict-of-interest rules for members of Congress and congressional staff, and prohibits members, House officers, and other employees from misusing a position to introduce or help pass legislation for pecuniary gain. H.R. 1 requires linking of FEC campaign finance reports with Lobbying Disclosure Act reports. According to the House Committee report, this will help voters hold elected officials and special interests accountable to the public interest and follow how levers of influence are linked.68 Finally, the bill imposes a code of conduct for Supreme Court justices.

III. Conclusion
As recorded in the Federalist in 1788:

Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States.69

H.R. 1 represents the most comprehensive democracy reform package since the Watergate era. Weaving together provisions to address election administration, voter access, redistricting reform, campaign finance reform, and new ethics provisions, H.R. 1 would radically transform our federal elections. While the prospects for ultimate passage are bleak, the bill stands as a testament for those striving to engender a more representative democracy.
Notes


2. Id.


4. See For the People Act of 2019, H.R. 1, 116th Cong. (as passed by House, Mar. 8, 2019) [hereinafter H.R. 1].


7. Id.

8. See H.R. 1, supra note 4.

9. Id.

10. House Committee Report, supra note 1, at 149.

11. Id.

12. Id.

13. Id. at 124.


20. Id. at 6.

21. Id.

22. House Committee Report, supra note 1, at 124.


24. House Committee Report, supra note 1, at 123.

30. Id.
31. Id.
32. Id.
34. Id.
35. H.R. 1, supra note 4, § 1903.
38. H.R. 1, supra note 4, § 2401.
40. Rucho v. Common Cause, No. 18-422, slip op. at *38 (U.S. June 27, 2019) (“As noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause. The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering. H.R. 1, 116th Cong., 1st Sess., §§ 2401, 2411 (2019.”).
41. House Committee Report, supra note 1, at 129.
42. Id.
46. Id. at 2.
47. H.R. 1, supra note 4, § 6002.
48. House Committee Report, supra note 1, at 138.
49. Weiner, supra note 44.
50. House Committee Report, supra note 1, at 441 (dissenting views).
51. Weiner, supra note 44.
52. Id.
54. House Committee Report, supra note 1, at 131.
56. House Committee Report, supra note 1, at 132.
58. House Committee Report, supra note 1, at 133.
59. Id.
60. Letter from David Keating, supra note 53.
62. Id.
63. House Committee Report, supra note 1, at 135.
67. House Committee Report, supra note 1, at 135.
68. Id. at 139.
PART THREE

VOTING RIGHTS LITIGATION
CHAPTER 14

CRIMINAL ENFORCEMENT OF THE ELECTION LAWS: LESSONS FROM 2016 AND WHAT TO EXPECT IN 2020

KEVIN PAULSEN

I. Introduction

The 2016 presidential election has been subject to more criminal scrutiny than any other American election in recent memory. With the appointment of Robert S. Mueller III as special counsel in early 2017, a large team of Department of Justice (DOJ) prosecutors was given the broad mandate to investigate potential links between the Russian government and the Trump campaign as well as any other matters directly arising from that investigation. The ensuing two-year investigation resulted in a number of high-profile indictments, brought both by the special counsel’s office directly and by federal prosecutors who were referred matters by Mueller’s team. Two particularly high-profile criminal prosecutions arose from the investigation: (1) the indictment of various Russian nationals by the special counsel for engaging in a sophisticated campaign to influence the outcome of the 2016 election, and (2) the indictment of Michael Cohen by the U.S. attorney for the Southern District of New York for campaign finance violations in connection with hush money payments alleged to have influenced the 2016 presidential election. This chapter examines both matters, each of which illustrates the inherent challenges in the criminal enforcement of federal campaign finance laws, and provides insight to the prosecution of potential misconduct associated with the 2020 election campaigns.

II. Foreign Interference in the 2016 Election

Interference by foreign actors remains the most immediate and pervasive threat to the American electoral process. While foreign attempts to influence domestic elections are neither a new phenomenon nor exclusive to a single state actor, the Russian government’s sophisticated efforts to influence the 2016 U.S. presidential campaign “represented a significant escalation in directness, level of activity and scope of effort compared to previous operations aimed at U.S. elections.” National security
experts agree that the Russian threat has not subsided, and Russian attempts to sow discord and undermine confidence in our democratic institutions through coordinated political activity will likely recur in 2020. Although the prosecution of foreign state actors for violations of federal election laws presents challenges, the investigations and criminal proceedings spawned from Russian election interference in 2016 give clues as to the potential outlook for the prosecution of criminal violations in 2020 and beyond.

A. STATUTORY FRAMEWORK

Congress has long sought to curb the influence of foreign citizens and governments over American democracy through the federal campaign finance laws. In 1966, as political campaigns became increasingly dependent on monetary contributions, Congress enacted a prohibition on political contributions by agents of foreign governments. The Federal Election Campaign Act (FECA) Amendments of 1974 expanded this prohibition to bar contributions from all “foreign nationals,” a term that encompasses any person who is not a citizen of the United States (other than lawful permanent residents), including foreign governments and corporate entities. The current statutory framework, adopted pursuant to the Bipartisan Campaign Reform Act of 2002, goes even further by banning foreign nationals from making any contribution, donation, direct or indirect expenditure, or independent expenditure in connection with federal, state, or local campaigns. Conversely, the statute prohibits candidates from soliciting, accepting, or receiving contributions or donations from foreign nationals. The terms “expenditure” and “contribution” are each broadly defined in this context to include “anything of value” that is intended to influence the nomination or election of a candidate. While almost all of FECA pertains to federal elections, Congress expressly applied the ban on foreign contributions and expenditures to state and local elections as well.

The breadth of the prohibition on campaign activity by foreign nationals underscores Congress’s concern that foreign interests may try to influence U.S. elections. Accordingly, this statute (52 U.S.C. § 30121) has withstood First Amendment challenges because federal courts have recognized the compelling government interest in “preventing foreign influence over the U.S. political process.” In 2011, the federal District Court for the District of Columbia upheld the constitutionality of the statute in *Bluman v. Federal Election Commission*, a decision summarily affirmed by the U.S. Supreme Court, holding that the “government may bar foreign citizens (at least those who are not lawful permanent residents of the United States) from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections.” The *Bluman* Court recognized that well-established Supreme Court precedent “has drawn a fairly clear line: The government may exclude foreign citizens from activities ‘intimately related to the process of democratic self-government.’”

As is the case with most federal campaign finance law, enforcement authority for the prohibition on campaign activity by foreign nationals is delegated to the Federal
Election Commission (FEC) in a civil and administrative capacity. FECA violations enter criminal territory, however, and are subject to prosecution by the DOJ, when a violation is (1) committed “knowingly and willfully” and, subject to certain exceptions, (2) the amount of money involved meets or exceeds $2,000 in the aggregate in a calendar year. If the amount in question exceeds $25,000 in a calendar year, the crime is elevated from a misdemeanor to a felony, generally subject to imprisonment for up to five years and fines of up to $250,000 and $500,000 per offense by an individual or organization, respectively. Criminal violations of FECA involving foreign nationals are subject to even stricter penalties pursuant to U.S. Sentencing Commission Guidelines. Under the guidelines, a base level offense for an impermissible contribution or expenditure is increased two levels if the offense directly or indirectly involves an illegal transaction made by a foreign national and four levels if that foreign national is a foreign government.

B. RUSSIAN INTERFERENCE OPERATIONS

Russia’s campaign to influence the 2016 presidential election is believed to have been personally authorized by President Putin and originated as early as 2014. What began as a “generalized program” of “information warfare” grew into a multifaceted attack on three main fronts: (1) a cyber-espionage campaign against U.S. political entities (including the Democratic National Committee) led by the Main Intelligence Directorate of the General Staff of the Russian Army (GRU) and the dissemination of hacked materials obtained therefrom; (2) cyber intrusions into state and local electoral systems by Russian intelligence agents; and (3) a propaganda campaign waged primarily through social media and spearheaded by the Internet Research Agency (IRA), a Russian “troll farm” funded by a Russian oligarch alleged to have close ties to Putin. The latter front, which sought to exacerbate political divisions in the United States in general and to promote the candidacy of now-President Donald Trump over Secretary Hillary Clinton in particular, has the clearest campaign finance implications and is the focus of this chapter.

In furtherance of the objective to promote President Trump’s candidacy, the IRA constructed a massive organization with hundreds of employees and a multimillion dollar annual budget. So sophisticated was the IRA’s operation that it maintained its own finance, graphics, data analysis, and search-engine optimization departments that enabled it to maintain hundreds of fake social media accounts posing as American citizens on Facebook, Instagram, and Twitter. Computer infrastructure was purchased inside the United States to conceal the Russian origin of the IRA’s Internet activity and content. IRA agents are even alleged to have undertaken covert intelligence-gathering operations in the United States, traveling to America under false pretenses in the summer of 2014 to better inform their messaging operations. Other agents posed as American political activists online and communicated with legitimate U.S. organizers who unwittingly provided the IRA with strategic advice to maximize its electoral impact, such as targeting its political messaging at “purple states like Colorado, Virginia & Florida.”


When the operation began in 2014, its mission was more generalized in nature: to use social media to aggravate existing racial, social, and political tensions in America to serve Moscow’s “longstanding desire to undermine the U.S.-led liberal democratic order.”25 As the campaign progressed, the operation became a targeted effort to assist Trump, Moscow’s “favored candidate,” and to undermine the electability of Hillary Clinton.26 This effort included significant political advertising on social media in violation of § 30121’s ban on such activity by foreign nationals. Examples of the overtly political advertisements purchased and promoted by the IRA included messages such as “Vote Republican, vote Trump and support the Second Amendment,” and “Hillary is Satan . . .”27 Other content was created and disseminated in an attempt to suppress voter turnout among groups believed likely to favor Hillary Clinton, such as “Hillary Clinton Doesn’t Deserve the Black Vote,” or to persuade would-be Clinton voters to instead support third-party candidates with Instagram posts reading “Choose peace and vote for Jill Stein. Trust me, it’s not a wasted vote.”28 According to congressional testimony from Facebook’s general counsel, the IRA spent approximately $100,000 to purchase more than 3,500 advertisements on Facebook alone to promote its content on the newsfeeds of U.S. users.29 Facebook estimates that “IRA-controlled accounts made over 80,000 posts before their deactivation in August 2017,” reaching a minimum of 29 million Americans, and potentially as many as 126 million people in total.30 Many IRA expenditures for political advertisements were fraudulently made using the identities of real U.S. persons via PayPal accounts and credit cards obtained using these individuals’ stolen Social Security numbers, birth dates, and fake U.S. driver’s licenses.31 Unsurprisingly, none of these expenditures were reported to the FEC, nor were the actual purchasers properly registered as foreign agents with the DOJ.32

C. THE MUELLER INVESTIGATION AND IRA INDICTMENT

Criminal prosecution of Russian interference in the 2016 election fell squarely within Mueller’s jurisdiction when Deputy Attorney General Rod Rosenstein appointed him as special counsel in May 2017 with a mandate to investigate potential links between the Russian government and Trump campaign as well as any matters directly arising from that investigation.33 Mueller’s final report (the Mueller Report) includes significant allegations of Russian interference, including accounts of the operations and activities described above, uncovered during the course of the two-year investigation.34 One of the most significant prosecutions to result from the special counsel’s investigation is the indictment of the IRA and related individuals (the IRA Indictment) in connection with its 2016 social media campaign.35 The IRA Indictment outlines the means by which federal prosecutors may bring criminal charges against foreign nationals who interfere with U.S. elections but also demonstrates the difficulty in obtaining convictions and deterring future misconduct.

In February 2018, Mueller’s team brought federal charges against the IRA, 13 Russian individuals alleged to have assisted the IRA in various capacities (including Yevgeny Prigozhin, the wealthy oligarch and Putin acolyte alleged to have
financed the IRA’s operations\textsuperscript{36}), and two Russian business entities controlled by Prigozhin (Concord Management and Consulting LLC and Concord Catering) for their collective efforts to interfere in the 2016 election.\textsuperscript{37} Rather than charging the IRA and its co-defendants with a criminal violation of FECA’s prohibition on political expenditures by foreign nationals under 52 U.S.C. § 30121, prosecutors rather secured an indictment from a federal grand jury under 18 U.S.C. § 371, which prohibits conspiracies to defraud the United States.\textsuperscript{38} A conviction under § 371 requires that the government prove (1) an agreement of two or more persons, (2) to defraud the United States by “impairing, obstructing or defeating the lawful functions of any department of Government” by “deceit, craft or trickery, or at least by means that are dishonest,” and (3) an overt act in furtherance of the conspiracy by at least one of the conspirators.\textsuperscript{39}

The DOJ has characterized a § 371 conspiracy case in the campaign finance context as follows:

The FEC, an agency of the United States, has the principal statutory duties of enforcing FECA’s campaign financing prohibitions and disclosure requirements and providing the public with accurate information regarding the source and use of contributions to federal candidates and expenditures supporting federal candidates. To perform these duties, the FEC must receive accurate information from the candidates and political committees that are required to file reports under [FECA]. A scheme to infuse patently illegal funds into a federal campaign, such as by using conduits or other means calculated to conceal the illegal source of the contribution, thus disrupts and impedes the FEC in the performance of its statutory duties.\textsuperscript{40}

Accordingly, the indictment charges that the IRA and its co-defendants made impermissible expenditures to influence the 2016 election, namely purchasing and promoting political advertisements through various social media platforms “without the proper regulatory disclosure,” thus frustrating the FEC’s ability to enforce its statutory objectives of publicly disclosing the sources of money in politics and prohibiting foreign funds from infiltrating American elections.\textsuperscript{41}

There are two key reasons Mueller’s team may have made the strategic decision to charge the IRA and its co-defendants with conspiracy pursuant to 18 U.S.C. § 371 rather than with violations of the ban on foreign nationals’ expenditures under 52 U.S.C. § 30121. First, these defendants, as Russian foreign nationals, will likely never appear for trial in the United States. More than a year after the IRA Indictment was issued, only Concord Management and Consulting LLC had entered an appearance in federal district court through U.S. counsel—all other defendants remain “at large.”\textsuperscript{42} If the majority of these defendants are to be tried in absentia, federal prosecutors will not have the opportunity to arrest, depose, subpoena records from, or otherwise interrogate these defendants. A conspiracy charge, by its nature, presents an appealing option in this context because it does not require that the government prove that all defendants engaged in the same level of misconduct to obtain a conviction from all conspirators. In fact, § 371 conspiracy to defraud the
government does not even require the government to demonstrate that the underlying misconduct constitutes a federal crime.\textsuperscript{43}

Second, by pursuing charges under the conspiracy statute, prosecutors avoided the need to satisfy the rigorous scienter element of 52 U.S.C. § 30121, which requires the government to demonstrate that a defendant “knowingly and willfully” violated campaign finance law.\textsuperscript{44} The Mueller Report noted that this requirement proved to be a “substantial barrier to prosecution” under FECA, identifying at least two instances in which prosecutors declined to pursue criminal charges against individuals because of the difficulty in proving beyond a reasonable doubt that the accused knew the conduct was unlawful.\textsuperscript{45}

That is not to say, however, that 18 U.S.C. § 371’s intent element is easily satisfied; the government must prove that the defendants intended to “disrupt and impede the lawful functioning of the FEC.”\textsuperscript{46} There is precedent for establishing that defendants intended to defraud the government through illegal campaign finance activity. In \textit{United States v. Hopkins}, the Fifth Circuit upheld the convictions of two men engaged in an illegal corporate contribution scheme.\textsuperscript{47} With respect to the intent element, the court held that “the evidence need not show that a conspirator had specific knowledge of the regulations, nor need it conclusively demonstrate a conspirator’s state of mind; [i]t suffices to show facts and circumstances from which the jury reasonably could infer that [a conspirator] knew her conduct was unauthorized and illegal.”\textsuperscript{48} In \textit{Hopkins}, the court recognized that a rational jury could infer from the elaborate efforts the appellants took to conceal the sources of their illegal contributions that their intent was to “evade lawful [campaign finance] obligations.”\textsuperscript{49}

Similarly, here, federal prosecutors can point to the extensive scheme allegedly undertaken by the IRA and its co-conspirators (e.g., creating bank accounts using fake U.S. personas, disguising computer networks using U.S.-based virtual private networks) to conceal the true origin of its political content and expenditures as evidence that they had the requisite intent to impede the lawful functioning of the FEC, the federal agency charged with regulating the activity in which they were engaged. Accordingly, the Mueller team likely made the correct strategic determination that an indictment for conspiracy to defraud the United States pursuant to 18 U.S.C. § 371 presented the most effective means of prosecuting foreign interference in the 2016 elections.

D. WHAT TO EXPECT IN 2020 AND BEYOND

Making predictions in today’s political climate is an extremely difficult undertaking, but if there is one prediction on which political prognosticators and national security experts agree, it is that foreign powers, namely Russia, will again attempt to interfere in the 2020 presidential election. American intelligence officials believe that their Russian counterparts view their 2016 interference campaign “at least as a qualified success because of their perceived ability to impact public discussion” and that “Moscow will apply lessons learned from its [2016] campaign” to influence future
U.S. elections. Although there was some Russian-connected activity aimed at the 2018 midterm elections—400 Russian propaganda outlets were identified as being directed toward U.S. audiences during the midterms, 100 of which have been identified by cybersecurity experts as being under the direction or control of Moscow—security experts and even government officials have acknowledged the likelihood that foreign adversaries stayed on the sidelines in preparation for the [2020] presidential election. Indeed, the intelligence community believes that influencing U.S. policy through attacks on domestic elections remains a priority for Russia, China, and Iran, among others.

Given the difficulty of prosecuting foreign nationals in this context, an indictment under 18 U.S.C. § 371 may continue to be the best tool at federal prosecutors' disposal for prosecuting future interference in American elections. This statute could be a particularly attractive means of indicting U.S.-based co-conspirators of foreign actors who knowingly aid and abet foreign interference operations as such domestic actors can be more easily apprehended by U.S. law enforcement. Section § 371 is not, however, prosecutors' only tool. In addition to FECA's criminal provision, 52 U.S.C. § 30109, federal prosecutors could pursue criminal charges under 18 U.S.C. § 1001 for withholding material information regarding federal elections from the FEC. The application of § 1001 to campaign finance violations was first upheld by the D.C. Circuit in 1985 and has been reaffirmed in every challenge since. Similar charges could be filed under 18 U.S.C. § 1505 for obstruction of agency proceedings.

Ultimately, all of these federal charges face an obstacle that highlights the inherent challenge in criminal prosecution of foreign election interference: that foreign actors, principally those sponsored by a nation-state, will never be extradited or surrender themselves for prosecution in the United States, much less face extradition by their governments. In reality, the punitive effect of criminal prosecution of these charges is extremely limited, as is, consequently, the deterrent effect. To effectively deter Russian interference, cybersecurity experts have warned that "Moscow needs to believe that the United States will impose costs beyond the sanctions" and criminal charges it has already pursued. This will require a combination of criminal prosecution, severe economic sanctions aimed at top Russian officials and oligarchs, and cyber countermeasures designed to inflict maximum damage upon Russia's cyber arsenal.

III. “Catch and Kill” in 2016 and the Cohen Guilty Plea

Some of the biggest headlines that dominated the news cycle in 2019 centered on President Trump's former attorney, Michael Cohen, and his alleged "catch and kill" misconduct during the 2016 presidential campaign. In mediaspeck, "catch and kill" refers to the practice of actively preventing a story from reaching the eyes and ears of the public. Cohen's alleged misconduct eventually resulted in his pleading guilty to various crimes, including two campaign finance violations stemming
from his participation in two separate catch-and-kill schemes. In addition to the campaign finance charges, the U.S. attorney for the Southern District of New York also filed a criminal information charging Michael Cohen with perpetrating a tax evasion scheme (Information). This chapter focuses specifically on Cohen's facilitating unlawful corporate and excessive campaign contributions on behalf of then-candidate Donald Trump.

A. STATUTORY FRAMEWORK

The Information charges that Cohen violated FECA, in particular 52 U.S.C. §§ 30118(a), 30116(a)(7), and 30116(a)(1)(A), by making or causing to be made unlawful corporate contributions and excessive campaign contributions to a 2016 presidential campaign. 52 U.S.C. § 30118 prohibits banks and corporations from making contributions and some expenditures in connection with certain elections, including presidential elections. A contribution is generally defined as “any gift, loan, or anything else having pecuniary value that is made for the purpose of influencing the nomination or election of a federal candidate.” Recent Supreme Court case law has limited the scope of 52 U.S.C. § 30118’s broad prohibition on corporate political activity. In Citizens United v. Federal Election Commission, the Court, in a 5–4 decision, held that the First Amendment’s free speech clause prevents the government from restricting independent expenditures (defined further below) for communications by certain organizations, including for-profit corporations. However, while Citizens United significantly narrowed the scope of the statute prohibiting corporate contributions and expenditures, the case upheld disclosure requirements for donations and left undisturbed the federal prohibition on direct contributions from corporations to candidate campaigns.

Meanwhile, FECA’s contribution limits are codified at 52 U.S.C. § 30116, which prohibits campaign contributions exceeding certain amount thresholds. In particular, the statute provides that no person may knowingly and willfully make contributions to any candidate for federal office in excess of $2,800 in a calendar year. As discussed more thoroughly earlier in this chapter, knowing and willful FECA violations may be criminally prosecuted as a misdemeanor if the relevant contribution and/or expenditure meets or exceeds $2,000 over the course of one calendar year; misconduct involving $25,000 or more in a calendar year may be prosecuted as a felony.

Expenditures on behalf of a federal candidate that are coordinated with that candidate’s campaign are considered contributions that are subject to the amount limitations and source prohibitions described above. Uncoordinated expenditures are known as “independent expenditures” and are not subject to these limitations. The FEC defines an “independent expenditure” as “an expenditure for a communication which expressly advocates the election or defeat of a clearly identified candidate and which is made independently from the candidate’s campaign.” In order for an expenditure to qualify as independent, the communication cannot be made by cooperating, consulting, or coordinating with the candidate or his or her
committees or agents, nor can the expenditure be made at the request or suggestion of any of those individuals. The Supreme Court has found that contributions are indirect political speech and therefore may be more strictly regulated than expenditures, which are considered to be direct political speech and are thus more carefully shielded against government regulation by the Constitution. These distinctions are relevant to the Cohen prosecution as discussed further below.

B. FACTUAL ALLEGATIONS IN THE COHEN INFORMATION

The Information filed in the Southern District of New York on August 21, 2018, alleged that Cohen coordinated with the chairman and chief executive officer of American Media, Inc. (AMI), a for-profit media corporation, to bury salacious news stories about a presidential candidate’s extramarital relationships with women by working to identify such stories so that the rights to the stories could be purchased in order to avoid their publication. According to the Information, AMI advised Cohen of two such stories over the course of the 2016 presidential campaign that Cohen then purchased with the intent to prevent their publication.

In the first instance, in June 2016, a model/actress tried to sell a story regarding a 2006–2007 extramarital affair with the presidential candidate. AMI entered into an agreement with the woman to obtain her limited life rights to the story in exchange for $150,000 and a commitment to feature the woman on two magazine covers and to publish articles written by her. The Information provides that the principal purpose of the agreement was actually to suppress the story “so as to prevent it from influencing the election.” Cohen later agreed with the AMI chairman to assign the rights to the nondisclosure portion of the agreement to Cohen for $125,000. Cohen used a shell corporation that he had incorporated to effectuate the $125,000 transaction, though AMI eventually canceled the agreement.

In the second instance, an agent for an adult film actress advised an AMI employee that the actress was willing to make public statements regarding her alleged affair with the candidate. Once Cohen was advised of this potential story, he negotiated an agreement to pay $130,000 in exchange for her silence. Cohen incorporated another shell company, opened a bank account in the company’s name, and deposited $131,000 into the account before wiring $130,000 to the attorney for the adult film actress the following day.

In January 2017, Cohen sought reimbursement for election-related expenses and provided a copy of the bank statement reflecting the $130,000 payment (in addition to a payment for $50,000 for technology services used during the election) to the adult film actress's attorney to the Manhattan-based real estate company associated with the presidential candidate. The company reimbursed Cohen for the $180,000, which was “grossed up” to $360,000 (in addition to a $60,000 bonus). The money was to be paid out to Cohen for “services rendered” over a 12-month period and was accounted for in the company’s records as “legal expenses.”
C. COHEN’S FECA VIOLATIONS AND GUILTY PLEA

On August 21, 2018, Cohen entered into a plea agreement with the Southern District of New York in which he pled guilty to all counts included in the Information, including the charges that he made or caused to be made excessive campaign contributions and prohibited corporate campaign contributions. In its application of facts to the law, the Information provides that Cohen knowingly and willfully caused AMI to make a prohibited corporate contribution of $150,000 to a presidential campaign in violation of 52 U.S.C. § 30118(a) during the 2016 calendar year. The contribution was made when AMI paid the model/actress so as to ensure that she did not make public her story about the candidate’s extramarital affair “and thereby influence that election.”76

Regarding the excessive contribution, Cohen pled guilty to knowingly and willfully making and causing to be made a $130,000 contribution in excess of the contribution amount limits at 52 U.S.C. § 30116(a) to the same presidential candidate by making an expenditure in cooperation, consultation, and concert with one or more members of the campaign in providing the payment to an adult film actress in exchange for her agreement to remain silent regarding an alleged affair with the candidate. Significantly, for purposes of establishing all elements of the crime, the Information references Cohen’s coordination with “one or more members of the campaign, including through meetings and phone calls, about the fact, nature, and timing of the payments.”77

D. WHAT TO EXPECT IN 2020

The Cohen guilty plea is useful in that it provides enough factual detail and legal discussion to allow one to surmise the prosecution’s theory of the case, had the case proceeded to trial: Cohen improperly paid (and caused a corporation to improperly pay) hush money to two individuals with the purpose of keeping those individuals silent as to their alleged extramarital affairs with a presidential candidate, and that silence influenced the presidential election due to the absence of the stories in the news cycle. Further, Cohen’s efforts were coordinated with the aid and knowledge of at least one member of the Trump campaign. Though helpful to a point, the absence of a trial and resulting verdict certainly generates lingering questions about whether Cohen would have been convicted had he pled not guilty and proceeded to trial. Would such a theory successfully have resulted in a conviction? Which, if any, of the crimes’ elements would have been most difficult to establish?

Because Cohen pled guilty, it is impossible to provide a comprehensive assessment of whether the prosecution had adequate evidence to establish each element of the campaign finance crimes sufficient to convince a factfinder of Cohen’s guilt. What is clear from the Information and subsequent guilty plea is that prosecutors worked to gather such evidence and included relevant facts in the Information in an effort to demonstrate that all elements reasonably could have been met at trial.

Cohen’s guilty plea also begs loftier questions about what is in store for the 2020 election. What is the likelihood that other individuals will be criminally charged for
campaign finance violations based on catch-and-kill scenarios? Further, does the Cohen prosecution signal the beginning of a shift in DOJ policy toward pursuing criminal convictions for this type of behavior in the future?

Historically, criminal charges for campaign finance violations have been a relative rarity. Criminal charges for campaign finance violations based on catch-and-kill activity have been rarer still, although there is at least one example in recent history of a politician being charged with (and eventually partially acquitted of) violating FECA by participating in a scheme to buy another person’s silence.

In May 2012, John Edwards, a 2008 presidential candidate, was brought to trial over allegations that he solicited almost $1 million from donors with the intention of using those funds to aid in concealing his extramarital affair. The jury deadlocked on five of the charges in the indictment, including charges for criminal conspiracy, illegal campaign contributions, and false statements, and acquitted Edwards of one charge alleging that Edwards knowingly and willfully accepted improper contributions of more than $25,000 in excess of FECA limits. At the time of the indictment, experts in the field described the charges as “unprecedented” and commented that the government’s case appeared to be weak.

Indeed, the government was unsuccessful in prosecuting the case against Edwards—two weeks after the jury verdict, the government dropped the remaining charges against Edwards and did not bring another criminal campaign finance violation case of this variety until the 2018 Cohen Information was filed. Commentators have suggested that a lack of witnesses who could testify to Edwards’s intent to violate the campaign finance laws contributed to the prosecution’s failure to obtain a conviction. That the prosecution’s star witness not only participated in the scheme to pay off Edwards’s mistress but also diverted campaign funds for his own personal gain and worked to secure book and movie deals related to the Edwards case also proved problematic for prosecutors.

The Cohen prosecution and guilty plea could signal a shift in favor of criminally prosecuting catch-and-kill conduct using the campaign finance laws (assuming, of course, that there will be catch-and-kill activity to be prosecuted). However, due to the dearth of criminal campaign finance violation case law, it is difficult to gauge the likelihood of success of any potential catch-and-kill prosecutions. Although it is impossible to say whether there will be catch-and-kill activity in the run-up to the 2020 election, in the digital age of new media and the “Me Too” movement, it is only becoming increasingly likely that candidates and their campaigns will continue to grapple with these issues.

If future prosecutions do proceed to trial, the DOJ should consider carefully its potential witnesses. Because the most knowledgeable witnesses may themselves have been involved in the misconduct, executing non-prosecution agreements with those witnesses (as the DOJ did with AMI) may be helpful in both assuring witnesses’ full cooperation and persuading those witnesses to take the stand. Pleading defendants out, as the DOJ did with Cohen, might also be a better approach than proceeding to trial. Finally, the DOJ could consider allowing the FEC to address such matters
through administrative proceedings, thus eliminating the need to prove intent, an element that was difficult to establish in the Edwards case, and avoiding the risks and costs associated with trial.

IV. Conclusion

Although predicting the landscape for criminal campaign finance prosecutions in 2020 is challenging (and forecasting the likelihood of success of any such prosecutions is harder still), prosecutors and political candidates alike should learn from the lessons of 2016 outlined in this chapter. With respect to foreign interference, criminal violations of campaign finance law will remain difficult to enforce due to the dual challenges of proving the intent element required for a criminal conviction under FECA and the extreme unlikelihood that foreign defendants, particularly state actors or their agents, will submit to the jurisdiction of U.S. courts. Accordingly, the most likely form of effective prosecution may be federal charges under 18 U.S.C. § 371 against U.S.-based persons who knowingly enter into a conspiracy with foreign actors to influence an American election, though obtaining such a conviction remains an uphill battle for federal prosecutors for reasons outlined in this chapter.

There also remains a high likelihood that catch-and-kill prosecution could once again arise in the 2020 campaign. In the era of “Me Too” and with the prevalence of new forms of digital media that allow individuals to directly disseminate information to large numbers of voters, campaigns may feel compelled to engage in catch-and-kill schemes to avoid embarrassing and damaging allegations of sexual misconduct. Although this form of prosecution also presents challenges, the intense criminal scrutiny of the 2016 presidential election and subsequent Cohen guilty pleas might suggest an increased willingness of the DOJ to prosecute similar conduct into 2020 and beyond.

Notes

5. Id.
6. Id. at 284. See also 52 U.S.C. § 30121 (2018).
8. Id. § 30101(9)(A).
9. Id. § 30121(a)(1)(A).
11. Id. at 289.
12. Id. at 282 (internal citations omitted). See also Foley v. Connelie, 435 U.S. 291, 295–96 (1978) (noting that “a State’s historical power to exclude aliens from participation in its democratic institutions [is] part of the sovereign’s obligation to preserve the basic conception of a political community”).
16. See Pilger, supra note 13, at 140 (citing U.S. Sentencing Guidelines Manual § 2C1.8(b)(2) (2018)).
17. Id. at 180.
20. See IRA Indictment, supra note 18, at 5.
21. Id. at 5–6.
22. See id.
23. Id. at 13.
24. Id.
25. See Mueller, supra note 19, at 4; DNI Report, supra note 2, at ii.
27. IRA Indictment, supra note 18, at 20.
28. Id. at 18, 20.
29. See Mueller, supra note 19, at 25 (internal citation omitted).
30. Id. at 26.
31. See IRA Indictment, supra note 18, at 16, 31–34.
32. Id. at 4.
34. See generally Mueller, supra note 19.
35. See id. at 174.
37. See generally IRA Indictment, supra note 18.
38. Id. at 3. Note that the IRA Indictment also charges three defendants with conspiracy to commit wire fraud and bank fraud and five defendants with aggravated identity theft for crimes undertaken in conjunction with the alleged conspiracy to defraud the United States.
40. See Pilger, supra note 13, at 162 (internal citation omitted).
41. See IRA Indictment, supra note 18, at 4. The IRA Indictment also alleges that defendants impaired the lawful functions of the DOJ and Department of State by failing to properly register as foreign agents and obtaining visas under fraudulent pretenses, respectively.
42. See MueLLer, supra note 19, at 174.
43. See Doyle, supra note 39, at 2.
44. See Pilger, supra note 13, at 123 (internal citation omitted).
45. See Mueller, supra note 19, at 187, 190.
46. Pilger, supra note 13, at 163.
47. United States v. Hopkins, 916 F.3d 207 (5th Cir. 1990).
48. Id. at 213.
49. Id. at 214.
50. DNI Report, supra note 2, at 5.
52. Cassidy, supra note 3.
53. Id.
54. See Pilger, supra note 13, at 159.
55. See id. at 159–62.
57. Wines & Barnes, supra note 56.
62. See Pilger, supra note 13, at 134.
63. 52 U.S.C. § 30116(a).
65. 52 U.S.C. § 30109(d).
67. Id.
68. Buckley v. Valeo, 424 U.S. 1 (1976); Pilger, supra note 13, at 130.
69. Although Cohen’s Information and guilty plea do not specifically name AMI, AMI entered into a non-prosecution agreement with the DOJ in which AMI acknowledged its participation in the catch-and-kill scheme detailed in the Cohen Information. See Non-Prosecution Agreement, American Media, Inc. (S.D.N.Y. Sept. 20, 2018).

71. See Information, supra note 59, at 11-19.

72. See id.

73. See id. ¶ 30.

74. See id. ¶ 32-24.

75. See id. ¶ 37-40

76. See id. ¶ 42.

77. See id. ¶ 35.

78. See id. ¶ 35.


80. Markon, supra note 78.


83. Roig-Franzia, supra note 79.
I. Introduction

Biblical prophecy predicts wars, famines, earthquakes, and all sorts of strange happenings indicative of the end times. Some would have included the demise of section 5 of the Voting Rights Act of 1965 (VRA) among these events. We are now almost six years hence and the world continues. But, the landscape for those involved in legislative redistricting who have operated in states previously covered by section 5 has been altered.

The last legislative redistricting cycle occurred after the 2010 Census. Not long afterwards, the U.S. Supreme Court radically altered the redistricting landscape by striking down section 4 of the VRA, which had the effect of rendering section 5 inapplicable. With the demise of section 5, drafters of legislative districts find themselves facing a somewhat different legal construct. Gone is the non-retrogression requirement of section 5. Preclearance is no longer required. What remains, though, is the all-important requirement of compliance with section 2 and adherence to constitutional mandates as interpreted and applied by the Supreme Court.

Removing section 5 from the redistricting calculus hoists section 2 to a position of prominence in the upcoming legislative redistricting cycle following the 2020 Census. This newfound stature will call upon drafters to not only be familiar with the well-established parameters of section 2, but also with emerging issues developing in the aftermath of section 5’s demise. This chapter will briefly review the familiar requirements for section 2 compliance and then focus on anticipated issues that should capture the attention of drafters going forward.

II. The VRA and the Demise of Section 5

In 1965, Congress adopted the VRA to address racial discrimination in voting due to “an insidious and pervasive evil which had been perpetrated in certain parts of
our country through unremitting and ingenious defiance of the Constitution.”5 As originally adopted, section 2 of the VRA applied to the entire country and prohibited any “standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color.”6 Following its adoption, litigants used section 2 to eliminate the more obvious obstacles to voting such as literacy tests, poll taxes, and White candidate slating.7 As these measures were defeated, the emphasis shifted to vote dilution claims, or claims by minority voters that redistricting plans or election systems resulted in denying their opportunity to participate in the election process.8 When Congress reauthorized the VRA in 1982, it amended section 2 to provide that any “standard, practice, or procedure [that] results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color” would be prohibited.9 This amendment clarified the scope of section 2 by providing that any enactment that had a discriminatory effect or result would violate section 2, as opposed to the initial enactment that required a specific discriminatory intent.

Beyond section 2, other sections of the VRA applied only to certain parts of the country and were intended to be temporary, as opposed to permanent. For example, section 4(b) of the VRA provided that there would be a “coverage formula,” subjecting only those jurisdictions that met the formula to certain requirements. Those jurisdictions became known as “covered jurisdictions.” In order to be a covered jurisdiction, it had to have “maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential Election.”10 If a jurisdiction was a “covered jurisdiction” under the formula in section 4(b), then section 5 applied and required all covered jurisdictions to seek approval from either the U.S. Department of Justice (DOJ) or the U.S. District Court of Appeals for the District of Columbia for any change in voting practices or procedures adopted by that jurisdiction.11 This requirement was known as “preclearance.”12

For approximately 48 years, drafters of legislative districts in covered jurisdictions had become well-acquainted with the preclearance process. The law applicable to preclearance had evolved over time from encouraging maximization of majority-minority districts at one point to adjusting for the holding that race could not be the predominant reason for drawing districts unless necessary to protect a compelling state interest.13 At the time of the Shelby County decision, the DOJ determination for preclearance was whether the submitting jurisdiction had adopted a plan “free of any discriminatory purpose” and not having “a retrogressive effect.”14 As to what constituted retrogressive effect, DOJ relied on Beer v. United States, stating that a plan would be retrogressive “if its net effect would be to reduce minority voters’ effective exercise of the electoral franchise when compared to the benchmark plan.”15 Making this determination required “a functional analysis of the electoral behavior within the particular jurisdiction or election district.”16 Thus, the lodestar for section 5 jurisdictions to obtain preclearance was non-retrogression, which Justice Scalia described as the “absence of backsliding.”17 But, Shelby County v. Holder was set to drastically alter the VRA and section 5 preclearance landscape.
Following adoption of the VRA, Congress reauthorized it four times with various amendments. However, the coverage formula set forth in section 4(b), which was unchanged from its original enactment in 1965, remained the same. Against this backdrop, in 2010 Shelby County, Alabama, sued the U.S. attorney general in federal court seeking inter alia, a declaratory judgment that sections 4(b) and 5 of the VRA were unconstitutional. Although the district court and D.C. Circuit held against Shelby County, the Supreme Court reversed and held section 4(b) unconstitutional.

The basis for the Supreme Court’s decision in Shelby County was that the underlying conditions of discrimination in voting that existed in 1965 no longer existed in 2013. While there was “no denying that, due to the Voting Rights Act, our Nation has made great strides,” nothing about section 4(b)’s coverage formula had changed since its enactment. In light of this and the then-current conditions in 2013, the Court concluded that the coverage formula had outlived its usefulness. Thus, by holding the coverage formula in section 4(b) unconstitutional, section 5 preclearance was rendered inapplicable. As a result, redistricting as drafters in section 5 jurisdictions had known it for so long was radically altered in one fell swoop.

With the abrupt demise of section 5, covered jurisdictions that had become accustomed to drawing legislative districts to avoid retrogression suddenly found themselves in unchartered waters. What would legislative redistricting now entail in the absence of the non-retrogression requirement? Would retrogression become a forgotten relic of the past or would it find new life in other legal principles, like section 2 of the VRA?

III. Section 2 Framework

To be sure, in the aftermath of Shelby County, section 2 remains fully intact. As the Court made clear, its ruling had no effect on section 2: “Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in Section 2.” As stated, section 2 compliance has always been important because it applies nationwide and prohibits any “standard, practice or procedure . . . imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” The Supreme Court provided the seminal guidance on interpreting and applying section 2 in Thornburg v. Gingles. Setting forth what is now commonly referred to as the Gingles test, the Court held that to prove a section 2 violation, a plaintiff(s) must first establish:

1. The minority group must be “sufficiently large and geographically compact to constitute a majority in a single-member district.”
2. The minority groups must be “politically cohesive.”
3. The majority must vote “sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”
After satisfying these three preconditions, a plaintiff(s) must then prove that the totality of the circumstances supports creating a majority-minority district. A court may consider numerous factors in making the totality of the circumstances determination, and no one factor controls.

Since inception of the VRA, sections 2 and 5 have operated simultaneously with different purposes and legal requirements. The contours of the legal requirements to satisfy section 2 compliance have been fairly well established since Gingles. However, one issue that troubled courts for years after Gingles was the applicability of the first prong of the Gingles test. That prong requires that there be a sufficiently compact concentration of minority voters to form a majority-minority district. In Bartlett v. Strickland, the Court established a bright-line numerical test for satisfying the first prong—there must be at least a concentration of 50 percent of a minority population before a district must be drawn. But, as examined later in this chapter, while this bright-line test has offered some clarity regarding the first Gingles prong, the Bartlett Court’s opinion has led to several conflicting district court opinions.

As for the remaining Gingles factors and the totality of the circumstances, their applicability continues to be a more fact-intensive inquiry largely reliant on expert analyses of racial and electoral data. Unlike the first Gingles factor, bright-line tests are too structured and not indicative of the local issues at play that must be considered to resolve the inquiry of whether the remaining factors have been met.

Finally, one important effect of section 5’s inapplicability will be the shifting of the burden of proof pertaining to the legality of a redistricting plan. Under section 5, in order to obtain preclearance, the burden was on the submitting jurisdiction to establish legality. With preclearance no longer being required, the burden is no longer on the submitting jurisdiction to establish the legality of a plan. Instead, the burden is now on a challenging party to establish that a plan is not legal. Challengers may employ a variety of theories of liability, one of which is compliance with section 2. Therefore, though always relevant, section 2 must move to the forefront for drafters in the upcoming legislative redistricting cycle.

IV. Emerging Issues

A. RETROGRESSION: RELIC OR RELEVANT?

As Faulkner reminded us, “The past is never dead. It’s not even the past.” Certainly, retrogression is now considered the past, but is it dead? Perhaps it is not even the past. Having been ingrained in the minds of legislative drafters for so long, it seems unlikely that it will just go by the wayside as a forgotten relic. Does retrogression have a role to play in the section 2 analysis?

This issue has arisen in the context of a number of vote denial claims brought under section 2 since Shelby County. A vote denial claim under section 2 differs from a vote dilution claim in that it typically involves some measure adopted by a legislative body that affects access to voting as opposed to the drawing of an election district in a manner allegedly diluting voting strength. In the context of
section 2 challenges to those changes, courts have grappled with what role retrogression should play in the analysis of a possible section 2 violation. Essentially two approaches emerge from these cases.

Both the Fourth and Fifth Circuits illustrate the approach of considering retrogression as relevant evidence in a totality of the circumstances analysis for a section 2 vote denial claim. In a challenge to laws enacted by the North Carolina legislature eliminating same-day voter registration and other features, the Fourth Circuit held that the district court erred by holding that “Section 2 does not incorporate a ‘retrogression standard.’” The Court reasoned that “an eye toward past practices is part and parcel of the totality of the circumstances” inquiry in a section 2 claim. The Court found further solace in the section 2 language that “forbids any ‘standard, practice, or procedure’ that ‘results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.’” The Court reasoned that an examination of past practices is relevant to determining whether there has been an abridgement. Not long afterwards, in another challenge to a change in electoral laws, the Fourth Circuit upheld the treatment of retrogression as probative evidence of a section 2 inquiry.

Likewise, the Fifth Circuit has upheld the treatment of evidence that a voter identification law made voting more difficult than it had been under the prior law as relevant to a section 2 vote denial claim. However, in a section 2 vote dilution challenge to a single-member/at-large city council plan, a Texas district court noted that “§ 2 does not prohibit retrogression . . . [b]ut . . . both dilution and retrogression analysis lead to the same result” in that case.

The other approach for addressing retrogression in a section 2 vote denial analysis is reflected by the Sixth Circuit’s treatment of past practice. In Ohio Democratic Party v. Husted, plaintiffs challenged a change in Ohio’s early voting law. The change reduced the number of days allowed for early voting from 35 to 29. En route to finding no section 2 violation, the Sixth Circuit rejected the notion that a showing of disparate impact alone constitutes a violation. The disparate impact must actually cause a denial or abridgement of the right to vote “as it interacts with social and historical conditions” under the totality of circumstances inquiry. Therefore, such a determination draws a distinction between a disparate result and causation of a denial of the right to vote. Employing this analysis treats evidence of past practices alone as irrelevant unless coupled with proof of causation. Proponents of this view argue that comparison to prior enactments improperly engraft a defunct section 5 standard into a section 2 inquiry.

Undoubtedly, the debate over the relevance of evidence of retrogression as part of the analysis of a section 2 inquiry will rage on. While courts have wrestled with the issue in the context of vote denial claims, there has been no guidance in the context of vote dilution claims. This paucity of guidance coupled with the level of activity by various state defendants and interest groups in asserting their arguments in vote denial claims is indicative of the potential life span of this issue. Assuming no distinction is drawn in addressing the issue in vote denial versus vote dilution claims,
under the approach advanced by the Fourth and Fifth Circuits, evidence of retrogression is considered relevant as part of the totality of the circumstances inquiry in determining compliance with section 2. The reasoning behind this approach is that a section 2 analysis is intended to be comprehensive and a uniquely local fact-intensive inquiry that necessarily includes a comparison to past practices and conduct. On the other hand, under the approach by the Sixth Circuit, evidence of retrogression is not necessarily relevant to the section 2 inquiry. This view is based on the idea that it is not appropriate to consider a statistical comparison to show disparate impact absent demonstrating a causal connection between the disparate treatment and actual electoral performance. This view maintains that to make such a comparison improperly engrafts the section 5 retrogression standard into the section 2 analytical framework.

Regardless of which view ultimately prevails as to whether the retrogression inquiry survives, drafters of legislative districts will be faced with the practical reality of having drawn districts previously to ensure compliance with the retrogression standard. These districts will serve as the benchmark for starting the drafting process for new districts. Given the broad scope under the totality of the circumstances test, past practice of the jurisdiction may be a relevant inquiry. Alas, it seems as though it will be difficult for drafters to ignore what has been done previously. Perhaps there is a path to take into consideration of past practices for purposes of maintaining fidelity to the totality of circumstances analysis without importing the prior section 5 retrogression standard. The best path to follow may depend upon how the federal courts in the jurisdiction’s federal circuit treat the issue. Until the Supreme Court decides, drafters will be left to navigate delicately in hopes of avoiding a legal challenge on the issue.

B. OTHER CONSIDERATIONS

On June 13, 2018, plaintiffs in Alabama, Georgia, and Louisiana filed mirror-image complaints in federal court alleging that the congressional redistricting plan adopted in each state in 2011 violated section 2. Each of these cases alleges only a section 2 violation and no other theories of liability. Shortly after plaintiffs filed these cases, plaintiffs in Mississippi filed a complaint in federal court asserting that a single majority-minority state senate district contained in that state’s 2012 state legislative plan violated section 2. All of these cases have been moving through the federal court system at different paces, with the Mississippi case having advanced the farthest thus far.

Being purely section 2 vote dilution claims, these cases provide the most recent insight into potential issues surrounding section 2 for drafters in the next cycle of legislative redistricting. Besides the obvious question of whether laches should bar each of these claims, there are several issues presented in these cases, the resolution of which will be relevant. First, given that these are all claims based solely on section 2, there is a jurisdictional question of whether they should be heard by a three-judge panel or a single judge. Second, regarding the Mississippi case, there is
the novel issue of whether there can be a section 2 challenge of an existing majority-minority district, and, if so, by what evidence?

1. Three-Judge Panel
In cases pending in federal courts in Alabama, Louisiana, and Mississippi, defendants moved to empanel a three-judge court. The Alabama court denied this request and the Louisiana court has not yet issued a ruling. Both of these cases are solely section 2 claims challenging congressional redistricting plans. In an effort to convene a three-judge court, defendants cite 28 U.S.C. § 2284(a): “A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts of the apportionment of any statewide legislative body.” Defendants argue that a section 2 claim is essentially a derivative constitutional challenge, given its origin in the 14th and 15th Amendments to the U.S. Constitution and therefore it should be considered a challenge to the “constitutionality of the apportionment of congressional districts.” The Alabama district court disagreed, holding that a section 2 challenge, standing alone, is a statutory claim not covered under § 2284(a).

A murkier issue is presented in the Mississippi case. That case involved a sole section 2 claim against a single state senate district. In that context, defendants employed a statutory construction argument that the plain language of § 2284(a) requires a three-judge panel. The district court disagreed with defendants, holding that the plain language of § 2284(a) did not require a three-judge court because plaintiffs’ claim was solely a section 2 claim, which is statutory and not a constitutional challenge of a statewide apportionment plan. The Fifth Circuit panel agreed, granting in part and denying in part defendants’ stay motion in a 2–1 split. What spawned the request for a three-judge court in each of these cases was the plaintiffs’ attempt to avoid § 2284(a) by pleading solely a section 2 claim. By doing so, in the cases challenging the congressional plans, plaintiffs took the position that § 2284(a) only requires a three-judge court when there is a constitutional challenge to a congressional plan as opposed to a statutory challenge. They then narrowly pled only a section 2 violation while asserting § 2284(a) does not apply because they have only pled a statutory claim. In the case challenging a single state senate district, the potential for ambiguity is greater due to the grammatical structure of the statute, affording the defendants a statutory construction argument. This jurisdictional argument is important for drafters defending plans because of the danger of forum shopping if a single judge hears a section 2 challenge versus a three-judge court. Thus, ultimate resolution of the applicability of § 2284(a) to a sole section 2 challenge—whether congressional districts or state legislative districts are at issue—rests primarily in statutory interpretation. While this determination may not be at the forefront for drafters of legislative plans, it can have a significant effect on the back end of the redistricting process if a plan is challenged on section 2 grounds. It therefore behooves drafters to follow the final resolution of this issue in these cases.
2. Majority-Minority District

Another important factor for drafters to consider in the impending round of statewide redistrictings is the minority threshold test—which is commonly known as the first Gingles factor under a section 2 analysis.\(^57\) Since its inception, the first prong of Gingles, the threshold test, is often the source of least discussion in section 2 cases. Yet, perhaps no other component of the entire section 2 analysis has the most potential to confound drafters of upcoming statewide redistricting plans, especially in light of several district court decisions on the issue this decade. That is because while the Supreme Court in Bartlett v. Strickland finally pronounced a simple majority of at least 50.1 percent for minority plaintiffs to satisfy the first Gingles prong, it did not explicitly determine that the same simple method could or could not be an automatic rule for states to use to preempt section 2 claims.\(^58\) In other words, the Bartlett Court announced that to satisfy the first Gingles prong, a minority group must be able to consist of at least 50.1 percent of the electoral district at issue. But what if the minority group already comprises the majority in the district? Does that preclude a section 2 claim since an “opportunity” exists? And, if not, what evidence does a plaintiff need to demonstrate to satisfy the minority’s lack of “a real opportunity” despite being a majority?\(^59\)

While Bartlett was silent to these points, the Court, by its own language, left the door open to speculation and interpretation. As a result, there exists several conflicting district court opinions, including one from Mississippi, as to whether an existing majority-minority single-member district can be subjected to a section 2 claim, and, if so, what evidence is needed to support such a claim.\(^60\) But, before examining those district court cases, a closer look at Bartlett is informative.

In Bartlett, the plaintiffs argued that section 2 should be construed to allow them to prove the existence of a district in which “the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority’s preferred candidate.”\(^61\) The Supreme Court flatly rejected this contention, holding that section 2 “does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters.”\(^62\)

Instead, after reviewing Gingles’s holding, the Supreme Court established a simple numerical standard for the evaluation of election districts to which section 2 might apply:

Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2 . . . Where an election district could be drawn in which minority voters form a majority but such a district is not drawn, . . . then—assuming the other Gingles factors are also satisfied—denial of the opportunity to elect the candidate of choice is a present and discernable wrong that is not subject to the high degree of speculation and predic-
tion attendant upon the analysis of crossover claims. The special significance, in the
democratic process, of a majority means it is a special wrong when a minority group
has 50 percent or more of the voting population and could constitute a compact
voting majority but, despite racially polarized bloc voting, that group is not put into
a district.63

But, that’s where the Bartlett Court stopped. And, as a result, several district courts
have taken conflicting positions on Bartlett.

In Jeffers v. Beebe, a district court of three judges took the position that Bartlett
precludes a section 2 claim arising from an existing majority-minority district,
because the minority already has, numerically speaking, an equal or greater
opportunity than other members of the electorate to elect representatives of
their choice—not less, which is required under section 2.64 In Jeffers, the plaintiffs
alleged that a single senate district with a Black voting-age population (BVAP) of
52.88 percent was insufficient to satisfy section 2.65 The district court, relying on
Bartlett, held:

In the present case, we conclude that the plaintiffs have not established a claim for
vote dilution under § 2 because the 2011 Senate District 24—the challenged dis-
trict—is already a majority-minority district under Bartlett’s definition. It has a BVAP
of 52.8 percent, which is greater than 50%. Thus, the plaintiffs have not shown that
an election district could be drawn in which minority voters form a majority but
such a district [was] not drawn. In other words, the plaintiffs failed to prove that
the alleged vote-dilution practice prevented the creation of an election district that
would have contained a majority of minority voters. Because plaintiffs are unable to
make that showing, they cannot satisfy the first Gingles precondition and therefore
cannot state a § 2 claim.66

Yet, notwithstanding Jeffers’s application of Bartlett to block a section 2 claim
from an existing single-member majority-minority district, the district court in
Perez v. Abbott had a different interpretation of Bartlett.67

In Perez, the plaintiffs contended that section 2 required the creation of seven
or eight Latino opportunity districts, not just majority-minority districts, in cer-
tain areas of Texas for seats to the U.S. House of Representatives.68 In support of
their vote dilution claim, the plaintiffs alleged “cracking” and “packing” in the
challenged majority-minority districts.69 The defendants argued that the challenged
plan contained seven majority-minority districts as required under section 2 and
because a 50.1 percent majority-minority district is by definition an opportunity
district regardless of performance, the minority can control the district.70 However,
the majority of the three-judge panel Perez court did not agree: “while Plaintiffs may
not have submitted sufficient proof that they are entitled to eight [Hispanic citizen
voting-age population (HCVAP)]-majority districts in South/West Texas, they have
shown that they are entitled to seven such districts, and they may assert claims
under . . . § 2 against the districts in [the current plan].”71
The court then addressed the defendants’ threshold argument:

[T]he Court rejects Defendants’ bright-line rule that any HCVAP-majority district is by definition a Latino opportunity district. Although some courts have applied such a rule and held that § 2 challenges may not be raised to a majority-minority district, that appears to be a minority view. In fact, Justice Kennedy recognized that a majority-HCVAP district may still lack “real electoral opportunity.” LULAC, 548 U.S. at 428 . . . (Kennedy, J.); see also Bartlett v. Strickland, 556 U.S. 1, 39–40 . . . (2009) (Souter, J., dissenting) (“[E]ven when the 50% threshold is satisfied, a court will still have to engage in factually messy enquiries about the ‘potential’ such a district may afford, the degree of minority cohesion and majority-bloc voting, and the existence of vote-dilution under a totality of the circumstances.”).

Although no Supreme Court decision explains when a majority-HCVAP district lacks “real electoral opportunity,” some lower courts have considered this issue and, consistent with Justice Kennedy’s observation, have recognized that the majority-minority status of a district does not preclude a § 2 claim. Thus, Perez declined to give Bartlett the same expansive reading as Jeffers and, instead, found evidence of cracking and packing to support the plaintiffs’ section 2 vote dilution claim in the majority-minority districts at issue.

And, finally and most recently, in a case discussed in the previous section, the Mississippi district court in Thomas v. Bryant held that a single-member majority-minority state senate district in the Mississippi Delta with an existing BVAP of 50.8 percent violated section 2. However, what differed Thomas from Perez was that the plaintiffs in Thomas did not challenge the total number of majority-minority districts created by the state or that an additional such district could have been created around the challenged district but for cracking and packing. Instead, the plaintiffs relied heavily on evidence related to voter turnout and other local factors under the Gingles and totality requirements. In turn, the district court held the senate district at issue violated section 2 even though it was an existing majority-minority district. This approach was truly novel as it now injects further questions and issues for drafters to consider when drawing majority-minority districts and how to avoid vote dilution challenges to the same.

As demonstrated by the unique and differing rulings in Jeffers, Perez, and Thomas, whether a section 2 violation may occur in an existing majority-minority single-member district, and, if so, by what proof, will only become more prevalent as we approach the next round of statewide legislative redistrictings. Until this exact issue is clearly decided by the circuit courts or the Supreme Court, drafters will certainly grapple with determining how many minorities should compose a majority-minority district and by what standard to avoid a section 2 challenge.
V. Conclusion

Legislative redistricting has forever been altered following Shelby County v. Holder. Rather than a primary focus on preclearance, jurisdictions previously covered by section 5 will now be confronting section 2 compliance front and center. Although section 2 has operated simultaneously with section 5 all these years, there remain issues that invite clarity. Legislative drafters will be presented with the challenge of crafting districts in a way that complies with the well-settled section 2 legal principles and attempts to comply with those outstanding issues needing refinement.

Certainly, no task for the faint of heart, but who has ever accused drafters of legislative plans of such frailty? Those so charged will move forward boldly to meet the challenge, while likely making some new law along the way. After all, it is the ebb and flow of ever-changing legal principles hewn out of the stones of litigation that has gotten us to this point in the evolution of redistricting law and, if the past is any indicator, will certainly carry us forward into the future.

Notes

3. In order to obtain preclearance, a submitting jurisdiction had to demonstrate that its proposed change in voting was not retrogressive. Perhaps the simplest explanation for adherence to this standard was offered by the late Justice Antonin Scalia when he wrote that “§ 5 prevents nothing but backsliding, and preclearance under Section 5 affirms nothing but the absence of backsliding.” Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 335 (2000).
4. See Shelby County v. Holder, 570 U.S. at 557 (holding does not affect viability of section 2).
8. Id. at 148–49.
11. Id. § 5, 79 Stat. at 439.


17. See supra note 3.


19. While holding section 4(b) unconstitutional, the Court declined to hold section 5 unconstitutional as requested by Shelby County. See id. at 557. Justice Thomas, however, would find section 5 unconstitutional. Id. at 557–58.

20. Id. at 549.

21. When the Court decided Shelby County, nine entire states and parts of seven others were subject to section 5 preclearance. See Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.1. This was an expansion of the original jurisdictions covered upon adoption of the VRA. See supra note 12.

22. Shelby County v. Holder, 570 U.S. at 557.


25. Id. at 50–51.


27. See Gingles, 478 U.S. at 45.


29. WILLIAM FAULKNER, REQUIEM FOR A NUN act 1, § 3 (Random House 1951).

30. See Ohio Democratic Party v. Husted, 834 F.3d 620, 636 (6th Cir. 2016). Apparently there have been no reported decisions yet addressing the issue of how to treat retrogression post-section 5 in a vote dilution claim under section 2.


32. Id.

33. Id.

34. Id. at 241–42.

39. Id. at 623.
40. Id. at 637; see also Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014) (finding that section 2 “does not condemn a voting practice just because it has a disparate effect on minorities”).
41. Ohio Democratic Party, 834 F.3d at 638.
46. See Thomas v. Bryant, 919 F.3d 298 (5th Cir. 2019) (granting in part and denying in part defendants-appellants’ motion to stay). Merits are currently on appeal.
47. Defendants asserted laches as a defense in the Alabama, Louisiana, and Mississippi cases due to the timing of the filing of the complaints in relation to when the challenged districts were drawn and the upcoming election schedules. The Alabama district court granted defendants’ motion to dismiss based on laches as to injunctive relief, but not as to declaratory relief. Chestnut v. Merrill, 356 F. Supp. 3d 1351, 1357 (N.D. Ala. 2019). The Mississippi district court denied defendants’ laches defense and that denial is one of the issues challenged on appeal. Supra note 45.
48. While not discussed substantively herein, it is important to note that in all three of the cases (Georgia, Alabama, and Louisiana) asserting a sole section 2 challenge to congressional districts, plaintiffs’ basis for attack is grounded in “packing” and “cracking.” “Pack ing” and “cracking” are terms used to describe the placement of voters in districts in an effort to diminish the strength of a group of voters. Most commonly arising in the racial and partisan gerrymandering contexts, they can also result in vote dilution supporting a section 2 claim. It remains to be seen how plaintiffs plan to prove packing and cracking but we must assume it will be the same way it is done in the gerrymandering contexts.
52. Supra note 45.
53. Specifically, defendants argued that using the “series-qualifier” canon of construction explained by the late Justice Antonin Scalia and Bryan Garner in their book *Reading Law* directs a reading of the statute so as to require a three-judge court. *Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts* 147, 147-48 (2012). Applying this canon of construction to the plain text of the statute requires a three-judge panel “when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.” (emphasis added).


55. *Supra* note 46.

56. In the Alabama, Georgia, and Louisiana cases, plaintiffs allege solely a section 2 challenge to statewide congressional districts. In the Mississippi case, plaintiffs allege solely a section 2 challenge to a single state senate district.

57. Thornburg v. Gingles, 478 U.S. 30, 50 (1986) (finding that the first factor requires that the relevant minority is “sufficiently large and geographically compact to constitute a majority in a single-member district”).


60. There are several circuit opinions discussing a majority-minority electoral district having a potential viable section 2 claim. See, e.g., Ferguson v. Florissant, 894 F.3d 924 (8th Cir. 2018); Monroe v. City of Woodville, 881 F.2d 1327 (5th Cir. 1989); Kingman Park Civic Ass’n v. Williams, 348 F.3d 1033 (D.C. Cir. 2003). However, these cases pertain to at-large electoral systems and not single-member districts or, as in *Kingman*, which occurred before *Bartlett*, no actual section 2 violation was found.


62. *Id.* at 15. In supporting its reasoning, the Supreme Court declined to require courts and legislatures “to scrutinize every factor that enters into districting to gauge its effect on crossover voting.” *Id.* at 22.

63. *Id.* at 18-19 (citations omitted).


65. *Id.* at 927–28.

66. *Id.* at 932 (emphasis original and internal quotations and citations omitted).


68. *Id.* at 875.

69. “In the context of single-member districts, the usual device for diluting minority voting power is the manipulation of district lines,” either by dividing the minority group among various districts (fragmenting or “cracking”) or concentrating minority voters within a district (“packing”). Voinovich v. Quilter, 507 U.S. 146, 153 (1993). Put another way, the “[d]ilution of racial minority group voting strength may be caused’ either ‘by the dispersal of [minorities] into districts in which they constitute an ineffective minority of voters or from the concentration of [minorities] into districts where they constitute an excessive majority.’” *Id.* at 154 (quoting Thornburg v. Gingles, 478 U.S. 30, 46 n.11 (1986)); see also Shaw v. Hunt, 517 U.S. 899, 914 (1996) (“a Plaintiff may allege a § 2 violation in a single-member district
if the manipulation of districting lines fragments politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population").

70. Perez, 253 F. Supp. 3d at 876.
71. Id. at 879.
72. Id. at 879–80
73. Supra note 45.
74. See supra note 46. As of the completion of this chapter, Thomas is currently on appeal to the Fifth Circuit in Thomas v. Bryant, No. 19-60133, where a number of issues are being challenged, including the 50.1 percent minority threshold test.
CHAPTER 16
DIGITIZED ELECTION ADMINISTRATION: PERILS AND PROMISE

REBECCA GREEN AND MARGARET HU

I. Introduction
The digitization of elections has both improved the administration of voting and opened elections to increased vulnerabilities. When the digital revolution first dawned, campaign practitioners, election officials, and policymakers recognized the potential for increased efficiency and accuracy in election administration. Many experts saw digitization in U.S. elections as a tremendous opportunity for candidates to run more sophisticated campaigns and for states to run better elections. For example, collecting data about individual voters has allowed campaigns to target them with campaign messages specific to their interests; digitized election administration means more accurate and efficient election management; and leveraging data has revolutionized the efforts of election administrators, nonprofits, and campaigns to get voters to the polls.

At the same time, privacy scholars have debated the possible unintended consequences of data-driven elections—particularly with respect to the data privacy costs associated with targeted campaigning. Additionally, experts increasingly observed the potential for discriminatory effects in voter list maintenance methods. The 2016 presidential election further raised awareness of the possibility of cyberattacks and hacking made possible by the digitization of campaigns and voting systems.

This chapter drills down on the digitization of voter data. This digitization has many advantages, including vastly improved accuracy and more efficient means of accounting for voter mobility. On the darker side, it can exacerbate voters being improperly inactivated or removed. This chapter reviews the promise and perils of digitized election data, explores best practices, and points to ways election officials are addressing challenges posed.
II. Election Administration and the Digital Revolution

The national controversy surrounding the 2000 presidential election led to widespread reform on numerous fronts. A call for technologically driven reform proposals coincided with massive digitization in state and federal government, and indeed throughout every sector. One of the centerpieces of post-Bush v. Gore reform, therefore, was the digitization of state and federal election administration. In direct response to Bush v. Gore, Congress reformed U.S. elections by funding the adoption of more technologically advanced methods to facilitate vote counting and to best ensure the integrity of electoral systems. Specifically, in 2002, Congress enacted the Help America Vote Act (HAVA) to upgrade state election administration, including voting equipment. Members of Congress concluded that technical difficulties in the 2000 presidential election were the result of paper ballots and outdated voting machines. States widely adopted the use of direct-recording electronic voting machines (DREs) in an effort to prevent future issues involving the counting and recounting of paper ballots. In addition, HAVA required states to create and maintain statewide voter registration lists.

To be sure, reforming list maintenance and registration procedures predated Bush v. Gore. Congress enacted the National Voter Registration Act (NVRA) in 1993 “to ensure that accurate and current voter registration rolls are maintained.” The NVRA mandated certain list maintenance protocols to ensure list accuracy and that eligible voters were not culled from the rolls. The NVRA limited the list of reasons why voters could be removed from the rolls, pointing ending the practice of removing voters when they failed to cast a ballot, or based on voter inactivity. In addition to limiting ways states can remove voters from the rolls, the NVRA also mandated that each state make “reasonable efforts” to ensure that it maintained voter list accuracy. Finally, the NVRA established a process by which voters can be moved to inactive status for two federal election cycles, and may only be removed from voter rolls if they do not vote or have contact with election officials during that time.

Thus, HAVA and the NVRA both require states to cull voter rolls to ensure that only those eligible to vote can do so. To comply with HAVA and NVRA list maintenance requirements, states have adopted multiple methods, including tools that compare state voter lists against state agency records regarding felony status and death records, and that remove any duplicate registrations. This does not limit states to comparing voter registration lists with only those state agencies included in the NVRA. States may also access federal information to assist in maintenance of voter registration lists, such as information from the Social Security Administration (SSA). Beyond the baseline requirements, states have the discretion to choose list maintenance methods, subject to NVRA protections that seek to avoid the removal of eligible voters described above.

For all the improvements realized, digitized election administration has resulted in problems that Congress arguably could not have anticipated when it passed HAVA in 2002 or the NVRA in 1993. First, state attempts to clean voter rolls through data
matching efforts have caused concern. And second, as is to be expected with any database in any sector or industry, digital voter lists leave states vulnerable to cyberattack. The discussion below, not an exhaustive review, provides examples of these problems.

A. THE PROBLEM OF FAULTY DATABASE MATCHING PROGRAMS

Following the enactment of HAVA, several states began implementing large, systematic programs to remove names from voter registration lists to comply with HAVA’s and the NVRA’s maintenance requirements. Shortly after HAVA was implemented, according to one report that gathered data from 39 states and the District of Columbia, 13 million voters were removed from voter rolls from 2004 to 2006. Voter rolls prior to HAVA routinely contained numerous double entries, people who had moved to different states, and those who had passed away. Removal of ineligible voters from the rolls is an important piece of ensuring election integrity. Yet, the digitization of election administration, at times, has led to the incorrect removal of eligible voters. For example, in Virginia in 2013, “nearly 39,000 voters were removed from the rolls when the state relied on a faulty database to delete voters who allegedly had moved out of the Commonwealth. Error rates in some Virginia counties ran as high as 17 percent.” Faulty database matching programs that incorrectly identify a greater disproportion of certain individuals as ineligible to vote are commonly to blame.

Relying upon various database screening systems can lead state election officials to improperly cancel or inactivate voter registrations as they work to identify potentially ineligible voters. The NVRA’s requirement that voters be listed as inactive for a period of time before being removed from voter lists is therefore an important safeguard against incorrect removal, especially since virtually no database (or screening system) is error free. Still, as will be explained below, the inaccurate removal of eligible voters and data problems in the voter registration process have led to allegations of disenfranchisement and discrimination. Specifically, errors in database maintenance have led to allegations of discrimination on the basis of race, ethnicity, citizenship status, socioeconomic class, age, geography, association, and political affiliation. Allegations surrounding the misuse and disparate impact of improper voter removal and other list maintenance methods have led to litigation in several states for violations of HAVA, the NVRA, and the Voting Rights Act of 1965, as well as other constitutional law violations.

Recent cases in Georgia generated allegations that registration procedures resulted in disparate impact. For example, the “exact match” law passed in 2018 requires a precise match between the names listed on state government-issued identification (ID), such as driver’s licenses and other state IDs, with the names on voter registration applications. Specifically, it requires an exact match of the voter records with the records held by the SSA or an exact match of the voter records with the full last name listed within the state of Georgia’s Department of Driver Services (DDS). Immediately before and after Georgia’s 2018 gubernatorial election, voting rights organizations challenged Georgia’s exact match law.
 Plaintiffs allege that the exact match law imposes a voter suppressive process, with effects disproportionately borne by minority groups. During the 2018 election, approximately 53,000 voters in Georgia whose voter registration applications were flagged by the exact match law protocol remained in “pending” status. In other words, voters in Georgia placed in pending status were not registered to vote because of a failure to conform to the exact match system. Media reports identified the disparate impact: “Georgia’s population is approximately 32 percent black, according to the U.S. census, but the list of voter registrations on hold with [the Georgia secretary of state] is nearly 70 percent black.” Under the exact match system, the transposition of a single letter, an extra space, or the addition or deletion of a hyphen may be enough for the exact match system to flag the application and thus render that otherwise eligible voter unable to cast a ballot. Also raising concern, Georgia had cancelled more than 1.4 million voter registrations since 2012; nearly 670,000 were cancelled in 2017.

The Interstate Crosscheck system, similarly, has been alleged to yield a disparate impact on minority voters and has faced legal challenge. The Interstate Crosscheck Program, which several states voluntarily joined, is a database matching program intended to help identify voters who are registered in more than one state. The system, which has come under criticism for its lack of sophistication and false positives, alerts authorities to instances where the same first and last name appear on voter registration information in different (member) states. The system ignores middle names, and suffixes, leading to false matches that otherwise could be more accurately distinguished.

Experts have offered theories on why the database screening protocols used to maintain voter lists disproportionately impact minority communities, including the complexities of naming conventions of minorities: multipart names, hyphenated names and names that include punctuation and spacing, and commonality of surnames, among other potential issues. But a 2012 Pew report found that the most common reason that voter records are out of date is mobility. People move (within a state or out of state); voter records fail to reflect this fact. High rates of mobility means such individuals are flagged more often in a state's matching program—often correctly so, sometimes not. Since the most mobile populations in the United States are the young, the poor, and people of color, mismatches can have disproportionate impacts. There is no consistent procedure between states that guides how a voter might be invited to cure a match or mismatch in the database screening protocol. Additionally, some states do not appear to follow proper procedures prior to removing voters from voter rolls.

These examples point to just a few of the many challenges to maintaining accurate voting lists while still ensuring that eligible voters are not prevented from registering or casting a ballot due to unfair, discriminatory, or mismanaged database matching efforts. As some states have struggled, others have had more success.
B. THE PROBLEM OF CENTRALIZED VOTER DATABASE VULNERABILITY

The 2016 presidential election will be considered historically significant for multiple reasons, including the manner in which it triggered wide recognition of the vulnerability of U.S. election systems to cyberattack. Numerous investigations have confirmed Russia’s involvement in the hacking of several state election systems.

In September 2017, the U.S. Department of Homeland Security (DHS) notified numerous states that Russia had targeted election systems during the 2016 presidential campaign. In one instance, federal officials reported that the Main Intelligence Directorate of the General Staff (GRU), Russian military intelligence, had compromised the computer network of the Illinois State Board of Elections (SBOE) by exploiting a vulnerability in the SBOE’s website. According to Special Counsel Robert Mueller’s July 13, 2018, indictment against the GRU, military intelligence officers in the GRU had attempted to compromise the computer networks of multiple SBOEs.

The final Mueller report explained that by August 2016, GRU had installed malware on the network of a company that provides voter registration systems to Florida counties and had also engaged in spearfishing attacks on e-mail accounts of Florida county election officials. Many experts believe that, in practice, it would be very difficult to change electoral outcomes by manipulating voting machines. Most experts agree the full impact of the Russian attacks on U.S. election infrastructure is unknown. Several intelligence reports have indicated that the extent to which the interference impacted the 2016 presidential election results is also unknown, although many credible analysts have concluded that there is no evidence that the infrastructure attacks impacted the administration of elections or the vote counts. There is agreement, however, that a primary goal of the interference was to lead Americans to mistrust their elections and sow general discord.

As in so many other sectors only recently coming to grips with overlooked cybersecurity challenges, Congress and states must grapple with the unintended consequences of election reforms that depend in part upon digitization. Certainly, there is no going back: digital voter rolls and other aspects of election administration hold extraordinary benefits including increased accuracy and efficiency. The trick is to maximize benefits and minimize risks. As the next section discusses, the election community is currently in the process of coalescing around a series of best practices to ensure that digital tools safeguard eligible voters, prevent discriminatory impacts, and secure our system of elections against digital threats.

III. State and Federal Efforts to Ensure the Reliability and Security of Digitized Elections

In the lead up to the 2020 elections, state election officials face many challenges to ensure that elections are administered fairly and efficiently and that the public
maintains confidence in election outcomes. The now-oft-cited decentralized nature of U.S. elections holds several benefits in this respect. First, it protects American elections by splintering them into more than 10,000 individual elections. Second, decentralized election systems enhances the laboratory of democracy: states and localities are actively experimenting with technologies and practices to improve elections. Election administrators understand the power of data to teach lessons, and are learning lessons with each passing election cycle. This section will highlight a few of the most promising state and national efforts to improve election administration and enhance public confidence in U.S. elections.

A. IMPROVEMENTS IN VOTER LIST MAINTENANCE

Despite the many challenges described above, state election administrators across the country are working diligently to improve security, efficiency, and accuracy of U.S. elections. Advances include enhanced state cooperation with the U.S. Postal Service (USPS) to help keep voter lists up to date using change of address information submitted to USPS. Significant progress has also been made to use sophisticated and secure data sharing to improve voter list maintenance processes. The Electronic Registration Information Center (ERIC) is now considered a leading example of how to properly conduct voter list maintenance.

ERIC’s creators envisioned it as a multistate data center, running state-of-the-art software capable of analyzing and resolving data from multiple sources. On ERIC, participating states (currently 28 states plus the District of Columbia) upload data from voter files and other sources with more up-to-date information (most notably, motor vehicles files), and receive reports when voter records are no longer up to date. The system features multiple data points and sources of data to minimize the number of “false positives” (where a record was erroneously matched to another with the same name, not representing the same person), while attempting to maximize the chance that a move, or a death, will be discovered and reported.

Among its most important features are ERIC’s privacy and security protections. As states supply data to ERIC, the system uses a technique called “one-way hashing” to scramble confidential data—such as driver’s license numbers, last four digits of the Social Security number, and even dates of birth. This cybersecurity tool safeguards personal data by turning it into complex strings of alphanumeric characters, unreadable by humans and virtually impossible to reconstruct. The data is stored in dedicated servers located within the United States, subject to stringent physical and virtual security standards. In short, ERIC’s sophisticated process attempts to resolve many of the challenges noted above involving faulty database matching programs.

B. FEDERAL AND STATE PARTNERSHIPS

An important source of support for improved security of state election data since 2016 has been the federal government. Both the Election Assistance Commission and the DHS have developed resources for states to improve cybersecurity measures.
While these resources are voluntary and not mandated (hewing to the American tradition of leaving election administration to the states), coordination efforts have proved useful. In 2009, the DHS formed the National Cybersecurity and Communications Integration Center (NCCIC). NCCIC’s goal is to help coordinate state responses to cybersecurity threats by training, conducting data analysis, helping states conduct operational planning, and engaging in incident response and recovery. More recently, NCCIC has been active in the elections space. NCCIC works with states conducting assessments to ensure security and resilience of election systems. Since 2016, nearly 60 state and local jurisdictions have engaged NCCIC and signed up for continuous scanning and vulnerability assessment services. Further, the Center for Internet Security's Elections Infrastructure Information Sharing and Analysis Center (EI-ISAC) established a cyber defense “suite” that focuses on election defense. Members, who must be election-focused government entities, include counties, secretaries of state, or other representatives from all 50 states and Guam. These efforts to coordinate resources, enhance information sharing, and learn from each other about best practices to safeguard elections represent important and continuing efforts.

C. IMPROVED VOTER REGISTRATION PROCESSES
States are also experimenting with streamlining voter registration in ways that decrease human error and boost participation. Automatic voter registration (AVR) reforms are the best example of this trend. AVR processes operate on the assumption that citizens are automatically registered to vote when they interact with a state agency (e.g., a motor vehicle agency) unless they “opt out” of registering to vote. AVR is not compulsory voting in the sense that anyone can request to opt out, yet it does away with the problem of eligible individuals who would like to vote encountering obstacles to registration. A second feature of AVR is to transfer voter registration electronically to election officials instead of relying on election officials to transcribe paper voter registrations. This vastly reduces human error and increases the likelihood that eligible registered voters will not be turned away on Election Day due to a discrepancy. As the Brennan Center for Justice rightly describes, these “common-sense reforms increase registration rates, clean up the voter rolls, and save states money.” As states are catching on to the many efficiencies and improvements to the registration process AVR offers, it is taking off fast around the country. Since Oregon became the first state to adopt AVR in 2015, 16 states and the District of Columbia have implemented AVR to date.

D. IMPROVED ELECTION TRANSPARENCY
Finally, individual states are taking important steps to demonstrate to the public that while no election is perfect, responsible and thorough work is being done to improve election administration with each new cycle. Virginia’s Department of Elections stands as an example. On December 21, 2018, Virginia’s chief election officer Commissioner Christopher Piper submitted what he called a “post-election report”
to the Virginia SBOE. The report, also published on the Department of Elections website, offered an overview of statistics gathered from the November 6, 2018, election. It highlights—in a readable, easy-to-digest format—issues that arose and lessons learned for administering future elections. Commissioner Piper announced that the Department of Elections would prepare a post-election report following every general election going forward. The 2018 report contained a trove of statistics, including: information on turnout, voters and votes cast, data about registration numbers, and website traffic data. Readers can review voter complaint data broken down by type of complaint and by county, for example, allowing identification of counties with particularly high levels of complaints. The report presents data over time. As a result, voters can begin to see election administration on a continuum.

As Commissioner Piper describes:

Each election in the Commonwealth of Virginia tells a story of anticipation, polls, results, candidates, voters, and election administration. As election officials, we are tasked with ensuring fairness and uniformity in our practices. While the story of any election is filled with anecdotes of specific instances both good and bad, the real story of administering the election is told in the data. . . . As we look at different aspects of the election, we can identify areas of concern for additional training and issues where we can work together to develop best practices.

He emphasizes that no election is perfect. The sheer volume of voting during a general election and the certainty of human error invariably combine to produce problems. Piper’s theory is that the more the public is provided data and educated about the nature of election administration and the problems confronted, the higher the level of public confidence that election officials are working hard to consistently improve voter experience and make elections better. Distinct from the post-election audits described above, Virginia’s post-election report is another way to pull back the curtain on election administration. It is an example of how simple transparency efforts can shore public trust at a time when public confidence in elections is under stress.

IV. Conclusion

The above discussion endeavors to provide a brief (and certainly incomplete) review of the promise and perils of digitized election administration. Election administrators are increasingly aware of the breakthrough benefits and some of the unintended consequences of bringing our elections into the digital realm. A prominent example of how election digitization is being reexamined is the widespread return to the paper ballot, now viewed by many election administrators as the most reliable and auditable form of voting. The return to paper ballots
signifies an important recognition: digital tools can undoubtedly improve the administration of elections; but they can also cause problems too. Be it election security, voter registration, list maintenance, or even the act of casting a ballot, election administrators are wisely reviewing when digital tools can assist in the accuracy and efficiency of election administration, and when unintended consequences can subvert these goals. Engendering public confidence in U.S. elections mandates transparency about digital challenges and open dialogue on how best to run free and fair elections. By attempting to resolve these challenges in good faith and in a fully transparent manner, members of the public can be reassured that election administrators in every state are working to ensure that the voices of voters are heard on Election Day.

Notes


8. *Id.*

For example, under 52 U.S.C. § 20504, states must allow voter registration through state departments of motor vehicles: “Each State motor vehicle driver’s license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.” *Id.* § 20504(a)(1).

10. *Id.* § 20501(b)(4).


14. *Id.* § 20507(d)(B). Note that if voters show up to vote during that time, they may cast a ballot that will count as an eligible vote and they will return to “active” status automatically. See *id.* § 20507(e).

15. *Id.*


22. See, e.g., Brater et al., supra note 3, at 2.


26. Id.

27. Amended Complaint & Injunction for Declaratory Relief at 22, ¶ 39, Georgia Coalition for the People’s Agenda, Inc. v. Raffensperger, No. 1:18-cv-04727-ER (N.D. Ga. Oct. 19, 2018) [hereinafter Georgia Coalition Amended Complaint] (“When matching registration data against the SSA database, it compares the following fields: first name, last name, date of birth [month and year of birth], and last four digits of the social security number.”). See also Answer at 10, ¶ 40, Georgia Coalition for the People’s Agenda, Inc. v. Raffensperger, No. 1:18-cv-04727-ER (N.D. Ga. Dec. 17, 2018) [hereinafter Georgia Coalition Answer] (admission of SSA matching protocol described in the Amended Complaint, only clarifying that the voter registration data does not require an exact match of the entire birth date, but only a match of the month and year of birth in the SSA database).

28. Georgia Coalition Amended Complaint, supra note 27, at 22, ¶ 39 (“When matching registration data against the DDS database, it compares the following fields: [first letter of the] first name, last name, date of birth, driver’s license or state ID number, and citizenship status.”). See also Georgia Coalition Answer, supra note 27, at 10, ¶ 39 (admission of DDS matching protocol described in the Amended Complaint, only clarifying that the voter registration data does not require an exact match of the entire first name, but only the first letter of the first name in the DDS database).

29. As of the date of this publication, litigation challenging Georgia’s “exact match” law remains ongoing. See, e.g., Motion for Preliminary Injunction, Georgia Coalition for the People’s Agenda, Inc. v. Kemp, No. 1:18-CV-04727-ELR (N.D. Ga. Nov. 2, 2018); Complaint for Declaratory and Injunctive Relief, Fair Fight Action v. Crittenden, No. 1:18-CV-05391-SCJ (N.D. Ga. Nov. 27, 2018). Note that the execution of exact match is not necessarily related to the digitization of election records per se. However, digital department of motor vehicle and other state records operated to make matching efforts far more efficient, increasing the scale of the alleged harm.


32. *Id.*

33. *Id.*


36. As of the date of this publication, litigation challenging the Interstate Voter Registration Crosscheck Program remains ongoing. See, e.g., Indiana NAACP v. Lawson, 326 F. Supp. 3d 646 (S.D. Ind. 2018).


38. Goel et al., supra note 35.

39. Miriam Valverde, *Georgia’s “Exact Match” Law and the Abrams-Kemp Governor’s Election, Explained*, PolitiFact, Oct. 19, 2018, https://www.politifact.com/georgia/article/2018/oct/19/georgias-exact-match-law-and-its-impact-voters-gov/ (stating that: “Minority voters are more likely statistically to have names with hyphens or suffixes or other punctuation that can make it more difficult to match their name in databases, experts noted. That makes them more likely to get caught up in the ‘exact match’ law.”).

40. *Id.*


43. *Id.*

44. *See, e.g.*, Pérez, supra note 18, at 15.

45. *Id.*
46. See, e.g., National Academies of Sciences, Engineering, and Medicine, Securing the Vote: Protecting American Democracy (2018).


48. Netyksho Indictment, supra note 4, at 26, ¶ 72 (“In or around July 2016, KOVALEV and his co-conspirators hacked the website of a state board of elections (‘SBOE 1’) and stole information related to approximately 500,000 voters, including names, addresses, partial social security numbers, dates of birth, and driver’s license numbers.”).

49. From the final Mueller report, it was revealed that prior to the presidential election, approximately in June 2016, the GRU exploited vulnerabilities in the SBOE’s website in Illinois, allowing Russia to “gain[] access to a database containing information on millions of registered Illinois voters, and extract[] data related to thousands of U.S. voters before the malicious activity was identified.” See 1 Robert S. Mueller III, Report on the Investigation Into Russian Interference in the 2016 Presidential Election 50 (2019) [hereinafter Mueller Report Vol. 1].

50. Id.

51. See, e.g., Cybersecurity of Voting Machines: Joint Hearing before the Subcomm. on Information Technology and the Subcomm. on Intergovernmental Affairs of the House Comm. on Oversight and Government Reform, 115th Cong. (2017) (statement of Susan Klein Hennessey, Fellow in National Security, Governance Studies, Brookings Institution) (“I believe, in context, a fair layperson characterization of that threat is to say that actually changing vote tallies is not a technical impossibility, but it is extremely difficult to do so on the scale necessary to predictably change the outcome of a statewide or national election.”); Office of the Director of National Intelligence, Assessing Russian Activities and Intentions in Recent US Elections 1 (2017) (ICA 2017-01D) [hereinafter 2017 ODNI Report] (“Russian intelligence obtained and maintained access to elements of multiple US state or local electoral boards. DHS assesses that the types of systems Russian actors targeted or compromised were not involved in vote tallying.”).

52. 2017 ODNI Report, supra note 51, at i (“We did not make an assessment of the impact that Russian activities had on the outcome of the 2016 election.”).

53. Id.

54. Id. at ii (“Russia's goals were to undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency”); Mueller Report Vol. 1, supra note 49, at 4 (“The [Internet Research Agency] later used social media accounts and interest groups to sow discord in the U.S. political system through what it termed ‘information warfare.’”).


58. As of June 2019, the following states are members: Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nevada, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. The District of Columbia is also a member. See ERIC, FAQs: Which States Are Members of ERIC?, https://ericstates.org (last visited Aug. 7, 2019).


60. As of June 2019, 28 states and the District of Columbia are members of ERIC, up from seven states enrolled at the inception of the program in 2012. ERIC, supra note 58.


63. DHS, supra note 61, at 14.

64. Id.


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69. Id.

70. Id. at 3.

I. Introduction

This chapter seeks to examine the impact of the landmark U.S. Supreme Court decision *Shelby County v. Holder* on the most recent federal election cycle and how that decision may affect the 2020 election. It begins by providing a brief history of the Voting Rights Act of 1965 (VRA), its purpose, and effect. It then discusses judicial decisions construing the act’s enforceability, culminating in the *Shelby County* decision. Finally, the chapter addresses both the theoretical and actual consequences of the case on modern election cycles, examining what can be said qualitatively and quantitatively about *Shelby County*’s impact so far, and into the future.

II. Preclearance under the VRA

A. History and Structure of the VRA

The VRA is “generally regarded as the greatest legislative achievement of the so-called ‘classical phase’ of the civil-rights movement.” Passed shortly following the march from Selma to Montgomery, the act sought to enforce the 15th Amendment to the Constitution, which southern states had systematically ignored for nearly a century, by prohibiting the denial or abridgement of the right to vote. As the Supreme Court would put it in *Shelby County*, the VRA “was enacted to address entrenched racial discrimination in voting, an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”

Congress sought to achieve this goal through a variety of mechanisms. First, section 2 of the VRA contains a general prohibition on voting practices or procedures that discriminate on the basis of race, color, or membership in certain language minority groups, and section 3 authorized the attorney general to enforce the 15th Amendment. Second, the VRA contained an express prohibition on literacy
tests, poll taxes, and other of the most insidious historical tactics that White southerners had used to disenfranchise Black voters. Though the ban on literacy tests is one of the narrower features of the VRA, it had an oversized and immediate impact, because literacy tests were a core mechanism of Jim Crow-era disenfranchisement of Black citizens.

The cornerstone of the VRA, however, was its effort to introduce federal oversight and approval of changes to voting laws and procedures, more commonly known as preclearance. Section 5 of the VRA requires state and political subdivisions with a history of racial discrimination in elections to preclear changes in voting procedure with either the U.S. Department of Justice or the District Court for the District of Columbia before putting them into effect. Section 4(b) set out a formula to identify those jurisdictions subject to preclearance. As initially enacted, section 5 covered most of the Deep South, but was later extended to Texas, Arizona, Alaska, and certain other counties and townships. Preclearance was a critical innovation, because southern politicians were quickly and willfully subverting efforts to enforce the Constitution in court. Congress thus concluded that “broad preventative oversight encompassing the universe of potential voting changes may be the most effective means of curbing discrimination in settings like the United States, where electoral rule-making is highly decentralized and opaque.”

B. EVIDENCE OF THE EFFECTIVENESS OF THE VRA

The effect of the VRA on minority enfranchisement was immediate, and dramatic. Between the 1964 and 1968 presidential elections, Black voter registration rates increased by two-thirds in the southern states. In a span of just 24 months, for example, Black voter registration in Mississippi rose from 7 percent to approximately 60 percent. Studies have repeatedly demonstrated the VRA’s profound and lasting effect on improving turnout of minority voters, particularly in preclearance states. Even the majority of the Supreme Court in Shelby County, which would strike down preclearance as no longer supported by the record, took pains to note that since the VRA’s adoption, “voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African Americans attained political office in record number.”

Although there is little dispute that the VRA spurred a dramatic increase in participation rates by minority voters, disentangling the effect of preclearance from the simultaneous banning of literacy tests in preclearance states is a trickier proposition. Desmond Ang has approached this problem by examining only those jurisdictions that became covered by the 1975 revision, because their experience with preclearance postdates the nationwide elimination of literacy tests. Ang found that preclearance itself “led to gradual and significant increases in voter participation and that these gains persisted for over 40 years, bolstering turnout by 4–8 percentage points in recent elections.” This effect is due entirely to increased participation by minorities.
What is more, preclearance appears to alter not just participation rates, but electoral structure. Ang also found, for example, that by 1980, covered areas were significantly less likely to employ at-large elections, a voting method that tends to dilute the power of minority voters. Ang’s quantitative attempts to isolate the effect of preclearance are consistent with historical analysis suggesting that preclearance was a driving force behind the VRA’s success. For example, James Patterson observed that the VRA’s goals were “accomplished brilliantly, thanks in large part to vigorous and unyielding federal oversight.” They also suggest that the preclearance was effective not just because it resulted in the outright denial of some requested changes in voting procedure, but because the existence of the preclearance process had a broader prophylactic effect on efforts to restrict the franchise.

III. Judicial Challenges to Preclearance

A. EARLY COURT CHALLENGES TO PRECLEARANCE

Opponents of the VRA immediately subjected it to legal challenge, but, for almost 50 years, the act withstood these criticisms. The VRA first arrived in the Supreme Court only a year after its passage, in South Carolina v. Katzenbach. South Carolina’s primary challenge to the legislation was that it violated constitutional principles of federalism by singling out particular states for federal supervision.

The Supreme Court emphatically rejected that contention. It explained that “[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.” Sections 4 and 5 of the VRA were “valid means for carrying out the commands of the Fifteenth Amendment” because the coverage formula focused on jurisdictions with minority voter registrations far below the national average. It was, therefore, an approach “rational in both practice and theory.” By the time the case reached the Supreme Court, opposition to the VRA appeared vested solely in the former Confederate states. Twenty-six states filed amicus briefs in the Supreme Court; only five states, all southern, stood with South Carolina.

B. THE BEGINNING OF A CHANGE

Four decades later, support for the VRA appeared well-entrenched. A bill to reauthorize the VRA (which, by its express terms, sunsets without a congressional extension) passed overwhelmingly in 2006, 390–33 in the House and 98–0 in the Senate. The Supreme Court, however, was less supportive of reauthorization, at least under the same coverage formula adopted in prior iterations of the VRA. In Northwest Austin Municipal Utility District No. One v. Holder, a Texas municipal utility district sought to use the “bail out” provision of the VRA, which would have removed the utility from federal oversight, including in that action a challenge to the constitutionality of section 5. The Supreme Court declined to revisit the constitutionality of preclearance, but noted that the “evil that § 5 is meant to address may no longer be
concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions. That statement, read in conjunction with the Court’s invocation in Katzenbach of the need for the coverage formula to be “rational in both practice and theory,” led observers to speculate that constitutionality of preclearance was suddenly an open question.

C. SHELBY COUNTY V. HOLDER

The Court answered that question in Shelby County v. Holder, a 5–4 decision holding that the coverage formula set out in section 4(b), now outdated by decades, could no longer pass constitutional muster. Although the Court declined to rule on the constitutionality of section 5 itself, with no coverage formula left in place, section 5 is dead letter law, at least until Congress adopts a replacement coverage formula.

The Shelby County opinion reveals sharply divided perspectives on both how much and why the South has changed since 1965. Chief Justice Roberts, writing for the Court, characterized the preclearance formula as no longer reflecting “current political conditions” and “based on decades-old data and eradicated practices.” Roberts focused on census data indicating that minority voter registration and turnout numbers had risen dramatically since the VRA’s adoption, and that the congressional record failed to show the pervasive, flagrant, and widespread discrimination in existence in 1965.

Writing for the dissent, Justice Ginsburg viewed the evidence in the record strikingly differently, for several reasons: First, despite the progress that had no doubt been made in the South, “Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated.” She highlighted that the majority itself conceded that “voting discrimination still exists; no one doubts that,” yet nonetheless were overruling a congressional determination that the preclearance formula ought to remain in place until those practices were eradicated. Second, the very fact that “conditions in the South have impressively improved since passage of the Voting Rights Act” was itself a compelling reason to extend preclearance because “eliminating preclearance would risk loss of the gains that had been made.” And third, while other states not subject to preclearance likewise had progress to make on voting rights, Congress could rationally consider the South’s abhorrent history in extending preclearance. “Consideration of this long history, still in living memory, was altogether appropriate.”

IV. The Effect of Shelby County on Modern Elections

Many Americans, including most voter rights activists, viewed Shelby County as a major blow to civil rights. Scholars immediately predicted that “[t]he Court’s ruling will have a major impact on election procedures in the South.” And both civil rights groups and members of the Congressional Black Caucus have pointed to Shelby County as a factor in decreased Black turnout in the 2016 election.
Harm to voting rights can be measured in at least two ways. First, there is the intrinsic harm from efforts at disenfranchisement, whether they involve increased difficulty in casting a ballot, outright denial of the franchise, or dilution of the value of one's vote. Second, there is an outcome-based harm where efforts at voter suppression change the result of an election.

There is at least some evidence suggesting that voter suppression efforts following *Shelby County* have altered election outcomes. Civil rights groups have suggested that voter suppression laws enacted largely in the wake of *Shelby County* were likely enough to tip the scales in favor of Donald Trump in the 2016 election.45 The president of the Leadership Conference on Civil and Human Rights, for example, claimed to “have documented beyond any doubt that voter suppression and a conscious effort to shave off 1 or 2 percent of the vote in key states, in all likelihood influenced the outcome of th[e] election.”46 Journalists have likewise so suggested, focusing on voter suppression efforts in swing states, but note that Trump’s margin of victory “was not so tiny that we can assume disenfranchisement was a contributing factor.”47

Likewise, multiple state-level races in 2018 were sufficiently close that it is fair to speculate whether voter suppression efforts were sufficient to alter the outcome. In Georgia, for example, the number of additional votes gubernatorial candidate Stacey Abrams would have needed to secure to obtain both a runoff and an outright victory was significantly below the number of voters purged from Georgia’s rolls as part of now-Governor Kemp’s effort to aggressively cull the registration rolls of voters who had not recently participated in an election.48

Nonetheless, because changed election outcomes are a consequence of disenfranchisement—voters must be successfully deterred from voting or have their ballots not cast to change an election result—most analysis of the effect of *Shelby County* has focused on the harm of disenfranchisement. The remainder of this chapter, likewise, will examine the evidence that *Shelby County* has already, and will in the future, contributed to states and municipalities imposing additional burdens on the right to vote.

A. THEORETICAL BASIS FOR EXPECTING AN IMPACT

At the risk of stating the obvious, halting preclearance does not directly result in voter suppression or a burden on the right to vote. The *Shelby County* decision, therefore, could impact election cycles either where the Court’s decision to strike down the preclearance formula permits a policy that otherwise would have been invalidated to go into effect, or where the now-absence of preclearance encourages a state or municipality to pursue a voter suppression tactic it otherwise would have forgone because of preclearance.

For that reason, *Shelby County* could be expected to impact voting rights either if the majority in *Shelby County* underestimated the extent to which states were continuing to pursue burdensome policies after the VRA authorization and were being actively prevented from doing so by preclearance, or where the dissent’s fear that removing preclearance would lead to backsliding is well-founded.
Several scholars have noted that Chief Justice Roberts in *Shelby County* may have overestimated the extent to which the VRA had already addressed the problem of suppression of minority voting. The majority opinion focuses in large part on the premises that registration numbers for minorities in the Deep South are remarkably higher than shortly before Congress enacted the VRA and in some cases had reached or exceeded parity with White registration. There is at least some reason to doubt the accuracy of these numbers. Political science research suggests that Blacks, Latinos, and citizens who are either poorly educated or less wealthy are likely to overstate their registration rates. Self-reported turnout may be especially exaggerated in the Deep South, where overreporting of registration may be as high as five to ten times that of the rest of the country.

Similarly, the Court in *Shelby County* relied in part on a comparison between the percentage of Department of Justice objections to changes in election laws that had to be precleared under section 5 of the VRA from 1965 to 1975 with the percentage from 1995 to 2005, ostensibly to show that covered jurisdictions were proposing a smaller percentage of policies with discriminatory effect. As scholars have pointed out, there are multiple reasons this comparison has the potential to mislead. One reason is that covered jurisdictions submitted few of their changes in election law for preclearance in the immediate aftermath of the VRA. In fact, the Justice Department had not issued formal guidance on section 5 until 1970. Likewise, the Supreme Court did not authorize objections to election laws based on vote dilution, rather than only those affecting an individual voter’s right to vote, until 1969. Second, as Chief Justice Roberts notes, the very existence and routine operation of preclearance could have deterred covered jurisdictions from submitting proposed changes that could not survive review. Finally, and relatedly, by the 1990s, the procedures for preclearance were well established and extensive litigation and practical experience may have clarified for covered jurisdictions both what to do to successfully obtain preclearance and, under which circumstances, a submission in its current form would be futile.

Academic analysis that has attempted to gauge the accuracy of Chief Justice Roberts’s conclusion that the preclearance formula no longer reflected current political conditions and was based on eradicated practices has been largely critical. For example, Morgan Kousser, examining a data set of “voting rights events,” found that Chief Justice Roberts was wrong both in his conclusion that voter suppression efforts had dramatically decreased and that the ratio of these instances in covered jurisdictions had significantly declined, instead finding that the significant majority of suppression efforts continued to occur in covered jurisdictions. In fact, Kousser concluded that “[f]ar from ‘fortuitous,’ the relationship between the adjusted formula and proven discrimination over the period from 1965 was nearly perfect, the coverage about as narrowly tailored and precisely targeted as a large nationwide regulatory scheme could be.”

Such analysis, though, runs the risk of proving too much. If preclearance’s 40-year run was insufficient to change the relative frequency of voter suppression
in covered states, it is reasonable to ask whether simply leaving that system in place for additional time would ever have eradicated such difference. If so, the stronger basis for expecting that removing preclearance will impact future elections lies in the backsliding theory, under which preclearance was a buttress against regression in covered jurisdictions. At least some evidence, both quantitative and qualitative, indicates this might be the case, and that the 2018 election cycle was, and the 2020 election cycle will be, subject to renewed efforts to burden the right to vote, leading disproportionately to disenfranchisement of minorities.

B. CAUSE FOR OPTIMISM

Before turning to that evidence, though, it is worth noting some causes for optimism that Shelby County will not have a major retrograde effect on voting rights. First, section 2 of the VRA, which prohibits racially discriminatory election laws, remains in place and allows a right of action to challenge such practices. While preclearance was doubtless necessary when used to fight widespread and flagrant attempts to flout constitutional requirements, comparatively more subtle efforts at a state level to disenfranchise voters, such as registration purges and new identification (ID) laws, may be more amenable to litigation in advance of an election.

Second, demographic changes may ultimately reduce the incentive to backslide. On the one hand, as the South’s demographics change at an accelerating rate, incumbents have a strong incentive to use any means to maintain narrow election margins, which can encourage efforts at disenfranchisement. Yet these same trends may ultimately mean that politicians employ such tactics at their peril. In Georgia, for example, Brian Kemp faced protracted criticism during the election for voter suppression efforts he undertook as secretary of state. Though he won a narrow victory, the Republican-controlled General Assembly felt compelled to pass legislation aimed at fixing some of Georgia’s most problematic laws, albeit in a manner that left voting rights activists significantly unsatisfied. Third, and relatedly, the very fact of implementation of suppression tactics may well backfire. For example, several southern states implemented voter ID laws prior to Shelby County, and in the years since implementation, minority turnout in voter ID states has increased, not decreased. This result could suggest that some suppression tactics do less to burden the franchise than to mobilize political opposition. Ironically, if efforts to thwart minority participation end up having the opposite effect, those attempts may well mirror the effect of the VRA itself. Some evidence suggests that despite the VRA’s profoundly positive effect on minority participation, the passage of the VRA triggered political realignment in the South so profound that even in recent election cycles, it continues to cause a significant net decrease in the shares of Democratic votes cast.

C. QUALITATIVE EVIDENCE OF SHELBY COUNTY’S IMPACT

Although pinpointing causation can prove tricky, there is little doubt that shortly after the Supreme Court’s decision in Shelby County, several previously covered
jurisdictions began enacting new laws restricting the right to vote. Most prominently, Alabama, Mississippi, North Carolina, and Texas introduced more restrictive voter ID requirements, while Florida, Georgia, and Virginia began purging their voter rolls of thousands of voters.66 But a broader array of measures and policies enacted post-Shelby County include, among other things, poll place closures, disenfranchisement of individuals involved in the criminal justice system, and gerrymandering.67 These measures, most commonly implemented by Republican state legislatures and politicians, are often justified as necessary and commonsense efforts to combat voter fraud.68 Democrats and voting rights groups, meanwhile, have denounced them as discouraging underrepresented minorities from participating in the political process.69

Of particular concern in looking ahead to 2020 is that potentially suppressive activity appears to be at its highest in states with competitive political races, such as Georgia, Texas, Florida, and North Dakota.70

1. Restrictive Voter ID Laws

The most immediate apparent effect of Shelby County was an expansion of voter ID restrictions in the South and other jurisdictions with a past history of racial discrimination in voting.71 Since 2010, the Department of Justice under the Obama Administration had been using section 5 to challenge several southern state’s voting laws.72 Shelby County had the immediate effect of allowing those states to proceed with their efforts. 73

One might assume that, since those states were attempting to proceed with voter ID laws even under preclearance, that their rapid adoption of such measures reflects a one-off effect of Shelby County that might not signal additional changes in subsequent election cycles. That theory does not appear to be the case, however, because states have continued to adopt or tighten ID laws. In 2016, Alabama, Arizona, Indiana, Kansas, Mississippi, New Hampshire, Rhode Island, South Carolina, Tennessee, Virginia, and Wisconsin all added additional ID requirements.74 In 2017 and 2018, Arkansas, North Dakota, Missouri, and North Carolina followed suit. 75 At least Arizona has further extended its ID requirements in 2019.76

A potential problem with ascribing all of these new restrictions to the elimination of preclearance is that several of these states were not covered by preclearance, while others, such as North Carolina and New Hampshire, had multiple counties and municipalities subject to preclearance, but the states were not covered in their entirety.77 The fact that both preclearance and non-preclearance states are pursuing similar measures to restrict voting could indicate that some cause other than Shelby County is at play, such as the fact that, in the 2010 midterm elections, large numbers of Republicans were swept into state office, at the same time that many states were undergoing redistricting. This shift creates a plausible alternative causal mechanism because Republicans, at least in recent election cycles, have been significantly more likely to push restrictions on voting rights.78
• 17. Impact of Shelby County v. Holder •

Notably, however, when the Brennan Center for Justice cataloged new voting restrictions in America starting after the 2010 election, each of the instances it identified dating prior to 2013 were in states in which only particular counties were covered by preclearance, such as Florida, Illinois, South Dakota, and West Virginia.79 This pattern could at least suggest that it is the existence of preclearance that was preventing the proliferation of restrictive voting measures following Republican gains in 2010.

Moreover, it can be difficult to pinpoint which direction causality runs in the data. For example, studies showing that voting barriers have increased post-Shelby County tend to show that barriers to voting increased in both covered and non-covered states.80 One possible interpretation of this finding is that Shelby County could not be the causal factor, and that the quality of analysis is in doubt. An alternative interpretation is that the Shelby County decision has had an unexpected effect beyond those states subject to preclearance, perhaps because “an unimagined benefit of the Voting Rights Act is it established a minimal, uniform expectation regarding voting procedures.”81 This explanation has some superficial appeal in the case of voter ID laws. Shortly after a wave of preclearance states were able to enact such restrictions, other non-preclearance states followed suit, suggesting that the absence of preclearance may have provided political cover for the broader adoption of such measures. If so, the impact of Shelby County may ultimately be larger than that initially feared by some of its critics, if its influence extends beyond covered jurisdictions.

If Shelby County has been the catalyst for such laws, then the decision likely reduced minority participation. Both recent academic research and a report by the Government Accountability Office suggest that the turnout gap between White and ethnic minority voters is significantly higher in states with ID requirements.82 This variation in turnout has at least the possibility of altering the outcome in closer races. For example, one recent study found that in the 2016 election, Wisconsin’s voter ID law deterred between 17,000 and 23,000 eligible voters in two counties from casting ballots; the higher end of that range is larger than President Trump’s margin of victory in the state.83

2. Purging of Voter Rolls (and Other Registration Problems)
The 2018 election cycle saw significant numbers of voters removed from registration rolls, ostensibly as part of efforts to cull and maintain those lists. The number of voters removed during purges is sometimes quite high. Carol Anderson identifies Virginia as purging 41,637 voters, Florida 182,000, Indiana 481,235, Georgia 591,549, and Ohio two million.84 Although statewide purges are highly visible and impact a significant number of citizens, many more mundane problems such as inadequate registration locations and hours and mishandling of voter registrations also contribute to disenfranchisement of otherwise eligible voters.85 It is often difficult to pin routine problems in registration processing to a particular policy that would have been subject to preclearance, but the widespread use of voter purges and
the manner of their implementation by covered states could be attributable in part to *Shelby County*. States making use of aggressive purges typically cite their obligations under the National Voter Registration Act, but that statute was passed in 1993 and does not intuitively explain why efforts to purge voters have become more aggressive post-*Shelby County*, and primarily in southern and battleground states. 86

The implementation of other restrictions on registration also appear closely tied to the demise of preclearance. For example, in Georgia, then-Secretary Kemp's strict implementation of an “exact match” requirement on registrations had twice been blocked by the U.S. Department of Justice.87 Although the Department of Justice eventually relented and allowed the policy to go through, civil rights lawyers suspect that the Department of Justice settled the matter in part to avoid an opportunity for the Supreme Court to take up the constitutionality of section 4(b).88

3. Polling Place Closures as Reductions in Early Voting

Historically, polling place closures have been a common tactic for disenfranchising voters.89 This strategy can prove particularly effective in the absence of preclearance because decisions to close a polling location are often not well publicized, and, if made close to the election, are difficult or impossible to address via emergency litigation.90

An analysis by the Leadership Conference Education Fund concluded that, since *Shelby County*, there were at least 868 fewer polling locations in formerly covered counties for the 2016 presidential election than in prior elections, a 16 percent reduction.91 Some states, such as Arizona, Louisiana, Alabama, and Texas, saw particularly widespread closures.92

Complicating an analysis of causation is that there are several other factors that could cause a county to want to close a particular polling place, including, for example, that demand for that location may have declined with the advent of early voting, and that public schools have tended to be less willing to share space for polling locations due to an increased emphasis on physical security following multiple school shootings.93

Related strategies, such as reducing the early voting window, appear to disproportionately affect racial and ethnic minorities, particularly where reductions in voting hours occur on the Sunday prior to Election Day.94

4. Gerrymandering

Congressional redistricting efforts in several states have faced criticism that they have sought to dilute the voting power of minorities. For example, North Carolina’s redistricting efforts were initially struck down on that basis.95 The Supreme Court recently held that North Carolina’s most recent redistricting effort, in which the state explicitly engaged in political, rather than racial, gerrymandering, raised a non-justiciable question, seemingly insulating from judicial review any redistricting efforts with explicitly partisan aims.96 The Court’s reasoning in *Rucho* raises the specter that political factors, now permissible to consider, can be used to mask
efforts to dilute Black votes, because of the extraordinarily high correlation between racial and political identification. Dilution efforts in congressional redistricting are difficult to clearly attribute to *Shelby County* because many redistricting efforts began prior to the decision, more closely in time to when Republicans were either taking control of state houses or strengthening their control around 2010.86 Some local redistricting efforts more clearly appear to have occurred in reaction to *Shelby County*. For example, Greene County, Georgia, promptly proceeded with a redistricting plan that was stalled in preclearance under which Black voters represent a minority in each of the five County Commission districts.87

5. Other Barriers to Voting
Although there are numerous other potential barriers to voting, some are difficult to tie to a particular policy that would have been subject to preclearance. For example, there is significant evidence of the effect of slow precinct operation on exercise of the franchise. Increasingly long lines represent a “time tax” that discourages individuals from voting across the United States.88 Such time taxes appear to disproportionately affect minority voters and voters in the South.89 Compound measures of precinct efficiency, which generally use late closure as a proxy for efficiency, show that low-efficiency precincts decrease voter participation, and tend to particularly impact Hispanic voters.90 Other metrics suggest that Black voters are most likely to experience long lines, followed by Hispanic and Asian voters.91 All three groups wait, on average, longer than White voters.92

Many voters experienced long lines in the 2018 election cycle, though additional analysis is necessary to tie those long lines to the demise of preclearance.93 Sometimes lines are caused by specific policies or practices, such as precinct consolidation and closure or shortening of poll hours. At other times lines may be caused by simple apathy and failure to furnish additional resources (a problem not directly solved by preclearance) or because of poor planning in advance of the 2018 election, which saw record turnout for a midterm in several locations.94

In other cases, isolated policies that made voting more difficult for minorities seem more clearly tied to *Shelby County*. For example, promptly following the Supreme Court’s decision, a previously covered county in Alabama moved to convert to English-only elections, eliminating Spanish reading material.95

D. QUANTITATIVE EVIDENCE OF SHELBY COUNTY’S IMPACT
Although the complete body of qualitative evidence presents a strong case that *Shelby County* has led to new policies and procedures making voting more difficult for some groups, additional quantitative research is necessary to strengthen the case for causation. Some statistics provide inductive evidence that *Shelby County* could have had an impact on the 2016 election, such as that participation among minorities was lower than in 2012, particularly in swing states that had engaged in efforts to restrict the franchise. In Wisconsin, for example, Black voting rates dropped from 78 percent to less than 50 percent, and Black early voting in North Carolina was down by
8.5 percent.\textsuperscript{107} But additional analysis is needed to eliminate plausible alternate explanations, such as that the 2016 cycle was the first presidential election in a decade without Barak Obama on the ticket. Conversely, increased turnout in the 2018 midterm election could suggest that voter suppression efforts have not occurred with regular frequency or are not effective, but a controlled comparison is necessary to determine whether heightened participation due to high current levels of political polarization are masking a suppressive effect attributable to \textit{Shelby County}.

At least some controlled studies, however, do purport to show that \textit{Shelby County} has had an effect on voting rights laws. First, working research suggests that preclearance was having a moderating effect on wait times of minority voters that has dissipated in covered states in election cycles following the \textit{Shelby County} decision.\textsuperscript{108} The same study found that increases in wait time, while causing only a marginal increase in the likelihood a given voter will not vote, in aggregate is sufficiently large alone to influence the outcome in competitive races.\textsuperscript{109} Second, recent research by Desmond Ang addresses both whether preclearance was continuing to prevent minority disenfranchisement after 40 years in operation and whether \textit{Shelby County} has lead to backsliding. Ang views his research as showing “not only that preclearance coverage led to historical increases in minority participation but also that the application of these restrictions in 1975 continued to bolster enfranchisement over four decades later.”\textsuperscript{110} Prior to \textit{Shelby County}, areas covered by preclearance experienced larger historical increases in turnout relative to control counties.\textsuperscript{111} Following the decision, those counties experienced a significant differential decrease in turnout of 1.5 percentage points, the largest single-year drop of the sample period.\textsuperscript{112} During that same period, White turnout remained unchanged, while minority participation dropped by 2.1 percent.\textsuperscript{113} These studies provide initial quantitative evidence that the demise of preclearance is having a negative effect on minority participation rates, but more research is needed.

Notes

1. \textit{Shelby County v. Holder}, 570 U.S. 529 (2013). The author wishes to thank Jason Sigalos and Marisa Finegan for their invaluable assistance with this chapter.


18. Id.
19. Id.
20. Id.
24. Id. at 323.
25. Id. at 308.
26. Id. at 330.
27. Id.
28. Id. at 308 n.1.
31. Id. at 203.
34. Id. at 557.
35. Id. at 551–52.
36. Id. at 553.
37. Id. at 559 (Ginsburg, J., dissenting).
38. Id. at 560 (Ginsburg, J., dissenting).
39. Id. at 576 (Ginsburg, J., dissenting).
40. Id. (Ginsburg, J., dissenting).
41. Id. (Ginsburg, J., dissenting).
43. Gaughan, supra note 9, at 110–11.
46. Id.
52. Shelby County v. Holder, 570 U.S. at 548.
53. See Kousser, supra note 29.
54. Id.
58. Id.
59. Id.
60. 52 U.S.C. § 10301 (2019); see U.S. Department of Justice, supra note 5.
61. See, e.g., Gaughan, supra note 9.
Kurt Kastorf, on Behalf of Fair Fight, to Georgia Senate in Opposition to H.B. 316 (Feb. 28, 2019), http://kurtkastorf.com/2019/02/28/testimony-on-h-b-316-election-reform/.

63. See, e.g., Gaughan, supra note 9, at 113.

64. Id.; see Hopps & Bowles, supra note 42, at 9.

65. Id., supra note 12.

66. Id.


68. Id., supra note 12.

69. Id.

70. Root & Barclay, supra note 67.

71. See Gaughan, supra note 9, at 111.

72. Id. at 112.

73. Id.


75. Id.

76. Id.


78. Pugh, supra note 45.

79. Brennan Center for Justice, supra note 74.


81. Id.

82. CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 70 (2018).


84. ANDERSON, supra note 82, at 72.

85. Id. at 73.

86. See generally id. at 72–96.


88. Id.
90. Id.
91. Id.
93. The Leadership Conference Education Fund, supra note 89.
96. Rucho v. Common Cause, No. 18-422 (June 27, 2019).
97. Id.
102. Davison, supra note 80, at 13.
103. Id.
106. See The Leadership Conference Education Fund, supra note 98.
107. Anderson, supra note 82, at 42.
108. Davison, supra note 80, at 15–16.
109. Id. at 16.
110. Ang, supra note 12.
111. Id.
112. Id.
113. Id.
PART FOUR

REDISTRICTING
Partisan gerrymandering—the practice of drawing electoral districts to “subordinate adherents of one political party and entrench a rival party in power”—is widely recognized to be “incompatible with democratic principles.” By “packing” supermajorities of disfavored voters into a small number of districts and “cracking” remaining members of the disfavored party among a large number of districts, mapmakers can artificially enhance the ability of the favored party to win elections, “all without changing the mind of a single voter.” As Justice William Douglas once stated, “The problem of the gerrymander is how to defeat or circumvent the sentiments of the community. The problem of the law is how to prevent it.”

The solution to this “problem of the law” is not as simple as it may seem. While it is a “core principle of republican government” that “voters should choose their representatives, not the other way around,” the U.S. Constitution delegates congressional and state legislative redistricting to state legislatures in the first instance. How can voters address this inherent conflict of interest?

For some, direct popular action is the answer: take the redistricting power out of the hands of legislators altogether. In recent years, citizens in several states have used the initiative process to reassign redistricting authority to independent (or quasi-independent) commissions. Unfortunately, not all voters have this option. “Fewer than half the States offer voters an opportunity to put initiatives to direct vote,” leaving voters in the other states at the mercy of legislators who can rig the very electoral systems that should keep them accountable.

For voters in these states, litigation has been the last resort. The question in such cases is not whether representatives should choose their voters, but whether federal or state constitutional law place any limits on how representatives choose their voters. On June 27, 2019, the U.S. Supreme Court dealt voters pursuing litigation under federal law a severe blow, holding in Rucho v. Common Cause that “partisan gerrymandering claims present political questions beyond the reach of the federal courts.” Technically speaking, partisan gerrymandering still violates the federal Constitution. From the earliest days of the Supreme Court’s “redistricting revolution,” the Court suggested that a plan might violate the Constitution if it “minimize[d] or cancel[ed] out the voting strength of racial or political elements of
the voting population,”12 and the Court’s decision in *Rucho* does not hold otherwise. Yet, after decades puzzling over what standard it should use to adjudge such violations,13 the Court decided it should not be in the business of formulating a standard at all.14

With the federal courthouse doors closed (for now)15 and a new round of redistricting approaching after the 2020 census, expect litigation in state courts to heat up. Prior to *Rucho*, federal and state courts alike began to coalesce around a core set of judicial standards and evidentiary methods for adjudicating partisan gerrymandering claims. Armed with these tools, voters bringing claims in state courts might finally have the means to ensure that it is not “the will of the cartographers,” but rather “the will of the people” that governs.16

I. Litigation under Federal Constitutional Law

After the Supreme Court’s decision to withdraw federal courts from any role in policing partisan gerrymandering, it may seem strange to start with a section on recent litigation under federal constitutional law. But while the string of victories before district courts in North Carolina,17 Maryland,18 Michigan,19 and Ohio20 eventually ended in defeat, the theories and evidence developed by the litigants and the standards articulated by the judges in those cases may serve as useful models in state court. As Justice Kagan’s *Rucho* dissent notes, the majority’s decision to abandon the field “[came] just when courts across the country . . . ha[d] coalesced around manageable judicial standards to resolve partisan gerrymandering claims.”21

State courts could make use of these developments in two ways. First, a state court could find (and, indeed, some have found) that the same types of evidence developed in federal litigation can help prove a violation of the state’s own unique constitutional provisions.22 Second, a state court could hold that partisan gerrymandering does not present a political question under its own state constitution, thereby allowing claims to proceed under the state constitution’s equal protection, free expression, and/or free association provisions.23 In other words, the legal standards developed by federal district courts to date could be adopted by state courts outright. The majority’s opinion in *Rucho* was tied closely to the unique structure and history of the federal Constitution and does not preclude state courts from finding partisan gerrymandering claims justiciable in their own courts. For these reasons, it is worth reviewing how federal courts conceived of gerrymandering’s harms, developed applicable legal standards, and treated the relevant evidence before the Supreme Court called the enterprise off.

A. THE CONSTITUTIONAL HARM

Prior to Rucho, scholars, litigants, and courts suggested that partisan gerrymandering might be limited by a number of different constitutional provisions, including the Equal Protection Clause,24 the First Amendment,25 and the Elections Clause.26 Behind these specific sources of constitutional protection, however, stood two
distinct types of cognizable injury: dilutionary harm and associational harm. How one conceives of the harm impacts the applicable provision(s), the scope of any standing analysis, the type of showing required, and the relevant evidence.

In *Gill v. Whitford*, the Supreme Court unanimously agreed that partisan vote dilution could constitute a cognizable constitutional injury. This was conceived to be a “district-specific injury” that disadvantaged the voter as an individual. Because an “individual voter . . . is placed in a single district” and “votes for a single representative,” dilutionary harm (according to the Court) “results from the boundaries of the particular district in which [the voter] resides.” To demonstrate dilutionary harm, a voter was required to show that “the particular composition of the voter’s own district . . . caus[ed] his vote . . . to carry less weight than it would carry in another, hypothetical district.” This is true regardless of the constitutional provision under which the dilutionary harm is alleged.

Yet, partisan gerrymandering can also cause “a different injury—an infringement of [the] . . . right of association.” This associational harm is a downstream consequence of the gerrymander and is distinct from any harm from the dilution itself. “Members of the ‘disfavored party’ in the State, deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office.” In such case, gerrymandering “burden[s] the ability of like-minded people across the State to affiliate . . . and carry out [the party’s] activities and objects.” On this theory, “the valued association and the injury to it are statewide, [and] so too is the relevant standing requirement.” Federal courts that elaborated on this theory required plaintiffs to show (1) that they were members of the impacted association and (2) that the map weakened the association’s ability to carry out its functions and purposes.

**B. THE APPLICABLE LEGAL STANDARDS**

As Justice Kagan observed in her *Rucho* dissent, “federal courts across the country . . . [had] largely converged on a standard for adjudicating partisan gerrymandering claims” before the Supreme Court pulled the plug. Federal courts generally employed a three-part test that required (1) partisan intent, (2) partisan effect, and (3) causation and/or a lack of legitimate justification for the challenged districting decision(s). Within this overarching framework, courts varied in their approaches to each type of claim, what each element entailed, and whether/when the burden of proof should shift to the defendant.

**1. Equal Protection Clause**

To establish partisan intent in a vote-dilution claim under the Equal Protection Clause, federal courts generally required plaintiffs to show that the challenged districts were drawn with the purpose of “subordinat[ing] adherents of one political party and entrench[ing] a rival party in power.” Some courts heightened this showing by requiring that this partisan goal be the mapmaker’s predominant purpose in
drawing the particular district lines. Although “district courts ha[d] not uniformly adopted one approach” (and even courts that required a showing of predominance questioned the need for this heightened intent threshold), the predominance requirement could be used by state courts to help constrain judicial involvement, either as a matter of pragmatic constitutional construction or out of institutional deference to separation-of-powers principles.

To establish partisan effect, plaintiffs had to show that “the particular composition of the voter’s own district . . . caus[ed] his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district.” For dilution claims arising under the Equal Protection Clause, some courts also required evidence of “entrenchment” or “durability.” For this, plaintiffs needed to show “that the dilution . . . [wa]s likely to persist in subsequent elections such that an elected representative from the favored party in the district [would] not feel a need to be responsive to constituents who support the disfavored party.” Other courts (and litigants) suggested that evidence of entrenchment provided additional support for the claim but was not required. As with the heightened “predominance” threshold of the intent element, the heightened “durability” threshold of the effects element may serve a useful gatekeeping function for state courts interested in limiting judicial involvement.

Once plaintiffs established partisan intent and partisan effect, most federal courts then shifted the burden to the defendant “to prove that a district’s or districts’ discriminatory effects are attributable to a legitimate state interest or other neutral explanation.” If the defendant could show that legitimate, nondiscriminatory reasons “provide a basis for the way in which each challenged district was drawn,” then it could avoid liability.

2. First Amendment

For dilution and associational claims arising under the First Amendment, federal courts adopted a somewhat softened standard but generally required the plaintiff to carry the burden with respect to all three elements. For partisan intent, plaintiffs had to show that the challenged districts (or, for associational claims, the map as a whole) were drawn with the specific intent to “burden individuals or entities that support a disfavored candidate or political party.” Federal courts did not require this to be the “predominant” purpose, and it is not clear that legislators needed to have the specific intent to “entrench” a party in power (as opposed to simply providing that party some meaningful partisan advantage).

District courts also appeared to treat an intent to burden the representational rights of voters as interchangeable with an intent to burden the associational rights of voters and/or organizational plaintiffs. For example, in League of Women Voters of Michigan v. Benson, the district court found that legislators had the “‘specific intent’ to burden the associational rights of Democratic voters” because they sought to “discriminat[e] against Democratic voters by diluting the weight of their votes.”
To establish partisan effect, plaintiffs had to show that the challenged districting plan “in fact burdened the political speech or associational rights of [the] individuals or entities [that supported a disfavored candidate or political party].” For vote-dilution claims, plaintiffs did not need to prove entrenchment; they needed only show “that their electoral effectiveness—i.e., their opportunity to elect a candidate of choice—was meaningfully burdened.” For associational claims, plaintiffs had to show that “the challenged map burdened [their] ability to associate in furtherance of their political beliefs and aims.”

Finally, in the district courts’ First Amendment cases, plaintiffs bore the burden of establishing causation. Thus, while plaintiffs might have faced lower thresholds for establishing partisan intent and partisan effect under the First Amendment, the plaintiff—rather than the state—was required to show that “absent the mapmakers’ intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred.” This showing was the same under both representational and associational theories. As with the equal protection standard, “a challenged districting plan that burdens political speech and associational rights” would nonetheless be considered to “pass[] . . . muster if legitimate state interests, unrelated to the redistricting body’s intent to burden the rights of supporters of a disfavored party, justif[ied] the . . . burdens imposed by the plan.”

C. THE RELEVANT EVIDENCE

Whether or not state courts decide to adopt some version of these standards to adjudicate equal protection or free expression/association claims under their own constitutions, the evidence developed to suss out partisan intent and partisan effect in the federal cases above remains highly relevant to claims brought under provisions unique to state constitutions. Both the majority and the dissent in Rucho, for example, favorably cite examples of state courts enforcing state constitutional limits on partisan gerrymandering.

To establish partisan intent, plaintiffs in federal litigation relied upon numerous sources of evidence. These included traditional sources, such as testimonial and documentary evidence from key actors (party leaders; committee chairs; and legislators, staff, and consultants directly involved in the districting process); process-related evidence (such as process secrecy, exclusion of minority-party input, and disregard of public input); and evidence of disregard for traditional districting criteria (such as compactness or respect for geographic or county/city boundaries). Advocates also relied upon more quantitative sources, such as statewide partisan symmetry analyses (such as the efficiency gap, mean-median difference, declination, and partisan bias) and both statewide and district-specific outlier analyses.

Partisan symmetry analyses test a norm that one might expect to find in democratic elections: “reversing the outcome of the election—flipping each party’s average district vote totals—[should] also reverse the number of seats won.” This expectation is complicated, however, by the fact that congressional and legislative maps use single-member districts and by the fact that voters are not uniformly geographically
distributed. This means that a map drawn without partisan intent might still end up asymmetrical. Thus, federal courts treated this evidence—like all of the evidence—as probative but not dispositive.

Outlier analyses, on the other hand, use “advanced computing technology to randomly generate a large collection of districting plans that incorporate the State’s physical and political geography and meet its declared districting criteria, except for partisan gain.” This universe of nonpartisan maps—which can be in the thousands, millions, or billions—is arrayed from most favorable to one party to most favorable to the other, resulting in a bell curve distribution. The more the challenged map constitutes an “extreme outlier” on this bell curve (i.e., the further out on the tail it falls) the more likely the map was drawn with partisan intent. For a fuller discussion of partisan-outlier analyses, see Chapter 19.

To prove dilutive effect, plaintiffs have—understandably—focused on evidence that can show that their vote would carry greater weight in “another, hypothetical district.” This will usually entail introducing alternative maps and/or relying upon an outlier analysis to demonstrate that the plaintiff would be better off in the vast majority of nonpartisan alternative districts. In her *Rucho* dissent, for example, Justice Kagan relied almost exclusively on outlier analyses as providing the most appropriate “baseline” for courts to determine constitutional compliance because such analyses do not require the court to “choose among competing visions of electoral fairness.” Using a randomized universe of nonpartisan maps tailored to the state’s own geography, demographics, and political priorities as the comparator prevents judges from “philosophizing” about “fairness” and instead allows them to focus on the real question: did the pursuit of partisan advantage actually distort the state’s districting decisions and cause any dilutive harm?

For additional, supporting evidence of dilutive harm, plaintiffs might also rely upon statewide partisan asymmetry analyses and/or prior election results; however, one’s mileage with such evidence may vary. While federal district courts welcomed and ably incorporated these various forms of evidence into their standards above, the *Rucho* majority turned it all away, incorrectly asserting that “[p]artisan gerrymandering claims invariably sound in a desire for proportional representation.” Litigants should carefully consider what theories and evidentiary approaches are most likely to appeal to the judges in their specific state.

Beyond showing dilutive impact, the evidence above can also be used to show associational injury. Partisan asymmetry, for example, could be probative of the “gerrymander’s effects on the fortunes of political parties and those associated.” Given the distinct nature of an associational injury, however, showing “partisan effect” in such cases might also require showing that the association had “difficulty convincing voters to participate in the political process and vote, attracting strong candidates, raising money to support such candidates, and influencing elected officials.” To prove these harms, plaintiffs to date have relied largely upon testimonial evidence—a fact derided by Chief Justice Roberts in *Rucho*. Nonetheless, more quantitative approaches are available and may avoid undue reliance on anecdotal
testimony and witness credibility alone in any future cases brought pursuant to state associational rights.85

* * *

While partisan gerrymandering litigation under the federal Constitution has been foreclosed by the Supreme Court's decision in Rucho v. Common Cause for the foreseeable future, the "detailed, thorough, painstaking" work of the district courts above need not go to waste.86 These decisions “used neutral and manageable and strict standards” and treated “the factual evidence and legal arguments the parties presented” with analytical rigor and careful nuance.87 And they provide a rich and valuable resource for voters to leverage as they seek to vindicate their rights under state constitutional law.

II. Litigation under State Constitutional Law

As the Rucho majority was quick to point out, the U.S. Constitution does not provide the only potential limit on partisan gerrymandering.88 In recent years, some voters have successfully challenged maps under their state constitutions.89 Although each state constitution is unique, many contain provisions that apply specifically to redistricting and elections or contain equal protection, free expression, and free association provisions that could independently constrain partisan gerrymandering.90

A. EQUAL PROTECTION, FREE EXPRESSION, AND FREE ASSOCIATION

Most state constitutions contain equal protection clauses and provisions protecting free expression/association.91 With the U.S. Supreme Court abdicating its responsibility to remedy the violation of federal constitutional rights, state supreme courts likely will be called to interpret analogous provisions in their own constitutions to provide independent limits upon the practice using the standards articulated above. Whether plaintiffs can rely upon these provisions depends upon two issues: (1) how state courts interpret state rights to equal protection and/or free expression/association in light of Rucho, and (2) how state courts interpret state separation-of-powers principles in light of Rucho.

When state constitutions contain individual rights analogous to the federal Constitution, state courts usually interpret their own constitution in one of three ways: the lockstep method, the interstitial method, or the primacy method.92 Under the lockstep method, the state court “automatically adopt[s] federal jurisprudence for the right at issue, declaring that state law goes only as far as federal law.”93 Under the interstitial method, the state court “first consider[s] [whether] the ‘federal floor’ . . . [provides protection] before then analyzing independently whether the state constitution provides greater protection.”94 Under the primacy method, the state court “first considers the state constitution and relies on the U.S. Constitution only if state protection is not robust enough to vindicate the plaintiffs’ rights.”95

State courts that use the primacy method might—as always—interpret their own equal protection or free expression/association provisions to provide additional
protections against gerrymandering above and beyond those provided by federal law. Interestingly, however, even courts that usually use a lockstep method need not hold that their equal protection and/or free expression/association provisions foreclose relief. After all, the *Rucho* majority acknowledged that partisan gerrymandering could violate the Constitution; it held only that federal courts do not have jurisdiction to rule on such claims due to the political question doctrine. To be sure, a state court might be persuaded by the *Rucho* majority’s objections to the standards above, but even these objections begin to shade into a separate question of state constitutional interpretation: whether a state’s own political question doctrine should track the federal political question doctrine.

There are good reasons for state courts (even in lockstep states) to avoid adopting the federal political question doctrine. To start, there are “significant distinctions between separation of powers and individual rights jurisprudence” that might lead one to “expect less deference by states to federal separation of powers doctrine.” As Professor Robert Schapiro has argued, “unlike federal individual rights precedent, federal separation of powers doctrine does not apply directly to the states. This . . . means that the pragmatic and institutional benefits of following federal individual rights case law do not apply in the separation of powers area.” In such situations, federal law provides no constitutional floor for state courts to incorporate, and because state courts will almost always be applying only one body of relevant separation-of-powers law—their own—lockstepping offers little in the way of clarity and uniformity.

Moreover, there are structural and historical differences between state governments and the federal government for state courts to consider when crafting separation-of-powers jurisprudence. “Federal doctrine reflects in part specific textual commitments not duplicated in state constitutions,” and the principles underlying the doctrine reflect the “structural imperatives” and the unique history of the political system at issue. For example, the *Rucho* decision purports to be informed by historical factors unique to the federal Constitution as well as the specific interplay of federal and state powers embodied in the Elections Clause of Article I. And while *Rucho*’s core holding appears to be that partisan gerrymandering claims are somehow inherently unmanageable, a decision on that basis alone would involve an unprecedented and unprincipled development in federal political question doctrine.

Unfortunately, state constitutional justiciability rulings to date appear to track federal doctrine quite closely with little justification. If this trend holds, partisan gerrymandering claims under state equal protection or free expression/association provisions would be foreclosed in lockstep states as well. Hopefully state-level partisan gerrymandering claims provide state courts an opportunity to revisit this trend and to adopt a separation-of-powers jurisprudence rooted in their own charter’s unique history, text, and structure.

**B. PROHIBITIONS ON FAVORITISM**

Some state constitutions contain provisions that explicitly prohibit districts that provide (or are intended to provide) undue favor or disfavor towards political parties
and/or incumbents. Although these provisions are often “included in state constitutions as part of broader amendments to create independent redistricting commissions,” they “are not exclusive to states that have independent commissions.”

Given the plain meaning of these provisions, voters should be able to bring partisan gerrymandering claims under them.

In Florida, for example, voters have brought successful lawsuits challenging districts that were drawn in violation of such a provision. The Florida Constitution contains two tiers of redistricting requirements. The first tier prohibits (1) plans or districts “drawn with the intent to favor or disfavor a political party or an incumbent”; (2) districts “drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice”; and (3) noncontiguous districts. The second tier requires that districts (1) “be as nearly equal in population as is practicable”; (2) “be compact”; and (3) “where feasible, utilize existing political and geographical boundaries.”

The Supreme Court of Florida has held that the Florida Constitution’s express prohibition on favoritism means “there is no acceptable level of improper intent” in the redistricting process. When direct evidence of impermissible intent is unavailable, “objective indicators of intent . . . can be discerned from the Legislature’s compliance with [the] constitution’s tier-two requirements, which set forth traditional redistricting principles.” Thus, “[a] disregard for these principles can serve as indicia of improper intent.” On the other hand, if “a direct violation of the . . . prohibition on partisan intent [is] found, the burden . . . shift[s] to the Legislature to justify its decisions in drawing the . . . district lines.”

C. PROTECTIONS FOR “FREE” ELECTIONS

A majority of state constitutions contain provisions that require elections to be “free,” “free and equal,” “free and fair,” “free and open,” or a similar variant. These provisions are not as explicit in their meaning but may be interpreted to provide broader protections to voting rights than those accorded under the Equal Protection Clause and First Amendment of the U.S. Constitution. After all, the federal charter contains no similar provision. Lockstepping a state’s equal protection or free expression/association clauses to their federal analogues may make sense because such provisions often have similar language and purposes. Using the lockstep method to define a state constitution’s guarantee of “free and equal” or “free and fair” elections, however, would “deny [the] state’s separate and differently worded . . . provision [of] any independent force.” Given the potentially broader electoral rights protected by such provisions, voters may be able to use them to challenge partisan gerrymanders.

The Supreme Court of Pennsylvania, for example, has held that vote dilution violates the state constitution’s “Free and Equal Elections Clause,” calling it “axiomatic that a diluted vote is not an equal vote.” In League of Women Voters v. Commonwealth of Pennsylvania, plaintiffs introduced outlier analyses demonstrating that
the challenged plan “could not have plausibly emerged from a districting process that prioritize[d] traditional districting criteria.” The court deemed this statistical showing “sufficient” to establish a violation, holding that a plan violates the Free and Equal Elections Clause when “neutral criteria have been subordinated, in whole or in part, to extraneous considerations such as . . . partisan political advantage.”

This subordination standard, however, was not held to be the exclusive means by which a violation of the clause could be established. The court “emphasized [that] the overarching objective of [the Free and Equal Elections Clause] is to prevent dilution of an individual’s vote,” and the court recognized that a future plan might comport with neutral criteria but still “unfairly dilute the power of a particular group’s vote.” Nevertheless, the court reserved this issue for another day, holding that “the case at bar [could] be resolved solely on the basis of [the subordination standard].”

The “free and equal” provisions found in other state constitutions could be read to provide similar protections against partisan gerrymandering. (Indeed, in a footnote, the Supreme Court of Pennsylvania appears to invite courts in other states to do just that.) Advocates in states that guarantee “free and open” or “free and fair” elections might consider whether these provisions could extend similar protections to their voters.

D. MANDATORY REDISTRICTING CRITERIA

Numerous state constitutions set out redistricting criteria that state legislatures are supposed to follow when drawing districting plans. These criteria often include contiguity, compactness, and/or adherence to geographic or political boundaries (such as county/city lines). Although these criteria are usually added to state constitutions to provide a check on partisan gerrymandering, they often fail to achieve these purposes because state supreme courts grant legislatures broad discretion in balancing the competing demands of the redistricting process. Courts also afford legislatures deference because these criteria are rarely amenable to bright-line rules and the redistricting process itself is highly fact-intensive.

Nonetheless, state courts have held that mandatory redistricting criteria impose some limits on the redistricting process. In Maryland, for example, the Court of Appeals has held that “non-constitutional criteria cannot override the constitutional ones.” Legislators can “pursue a wide range of objectives” and consider “countless” factors, “including broad political and narrow partisan ones”; however, these justifications cannot “subordinate” the criteria “mandated by the Federal or State Constitutions.”

Other courts, however, have taken approaches so deferential that they render the relevant constitutional provisions functionally meaningless. The Supreme Court of Virginia, for example, has held that the state’s compactness requirement “does [not] require that compactness be given priority over other considerations, much less establish a standard to determine whether the legislature gave proper priority to compactness.” That court purports to still “ha[ve] the authority and obligation to
intervene when an abuse of discretion is shown by a grave, palpable, and unreasonable deviation from the [mandatory redistricting] principles,” but has offered little indication of how such a “deviation” might be shown.135

Needless to say, each state court’s approach to interpreting its constitution’s mandatory redistricting criteria is unique. Yet, to the extent new forms of evidence (such as outlier analyses) allow plaintiffs to demonstrate more conclusively that specific constitutional criteria were disregarded or subordinated to the pursuit of partisan advantage, these provisions may offer meaningful constraints on the most egregious forms of partisan gerrymandering.

* * *

Despite the U.S. Supreme Court’s unfortunate decision in Rucho v. Common Cause, the legal battle against partisan gerrymandering looks sure to continue in the decade ahead. At the state level, voters are just beginning to explore the protections afforded by their own state constitutions, and recent federal litigation may provide some of the tools and standards they need. If gerrymandering becomes worse after the 2020 census—as now seems certain—state supreme courts may feel compelled to step in and provide relief. With the U.S. Supreme Court’s retreat from enforcing constitutional rights and with rigged districts undermining democracy itself, state supreme courts may be voters’ last line of defense.

Notes

7. U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .”).
9. Id. at 2524 (Kagan, J., dissenting). See also Ballotpedia, States with Initiative or Referendum, https://ballotpedia.org/States_with_initiative_or_referendum (last visited Aug. 8, 2019).
10. Congress has the power to enact redistricting reform as well and has begun to entertain more sweeping intervention in recent years. See Nicholas Stephanopoulos, H.R. 1 and Redistricting Commissions, Election L. Blog, Jan. 9, 2019, https://electionlawblog.org/?p=103123 (analyzing the redistricting commissions section of an electoral reform bill proposed by Congress).


15. The Supreme Court’s decision in Rucho rests on weak theoretical ground. See G. Michael Parsons, Gerrymandering & Justiciability: The Political Question Doctrine after Rucho v. Common Cause, 95 Ind. L.J. (forthcoming 2020) [hereinafter Parsons, Gerrymandering & Justiciability], available at https://ssrn.com/abstract=3334370 (arguing that the Supreme Court lacks judicial power under Article III to render a category of constitutional claims nonjusticiable on the basis of “manageability” alone). As the Court’s composition changes with time, the Rucho decision is a good candidate to be overturned as poorly reasoned and unprincipled when decided.


23. See infra text accompanying notes 92–106.


28. See id. at 1930 (citing Baker v. Carr, 369 U.S. 186, 206 (1962)).
29. Id.
30. Id. at 1931.
31. See Rucho, 318 F. Supp. 3d at 829 (noting that the “dilutionary aspect of the First Amendment injury associated with partisan gerrymandering echoes the district-specific injury giving rise to a partisan vote dilution claim under the Equal Protection Clause”); League of Women Voters of Mich. v. Benson, 373 F. Supp. 3d 867, 934 (E.D. Mich. 2019) (same); Householder, 367 F. Supp. 3d at 726 (holding that “to the extent that the First Amendment theory is based upon vote dilution, the same [standing] analysis applies as in the Fourteenth Amendment context”); id. at 713 (holding that the standing analysis for most theories of harm under the Elections Clause “is not truly distinguishable from the other [vote-dilution] claims”).
35. Id. Empirical evidence suggests that these suppositions may be true. See Stephanopoulos & Warshaw, supra note 33, at 20–21 (“When a district plan is skewed against a party, its candidates contest fewer legislative seats and have worse credentials when they do run, its donors contribute less money, and its voters are not as supportive at the polls.”).
37. Id.
40. See id.; Benson, 373 F. Supp. 3d at 912 (citing examples from Ohio, North Carolina, and Maryland).
41. Benson, 373 F. Supp. 3d at 912; Rucho, 318 F. Supp. 3d at 864.
42. See Benson, 373 F. Supp. 3d at 912; Rucho, 318 F. Supp. 3d at 864.
43. Householder, 367 F. Supp. 3d at 708 (holding at the summary-judgment stage that “we do not need to choose between the ‘predominant purpose’ and the ‘motivating factor’ tests [yet]”).
44. Rucho, 318 F. Supp. 3d at 864, 864 n.24 (questioning the doctrinal reasons for a predominance threshold but applying a predominance threshold given the Supreme Court’s directional signals).
45. See Parsons, Gerrymandering & Justiciability, supra note 15, at 47–48, 52–58; Rucho, 139 S. Ct. at 2516 (Kagan, J., dissenting) (“Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.”). In Rucho, Chief Justice Roberts purports to reject a predominant intent requirement because he believes “securing partisan advantage” to be a “permissible” intent that “does not
become constitutionally impermissible . . . when [it] 'predominates.'” 139 S. Ct. at 2502–03. As Justice Kagan observes, this actually marks a profound shift in constitutional doctrine. See id. at 2517 (Kagan, J., dissenting). Before Rucho, the Court had never held partisan advantage alone to constitute a legitimate state interest. See generally Michael S. Kang, Gerrymandering and the Constitutional Norm against Government Partisanship, 116 MICH. L. REV. 351 (2017); Parsons, Clearing the Political Thicket, supra note 24. State courts need not degrade their own constitutions by adopting this profoundly nihilistic and institutionally destructive interpretation.


47. See, e.g., Rucho, 318 F. Supp. 3d at 867 (relying on the Supreme Court's “reference[s] to entrenchment” as expressing a principal concern with gerrymandering that “insulates legislators from popular will and renders them unresponsive to portions of their constituencies”).

48. Id.

49. See Householder, 367 F. Supp. 3d at 709 (“Discriminatory effect . . . may also be evidenced by entrenchment. Evidence of entrenchment adds more weight to an individual voter's dilution claim. . . .”); Brief for Appellees Common Cause et al. at 58, Rucho v. Common Cause, No. 18-422 (filed Mar. 4, 2019) (“[T]here is no need to engraft a 'durability' requirement foreign to Equal Protection doctrine.”).

50. Chief Justice Roberts critiques the durability threshold in Rucho by claiming it invites “prognostications as to the outcome of future elections,” 139 S. Ct. at 2503, but examining the “likely” or “usual” effects of a gerrymander on future elections is an evidence-driven task that courts routinely and capably exercise in the context of racial dilution claims, see Thornburg v. Gingles, 478 U.S. 30, 48–49 (1986). The task in the partisan-gerrymandering context is similarly fact-based and evidence-driven. See Rucho, 139 S. Ct. at 2519 (Kagan, J., dissenting). Again, state courts are not bound by the majority’s reasoning in Rucho.


52. Householder, 367 F. Supp. 3d at 709. In Rucho, Chief Justice Roberts contends that this final prong adds nothing to the initial intent inquiry. See 139 S. Ct. at 2504.


54. See Benson, 373 F. Supp. 3d at 913; Rucho, 318 F. Supp. 3d at 929–30.

55. See, e.g., Benson, 373 F. Supp. 3d at 954 (“Because Plaintiffs have established that their protected First Amendment speech was the 'predominant purpose' of the map-makers' and legislators’ decision to dilute their votes, they have necessarily satisfied the lower threshold . . . of showing that their protected speech was a 'motivating factor' for the challenged activity.”); Benisek, 348 F. Supp. 3d at 522–23 (applying the same intent standard to a First Amendment vote-dilution claim and a First Amendment associational claim and finding that the same evidence satisfies both).

56. Benson, 373 F. Supp. 3d at 954.


59. *Id.* at 522.

60. See *Benson*, 373 F. Supp. 3d at 913; *Householder*, 367 F. Supp. 3d at 711; *Benisek*, 348 F. Supp. 3d at 515; *Rucho*, 318 F. Supp. 3d at 929.


63. *Rucho*, 318 F. Supp. 3d at 935. At least one court held that the burden shifts to the state after a plaintiff shows partisan intent, partisan effect, and causation, at which point the defendant “can still avoid liability by showing that its redistricting legislation was narrowly tailored to achieve a compelling government interest.” *Benisek*, 348 F. Supp. 3d at 515.

64. See *Rucho* v. Common Cause, 139 S. Ct. 2484, 2507 (2019) (Florida); *Id.* at 2524 (Kagan, J., dissenting) (Pennsylvania).


68. See *Benson*, 373 F. Supp. 3d at 895–96, 901–03.

69. See *Id.* at 893–94, 897–98; *Householder*, 367 F. Supp. 3d at 717; *Rucho*, 318 F. Supp. 3d at 870–76.


71. *See id.*


76. Rucho, 139 S. Ct. at 2520 (Kagan, J., dissenting).
77. See id. at 2520–21.
79. See, e.g., Rucho, 318 F. Supp. 3d at 884.
80. Rucho, 139 S. Ct. at 2499.
82. Rucho, 318 F. Supp. 3d at 932. See also Benson, 373 F. Supp. 3d at 954–55 (“By diluting the weight of Democratic voters’ votes, the Enacted Plan has made it more difficult to energize the party’s base, register voters, recruit candidates, mobilize and attract volunteers, raise money, and motivate people to vote.”).
84. See Rucho, 139 S. Ct. at 2504 (“How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded?”).
85. See Benisek, 348 F. Supp. 3d at 523 (relying, in part, upon a drop-off in Republican turnout and fundraising in the targeted district after the gerrymander took effect). See also generally Stephanopoulos & Warshaw, supra note 33.
86. Rucho, 139 S. Ct. at 2525 (Kagan, J., dissenting).
87. Id.
88. Id. at 2507–08.
89. See, e.g., League of Women Voters of Pa. v. Commonwealth (LWV-PA), 178 A.3d 737 (Pa. 2018); League of Women Voters of Fla. v. Dettmer (LWV-FL), 172 So. 3d 363 (Fla. 2015).
91. See Hessel, supra note 90, app.
92. See Douglas, supra note 90, at 105.
93. Id.
94. Id.
95. Id.
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98. Schapiro, supra note 97, at 92–93.
99. See id. at 93–94. Several other considerations likewise “suggest that state courts should not put much reliance on federal analysis when interpreting their own state charters,” including “the intrinsic weaknesses of federal precedents.” Devlin, supra note 97, at 1224.

100. See Schapiro, supra note 97, at 100–07.
101. See id. at 100–02.
102. See id. at 107.
104. See id. at 2491, 2499–506; Parsons, Gerrymandering & Justiciability, supra note 15.
105. See Schapiro, supra note 97, at 80 (“Contrary to . . . expectation[s], however, federal precedent sets the terms for much state separation of powers debate, and federal principles provide a presumptive standard for state constitutional decisions.”); Nat Stern, Don’t Answer That: Revisiting the Political Question Doctrine in State Courts, 21 U. Pa. J. Const. L. 153, 155–56 (2018) (observing that, while “no uniform approach [to the political question doctrine] has emerged,” state courts have failed to “carve[e] out the kind of distinctly nonfederal theory for which scholars have called in state constitutional discourse”).

106. See Hessel, supra note 90, app.
107. See id. at 2–3. In fact, reformers who advocate for independent state commissions should consider ensuring that any proposed constitutional amendment also include a separate provision prohibiting favoritism and guaranteeing a private cause of action. In AIRC, a narrow 5–4 majority (including Justice Kennedy) concluded that the use of the term “legislature” in Article I of the U.S. Constitution “included not just the legislative body but the state’s legislative process, including the people acting through the initiative process.” Richard L. Hasen, The Next Threat to Redistricting Reform, Harv. L. Rev. Blog, Oct. 22, 2018, https://blog.harvardlawreview.org/the-next-threat-to-redistricting-reform/. In response, the Chief Justice wrote a forceful dissent, alleging that the majority failed to “explain how a constitutional provision that vests redistricting authority in ‘the Legislature’ permits a State to wholly exclude ‘the Legislature’ from redistricting.” AIRC, 135 S. Ct. 2652, 2678 (2015) (Roberts, C.J., dissenting). As Professor Rick Hasen has noted, if the Supreme Court ever revisits its holding in AIRC, it could “spell the end of independent commissions.” Hasen, supra. A reversal of AIRC, however, need not necessarily doom all voter-initiated redistricting reform. See AIRC, 135 S. Ct. at 2691 (Roberts, C.J., dissenting) (declining to discuss voter-enacted federal election reforms that do not “permanently and totally displace[] the legislature from the redistricting process”); Rucho, 139 S. Ct. at 2507–08 (citing state court enforcement of state constitutional redistricting limitations with favor). Ensuring that the
constitutions of any affected states retain strict and forceful prohibitions on partisan favoritism could help limit the fallout from any decision eliminating independent commissions.

108. See Rucho, 139 S. Ct. at 2507 (citing intervention by the Supreme Court of Florida pursuant to such a provision with favor). See also Christopher S. Elmendorf, From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on Partisan Gerrymanders, 59 WM. & MARY L. REV. 1601, 1625–26 (2018).

109. See, e.g., In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d 597 (Fla. 2012); LWV-FL, 172 So. 3d 363 (Fla. 2015).


111. Id. § 21(b).

112. Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d at 617.

113. Id. at 618.

114. Id.

115. LWV-FL, 172 So. 3d 363, 371 (Fla. 2015).

116. See Douglas, supra note 90, at 103, 144–49.

117. See id. at 109.

118. Id. at 110.

119. See Rucho v. Common Cause, 139 S. Ct. 2484, 2524 n.6 (2019) (Kagan, J., dissenting) (citing intervention by the Supreme Court of Pennsylvania pursuant to such a provision with favor, and noting that this provision does not inherently offer specific “standards and guidance”).

120. LWV-PA, 178 A.3d 737, 741 (Pa. 2018).

121. Id. at 814.

122. Grofman & Cervas, supra note 66, at 271. See also LWV-PA, 178 A.3d at 820 (finding that “the 2011 Plan cannot, as a statistical matter, be a plan directed at complying with traditional redistricting requirements”). Professor Jowei Chen created two sets of simulations: Set I prioritized traditional criteria; Set II included (along with these criteria) a rule avoiding the pairing of incumbents. Grofman & Cervas, supra note 66, at 270–71. Outlier analyses are especially helpful in such circumstances because they incorporate both state-specific redistricting rules and the unique “idiosyncratic physical and human geography” of each state when determining whether a challenged map is a partisan outlier. Amicus Brief of Mathematicians, Law Professors, and Students ISO Appellees at 19–20, 25–26, Rucho v. Common Cause, No. 18-422 (filed Mar. 8, 2019).

123. LWV-PA, 178 A.3d at 820, 817.

124. Id. at 817.

125. Id.

126. Id.

127. See id. at 813 n.71.

128. See Hessell, supra note 90, app.

130. See, e.g., In re 1983 Legislative Apportionment, 469 A.2d 819, 827 (Me. 1983) (“[F]ull compliance with all of the standards imposed by the state constitution as well as the federal . . . is a practical impossibility.”); In re Livingston, 96 Misc. 341, 349 (N.Y. Sup. Ct. 1916) (“[I]t is . . . apparent that in every case all the provisions of the Constitution cannot be complied with . . .”). See also Grofman & Cervas, supra note 66, at 284 (noting that traditional criteria requirements “have in the past failed to actually constrain partisan gerrymandering”); Hess, supra note 90, at 4 (noting that “courts have been generally reluctant to strike down districting plans based on allegations of non-compactness and non-contiguity” and that courts have “generally allowed legislatures to draw maps that prioritize other factors over political boundaries”).

131. See, e.g., Vesilind v. Va. State Bd. of Elections, 813 S.E.2d 739, 751 (Va. 2018) (rejecting a “bright-line standard” for gauging compactness); In the Matter of 2012 Legislative Districting of the State, 80 A.3d 1073, 1091 (Md. 2013) (“[E]ach legislative districting plan . . . must be based upon the unique facts of that particular case” because “[d]ue to the shifts in population that may occur from decade to decade, what may be a constitutional necessity at the time one plan is enacted may no longer be a constitutional necessity by the time the next plan is enacted.”).

132. 2012 Legislative Districting of the State, 80 A.3d at 1080 (quoting In the Matter of Legislative Districting of the State, 805 A.2d 292, 297 (Md. 2002)).

133. Id. at 1079, 1081.

134. Vesilind, 813 S.E.2d at 753.

135. Id. at 749.
I. Introduction

Although gerrymandering is an old phenomenon in America, it has recently gotten new attention from the public, the legal system, political scientists, and mathematicians. After much anticipation, the U.S. Supreme Court recently held that partisan gerrymandering allegations are nonjusticiable by the federal courts, as a political question.\(^1\) However, challenges to partisan gerrymandering under state constitutions are still viable,\(^2\) and state and federal legislation forbidding partisan gerrymandering is still available.\(^3\) By applying advanced computational techniques to the gerrymandering problem we may be at the start of a more successful approach to labeling some districting maps as unfairly gerrymandered. In this chapter, we first provide a brief introduction covering how we came to this point: how has the case law on partisan gerrymandering developed in the past 35 years, and how has it influenced and been influenced by anti-gerrymandering activists, political activists, and the law governing the voting rights of racial and language minorities? In Part II, we review the key fairness metrics that political scientists and mathematicians have developed to assess the partisan bias of district maps. In Part III, we explain what outlier analysis is and why it is a promising approach to detecting gerrymanders. We also look at how it has been used in other areas of law, such as employment discrimination. In Part IV, we review current approaches to the problem of generating a sample of district maps—a necessary component in outlier analysis. In Part V, we outline future directions for research that could improve the law’s responses to partisan gerrymandering.

Partisan or political gerrymandering has been defined as the assignment of voters into districts such that the votes of some partisan-affiliated group, such as
Democrats, are unconstitutionally diluted. In other words, the district map is unfair. It has also been described as an “intentional effort to favor” certain candidates, such as those from a particular political party, and to “disadvantage” voters from other parties. In other words, the district map is intended to be unfair. While many agree that the practice is undemocratic, there is not total agreement on what the wrongful practice even is. Recently, in Rucho v. Common Cause, the U.S. Supreme Court held that defining unconstitutional partisan gerrymandering is a nonjusticiable political question due to its judicial unmanageability. But even before that, disagreement and confusion were rampant. Even in a prior Supreme Court opinion that held the practice to be both unconstitutional and justiciable, the same author, Justice White, alternated between language seeming to endorse both definitions—a results-based definition of vote dilution and an intent-based one.

Perhaps because the rule Justice White articulated was not particularly clear, challenges to partisan gerrymandering were unsuccessful for decades, until the Supreme Court virtually shut these challenges down by indicating that they were nonjusticiable for the time being. The justices had various reasons for this, but, notably, Justice Kennedy, who delivered the fifth vote for the result in Vieth v. Jubelirer, indicated that nobody had presented the federal courts with a judicially manageable standard for adjudicating when a gerrymander is unconstitutional. He left open the door for challengers to do so at some later point. In other words, Justice White’s definition of what is substantively unfair about gerrymandering had proved unmanageable.

Both parties continued to engage in partisan gerrymandering, with a virtually free license to do so unless it could be shown that a gerrymander had a predominantly racial motive. Nonpartisan anti-gerrymandering and civil rights activists and academics focused on racial gerrymandering and Voting Rights Act (VRA) challenges, as well as on Justice Kennedy’s invitation to come up with a manageable standard for adjudicating when a partisan gerrymander has occurred.

One of the standards proposed as a means of satisfying, at least in part, the Court’s need for a manageable standard was the efficiency gap. In the next part, we will review the various attempts, including the efficiency gap, to come up with a simple measure of substantive fairness. For now, though, we mention the efficiency gap as part of the story of how the courts, activists, and academics have influenced each other in their approaches to partisan gerrymandering. With the efficiency gap in hand, litigants in Wisconsin challenged that district map in federal court in Whitford v. Gill. They succeeded in convincing a three-judge federal district court that partisan gerrymandering is justiciable by federal courts, and also that the Wisconsin map was unconstitutional. That case reached the U.S. Supreme Court, where, on review, the plaintiffs and numerous amici emphasized not only the efficiency gap but other potential indicators of unconstitutionality, using both substantive unfairness measures (simple measures scoring an individual map) and indicators of illicit intent (i.e., outlier analysis using map ensembles). At the same time as the public’s attention was focused on Gill v. Whitford, a separate lawsuit in
Pennsylvania state court challenged a Republican-drawn district map as unconstitutionally gerrymandered under the Pennsylvania Constitution. The challengers in that case succeeded in convincing the Pennsylvania Supreme Court that such cases could be adjudicated, at least by the Pennsylvania Supreme Court, and that the map was indeed unconstitutionally gerrymandered. The court stated that

[w]hen . . . it is demonstrated that, in the creation of congressional districts, these neutral criteria [such as compactness and minimization of dividing political subdivisions] have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage, a congressional redistricting plan violates the Pennsylvania Constitution.

The court inferred illicit intent, based on what it saw as deviation from how neutral, unbiased maps targeted at principles like compactness and preserving political subdivisions would appear. It held that this deviation alone was enough for the plan to be unconstitutional, noting the substantive unfairness of the plan as represented by various measures of partisan advantage.

The U.S. Supreme Court rejected expedited review of *League of Women Voters v. Pennsylvania*, indicating it is unlikely to ever review the case, based solely on the state constitution. While the case is only binding precedent in Pennsylvania, its reliance on evidence of deviation from a baseline norm—the outlier analysis discussed in Part III—will likely serve as a road map and inspiration for activists in other states who may bring challenges rooted in state constitutional mandates. It also leaves the door open to measures of substantive unfairness as an additional or even alternative method of proving unconstitutionality, so academics should continue to be motivated to come up with simple definitions of unfairness that can be understood by state courts and the public.

While partisan gerrymandering has now been definitively removed from the purview of the federal courts, it will continue to receive attention in state courts, state ballot initiatives, and federal and state legislative reform. For instance, redistricting litigation is currently ongoing in North Carolina state court. In these arenas, the decades-long tension between substantive and intent-based definitions of partisan gerrymandering could be reconciled by recognizing that a law's substantive unfairness has consistently been treated as one form of evidence that can be helpful in inferring discriminatory intent. For example, in *Common Cause v. Rucho* and other cases, expert witnesses and amici relied on outlier analysis, which we explain below, to infer illicit intent. Therefore, we review the leading work in both these areas below, consider the limitations and drawbacks of this work, and provide thoughts for further research.

II. Measures of Substantive Fairness

Justice Kennedy’s call in *Jubelirer* for a judicially manageable standard to assess when partisan gerrymandering has strayed into the realm of unconstitutionality
helped motivate a number of proposals for measures of partisan bias, or substantive unfairness. It is tempting to think that if judges could distill the unfairness of a district map into a single number, then they could rule that some maps, with worse scores, are unconstitutional, while other maps, with better scores, are constitutional. In fact, this is what federal judges do when faced with challenges to district maps on the grounds that they violate the principle of “one person, one vote.” However, as described below, it is unlikely such a simple measure will, on its own, become an accepted means of proving partisan gerrymandering even outside the federal courts.

Nevertheless, measures of substantive fairness will continue to be potentially useful for helping courts and commissions and the public to infer an illicit motive. We therefore describe the leading measures below, but note that they will likely need to be combined with methods that account for state-specific demographic and geographic factors. Measures of substantive fairness proposed and accepted by lower courts as meaningful evidence of intent include partisan symmetry, the mean-median gap, the efficiency gap, and proportional representation.

A. LEADING SUBSTANTIVE FAIRNESS MEASURES

Bernard Grofman and Gary King propose specific methods for assessing how much a map deviates from the ideal of partisan symmetry in order to measure its substantive unfairness. (Grofman and King use the term “partisan symmetry” in a narrower sense than the Supreme Court did in Gill v. Whitford, where the term applied to all kinds of statewide measures of substantive unfairness, including efficiency gap. We refer to Grofman and King’s sense of the term here.) The authors propose plotting the behavior of an electoral map under the hypothetical scenario of “approximate uniform vote swing.” In other words, they propose checking to see how many additional districts a political party would win if its vote share in each district increased or decreased by 1 percent, then again if it increased or decreased by 2 percent, and so on.

In Michael McDonald and Robin Best the difference between mean and median vote share across districts within a state was assessed as a simple measure of partisan asymmetry, or skew. Under this method, the vote share that Party A obtains in each district within a state is listed, in rank order (i.e., if there are six districts, the list might be .10, .12, .35, .48, .55, .60, with a mean of .367). The median of this list is the average of .35 and .48, or .415. The mean-median gap is therefore the difference, or −.05. The larger this number, the more skewed an electoral system is, as the mean and median deviate from each other if the vote totals are engineered by packing and cracking for one side.

Proportional representation aims for a party’s seat margin (SM) to match its vote margin (VM), in other words an ideal of SM = VM where the seat margin is the
Nicholas Stephanopolous and Eric McGhee propose the “efficiency gap” (EG) as a simple metric, easily understandable by judges. It is the difference in votes wasted by the two major parties (denoted \( W_a \) for Party A and \( W_b \) for Party B), divided by the total number of votes cast (\( V \)) in the election:

\[
EG = \frac{(W_a - W_b)}{V}
\]

“Wasted votes” are described as “surplus” votes that are cast in a district that the winning party did not need to win, combined with “lost” votes cast for a losing candidate. The efficiency gap measure is algebraically reducible to proportional representation albeit with a built-in and fixed winner-take-all bonus (i.e., coefficient not equal to 1). As the authors note, the efficiency gap—under the assumption of equal voter turnout across districts—reduces to

\[
EG = SM - 2*VM
\]

Nevertheless, as the lower court in *Common Cause v. Rucho* noted, a high efficiency gap, along with these other measures of substantive unfairness, can constitute supporting evidence of partisan gerrymandering where other evidence is present.

**B. THE IMPOSSIBILITY OF A SUBSTANTIVE FAIRNESS CUTOFF**

The intuitive appeal of many of the major substantive fairness metrics is clear. Nonetheless, creating a simple “cutoff” for substantive unfairness in gerrymandering, analogous to a population deviation cutoff for state legislative districts, can be difficult because measures of substantive unfairness are difficult to compare across jurisdictions with different geographies and partisan voter distributions. For instance, in State A, Democratic voters may tend to reside in urban areas and are thereby “naturally” packed into a few areas with strong Democratic majorities (see Figure 19.1). In State B, Democratic voters may be more evenly distributed across the state (see Figure 19.2). Someone lacking in partisan bias, drawing a district map that subscribes to reasonable and neutral districting principles, may be more likely to draw a map for State A, as opposed to State B, that scores badly on measures of substantive fairness. In the figures, Democrats are denoted by dots and Republicans by triangles.
FIGURE 19.1 State A

FIGURE 19.2 State B
In the example visualized, the map drawer has sought to avoid drawing districts—denoted by solid lines—that cross the dotted line boundaries. At the same time, each district must have equal population. As a result, many of the Democratic voters in State A are “packed” into a district made up of naturally clustered voters rather than divided into districts made up of both naturally clustered and dispersed voters. In State B, the same unbiased map drawer would be able to draw a map in which Democrats are less packed into districts with extremely heavy Democratic majorities. As a result, more Democratic votes will be “wasted” in State A than in State B. Thus, if we were to use the efficiency gap as our sole method of assessment, we would determine that State A was more gerrymandered than State B—when in reality this single metric on its own does not account for differences in population clustering. For map A, the efficiency gap = 1/3, while for map B it is 1/6. Indeed, the Wisconsin Legislature made a version of this argument in *Gill v. Whitford*, seeking to undermine use of the efficiency gap to assess the constitutionality of the map that the legislature drew.28

In order to create a judicially manageable standard, one that can be applied to states with differing geographies and voter distributions, we need a means of controlling for particular geographies and voter distributions. Outlier analysis, described in Parts III and IV, is a useful means of doing so, since it compares a given district map to a space of hypothetical, valid maps drawn for the same state.29

**III. Outlier Analysis**

Outlier analysis seeks to compare a particular map to the space of reasonable, possible maps, or to some proxy for that space. If the map is an outlier compared to the space, this fact is used to support an inference of illegal, discriminatory intent. It can also be used to show that a map is sufficiently harmful to voters, whether to support a showing of individual injury for standing purposes or an ultimate constitutional violation.30 As explained in Part I, the leading precedents that consider racial and partisan gerrymandering to be unconstitutional actions treat discriminatory intent as a crucial, if not required, factor. It is likely that evidence other than the degree of substantive unfairness of a map will remain an important part of redistricting policymaking and litigation. We will briefly explain how an analogous form of outlier analysis is already well established in such other areas of law as employment discrimination.

In *Hazelwood School District v. United States*,31 the Supreme Court provided a clear endorsement of outlier analysis in the context of a “pattern or practice” discrimination case brought against a public school district by the Department of Justice, under title VII of the Civil Rights Act, which prohibits discrimination in employment based on race, sex, and some other factors. In addition to traditional forms of evidence of intentional discrimination in some individual hiring decisions, the United States also leveraged a number of pieces of quantitative empirical evidence. The Court did not set out a clear standard of what kind of statistical evidence
would be sufficient on its own to constitute a prima facie case of intentional discrimination. However, the Court did endorse a frequentist analysis of the statistical evidence as probative and helpful. As refined in future litigation it is now accepted practice to model intentional discrimination in a Title VII case as follows.

First, we would assume as the null hypothesis that the employer did not discriminate. Second, given these assumptions, we would determine how likely the actual hiring results would be. If deemed very unlikely, we would reject the underlying assumption (the null hypothesis) to conclude the employer did in fact discriminate. In a simple example, say the average number of African Americans in the qualified labor pool is 15 percent. If there is no discrimination going on—our null hypothesis—sometimes the employer will hire 20 percent African Americans, sometimes 10 percent, sometimes there will be a very unusual year—an outlier year—and the employer will hire only 2 percent, or 60 percent, but usually the employer will hire around 15 percent.

Next we would look at the percentage of African Americans actually hired by the employer. Suppose it is 8 percent. We would factor in the difference between 8 percent and the expected, average percentage of African-American hires, or 15 percent, as well as the number of data points we have actually measured—the size of our qualified applicant pool—in order to calculate the probability that we would see a difference that large or larger just by chance. In other words, do the employer’s actual hiring results demonstrate that it is an outlier when compared to the distribution of nondiscriminatory outcomes, and, if so, how much of an outlier is it?

Outlier analysis has been accepted in other cases, most famously Teamsters v. United States. When the union-defendant in that case tried to downplay the value of statistics and outlier analysis, the Court stated:

[O]ur cases make it unmistakably clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases. Statistics are equally competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances. 32

Developing high-quality statistical outlier analysis for partisan gerrymandering cases is clearly a promising avenue in the legal sense for those seeking to prove unconstitutional redistricting. Not only have courts approved of the above parallel form of outlier analysis in other areas, such as employment discrimination, they have done so even though the analysis is difficult to perform perfectly. Moreover, League of Women Voters v. Pennsylvania recently accepted outlier analysis as sufficient on its own to prove unconstitutional partisan gerrymandering, the lower court in Common Cause v. Rucho33 accepted it as a major factor in demonstrating partisan
gerrymandering, and some lower federal courts have accepted it as one major factor in proving racial gerrymandering. There are additional challenges, however, to modeling the space to which a district map is compared that do not exist in modeling employment decisions. In particular, a massive computational challenge exists.

IV. Determining Intent with Outlier Analysis

To conduct outlier analysis, a given district map must be compared to a collection of alternative maps. These alternative maps should be “valid” in that they reasonably abide by nonpartisan districting criteria. Although elements of this criteria are common across states (equal-population districts and district contiguity), the list has to be tailored by region.

The various methods of generating a collection of random and “valid” maps begin with a common setup. Small geographic units need to be sorted into larger districts to form a statewide district map. While the smallest geographic unit for which we have demographic data is the census block, random map generation in the literature often takes place at a higher level of aggregation: precincts, wards, block groups, and so on, are combined to form districts.

More formally, given \( n \) geographic units:

\[
U = \{U_1, \ldots, U_n\}
\]

and \( k \) districts:

\[
D = \{D_1, \ldots, D_k\}
\]

each needs to be assigned to one district \( D_j \), \( j \in \{1, \ldots, k\} \). Districting criteria aside, we are interested in all the ways \( n \) units can be assigned to \( k \) districts. Each method of assigning the units constitutes a separate map.

Although the problem formulation may appear straightforward, the space of all possible maps—each element of which is a particular sorting of units into districts—is so large that it poses significant computational hurdles. For instance, the number of ways to divide 50 census blocks into five districts, with each district containing at least one block, is more than \( 7.4 \times 10^{32} \). There are nearly 290,000 census blocks and 13 congressional districts in North Carolina.

Whittling down the space of maps to those that are “valid” by districting standards helps with the scale problem, but not enough that full enumeration of the space is possible. Generating a map ensemble for outlier analysis (i.e., a collection of maps to compare a given map to via some fairness metric) requires choosing a representative sample of maps from the space. A robust sampling method requires some kind of heuristic certification of representative sampling or another rigorous source of statistical significance. Ideally, samplers will not get “stuck”—oversampling certain regions and skewing the resulting ensemble. The ability for a sampler to “jump”
around the space is particularly important when considering how large patches of the map space can contain nearly identical maps (i.e., maps that only vary by two units on a district border being swapped). A good sampler will capture maps that vary across these metrics while remaining valid by districting standards. Next we examine how several teams of researchers traverse the map space to generate map ensembles.

A. MAKING MAPS FROM SCRATCH: “FLOOD FILL” METHODS

The literature shows two ways to begin random map generation to sample the map space: start with an existing map and randomly perturb district boundaries or begin anew, building districts from scratch. The second technique, explored in this section, can be ad hoc and lacks mathematical proof that it adequately samples the map space. Furthermore, districting criteria are often incorporated in a non-rigorous fashion.

The team that has gained the most traction with this method in recent redistricting studies and litigation is Jowei Chen and Jonathan Rodden. Using their own random map algorithm they have studied the effects of human geography on partisan bias, assessed whether the 2012 Florida congressional map was a partisan gerrymander, and Chen has served as an expert witness in multiple redistricting cases (including Common Cause v. Rutherford and League of Women Voters v. Pennsylvania). Their algorithm can be summarized as follows: Starting at the precinct level, label each precinct as its own district. Randomly select one of the districts, then choose the closest district from amongst its bordering neighbors. Combine the two districts. Now the original number of districts has been decreased by one. Repeat these initial steps until the desired number of districts are made. A second round of modification is done on the districts to address population equality requirements. The algorithm can also consider lower priority criteria such as avoiding municipal splits when deciding whether to incorporate random units into their existing districts in a given simulation. It should be noted that we are only able to describe Chen’s algorithm in general terms because we have been unable to view his code. We have therefore gleaned details about his approach from his papers and expert witness testimony. This and other “flood fill” approaches do not offer proof that they representatively sample the space of valid maps (those that are consistent with map criteria) or show rigorously that it is unlikely a challenged map is from that collection.

Other researchers who have approached sampling the map space via “flood fill” map generators (i.e., not starting with an existing map) include D.J. Rossiter and Ron Johnston (1981), Carmen Cirincione et al. (2000), Micah Altman and Michael McDonald (2011), and Daniel Magleby and Daniel Mosesson (2018). The above types of algorithms, although ad-hoc, use districting criteria to guide map-making. They suggest it is only sensible to compare a contested district map to a collection of maps subject to the same nonpartisan guidelines (compactness, contiguity, etc.). The next section looks at methods of sampling using a more formal notion of “likely” maps. Additionally, they are based on algorithms that are designed to sample the map space according to a probability distribution.
B. THE THEORY OF MARKOV CHAIN MONTE CARLO MAP SAMPLING

Probability distributions—functions that return the probability that underlying events will occur—are sometimes difficult to draw samples from. In the context of district maps, some researchers seek to draw random samples from a distribution that labels maps according to their likelihood, or how closely they follow districting criteria. For example, a map with highly compact districts and deviation from population equality of less than 1 percent would be more likely than a map with less compact districts and a population deviation of 5 percent. Other researchers have opted to sample valid maps uniformly, giving them equal weight in constructing an ensemble. Both methods have been tried in court with some success. If one can randomly select maps according to a distribution, we will have a collection of maps against which we can determine if an adopted state map is an outlier.

Markov chain Monte Carlo (MCMC) methods are techniques to collect samples from distributions that are difficult to draw from directly. MCMC creates a “random walk” through the event space (in our case the map space). After the algorithm continues for long enough, or the Markov chain “mixes,” the samples it picks will be from something nearly identical to the target distribution \( P(x) \). One difficulty with MCMC is knowing how many steps are sufficient to reach this point.

C. MCMC APPLIED TO THE DISTRICTING PROBLEM: AIMING TO SAMPLE FROM A TARGET DISTRIBUTION ON THE SPACE OF VALID MAPS

As an example of MCMC applied to the districting problem we look to the approach outlined by Jonathan Mattingly and his team. The team uses MCMC sampling to randomly generate 24,000 U.S. House district maps for North Carolina (13 districts) using adopted state maps from 2012, 2016, and a judges’ committee (among others) as starting points for their algorithm. They integrate state districting criteria into a map-scoring function that is then used to define a probability distribution. The distribution can weight maps that closely follow the criteria as more likely than others. This likelihood measure in turn guides the sampling process according to MCMC.

More formally, using the notation from the beginning of the section and adopting the convention used by the authors, a district map is denoted:

\[ \xi: U \rightarrow \{D_1, \ldots, D_k\} \]

where \( U \) is the set of geographic units to be sorted into \( k \) districts. In the team’s version, these units are voter tabulation districts (VTDs). VTDs are represented by vertices, and adjacent VTDs are connected by edges. With this setup, they define a scoring function for each map:

\[ J(\xi) = w_p J_p(\xi) + w_I J_I(\xi) + w_c J_c(\xi) + w_m J_m(\xi) \]

where the four components of the score measure population equality between districts, compactness (via a district boundary-to-area ratio), county splits, and a proxy
for adherence to the VRA (giving better scores to maps with the same number of districts with as much African-American representation as the 2016 North Carolina map). The $w$ coefficients determine the weights of each districting criteria and are computed in a calibration process. Each piece of the score is lower the better the map $n$ follows its corresponding criteria. The best maps (i.e., those that most closely follow districting criteria) therefore minimize the overall score $J(\xi)$.

MCMC sampling requires a probability distribution to guide “walking” through the map space. Sachet Bangia et al. (2017) choose a distribution that treats better maps—those more closely aligned with districting criteria—as more likely to occur. The probability density function used in Bangia et al. (2017) is:

$$P(\xi) = \frac{e^{-\beta J(\xi)}}{Z}$$

where $Z$ is a normalizing term. We can see that for fixed $\beta$, a better map (which corresponds to a lower value of $J(\xi)$ results in a higher probability.

The next major component of the MCMC setup is a means to propose a next step in the “walk” through the map space. For this the team randomly choose a contested edge, or an edge that connects adjacent VTDs lying in different districts in the current map $\xi$. One of the two VTDs (that are connected by this contested edge) is then randomly selected to swap out of its own district and into the neighboring one (that contains the other VTD from the pair). This new proposed map $\xi'$ is compared to the current map $\xi$ in the MCMC acceptance ratio to decide whether to adopt it as the next step in the walk through the map space.

To move more flexibly through the space they use a process called simulated annealing, which alters the value of $\beta$ during sampling. In this way, the sampler can end up in different pockets of the space that each produce good, but different, maps.

Although the team cites several drawbacks to this approach (results can change based on the number of steps before drawing a sample, mixing time—or the time it takes to reach the target distribution—is unclear, and changing $\beta$ means changing the target distribution etc.), they demonstrate a method that gets a diverse sample of maps that are deemed likely according to districting criteria. This technique was relied upon heavily by the court in Common Cause v. Rucho, on remand after Gill v. Whitford, to conclude that North Carolina’s district map was unconstitutionally gerrymandered.

The team devotes sections in their paper to both determining the weights in their scoring function ($w_p, w_r, w_m$ in $J(\xi)$) and performing a sensitivity analysis on the weight values. In practical terms, changing weights means changing the relative importance of districting criteria when randomly choosing valid maps. For example, in the extreme scenario of setting $w_r$ to 1 and all other weights to 0, the resulting map ensemble would be dominated by those that split the fewest counties (they could violate the other districting criteria). The analysis would offer no indication of whether the contested map had to sacrifice some county cohesion to satisfy other criteria such as maintaining majority-minority districts. Although
this example is extreme, it demonstrates the impact of weighting decisions in scoring functions. Mattingly and his team found that changing their weights did not significantly impact results. However, deciding on reasonable ranges for weight values, and thus reasonable variations in map ensembles, remains subject to interpretation.

Other researchers using MCMC to sample maps include Benjamin Fifield et al. and the Metric Geometry and Gerrymandering Group (MGGG). The approach outlined by Fifield’s group shares a number of similarities with the MCMC process used by Mattingly and his coauthors, but its differences include allowing groups of units to be transferred between districts at a time as well as reweighting their samples to be from a uniform distribution on valid districting maps. MGGG’s approach uses a novel MCMC step called “ReCom” to propose new maps, which allows for large movement in the map space. It takes two adjacent districts, merges their geographic units, and does a random but valid resplitting into two new districts that follow encoded constraints (i.e., population equality, etc). This method was used successfully to study Virginia’s House of Delegates map. It was also used to study North Carolina’s congressional map in an amicus brief by mathematicians submitted in Rucho v. Common Cause. Notably, MGGG compared its outcome to that of plaintiff’s expert Jonathan Mattingly (part of the Bangia et al. team, whose method is described above) and found nearly identical results: both MCMC formulations found the same North Carolina districts to be extreme partisan outliers. This supports the notion that outlier analysis is manageable and reliable, even with variations on the underlying technique.

D. A MARKOV CHAIN METHOD THAT DOES NOT REQUIRE SAMPLING FROM A TARGET DISTRIBUTION

The approach in Maria Chikina et al. is markedly different from the above MCMC methods. Instead of aiming to sample from a close approximation of a target distribution, the team devises a method to show that a given legislative map is unlikely to be drawn from a uniform distribution (a distribution that weights valid maps equally, as opposed to the distribution used in Bangia et al. that weights maps more closely aligned with districting criteria as being more likely) on valid districting maps.

The Chikina group starts by assuming a given map \( X_0 \) is chosen from a stationary distribution \( \pi \) of the Markov chain. A stationary distribution means that the probability that a new map takes on a particular state (districting) does not change throughout the chain’s run (\( X_i \sim \pi \), \( X_j \sim \pi \), etc.). In this case, the stationary distribution is the uniform distribution on all valid districtings. In other words, it is assumed that the initial map \( X_0 \) takes on a random districting chosen from all possible district maps (according to the distribution \( \pi \)). It is also assumed that the Markov chain is reversible (a sequence of variables in the chain has the same distribution as the sequence in reverse order).
From $X_0$ the chain $X_1, X_2, \ldots$ is constructed by swapping precincts on district boundaries into neighboring districts. Suppose that in a chain of $k$ maps, $X_0$ has a partisan score that is an $\varepsilon$-outlier of the $k$ observed scores of the chain (i.e., if $\varepsilon = .0001$, then $X_0$ has a partisan score that exceeds 99.99 percent of the observed scores). Chikina et al. prove there is a $p = \sqrt{2\varepsilon}$ chance of this occurring if $X_0 \sim \pi$. In other words, for $\varepsilon$ small, this offers a way to show it is extremely unlikely $X_0$ was chosen from the space of all possible valid districting maps.57

This method does not require that the sample be representative of the search space, nor does it require the Markov chain to be reducible (i.e., elements of the map space can be unreachable from others during the chain). However, this method does not offer a way to directly sample from the uniform distribution on all valid maps. It only proves when a particular map is unlikely to be drawn from that distribution.58

This approach was used in an expert witness report in League of Women Voters v. Pennsylvania by one of the authors, Wesley Pegden.59 The approach is also cited in an amicus brief in Rucho v. Common Cause.60

E. THE MCMC SETUP AS AN EVOLUTIONARY ALGORITHM

Another way to package the MCMC approach to map generation is by using evolutionary algorithms (EA), or algorithms that mimic a population’s shifting and mutating over time to produce more “fit” members. In the map context, a population is a collection of district maps, and “fitness” is measured by an objective function that scores a map’s features such as compactness, population equality, and so on. Although this approach offers a different way of thinking about the map generation setup, the steps to construct new maps and “jump” through the map space are very similar to those described in the MCMC approach.

Wendy Cho, Yan Liu, and Shaowen Wang encode a district map in a “chromosome” structure or a string of pairs of values: one indicating the geographic unit (Cho’s team uses VTDs) and the other the district it is assigned to.61 An EA begins with an initial population, or the group from which to breed new members. The initial population they employ consists of 200 randomly generated maps.

To generate new members of the population, the group uses a combination of mutation and crossover algorithms. Mutation algorithms perturb a member of the population in a randomized way (on the chromosome level, this means randomly changing a value or values in the string, or the districts to which a randomly chosen subset of VTDs are assigned). The crossover algorithm takes two members of the population and crosses them to construct a “child” map.62 Crossover steps can make large “jumps” through the map space, producing new maps that can be significantly different than the parent maps. These are very similar to how the above MCMC methods make both small and large changes to maps.

Members of the population are evaluated with some fitness or objective function (that incorporates districting criteria) and can be selected to be in the final map ensemble. Drawbacks to the EA approach include the required computing power. However, Cho is working with a supercomputing specialist (Liu) to optimize
parallelizing her approach, making her sampling much faster than that used in MCMC.63

F. MAP CREATION AND RANDOMIZATION CODE

Teams that have released open source MCMC code include Fifield et al. and most recently the MGGG.64 MGGG’s code is written in Python and it is customizable in several respects. The user can specify if his or her Markov chain uses only “flips” (randomly swapping geographic units at district boundaries), “ReCom” (merging and resplitting districts to make larger jumps in the map space), or a mix of the two. The user can also specify constraints (equal population, compactness, etc.), how/when to accept proposed maps into the Markov chain, how long to run the chain, and evaluation metrics for each map along the way.

V. Future Directions

While districting criteria such as contiguity, population equality, and even compactness have clear measures that can be used in map-scoring and optimization functions, compliance with the VRA is less straightforward. The act forbids maps in which voters of one racial group have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” On the other hand, the Constitution forbids racial gerrymanders, including those whose intent is to benefit historically discriminated against racial groups.65 Thus, a map in a state with racially polarized voting that either packs or cracks the minority voters too excessively may violate the VRA. However, a map that tries too strenuously to avoid this situation may violate the Constitution. To convince lawmakers and courts that a contested map is gerrymandered using outlier analysis, it must be compared to an ensemble of maps that comply with the VRA in a reasonable way. Standards must be agreed upon for how to encode it and score its implementation in a district map, and no such consensus exists in the literature.

Several approaches have been taken to this problem. Chen and Rodden66 freeze districts from the contested map that the state claims (Florida in this case) have been constructed specially for the VRA. Their simulations change districts around them. To generate a map ensemble for North Carolina, Bangia et al.67 refer to a former state map that was accepted by the courts for guidance. They take the percentage of African Americans in the districts designed to comply with the VRA as a baseline. In their scoring function they penalize maps that do not have the same number of districts with at least as high a percentage of African Americans. Moon Duchin68 uses an MCMC approach in which she can label regions where a minority group or community of interest is concentrated as “geoclusters” and gives the option for the algorithm to require that they be kept intact or favor maps that do so. One advantage of this approach is that it does not adhere rigidly to how an existing map complies with the VRA, but instead allows the borders of districts to vary around the core communities. Concerns with approaches that rely on existing maps for how to comply with
the VRA include the fact that these maps may overpack, and therefore dilute African-American votes. Because the balance between constructing majority-minority districts and overpacking minority votes is delicate, simply deferring to a past approach that has not been overturned by the courts as the standard may prove inflexible in this balancing act. In *Abbott v. Perez*, a 2018 case involving both racial gerrymandering and VRA compliance, the majority and dissenting opinions, while disagreeing on the facts in the case at hand, agreed that creating opportunity districts for some voters, particularly those lacking a section 2 right to such a district, cannot justify failure to create an opportunity district for voters who themselves possess a section 2 right. Simply maintaining an opportunity district that was previously approved by a court is likely not sufficient for VRA compliance, where shifting evidence of block voting may have created the need for additional opportunity districts, or at least ones with different borders. The question of how to standardize scoring VRA compliance thus remains open. A proposal is forthcoming from one of us.

On the theoretical side, as noted in Part IV, more analysis is needed on how sensitive map ensembles are to changes in distributions (for MCMC sampling) or optimization functions (for EA sampling). Specifically, understanding how weighting criteria in scoring functions skews resulting ensembles is important to head off claims that map collections are too variable for reliable outlier analysis.

While many advocates of gerrymandering reform were disappointed by the Court’s decision in *Rucho v. Common Cause*, the efforts to firm up a standard with which to evaluate gerrymandering are still worthwhile. As the Pennsylvania Supreme Court demonstrated in *League of Women Voters v. Pennsylvania*, local and state courts may be free to start crafting their own workable standards in redistricting cases. This could be an avenue for outlier analysis to gain popularity.

Moreover, popularizing substantive fairness measures and outlier analysis, as well as publicizing their benefits and drawbacks, could be useful for independent redistricting commissions who want to compare proposed maps within a state along fairness metrics. Substantive measures can also play a role as supporting, if not sufficient, evidence. It is also crucial for normalizing reliable and rigorous techniques for the public to point to partisan excess in map drawing. Having a community of mathematicians, political scientists, and lawyers continue to work towards this standard will help make tools available to construct fair maps and also call out legislatures’ maps that do not pass muster, with or without the courts.

**Acknowledgments**

The authors would like to thank Moon Duchin and Mira Bernstein for hosting the Metric Geometry and Gerrymandering Group (MGGG) conference series and encouraging its participants to get involved in this area of research. They would especially like to sincerely thank Moon Duchin for her extensive feedback on an earlier draft of the article on which this chapter is based. The authors note they worked independently and all interpretations and conclusions are their own.
Notes

3. For instance, multiple states passed independent redistricting commission mandates in 2018, and the House of Representatives passed a bill mandating such commissions in all 50 states in 2019, see For the People Act of 2019, H.R. 1, 116th Cong. (2019).
5. Rucho, No. 18-422 (2019).
10. Id.
14. Id. at 817.
16. See supra note 3.
27. Color versions of these figures are available in the online version of our prior work, Using Outlier Analysis to Detect Partisan Gerrymanders: A Survey of Current Approaches and Future Directions, at https://www.liebertpub.com/doi/10.1089/elj.2018.0503.
34. Id.
36. Chen & Rodden, supra note 29.
38. We have developed this summary based on Chen and Rodden’s 2013 and 2015 papers, supra notes 35 and 29.
40. Jowei Chen, trial transcript, supra note 37.
47. Bangia et al., supra note 45.
48. Id.
50. Bangia et al., supra note 45.
51. Fifield et al., supra note 46.
53. Bangia et al., supra note 45.
54. MGGG, supra note 52.
55. Amicus Brief of Law Professors, Mathematicians, and Students, supra note 19.
56. Chikina et al., supra note 46.

58. Chikina et al., supra note 46.
62. Liu et al., supra note 61.
66. Chen & Rodden, supra note 29.
67. Bangia et al., supra note 45.
PART FIVE

AUDITS AND RECOUNTS
CHAPTER 20

RISK-LIMITING AND BALLOT IMAGE AUDITS

THOMAS W. RYAN

I. Overview

Most elections in the United States are conducted with the aid of computers and associated electromechanical equipment. These tabulation systems are generally more reliable, efficient, and accurate than their predecessors (punch cards and lever machines), yet they are still vulnerable to errors including inadvertent or malicious software problems, user errors, user manipulation of data, chain of custody failures, and poor ballot design, any of which could result in incorrectly reported election outcomes. There are compelling arguments that these new systems are more vulnerable to malicious actors and because most of these computerized systems lack transparency, it is impossible to observe what the system is doing with ballots. Are the ballots being interpreted correctly? Is the data from all the ballots being combined correctly? Is the system reporting the results correctly? Has someone manipulated the data? Without some kind of auditing, there is no way to answer these questions.

In order to reduce the risk of incorrectly certifying election outcomes, 34 states have introduced some type of post-election tabulation audit that addresses the question of whether or not vote tallies have been correctly computed and reported. A majority of these states employ hand counting to check batches of paper ballots against reported results for selected precincts and contests. For the most part, these batch count audits lack statistical rigor; they might be able to show that a few batches of ballots were tabulated properly, but there is usually no attempt to quantify confidence in reported results.

A few states, namely Colorado, Rhode Island, and Virginia, have enacted laws requiring risk-limiting audits (RLAs) that are based on a solid statistical foundation and use ballot sampling to limit the risk of erroneous election certification while also keeping audit sample sizes to a minimum. A few other states explicitly allow RLAs in addition to the more traditional hand counting. RLAs are described in Part II.
Maryland and parts of Florida, New York, Vermont, and Oregon are taking a completely different approach, in which digital images of paper ballots are used to verify election results. In these ballot image audits (BIAs) there is no statistical sampling. Instead, the goal is to independently retabulate all ballots using their images and track discrepancies between the official tabulation system (reporting system) and the auditing system. The BIA automatically analyzes tens of thousands of ballots without having to manually handle or interpret the paper ballots. BIAs are described in Part III.

Ideally, RLAs and BIAs would be performed prior to the formal certification of election results and could affect outcomes. State laws vary, however, and in some places (e.g., Virginia), the audits are performed after certification and have no effect on certified results.5

This chapter describes RLAs and BIAs, focusing on their defining characteristics as well as advantages and disadvantages of each. Each type of audit has its supporters and detractors and their positions will be presented. Since these auditing approaches are relatively new, very few legal issues have arisen, but the issue of ballot image availability will be addressed.

II. Risk-Limiting Audits

An RLA is a post-election audit using a systematic manual review of randomly selected paper ballots to provide statistically sound evidence regarding the correctness of the reported outcomes, where the term “outcome” refers to contest winners and losers, not vote tallies per se. If evidence supporting the reported outcomes is sufficiently strong, the audit stops. If evidence supporting the reported outcomes is weak, the audit continues to collect more evidence from sampled ballots. If a reported outcome is incorrect, the RLA will very likely advance to a full hand count to correct the error. The “risk” in an RLA is the pre-specified chance that the randomly sampled ballots will not provide sufficient evidence to expose incorrectly reported outcomes. RLAs have been endorsed by the American Statistical Association,6 the Presidential Commission on Election Administration,7 and many other groups.8

The number of ballots to be examined in an RLA depends on the risk limit and the vote margins between the winners and losers. The vote margin for a contest is determined by the smallest difference in vote counts between winners and losers divided by the total number of votes cast in the contest. The lower the margin in a contest, the greater the number of sample ballots required to establish evidence supporting the reported outcomes. Formulas for the sample size as a function of risk and margin can be found in Lindeman and Stark.9 Stark also provides online tools for computing sample sizes and audit-stopping criteria.10

There are different types of RLAs depending on the capabilities of the election system being audited. The two most efficient are ballot comparison RLA and ballot polling RLA. In a comparison RLA, randomly selected physical ballots are compared, one by one, to the reporting system’s electronic representations for those ballots,
keeping track of discrepancies. In a polling RLA, randomly selected ballots are hand counted and the sample tallies are compared to the reported tallies, much like an exit poll. In either case, a test statistic is calculated from the observations to determine if the audit can terminate or whether more sample ballots are needed. Table 20.1 lists sample sizes typically required for comparison and polling RLAs applied to an election in which 400,000 ballots are cast, with 390,000 split between Candidate A and Candidate B in a vote-for-one contest. The remaining 10,000 ballots are assumed to be split among other candidates as well as undervote, overvote, and write-in choices. The sample sizes are independent of the total number of ballots. The actual number of ballot samples will vary depending on the number and nature of observed discrepancies (comparison) and votes (polling). It is clear from this table that the comparison RLA becomes far more efficient than the polling RLA as the margin decreases. This difference is due to the fact that in a comparison RLA, every sampled ballot adds evidence, whereas in the polling RLA, there are only the sample tallies from multiple randomly selected ballots to compare to the reported tallies.

<table>
<thead>
<tr>
<th>Votes for A</th>
<th>Votes for B</th>
<th>Margin</th>
<th>Sample Size Comparison RLA</th>
<th>Sample Size Polling RLA</th>
</tr>
</thead>
<tbody>
<tr>
<td>197,000</td>
<td>193,000</td>
<td>0.010</td>
<td>678</td>
<td>534</td>
</tr>
<tr>
<td>200,000</td>
<td>190,000</td>
<td>0.025</td>
<td>271</td>
<td>214</td>
</tr>
<tr>
<td>210,000</td>
<td>180,000</td>
<td>0.075</td>
<td>91</td>
<td>72</td>
</tr>
<tr>
<td>220,000</td>
<td>170,000</td>
<td>0.125</td>
<td>55</td>
<td>43</td>
</tr>
<tr>
<td>230,000</td>
<td>160,000</td>
<td>0.175</td>
<td>39</td>
<td>31</td>
</tr>
<tr>
<td>240,000</td>
<td>150,000</td>
<td>0.225</td>
<td>31</td>
<td>24</td>
</tr>
</tbody>
</table>

A. BALLOT COMPARISON RLA

A comparison RLA is recommended when the reporting system is able to export a cast vote record (CVR) for each ballot. The CVR is a data structure that contains the choices made by each voter (without revealing any voter's identity). The CVRs are usually presented as a spreadsheet, with one row per ballot. An example, based on the format used by system vendor ES&S, is shown in Table 20.2 for five ballots and three contests. Any computerized voting system will use a comparable data structure, but not all systems can export this data for use outside the reporting system software. The idea behind the comparison RLA is to collect evidence that the CVR data is consistent with both the reported results and the voter-verified paper ballots. Virtually all the effort in a comparison RLA is done to establish that the CVRs represent the paper ballots with a high degree of certainty.
TABLE 20.2 Example of CVRs

<table>
<thead>
<tr>
<th>CVR Number</th>
<th>Precinct</th>
<th>Ballot Style</th>
<th>U.S. Senator</th>
<th>State Rep. Dist. 1</th>
<th>State Rep. Dist. 1</th>
<th>Proposition A</th>
</tr>
</thead>
<tbody>
<tr>
<td>23459</td>
<td>43</td>
<td>43.0</td>
<td>SMITH, TOM</td>
<td>JONES, LARRY</td>
<td>ROSE, MARY</td>
<td>Undervote</td>
</tr>
<tr>
<td>23460</td>
<td>192</td>
<td>192.1</td>
<td>JOHNSON, DEBRA</td>
<td>Undervote</td>
<td>Undervote</td>
<td>YES</td>
</tr>
<tr>
<td>23461</td>
<td>83</td>
<td>83.0</td>
<td>Write-in</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>23462</td>
<td>14</td>
<td>14.2</td>
<td>FLYNN, JACK</td>
<td>JONES, LARRY</td>
<td></td>
<td>NO</td>
</tr>
<tr>
<td>23463</td>
<td>122</td>
<td>122.0</td>
<td>SMITH, TOM</td>
<td>FLYNN, JACK</td>
<td>Undervote</td>
<td>YES</td>
</tr>
</tbody>
</table>

Note: A blank entry in the body of the spreadsheet means that the ballot did not include that contest. “Undervote” means the voter did not cast a vote in that contest; “overvote” means the voter voted for more than the allowed number of choices in that contest. In the state representative contest, voters are allowed to vote for up to two candidates.

The comparison and polling RLAs follow the procedural steps shown in Box 20.1. In Step 10, a CVR discrepancy would be noted if, for example, the human ballot interpreter sees a vote for B when the CVR shows a vote for A or perhaps an undervote. Any discrepancy that, if corrected in the CVR, would decrease the corrected margin may cause an increase in the number of ballots required. Discrepancies that, if corrected, would increase the vote margins may cause a decrease in the number of ballots required. If CVRs are not available from the reporting system, it may be possible to produce them after an election by rescanning all ballots using an independent scanning and interpretation capability. This is referred to as a “transitive audit.” RLAs should be open to observers and evidence should be openly presented as it is collected, including the comparison step. But any visual presentation of a comparison must be done after the ballot interpretation is finalized so as to avoid biasing the persons doing the interpretations.

BOX 20.1 RLA Steps (Steps 4 and 10 Are Skipped in a Ballot Polling RLA)

1. During ballot scanning, keep track of where all cast ballots are stored using a “ballot manifest.”
2. Select contests to be audited.
3. Select risk limit for each contest.
4. Validate the set of CVRs for each selected contest (comparison RLA).
BOX 20.1 RLA Steps (Steps 4 and 10 Are Skipped in a Ballot Polling RLA), continued

5. Calculate margins for each contest from the reported results.
6. Determine, using RLA formulas, the number of samples needed for each contest.
7. Select a random set of ballots of size determined in Step 6.
8. Retrieve the selected paper ballots from storage using the ballot manifest as a guide.
9. For each ballot, record (in a pre-specified format) the voter’s choices for each contest. This is called “ballot interpretation” and should reflect voter intent.
10. Compare the ballot interpretations with the corresponding CVR in the selected contests and keep track of agreements and the different kinds of discrepancies (comparison RLA).
11. Test for audit termination using RLA formulas. If the stopping criterion is satisfied, end the audit.
12. If discrepancies have been observed and sufficient evidence for termination has not been gathered, repeat Steps 6–11 until termination or until all ballots have been examined.

B. BALLOT POLLING RLA

A ballot polling RLA is recommended when CVRs are unavailable. The main idea behind the polling RLA is to tabulate a random sample of ballots to see if the sample vote tallies are consistent with the reported outcomes. Randomly selected ballots are retrieved and interpreted just as in the comparison RLA. But instead of doing a CVR comparison, the selected ballots are tallied for the contests under audit and a simple test statistic is tracked for each winner-loser pair. The audit continues until there is statistically strong evidence that every winner got more votes than every loser.

As an example, consider the case from Table 20.1 in which Candidate A received 220,000 votes and Candidate B received 170,000 votes for a margin of 0.125. A ballot polling RLA with a 10 percent risk limit anticipates a sample size of 295 ballots but could stop sooner. For example, if the first 20 sample ballots all show a vote for the reported winner, the audit stops. If the sample tally shows Candidate A with 166 votes and Candidate B has less than 130 votes, the audit stops. Table 20.3 shows the value of the stopping test statistic (the risk) as a function of the number of sample votes received by Candidates A and B.
TABLE 20.3 Values of the Ballot Polling RLA Test Statistic $T$

<table>
<thead>
<tr>
<th>Sample Votes for A</th>
<th>127</th>
<th>128</th>
<th>129</th>
<th>130</th>
</tr>
</thead>
<tbody>
<tr>
<td>162</td>
<td>0.120</td>
<td>0.138</td>
<td>0.158</td>
<td>0.182</td>
</tr>
<tr>
<td>163</td>
<td>0.107</td>
<td>0.122</td>
<td>0.140</td>
<td>0.161</td>
</tr>
<tr>
<td>164</td>
<td>0.095</td>
<td>0.108</td>
<td>0.124</td>
<td>0.143</td>
</tr>
<tr>
<td>165</td>
<td>0.084</td>
<td>0.096</td>
<td>0.110</td>
<td>0.127</td>
</tr>
<tr>
<td>166</td>
<td>0.074</td>
<td>0.085</td>
<td>0.098</td>
<td>0.112</td>
</tr>
<tr>
<td>167</td>
<td>0.066</td>
<td>0.076</td>
<td>0.087</td>
<td>0.099</td>
</tr>
<tr>
<td>168</td>
<td>0.058</td>
<td>0.067</td>
<td>0.077</td>
<td>0.088</td>
</tr>
<tr>
<td>169</td>
<td>0.052</td>
<td>0.059</td>
<td>0.068</td>
<td>0.078</td>
</tr>
<tr>
<td>170</td>
<td>0.046</td>
<td>0.053</td>
<td>0.061</td>
<td>0.070</td>
</tr>
</tbody>
</table>

Note: The test statistic $T$ (Box 20.1, Step 11) is determined after sampling between 289 and 300 ballots having votes for Candidate A or B. For a 10 percent risk limit, the audit stops for vote combinations having $T < 0.1$ (shaded region). For a 5 percent risk limit, more ballots would be sampled. A sample having 170 votes for Candidate A and less than 128 votes for Candidate B would satisfy the 5 percent risk limit (darker shaded region).

Although the RLA steps listed in Box 20.1 seem straightforward, there are a number of factors that can complicate the audit and are often overlooked in the literature. These factors can have a significant impact on the efficiency and practicability of the audit and are discussed in the following sections.

C. SELECTION OF CONTESTS

There is no consensus on how contests should be selected for audit. In most major primary and general elections, there are too many contests to audit all of them; consideration has to be given to the time and resources needed to complete the audit. The contests to audit could be selected randomly but this approach can put undesired emphasis on certain kinds of contests, like judge retention or bond issues, that comprise a substantial fraction of the total number of contests. It is also reasonable for some contests (e.g., president, senator, governor) to have higher auditing priority than other contests (e.g., school board, justice of the peace). One way to address this is to place each contest into one of several categories then randomly select one or more contests from each category. Arizona and Ohio use variations on this approach. In Colorado’s RLAs, the secretary of state selects the contests to audit and must select at least one statewide contest and at least one other contest for each county. It should be noted that most auditing advocates are opposed to having any elected officials involved in the design or implementation of the audit.
Some ballot scanning devices (e.g., ES&S DS850) are able to imprint each paper ballot with a unique sequential serial number (or identification (ID)) that is linked to the CVR number. This capability has a major influence on the ease with which the comparison audit is conducted. The ballot manifest is an inventory of the set of serial numbers in each storage container as indicated in Table 20.4. A random number generator is typically used to select ballots from the ballot manifest.16 If ballots are randomly selected by CVR number, then the corresponding imprinted serial number leads directly to a specific container in which a ballot retriever can look for the requested imprinted serial number. However, in an election system lacking the ballot imprinting capability (e.g., ES&S DS200), the ballot manifest must keep track of the CVR numbers for the paper ballots in each container and the ballots must be stored in CVR numerical order. Since these ballots have no identifying marks, the ballot retriever must count into the set of ballots (i.e., retrieve the 35th ballot in box 15, folder C). This manual counting is a potential source of retrieval error resulting in a paper ballot that may not match the selected CVR.

<table>
<thead>
<tr>
<th>Box</th>
<th>Folder</th>
<th>Batch ID</th>
<th># Sheets</th>
<th>First Imprinted ID</th>
<th>Last Imprinted ID</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>A</td>
<td>1-A</td>
<td>198</td>
<td>0237003942</td>
<td>0237004139</td>
</tr>
<tr>
<td>1</td>
<td>B</td>
<td>1-B</td>
<td>103</td>
<td>0237004140</td>
<td>0237004242</td>
</tr>
<tr>
<td>2</td>
<td>A</td>
<td>2-A</td>
<td>197</td>
<td>0237004243</td>
<td>0237004440</td>
</tr>
<tr>
<td>2</td>
<td>B</td>
<td>2-B</td>
<td>197</td>
<td>0237004441</td>
<td>0237004640</td>
</tr>
</tbody>
</table>

The ballot retrieval for a polling RLA can be done in the same manner as for the comparison RLA, but since no ballot-level comparisons are done, there is no need to find ballots having specific CVR numbers or serial numbers. Instead, it is more efficient to specify the random ballots in terms of their location in storage. For example, the audit can select a random container and a random ballot from the container in a manner that makes every ballot equally likely. The ballot manifest guides this process, but in this case the serial numbers may be missing from Table 20.4. It is possible that not all ballots will be physically available at the time of the audit due to a backlog (usually provisional ballots). An RLA treats unavailable ballots, if selected, as “zombie” ballots in which all the unknown choices are assumed to be for the reported losers. This ensures that unavailable ballots cannot contribute evidence to support the reported outcomes and creates an incentive to minimize the unavailable ballots.

As the example in Table 20.2 indicates, not all ballots cover the same set of contests. A congressional seat or state senate seat, for example, may only appear on a fraction of ballots in the jurisdiction running the election. As a result, a selection of
ballots that adequately samples one contest may be insufficient for another contest. In this case, it may be necessary to select ballots separately for each contest. To date, there is no optimal sampling strategy when auditing multiple contests having different, but perhaps overlapping, geographic coverage.

E. CVR VALIDATION
When CVRs are available, they are exported from the reporting system after all ballots are tabulated. Before using these CVRs in a comparison RLA, it is necessary to ensure that the provided CVR data is an accurate representation of the reported results. Software is needed to read the CVRs and calculate all the choice tallies for the contests to be audited. These tallies are then compared to the reported results. If there are differences, the CVRs are not reliable and should be corrected before proceeding. Since reported outcomes are derived from CVR data, this should be a rare occurrence. To date, software for CVR validation has been developed as needed for each state and is specific to the provided CVR data formats.

F. CONTESTS EXTENDING BEYOND ELECTION DISTRICT BOUNDARIES
Many contests, such as U.S. senator, U.S. representative, governor, state senate, and others, involve voters from more than one election jurisdiction (e.g., a county). Some of these are statewide races and thus involve every election district in a state. When the contest margin is determined, it must consider overall results, not just those within a given jurisdiction. The random sampling of ballots must therefore also encompass all jurisdictions involved in an audited contest, with the sample set distributed across these jurisdictions in proportion to the number of votes cast in the audited contest. Decisions about audit termination and additional sampling, if any, must also be done in concert among all involved jurisdictions. These considerations call for coordination of the RLA at the state level. We will refer to this coordination entity as the audit center (AC). In Colorado, for example, the AC is a website hosted by the secretary of state. The individual counties upload their CVRs and ballot manifests to the AC and AC software specifies the random ballot sampling for each county. The counties provide the AC with ballot interpretations and the AC determines whether the audit stops or continues to gather evidence. This kind of coordination among counties and the state is a significant departure from business as usual in which each county operates its own elections independently.

G. MAIL-IN VERSUS POLLING PLACE BALLOTS
If ballots are mailed, as they are in Colorado, they are scanned at a central counting facility in each county. In most Colorado counties, these ballots can be imprinted with a sequence of serial numbers and organized in a manner designed to support retrieval. In Rhode Island, however, 80 percent of the ballots are cast at polling places distributed across many municipalities with local ballot scanners. These precinct scanners do not have the ability to imprint serial numbers (although that may change in the future), but even if they were imprinted, the scanned ballots fall
into bins with no guarantee that the order of the ballots is maintained. That is, the physical ballot sequence is not necessarily the same as the CVR sequence, thereby compromising ballot retrieval accuracy. And lastly, the serial numbers assigned in polling places may be generated randomly (to protect voter identity) and are therefore not in numerical order. These factors make the retrieval of polling place ballots by serial number extremely difficult if not impossible. In this situation, it may be best to transport all ballots to a central count facility for rescanning, or resort to a ballot polling RLA. The distinction between mail-in and polling place ballots is less important for a ballot polling RLA since ballots can be selected randomly by location, which could include names of municipalities.

H. PAPER BALLOTS VERSUS DIGITAL IMAGES FOR COMPARISON RLAS
The ballot retrieval problem could be greatly streamlined if ballot images could be used in place of paper ballots. With the ES&S system, for example, the images can be easily retrieved by CVR number. The use of images would also solve the precinct scanner ballot retrieval issues discussed above. There is an ongoing debate in the tabulation auditing community about the use of ballot images. The debate centers on whether ballot images can be trusted to accurately represent the paper ballots that are filled out by voters. Voters never see these images and cannot verify them. RLAs conducted in Colorado and Rhode Island have rejected the use of ballot images for this purpose. Ballot image reliability will be further discussed in Part III.

III. Ballot Image Audits
Most modern election systems create digital ballot images as part of the standard ballot scanning process. These images are interpreted by software to determine a voter’s choices that are represented by filled “choice ovals” (in most systems). A BIA uses ballot images to retabulate the entire election or a selected subset of contests. The BIA is not trying to confirm winners and losers so much as it is checking the accuracy of vote tallies. The BIA differs from a formal “recount” that reprocesses original ballots and usually is limited to one contest having a vote margin that falls below a pre-established threshold defined in state law. The images used for the BIA can be either those created by the election system or images created by independent rescanning of all the ballots. In either case, the BIA compares original reported ballot counts and vote tallies to those given by independent reinterpretation of ballot images. Ballot count and tally comparisons can be obtained at multiple points, not just the final tallies that determine winners and losers. The tallies can be compared for each precinct or each ballot style. And for each, tally comparisons can be made for different ballot reporting groups, such as polling place, mail-in, and provisional ballots that are usually tracked separately by the reporting system. For example, in an election with 20 choices (over several contests) and 100 precincts, and three ballot reporting groups, there is the possibility of comparing tallies and ballot counts at up to $20 \times 100 \times 3 = 6,000$ points. The BIA can thus provide a variety of statistics.
describing the degree to which the two counting systems agree and has the potential to flag conditions that exceed some pre-specified discrepancy threshold.

Some vote discrepancies are expected if the primary election system and the independent auditing system use different images or different algorithms for deciding when a vote is cast for a specific choice. It is important to recognize that digital images are the input to the interpretation process, not the paper ballots themselves. The distinction is important because the images, by the very nature of the imaging process, cannot be perfect representations of the ballots. In addition, some vendors create images that are “lossy,” meaning that the quality of the images is intentionally degraded. Degradation can occur by sampling spatially at a low rate (pixels per inch) and “quantizing” to a small number of colors (bits per pixel). These choices yield the spatial and tonal resolution, respectively. For example, the ES&S DS850 system samples at 200 pixels per inch and quantizes to two levels, black and white. This spatial resolution is a little lower than typically recommended for text documents and the one bit tonal resolution is a visually obvious degradation. Intentional image degradation allows for faster image interpretation because there are fewer pixels and fewer colors and allows the images to be processed and stored using less computer memory and disk space. If an independent BIA uses higher quality images, for example, then one would expect some differences in choice oval interpretation, especially for cases with incomplete filling of choice ovals. The use of intentional image degradation should disappear in future systems with faster processors and cheaper memory.

The reporting system and the auditing system are also likely to use different ballot interpretation algorithms. As an example, consider an election system that decides that a choice oval is filled if the oval region is more than X percent filled, where X is a vendor design parameter. The independent auditing system, however, may try to reduce voter intent misinterpretations by using an algorithm that looks at all the ovals in a contest simultaneously in order to make the interpretation based on relative fill or darkness of marks within or near the ovals. Both systems require a decision threshold that determines whether or not an oval is interpreted as filled. One would not expect these two systems to produce exactly the same results.

Since some discrepancies are to be expected, a good BIA system will provide ways to try to explain or predict the differences. One technique is to use visualization tools to observe those choice ovals that are close to the BIA interpretation algorithm decision threshold as shown in Figure 20.1. Observations of this kind, along with an understanding of how the official election system makes interpretation decisions, can lead to insight into why the discrepancies occur. These tools can help to reveal the number of votes that might be questioned and whether there is any chance of a loser overcoming the winner-loser vote margin. A BIA also has the potential to compare CVRs from the reporting and auditing systems. However, access to the official set of CVRs compromises audit independence and would make it possible to rig the audit.
Maryland is the only state that requires a BIA for all statewide primary and general elections along with a manual audit of at least 2 percent of the precincts statewide to include at least one in each county. The law in Maryland does not specify a timeline for the BIA nor does it provide remedies if it discovers discrepancies. It also states that the audits “may not have any effect on the certified election results.” The Maryland State Board of Elections is in the process of enacting regulations that would address these issues and also ensure that the BIA cannot access any data from the reporting system other than the original ballot images.

Proponents of BIAs tout the prospects of open public inspection and analysis of ballot images. While this would greatly improve election transparency, there are currently only a few states where ballot images are publicly available. In 2018, a New York appellate court granted public access to ballot images under the Freedom of Information Law (Kosmider v. Whitney), but this decision was ultimately reversed in 2019. In most places, these images are not available for public inspection although it may still be possible to use them in an audit. Furthermore, many jurisdictions that create these images during their elections do not retain them after the election despite federal law (52 U.S.C. § 20701) requiring that all election records be kept for 22 months after each election. These issues were recently litigated in Florida (Fox v. Lee), where more than half of the state’s 67 counties are not preserving ballot images. The court found that 52 U.S.C. § 20701 does not confer a private right of action. Instead, enforcement rests with the attorney general or his representatives.
IV. Advantages and Disadvantages of Auditing Methods

A. EASE OF IMPLEMENTATION

RLAs are more complex than BIAs or existing hand counts of ballot batches. A comparison RLA is somewhat more complex than a polling RLA because of the need to create and retrieve ballots with specific CVR or imprinted serial numbers. In addition, the resources needed to conduct RLAs depends on the contests selected, and the corresponding vote margins, factors that are unknown prior to the election. The choice of contests affects the complexity of random ballot sampling with difficulty increasing for contests that comprise only a small fraction of ballots in a jurisdiction. Currently, it is uncertain whether states with only partial CVR availability will be able to combine comparison and polling RLAs in a hybrid audit; the mathematics does not yet support it. Jurisdictions that choose to produce CVRs after the election, in a transitive audit, have the additional complication, with attendant logistics, of rescanning all the ballots. These issues are being addressed in Colorado and Rhode Island, but there is considerable effort involved. In recognition of these concerns, Colorado’s RLAs started with a very limited scope and are gradually expanding to include more complex situations. Early-adopting states will provide models and best practice guidelines for the next states looking to implement RLAs and this should gradually reduce the initial costs and difficulties and improve the efficiency of the audits.

A BIA can be conducted entirely within a jurisdiction and there are no concerns about statistical sampling. Prior to the election, the jurisdiction must provide copies of blank ballots for all ballot styles in order to create templates needed to support ballot interpretation. In order to audit statewide contests, the BIA should be implemented in every election jurisdiction and there should be a state-level entity that collects and reports audit results. Maryland hired a vendor (Clear Ballot Group, Inc.) to conduct their BIAs and this approach should provide a thorough assessment of the election with the most immediate feedback statewide.

B. EFFICIENCY

RLAs are highly efficient in the sense that they require the observation of a relatively small number of ballots most of the time, but the efficiency degrades as vote margins get smaller. A BIA processes all of the ballot images but the “observation” is done by computers, not humans. The RLA is inefficient in the sense that it requires cooperation and communication statewide during the audit, but this should become a minor issue once the communication channels are established. A BIA also requires some cooperation but only to collect and report results statewide. RLAs and BIAs become less efficient if the paper ballots are rescanned. In the unlikely instance of an incorrectly reported outcome, the RLA would most likely proceed to a full hand count, a very inefficient and tedious process. In this rare circumstance, the BIA would most likely call for additional human effort to diagnose borderline ballot markings.
C. DIAGNOSTIC POWER

The diagnostic power of an audit refers to the ability to detect system errors and determine their cause. Since the goal of an RLA is to observe as few ballots as possible in order to reach a confident conclusion, diagnostic power is limited. In a ballot polling RLA, there is no real diagnostic power because the audit is simply tallying a random set of ballots and cannot detect errors unless it proceeds to a full hand count. A comparison RLA, on the other hand, can detect ballot interpretation errors within its sample set and analysis of these errors may lead to a cause. The diagnostic power of a BIA depends on whether the audit can compare the reporting system CVRs to the audit CVRs. If this comparison can be made, the audit tests every ballot interpretation and any inconsistencies can be resolved by using the images or original ballots in question. Systematic errors, if they exist, would almost certainly be discovered with this kind of BIA. However, as noted previously, this approach is discouraged by election integrity proponents because access to reporting system CVRs could be used to corrupt the audit. If the BIA does not link the CVRs from the two systems, the audit can focus on the ballots (or images) that exhibit low confidence in vote interpretation. In either case, the BIA can compare the tallies at many points (precincts, early ballots, provisionals). Systematic differences in tallies (e.g., for a certain candidate) would almost certainly lead to an investigation of causes.

D. PUBLIC UNDERSTANDING

Since an RLA is based on statistical sampling and some sophisticated mathematics, it is harder to understand the underlying theory. The public has to trust that (1) the mathematics is correct and meaningful; (2) the ballot sampling, retrieval, and interpretation is done without bias; and (3) the audit-stopping rules satisfy the stated risk criteria. It is difficult to convince nonscientific people, including many legislators, that an audit based on solid statistical principles is any more useful or valid than hand counts of a few random ballot batches. There are also people who simply do not trust the scientific community and they may not accept the audit conclusions any more than they accept the election results. On the other hand, the actual execution of an RLA, if done correctly, is completely open and observable. Since a BIA is essentially a recount of the election by an independent system, it is easier to understand the basic process; it is more intuitive on the surface. However, since the BIA is automated, it is less transparent than a public hand count or RLA. The public in general does not have a good understanding of ballot images and how they might differ from the original paper, nor does the public understand the potential for intentional corruption of images and CVRs that would, if undiscovered, seriously undermine the quality of the audit. Public availability of ballot images and open source ballot interpretation software would make the BIA approach reachable by more people, allowing many persons or groups, including critics and skeptics, to conduct their own BIAs. These would be less-controlled audits but would provide the greatest transparency from the perspective of voters and candidates. In the long run, this might reduce or eliminate the need for election challenges and recounts.
V. Conclusion

Election auditing has been getting more attention since the 2016 general election in which the integrity of the system was heavily questioned due primarily to Russian efforts to affect the presidential election outcome. States have been under pressure to provide evidence that their ballot control and tabulation systems have not been compromised. After the 2000 and 2004 general elections, a number of states enacted laws requiring paper ballots. Some states also enacted audit laws but most of these states opted for fixed percentage hand counts of selected ballot batches (e.g., precincts). While better than nothing, these “audits” do not provide compelling evidence that the outcomes were reported correctly. A number of different auditing techniques have been developed over the past ten years or so to address this shortcoming. Two of these techniques, the RLA and the BIA, seem to have gained an initial foothold and states looking to implement auditing are experimenting with these methods and trying to decide which, if either, provides a good fit for their circumstances.

The auditing community seems to be split between the RLA and BIA camps. Critics of BIAs say that retabulation of ballot images is not actually auditing because “it violates the common definition of a post-election audit, which entails manually inspecting some ballots.” BIA critics focus on the question of whether ballot images can be trusted to accurately represent the voter-verified paper ballots since digital images can be intentionally corrupted or have unintentional flaws. Proponents of BIAs claim the digital imaging technology and security is good enough to ensure high-quality and trustworthy images, although many deployed election systems may not have implemented the necessary security steps. In addition, statistical tests can be devised to validate ballot images and these tests should be less complicated than an RLA, although there is still some debate on best methods for validating ballot images.

Critics of RLAs usually focus on the relative complexity of paper ballot sampling and retrieval, especially when auditing multiple contests that span many jurisdictions and/or have different geographic coverage. And if ballots are cast at distributed polling places it is difficult to maintain a serviceable ballot inventory. Proponents of RLAs stress the need to extract evidence from original voter-verified paper ballots and anything that circumvents that requirement compromises the integrity of the audit.

Either of these methods, if done properly and implemented statewide, would provide a significant improvement in election integrity by providing compelling evidence that supports or rejects the reported outcomes or vote tallies, thereby discouraging election challenges, recounts, and intentional manipulation. Auditing technology and protocols are still in their infancy with only a few states adopting these newer methods. It remains to be seen whether the various approaches can find complementary applications. The bigger issue, for now, is the number of jurisdictions lacking dependable election audits.
Notes


3. In this chapter, the term “contest” is equivalent to a race. It is not referring to an action to dispute an election.


16. Stark, Ballot-Polling RLAs, supra note 10; Stark, Comparison RLAs, supra note 10.

CHAPTER 21

RECOUNTS: THE NEW REALITY TWO DECADES AFTER *BUSH V. GORE*

CHRISTINA E. BUSTOS, CHRIS SAUTTER, AND JOHN HARDIN YOUNG

1. Introduction

The world of election recounts is a very different one than it was before the U.S. Supreme Court intervened in the 2000 Florida election dispute and in effect decided that year's presidential election. Until *Bush v. Gore* catapulted “recounts” into the public consciousness, election disputes usually played out in relative obscurity—quietly, meticulously, and without controversy. Only occasionally would a recount warrant national news coverage.

Now the country is more polarized than ever and hyper-partisan disputes erupt every election cycle, including hotly contested recounts. Some, like the 2008 Al Franken-Norm Coleman Minnesota U.S. Senate recount, last months before a winner is declared. Similarly, in the Washington State election for governor in 2004, the closest gubernatorial election in American history, highly publicized litigation continued months after a winner was sworn into office. And, in 2018, Florida’s recount process was again marred by problems with antiquated voting machines, administrative incompetence, and political interference.

The chaos and irregularities that overtook the Florida presidential recount exposed serious flaws in our election system, prompting Congress to pass the Help America Vote Act (HAVA) in 2002. Among other things, HAVA sought to replace punch card and mechanical lever voting systems, and to assist in the administration of federal elections.

Yet the more things have improved in the election process, the more they seem as beset with problems as they were in 2000. Many election administration problems are rooted in the very nature of an election system that is highly decentralized and partisan-based. Other issues occur simply because of poor leadership and a lack of adequate training of election officials. Still, it troubles many that voting machines continue to break down and the election process is often mistake prone.

One area of election administration that attracts perhaps the most attention during recounts is the counting of absentee or mail-in ballots. That is because
voting by mail includes additional requirements, such as the voter’s signature on the outer envelope, timely receipt at the election office, and in some states witness signatures, all of which has to be checked and may be subject to challenge in a recount. Recently, there has been intense controversy and litigation over the question of alleged signature mismatches—that is, when signatures on mail-in envelopes are ruled to not match the signature on record. Critics complain that untrained election officials are making decisions about whether signatures match, and as well as rejecting such ballots without providing the voters an opportunity to contest the determination by demonstrating that the signature on the ballot envelope is indeed theirs. The expansion of vote-by-mail voting has multiplied these problems as more ballots are rejected. The greater the turnout, the more likely mistakes will be made in counting absentee ballots.

States continue to conduct elections using many ways to count votes. While the equal protection holding in Bush has been incorporated to some degree in many recounts, Bush has not translated into consistency in most procedures and mechanisms of voting. But it has meant that most jurisdictions have generally tried to apply the principle of treating similar ballots in the same way when counting and recounting.

II. The Courts Grapple with the Meaning of Bush v. Gore

While the political environment surrounding recounts is now substantially more partisan and litigious than it was prior to the 2000 Florida recount, the courts have yet to reach a consensus about the meaning of Bush. One reason is the legal rationale in the Supreme Court’s holding was that the decision was “limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” In other words, the Court’s opinion was intended to be extremely narrow, a one-time escape route to resolve an apparent election impasse. Whether the Court resolved a hopeless impasse or prevented a full and careful recount of the Florida vote remains a matter of debate.

The Supreme Court in Bush in an unusually activist fashion for a conservative majority found that the way votes were being counted violated the Equal Protection Clause of the 14th Amendment. Specifically, they found that the lack of predetermined, uniform standards in Florida’s statutory and common law or in practice violated candidate Bush’s constitutional rights.

Prior to Bush v. Gore, the Supreme Court applied the federalism-based Anderson-Burdick balancing test to election cases that involved identifying and weighing the burden on voting rights in relation to the state interest. But in Bush, the Court neither cited the Anderson-Burdick balancing test nor did it identify the standard of review it was applying. Whatever the standard, the Bush decision disrupted the convention that states were to establish, conduct, and control their own elections, free from federal intervention.
Post-Bush, courts around the country have adjudicated a wide range of election-related equal protection and due process issues, using varying standards to reach disparate decisions. The majority's maxim in Bush, “having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment value one person's vote over that of another,” is difficult to apply and implement in jurisdictions with varying election rules and practices, regulatory bodies, and common law. In fact, were it to be applied throughout the country, it might call into question almost every single state's counting methods.

Bush provided no clear direction as to when to apply an equal protection analysis to post-election disputes, and what standard of review—rational basis, strict scrutiny, or something in between—is warranted. Post-Bush jurisprudence shows the courts taking a step back from automatic equal protection analysis, and taking a side step to acknowledge different methods of review, while molding available precedent to respond to differences between states and localities within states as well as the practical realities of elections and recounts.

Whereas the Supreme Court in Bush used due process language to come to the conclusion that there had been a violation of equal protection, in 2009, the Minnesota Supreme Court in In re Contest of General Election Held on November 4, 2008 (“Coleman”), applied a substantive due process analysis to a recount dispute centering around absentee ballots. The Minnesota Supreme Court followed a rule from the Ninth Circuit that in order for the court to strike down an election on due process grounds, the petitioner must demonstrate two elements: “likely reliance by voters on an established election procedure and/or official pronouncements about what procedure will be in the coming election” and “significant disenfranchisement that results from a change in the election procedures.” Well-established Minnesota precedent recognized different standards for voters and election officials—“strict” compliance for voters to submit ballots, and “substantial” compliance for the state officials accepting ballots, based on the voter having complete control over his or her conduct, but no control over the conduct of election officials, and the reality of irregularities and mistakes in the recount process. In applying the first prong, in light of that precedent, strict compliance with statutory requirement for absentee voting had always been required, so voters would not have “reasonably believed anything less than strict compliance would suffice.” For the second prong of the analysis, there had been no change in election procedures, and petitioner Coleman did not demonstrate examples of voter disenfranchisement based on the alleged substantial compliance standard. The court iterated that “mere fraud or mistake” will not render an election invalid; there must be “significant disenfranchisement” to trigger federal due process intervention.

Coleman used an equal protection argument that closely mirrored that of the majority in Bush when he contended that “similarly situated absentee ballots were treated differently” depending on where they were cast and that the “disparate treatment was in violation of the Equal Protection Clause. The Minnesota Supreme
Court, however, found that local election officials did not violate Coleman’s equal protection rights by enforcing ballot requirements differently in different locations. This marks a sharp departure from Bush, and the court in fact applied the Supreme Court’s pre-Bush standard from Snowden v. Hughes that limited equal protection violations to petitioners who could demonstrate an “intentional or purposeful discrimination between persons or classes.”

The Minnesota Supreme Court cautioned against an automatic 14th Amendment analysis for every state election contest, citing guidance from the Eleventh Circuit that not every state election dispute implicates the due process protections and warrants federal court intervention; but, if the election process reaches the point of “patent and fundamental unfairness, a violation of the due process may be indicated. . . .” The court explained that erroneous or mistaken performance of a statutory duty, like public officials applying statutory requirements differently, may violate the statute but are not “without more” an equal protection issue.

The court attempted to distinguish the facts of Coleman from Bush, citing three examples: (1) In Bush, the Court said it was specifically staying away from whether localities can have different systems for implementing elections, while in Coleman varying standards in implementation of absentee voting procedures were, in part, the issue; (2) in Coleman there were “clear statutory standards” and all election officials had taken part in “common training,” while in Bush there had not been statutory standards or standard procedure for determining voter intent; or (3) Coleman centered on determining for whom the voter had voted, on the face of the ballot. The court also reiterated that using absentee ballots is a privilege and not a right.

This result seems to be in part determined by practical realities. Minnesota election officials had to choose a statutory interpretation to assist with the actual carrying out of the recount as a point of necessity. Minnesota had established clear statutory standards to conduct the recount, and the court did not find that any of the inconsistencies in implementation rose to a level that warranted disturbing the method of implementation.

In 2011, the Sixth Circuit Court of Appeals pivoted sharply away from the Coleman decision. In Hunter v. Hamilton County Board of Elections, the court examined the issue of whether a local election board violated the Equal Protection Clause when it considered the location where the ballot was cast as evidence of poll-worker error for provisional ballots cast at its office, but not for provisional ballots cast at the right polling location but wrong precinct. Like in Bush, the court in Hunter looked for specific and uniform standards that governed the board’s review of provisional ballots. Applying the Bush standard, that to satisfy both equal protection and due process rights, state actions in election processes must not result in “arbitrary and disparate treatment of votes,” the court found that by treating some miscast provisional ballots more favorably than others, the board had acted arbitrarily and, thus, in violation of equal protection and due process. Like in Bush, to the court in Hunter, the issue before it was not whether local entities may develop differing systems for implementing elections, it was ensuring similar treatment.

once the votes are cast; “such a discretionary review must apply similar treatment to equivalent ballots.”23

The Bush standard is the backbone of the decision, but unlike the Supreme Court in Bush, the court employs the Anderson-Burdick test to fortify its finding of an equal protection violation.24 The court, in determining that the board failed to assert “precise interests” to justify the unequal treatment of ballots, expanded the Anderson-Burdick analysis beyond analyzing the constitutionality of state law to apply to what the court described as a “local misapplication of state law.”25

The court acknowledged but disregarded Coleman’s reliance on the Snowden “intentional or purposeful discrimination” standard, explaining that the Supreme Court had chosen to apply the Bush “arbitrary and disparate treatment” standard in more recent equal protection cases.26

In Hunter, the court began to establish Bush v. Gore as meaningful precedent, signaling in a footnote that Bush was not limited to the facts of the case, but that “the Court has spoken regarding the requirements of the Equal Protection Clause with respect to claims that a state is counting ballots inconsistently,” and cited to “See Bush.”27 However, Hunter acknowledged that it addressed only the equal protection violation among ballots cast in a single county, not a “hypothetical statewide challenge.”28

In Obama for America v. Husted29 in 2012, the Sixth Circuit took Bush a step further. In Obama for America, the court applied equal protection analysis to evaluate a statute with different deadlines for in-person early voting between military and nonmilitary voters.30 In doing so, the majority applied an evidence-based inquiry that continued the course set in Hunter while attempting to flesh out the road map the Hunter decision lacked.

The majority cites Bush’s “arbitrary and disparate treatment” standard and emphasizes the importance of protecting the fundamental right to vote, but rejects a “straightforward equal protection analysis,” and in doing so rejects the notion that every election dispute automatically triggers equal protection review.31 The majority’s equal protection discussion lays out a spectrum of the level of scrutiny that applies to the fundamental right to vote—on the one end of the spectrum is rational basis review, for when the state treats a voter “differently than other similarly situated voters without a corresponding burden on the fundamental right to vote,” and on the other end of the spectrum is strict scrutiny review, for when “a state’s classification severely burdens the fundamental right to vote.” Most cases, the majority explains, “fall between the two extremes.” Instead, “when a state regulation is found to treat voters differently in a way that burdens the fundamental right to vote, the Anderson-Burdick standard applies.”32 In applying the balancing test, the court found that petitioners had “introduced extensive evidence that a significant number of Ohio voters will in fact be precluded from voting without the additional three days of voting,” and that the resulting burden on those precluded from voting was “particularly high.”33 The court found that the state had not shown its interest in avoiding the additional burden on local boards of elections outweighed the
burden on nonmilitary voters, in large part because the court did not feel the state had presented compelling evidence that the election would be more burdensome than others administered since early voting had been established.34

A reason to potentially limit the scope of Obama for America and its application was legislative confusion. A new bill had created two separate and contradictory deadlines for in-person early voting, and a bill intended only as a technical correction remained in place even when the original bill was suspended on a referendum and ultimately repealed.35 The facts in Obama for America, however, and in most post-election cases share a common theme: structural or substantive confusion on the law, resulting in erratic implementation, and post-election courts trying to piece together a resolution.

Judge White’s concurring opinion in Obama for America exemplifies some of the existing uncertainty and the need for straightforward standards in post-election jurisprudence. Her concurrence thoroughly examines legislative intent, whether there is a fundamental right to an absentee ballot, and what standard should apply to situations like that in Obama for America.36

Judge White expressed uncertainty as to what standard applies—rational-basis applied in the absentee-ballot cases or the “more recent” Anderson-Burdick balancing test, acknowledging the Snowden/Coleman standard without directly citing to it.37 Judge White settled on the Anderson-Burdick balancing test because, while the Supreme Court had not spoken on what standard is to govern absentee-ballot cases since the test was announced, two circuit courts had, and those circuits had applied the balancing test.38

In applying the balancing test, Judge White found fault with the majority’s assertion that the petitioner had shown a significant number of voters would be precluded from voting, but determined that the burden may be “substantial” without being “preclusive.”39

III. Post-Bush v. Gore Issues in the Recount Process

While the fundamentals of recounts have not changed significantly since the days before Bush v. Gore, a number of new and prominent issues have arisen in elections and recounts that are worth discussion.

A. BEFORE THE ELECTION

1. Identify the Type of Machine Used in the Election

The recount process starts before Election Day. It begins with the identification of the method(s) to be used to cast and count ballots on Election Day.40 Approaches to recounts vary depending on the type of voting equipment used. The most common mode of voting currently is optical/digital scan paper ballots. As many as three-quarters of voters will vote on optical/digital scan machines in 2020. Ballot marking devices (BMDs), at first limited to disabled citizens voting, are increasing in use. Although direct-recording electronic voting machines (DREs) are being phased out,
there will still be jurisdictions where they will be in use over the next several years. Where BMDs are the predominant mode of voting, the recount may function more like an audit except for absentee and mail-in ballots that are paper.

2. Security and Logic/Accuracy Testing
All voting devices, except pure paper ballots, require a computer to electronically identify and count ballots. BMDs, for example, count the bar codes created when the voter selects the candidates. Prior to the delivery of the voting devices to the precincts, they should undergo review of the logic and accuracy for the upcoming election (L&A tests). L&A tests are designed to make sure that the programs installed on the voting equipment, as well as the equipment itself, read and record the votes as intended. Election officials run a set of predetermined ballots through the counting machine to determine if the machine returns the same results. Candidates and political parties must be given an opportunity to view this testing.41

3. Ballot Design
While ballot design is not a matter for a recount, it can have a significant impact on the vote count that cannot be remedied after the election. Nearly 20 years after the infamous “butterfly ballot” debacle in Palm Beach County likely cost Al Gore the presidency, poor ballot design may have altered the outcome of the 2018 Florida U.S. Senate election. The Broward County ballot tucked the U.S. Senate race at the bottom of the left column underneath the instructions. There were 30,896 voters who skipped voting in that race, 2.5 percent more than other counties, in an election decided by just 10,000 votes. Needless to say, ballot design is a critical area for pre-election review.42

B. DURING THE ELECTION AND CANVASS
1. Attorney Deployment on Election Day
Many problems that occur on Election Day (including early voting) can impact the vote count. Attorneys and volunteers must be strategically deployed to monitor and observe the electoral process. While voting issues must be immediately addressed, systemic issues that could affect the vote count should be fully documented. For example, voter confusion on the appropriate voting precinct has resulted in litigation with differing results.43

The canvass of votes, which generally occurs immediately after the election, is the first instance that a candidate must ascertain the true nature of the race and the difference in the vote totals. Many of the steps described for a recount also occur during the canvass.

2. Signature Mismatch Issues with Absentee and Mail-In Ballots
As the volume of mail voting has increased, so have the number of ballots rejected because of alleged signature mismatches. Signatures on the envelope of mailed-in ballots are required to match the signature on the voter’s registration form. The
signatures of some voters have changed over time, particularly older voters, while many younger voters have yet to settle on a consistent signature. In addition, many voters believe they are simply affirming they are the voter whose name is printed on the envelope, not realizing their signature must match the signature on file. The signature requirement is intended to curb fraud. Instead, as enforced, it is disenfranchising tens of thousands of voters nationwide as untrained election officials are making decisions about whether a signature on a ballot envelope has been made by the correct voter.45

The issue first reached prominence during the 2008 Minnesota U.S. Senate recount and eventually additional ballots were counted that improved winner Al Franken’s margin from 49 votes to 312. Since the Franken-Coleman recount, a series of lawsuits have challenged signature matching processes that result in the disenfranchisement of eligible voters. In 2018, for example, a federal court in Florida ordered election officials to give voters whose ballots were rejected for signature mismatch additional time to verify their signatures.46 This issue is likely to continue to arise in close elections in the years ahead.

C. THE RECOUNT

A recount is the tabulation of the votes cast on Election Day. Generally, but not always, only those votes cast and counted are considered. Questions of eligibility to vote, or other irregularities, are not usually considered; rather, they are to be considered in a contest supported by allegations that the outcome of the election is in doubt or the putative winner is not eligible to hold office.47 The states differ on whether there is an automatic recount.48 In all instances, the losing candidate has the right to petition for a recount if the election is close.

Following Bush, many states created detailed instruction for the canvass and recounting of ballots. Virginia, for example, created guides for how to count optical scan ballots with marks outside the ballot’s oval consistent with the rule favoring the ascertainment of voter intent.49 Virginia also developed detailed manuals for every step of the process for a canvass and recount.50 Many other states have followed suit.51 These guides and instructions have made the recount process more transparent. They have not, however, adequately addressed issues with counting absentee ballots and with signature matches and provisional ballots, or resolved questions with the logic and accuracy of voting machines presently in use or proposed. Newer technology has merely moved the area of controversy.

IV. Conclusion

Many observers predicted in the aftermath of the 2000 Florida debacle that troubled election administration and flawed voting equipment would be fixed for future elections. Instead, nearly two decades after the infamous recount, there are partisan battles in every part of the country over how elections should
be conducted—who should be allowed to vote, when voters can vote, and whose votes are counted. Election litigation has exploded since the Florida recount protection programs for Democrats and ballot security strategies for Republicans have become a mainstay of election campaigns. Debate over what type of voting equipment provides the most accurate and secure elections have escalated. And, recounts have become more common, triggering recount planning and training as an integral part of the campaigns of candidates from both political parties.

The approaches to post-election disputes have changed as well. Because of the increase in popularity of absentee/mail voting, as well as the increasing numbers of provisional ballots cast, there is increased focus on monitoring and challenging the canvass, which had often been ignored by lawyers before 2000. Absentee ballots had always been a source of disagreement, but disputes over alleged signature mismatches have now become almost routine. Similarly, there are challenges to determinations of eligibility for provisional ballot voters. Neither of these issues is likely to be resolved in a uniform manner in the near future. The signature process is designed to protect against fraud. And, while fraud in mail-in voting is rare, the opportunity for mischief is significantly greater than with Election Day voting. For example, the absentee ballot fraud scandal that caused the results of the 2018 congressional election in North Carolina’s ninth district to be vacated highlights the potential for absentee fraud.

While most everything surrounding recounts has changed dramatically since the 2000 Florida recount, the actual mechanics of recounts are largely unchanged. Paper ballots are run back through voting machines. Ballots not counted by the machines are counted by hand. Manual counting of ballots occurs in states where law provides for such a recount. And, computer tapes are reviewed where DREs are still in use, although that mode of voting is largely being phased out.

Wherever paper ballots are used, there will be questions of voter intent. The Supreme Court in Bush in effect held that the process of counting ballots must occur under rules that are applied uniformly and fairly. This has led to the promulgation by some state election boards of guidelines for determining voter intent including examples of valid and invalid votes. Such guidelines where they exist have reduced controversies over voter intent.

Going forward, technology is likely to play a greater role in recounts. For example, digital scan voting began replacing conventional optical scan voting in 2008. Digital scanners produce ballot images that can be used to verify election counts and streamline recounts. Well over half of voters in 2020 will be voting on digital scan equipment. BMDs such as ExpressVote are the latest and increasingly popular equipment in voting technology. BMDs allow the voter to use a touch screen to select choices and then print out a paper ballot with the vote displayed on the screen to verify. However, security experts warn that hackers can still manipulate the barcodes without voters knowing and the barcodes render a traditional recount of votes impossible. The debate over BMDs is likely to continue.
Voter confidence has continued to decline since Bush.53 The chronic problems of long lines, inaccurate poll lists, confusing new laws designed to restrict access, and voting machine failures, among other issues, underscore the need for comprehensive reform, uniform standards, and increased government oversight.54 In the end, election officials and partisans need to retain focus on the fundamental purpose of a recount: to ensure that the candidate with the most votes is declared the winner and that votes are not diverted intentionally or unintentionally.

Notes

4. Id. § 20902.
6. Id. at 110.
8. Under the Elections Clause of Article I, Section 4 of the U.S. Constitution, “[t]he times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof.” The U.S. Supreme Court has long held that the Elections Clause provides the states broad powers related to the regulation of elections, which it has described as being the powers “to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.”
11. Id. at 459 (citing Bennett v. Yoshina, 140 F.3d 1218, 1226–27 (9th Cir. 1998)).
12. Id. at 461 (citing Wichelmann v. City of Glencoe, 273 N.W. 638, 640 (Minn. 1937); Bell v. Gannaway, 227 N.W.2d 797, 800 (Minn. 1975)).
13. Id. at 462.
14. Id.
15. Id. at 459 (citing Bennett, 140 F.3d at 1226–27).
17. See Roe v. Alabama, 43 F.3d 574, 580 (11th Cir. 1995).
19. Coleman, 767 N.W.2d at 462.
21. Id. at 236.
22. Id. at 234.
23. *Id.* at 238 (quoting Crawford v. Marion County Election Bd., 553 U.S. 181, 190 (2008)).

24. *Id.*

25. *Id.*

26. *Id.* at 242.

27. *Id.* n.13.

28. *Id.* at 242.


30. *Id.*

31. *Id.*

32. *Id.* at 430 (citing *Hunter*, 635 F.3d at 238); see *Clements v. Fashing*, 457 U.S. 957, 965 (1982) (rejecting the assertion that traditional equal protection principles should automatically apply in the voting rights context “without first examining the nature of the interests that are affected and the extent of the burden”).

33. *Obama for Am.*, 697 F.3d at 431.

34. *Id.* at 433.

35. *Id.* at 426–28.


37. *Id.* at 440 (White, J., concurring); *Snowden v. Hughes*, 321 U.S. 1, 8, (1944); *Coleman*, 767 N.W.2d 453, 456 (Minn. 2009).

38. See *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101 (2d Cir. 2008); see *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004).


40. Optical scan ballots involve the voter using a pen or pencil to make a selection by filling in an oval (e.g., on ES&S, Dominion, Premier/Diebold, and Unisys ballots) or filling in a box (e.g., on Hart InterCivic ballots) or completing an arrow (e.g., on Sequoia ballots). The voter takes the completed ballot to a scanner where the ballot is inserted and counted by the scanner. Alternatively, the ballots may be collected in the precinct and scanned at a central location. In both instances, the paper ballot is retained in a storage bin under the scanner for later hand review and counting in a recount, or counted at a central location. The advantage of scanning in the presence of the voter in the precinct is that an overvote or other error can be rejected by the scanner and returned to the voter for correction. Optical scan ballots are also used for most absentee voting.

BMDs produce a paper ballot marked by the voter on a touch screen. The paper ballot can be reviewed by the voter before it is submitted for counting. In the ES&S ExpressVote, the ballot is protected from actual possession of the voter and submitted for counting when the voter selects the review or cast vote button. Many BMDs produce a traditional ballot form listing the voter’s choices. Added to this ballot is a bar code representing the voter’s choices. It is the bar code that is counted by the digital scanner. The scanning device also
creates a cast vote record. The paper ballots are retained in a secure storage container under the scanner. The general default setting for the most commonly used BMD machines made by ES&S is to retain the ballot images. These images can then be imported into an election management system for later review. The system, however, permits the electoral board to choose among the options for image preservation of none, all, or only write-in images. Only the selection of the “all processes image option” saves the images for later review.

DRE voting systems include those with and without voter-verifiable paper trails. The defining feature of DREs is that they rely on the voter selection from a touch screen list of candidates that are electronically recorded on the machine. Both types of DREs produce reports of the total number of votes cast, undervotes and overvotes, and an event log. DREs with a voter-verified paper trail record the voter’s choices in electronic form within the machine and produce a paper ballot that can be verified by the voter. The paper trail is retained in the machine for later review.

41. L&A testing must include:
   • For all machines and voting records: security measures must be in place to prevent hacking and tampering before, during, and after the election.
   • For all machines: testing of a number of machines, selected at random, must be included by inserting a number of ballots marked for various candidates to determine if the voting device has been properly programmed to properly record the votes for the candidates, record the number of votes cast, and provide the necessary reports. Reset the machines to zero.
   • For BMDs: where a bar code is used, a human-readable list of candidates must exist, be displayed to the voter, and be available as a means for recounting the ballots during a recount or audit. The bar code and list of candidates must be reviewed and randomly tested to ensure that the bar codes correlate to the candidates. The selection of “preserve all records” must be in place.

42. The existence of the “butterfly ballot” in Palm Beach, Florida, in 2000, and similar instances in Florida in 2004 and 2018, show the impact a poorly designed ballot can have on the outcome. In 2000, Vice President Al Gore lost nearly 6,000 votes to third-party candidate Pat Buchanan when voters were confused on the appropriate place to select Gore. The vice president ended up losing Florida’s electoral votes, and the presidency, by 537 votes. Similarly, in 2004, the congressional candidate may have lost when the ballot placed the race at the top of a page listing state candidates, and the Democratic candidates may have lost the senate race when the candidates for U.S. Senate were placed after the vote instructions in Democratic-leaning Palm Beach, which obscured the race for many voters. The Palm Beach Post conducted an independent post-election analysis and concluded that “voters confused by Palm Beach County’s butterfly ballot cost Al Gore the presidency.” Newspaper: Butterfly Ballot Cost Gore White House, CNN, Mar. 11, 2001. See also Edward B. Foley, Ballot Battles: The History of Disputed Elections in the United States (2016) (“George W. Bush vs. Al Gore, 15 years later: We really did inaugurate the wrong guy.”).


46. Democratic Executive Comm. of Fla. v. Lee, No. 18-14758 (11th Cir. 2019).

47. *But see Wis. Stat. § 9.01(1)(a)2.B (2017) indicating that the petition can include a mistake or fraud was committed in the conduct of the election.*

48. *Compare Fla. Stat. § 102.166 (providing for an automatic machine recount when the difference in total votes for an office or measure is 0.5 percent), with Va. Code § 24.2-800 (no automatic recount).*


52. One of the first successful programs to ensure the vote was the Promote and Protect the Vote program for Mark Warner in 2001 in his race for governor of Virginia organized by Chris Sautter, Jay Myerson, and Jack Young.

