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Resolving Election Error: The Dynamic Assessment of Materiality

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RESOLVING ELECTION ERROR: THE DYNAMIC ASSESSMENT OF MATERIALITY

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ABSTRACT

The ghosts of the 2000 presidential election will return in 2012. Photo-finish and error-laden elections recur in each cycle. When the margin of error exceeds the margin of victory, officials and courts must decide which, if any, errors to discount or excuse, knowing that the answer will likely determine the election's winner. Yet despite widespread agreement on the likelihood of another national meltdown, neither courts nor scholars have developed consistent principles for resolving the errors that cause the chaos.

This Article advances such a principle, reflecting the underlying values of the electoral process. It argues that the resolution of an election error should turn on its materiality: whether the error is material to the eligibility of a voter or the determination of her ballot preference.

In developing this argument, this Article offers the first transsubstantive review of materiality as a governing principle. It then introduces the insight that, unlike the evaluation of materiality in other contexts, the materiality of a voting error may be reassessed over time. This dynamic assessment of materiality best accommo-

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dates the purposes of a decision rule for election error. Indeed, the insight is most powerful when the stakes are highest: when an election hangs in the balance. Finally, this Article discusses the pragmatic application of the materiality principle, including the invigoration of an underappreciated federal statute poised to change the way that disputed elections are resolved, in 2012 and beyond.

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INTRODUCTION

Twelve years ago, the U.S. Supreme Court's decision in *Bush v. Gore*[1] shocked a nation and catalyzed an academic field. In many ways, the controversy of 2000 marked the rebirth of the study of election law. But with all of the ink spilled on the law of democracy in the last decade, the difficulty at the heart of this catalytic event has been sorely neglected.

Humans are imperfect. This is no less true in our ability to execute election instructions than in any other arena. In Florida in 2000, citizens made mistakes, inter alia, in registering to vote, completing and mailing absentee ballots and requests for those ballots, and most notoriously, indicating their preferred choices on ballots.[2] Citizens made similar mistakes elsewhere around the country, in 2000 and long before. The only meaningful difference is that in Florida the mistakes happened to be outcome determinative, and spectacularly so.

These mistakes and opportunities for others have not vanished, and with surprising frequency, they continue to represent the difference between those who prevail in an election and those who do not.[3] The fundamental problem of what to do with these mistakes remains curiously unresolved. Particularly when minor errors—by voters and by election officials—exceed the margin of victory, courts are placed in the unenviable position of deciding which, if any, of these errors to discount or excuse, with the knowledge that their judgment will likely determine the election's winner.

Courts have had little help in this endeavor thus far. Though scholars have noted that the aggregation of election errors will likely cause another national meltdown,[4] the most prominent

1. 531 U.S. 98 (2000).

2. *See, e.g.*, *id.* at 102-03; Jacobs v. Seminole Cnty. Canvassing Bd., 773 So. 2d 519, 521 (Fla. 2000). *See generally* U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001), *available at* http://www.usccr.gov/pubs/vote2000/report/main.htm.

3. *See infra* Part I.

4. *See, e.g.*, Heather K. Gerken, J. Skelly Wright Professor of Law, Yale Law Sch., Getting from Here to There in Election Reform, Speech Delivered at Okla. City Univ. Sch. of Law (Apr. 3, 2008), *in* 34 OKLA. CITY U. L. REV. 33, 34-38 (2009); Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral*

analytical frameworks in the field, and particularly the prevailing frame of rights-based constitutional adjudication, provide little useful guidance for decision makers charged with averting crisis wrought by the aggregation of individual mistakes.[5] Authors have examined methods for determining the extent of election-related error,[6] the design of institutions to review claims of error,[7] and remedial options to salvage an election when all hope for directly confronting the error is lost.[8] But very little scholarship offers a consistent principle or set of principles for addressing the appropriate legal impact of an error in the first instance.[9]

Absent such principles, some decision makers have attempted to intuit whether errors are "large" or "small" in order to determine whether the associated ballots should be counted.[10] Others have turned to an assessment of responsibility or fault: voters are relieved from errors made by others but held to their own mistakes or deficiencies.[11] Neither approach has faced significant scholarly scrutiny; on further examination, both prove to be substantially flawed.[12] In this Article, I suggest a principle better suited to the purposes of the voting process.

The principle I propose is materiality: particularly, the materiality of an error to an assessment of the affected individual's eligibil-

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Meltdown, 62 WASH. & LEE L. REV. 937, 944 (2005).

5. *See infra* Part II.B.

6. *See, e.g.*, Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350, 352-61 (2007).

7. *See* Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. (forthcoming 2013); Foley, *supra* note 6, at 361-81.

8. *See, e.g.*, Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265 (2007) (discussing systemic remedies for election-related errors, such as rerunning the election); Michael J. Pitts, *Heads or Tails?: A Modest Proposal for Deciding Close Elections*, 39 CONN. L. REV. 739 (2006) (recommending the random disposition of elections within a certain margin, including elections with substantial rates of error).

9. One of the few exceptions may be the interpretive rule suggested by Professor Rick Hasen in his exposition of the "Democracy Canon" and the developing response that Hasen's suggestion seems to have engendered. Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009) [hereinafter Hasen, *Democracy Canon*]; Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051 (2010); Richard L. Hasen, *The Benefits of the Democracy Canon and the Virtues of Simplicity: A Reply to Professor Elmendorf*, 95 CORNELL L. REV. 1173 (2010); *see* discussion *infra* text accompanying notes 64-66, 240-44.

10. *See infra* Part II.B.

11. *See infra* Part II.B.

12. *See infra* Part II.B.

ity or ballot preference. Materiality plays a critical role in contract, in tortious and criminal fraud, in the law of securities, and in many other legal contexts, separating predicates of legal consequence from those that the law ignores.[13] Yet I am aware of no methodical trans-substantive examination of this notoriously flexible idea. This Article offers such an examination, setting forth a taxonomy of materiality designed to assist in the identification of the election errors that should preclude the counting of a ballot.

Moreover, this Article unearths a feature of the concept that proves pivotal in the election context: the materiality of a voting error may *change*. This, too, is a notion mostly overlooked. Little work in the field of voting rights has addressed the impact of the ability to assess and reassess determinative rulings at different points in time within the election cycle.[14] Today, errors in the election process are generally evaluated at the time they are committed, and the voter is saddled by that evaluation despite the fact that the error may later become wholly unimportant.[15] The recognition that materiality may change over time highlights the inadequacy of the existing approach to the assessment of error in the election context.

Furthermore, the insight into the dynamic nature of materiality is most powerful when the stakes are highest. When errors leave the result of an election in question, there often appears to be a conflict between two fundamental precepts: the rule of law and majority rule. A proper appreciation for the changing materiality of an election-related error can help to resolve this perceived, but ultimately artificial, conflict.[16]

Finally, I explain how the materiality principle may be implemented in practice. The most tangible manifestation of the principle currently exists in a surprisingly underappreciated provision of the landmark Civil Rights Act of 1964, which prohibits disenfranchisement on the basis of some errors or omissions that are not material to a voter's qualifications.[17] Few courts or commentators have

13. *See infra* Part III.A.

14. The leading pertinent work is by Professor Adam Cox, who concentrates on the difficulties in assessing harm and remedy to groups of voters across election cycles. Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361 (2007).

15. *See infra* Part III.B.3.

16. *See infra* Part III.C.4.d.

17. Pub. L. No. 88-352, § 101(a), 78 Stat. 241, 241 (1964) (codified as amended at 42 U.S.C.

recognized the power of this provision, and none have done so with an appreciation of the dynamic quality of materiality; indeed, proper application of the statute might well have yielded different results in several recent elections.[18] Yet even the Civil Rights Act does not apply the materiality principle as thoroughly as would be beneficial. I therefore suggest that states explicitly incorporate the principle into their own election codes.

The Article proceeds as follows. Part I demonstrates the recurring nature of the problem with a brief review of notable and often outcome-determinative errors that have materialized in recent elections. Part II explores some of the potential decision rules for confronting these errors. Part III offers the materiality principle that I propose as superior. Of particular note, I introduce for the first time the insight that in the voting context, an assessment of materiality may change over time. Recognizing the dynamic nature of materiality, moreover, better serves the rationales supporting the election process than any of the available alternatives for confronting error. Finally, Part IV describes how the materiality principle may be implemented in practice, including the first sustained scholarly review of the Civil Rights Act's materiality provision, a ready vehicle for applying the concept in many circumstances.

I. ERRORS IN RECENT ELECTIONS

The prospect that the balance of an election might turn on the resolution of errors did not die with *Bush v. Gore*. In 2010, the election for a U.S. Senate seat in Alaska was cast into controversy when incumbent Senator Lisa Murkowski lost the Republican Party primary and announced her intention to run as a write-in candidate.[19] In many states, write-in candidates distribute stickers that their supporters can affix to a ballot to avoid any potential ambiguity in their choice.[20] But a few years prior, the Alaska legislature outlawed such stickers after determining that they would foul the

§ 1971(a)(2)(B) (2006)).

18. *See infra* Part IV.B.

19. Nate Silver, *Alaska Race May Make for Long Election Night*, N.Y. TIMES FIVETHIRTYEIGHT (Oct. 18, 2010, 10:19 AM), http://fivethirtyeight.blogs.nytimes.com/2010/10/18/alaska-race-may-make-for-long-election-night/.

20. *See, e.g.*, WIS. STAT. ANN. § 7.50 (West 2011) (allowing for use of sticker).

state's new optical scan readers.[21] Suddenly, in a race polling well within a comfortable margin of error on the eve of the election,[22] there was a substantial likelihood that the election result might turn on the spelling and/or penmanship of Murkowski's supporters. Sure enough, voters actually cast a healthy number of ballots for "Murcowski," "Morcowski," and "McCosky," with corresponding controversy as to the outcome of the race.[23]

Two years earlier, another U.S. Senate election left at least 4,797 absentee ballots of disputed validity—far more than the 312-vote margin of victory.[24] These absentee ballots were rejected in the initial election canvass, and most remained uncounted even after a thorough recount and vigorously disputed contest proceedings.[25] Officials rejected many of the absentee ballots because of alleged errors.[26] Some voters failed to sign absentee ballot materials[27] or signed them in the wrong place.[28] Others completed their own materials accurately, but witnesses observing the process submitted flawed information.[29]

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21. 2000 Alaska Sess. Laws 14 (amending ALASKA STAT. § 15.15.361); S. State Affairs Comm., 21st Leg., Committee Minutes, at Item No. 2329 (Mar. 16, 2000), http://www.legis.state.ak.us/basis/get_single_minute.asp?house=S&Session=21&Comm=STA&date=20000316&time=1540; H. State Affairs Standing Comm., 21st Leg., Committee Minutes, at Item No. 1970 (Feb. 8, 2000), http://www.legis.state.ak.us/basis/get_single_minute.asp?house=H&Session=21&comm=STA&date=20000208&time=0811.

22. *See, e.g.*, Silver, *supra* note 19.

23. Sean Cockerham, *98% of Write-In Votes Go to Murkowski*, ANCHORAGE DAILY NEWS, Nov. 11, 2010, *available at* 2010 WLNR 22507177.

24. Sheehan v. Franken *(In re* Contest of Gen. Election Held on November 4, 2008, for the Purpose of Electing a U.S. Senator from the State of Minn.) (*Franken Trial*), No. 62-CV-09-56, 2009 WL 981934, ¶¶ 12, 126 (Minn. Dist. Ct. Apr. 13, 2009).

25. Sheehan v. Franken (*In re* Contest of Gen. Election Held on November 4, 2008, for the Purpose of Electing a U.S. Senator from the State of Minn.) (*Franken Appeal*), 767 N.W.2d 453, 456-58 (Minn. 2009); *Franken Trial*, 2009 WL 981934, ¶¶ 129-138.

26. *See Franken Trial*, 2009 WL 981934, ¶¶ 85, 92-93.

27. Absentee ballot envelopes identify voters; they remain sealed with the ballot inside until election officials determine that they comply with state law and that the ballots inside may therefore be counted. *See, e.g.*, MINN. STAT. § 203B.121 (2011). In order to preserve the secrecy of an individual voter's political choices, there may be no marks that serve to identify the voter on the ballot itself. *E.g.*, MINN. STAT. § 204C.18(2) (2011). Once the ballot envelope is opened and the absentee ballot is separated from its envelope, the identity of the individual casting votes via a particular ballot cannot be determined.

28. *See, e.g.*, Contestants' Memorandum of Law in Support of Motion for Summary Judgment at 27-30, 34-37, *Franken Trial*, No. 62-CV-09-56 (Minn. Dist. Ct. Jan. 21, 2009), 2009 WL 981934.

29. *See, e.g.*, *id.* at 12, 39-43; Affidavit of Charles N. Nauen in Support of Petition by

Though the Minnesota race drew the most attention, ample errors also arose elsewhere. Palm Beach County, Florida—no stranger to election controversy—also rejected absentee ballots with legitimate signatures written in the wrong location.[30] Officials in Waller County, Texas—home to Prairie View A&M College (a "historically black university") and a history of alleged voting rights abuses[31]—rejected registration forms with complete addresses but without ZIP codes.[32] Waller County also rejected versions of registration forms that were not the most recent forms produced;[33] some counties in Indiana did the same.[34] Colorado rejected voter registration forms on which applicants provided the last four digits of their Social Security number but did not check a box explaining that they had no driver's license or state identification number to provide instead.[35] Ohio rejected absentee ballot applications for citizens who did not check a box indicating their status as a qualified elector,[36]

Certain Minnesota Voters to Have Their Votes Counted Pursuant to Minn. Stat. § 204B.44, at Exhibit 3, ¶ 14, Peterson v. Ritchie, No. A09-0065 (Minn. Jan. 13, 2009).

30. Jane Musgrave, *372 Absentee Ballots Tossed*, SUN SENTINEL (Fort Lauderdale, Fla.) (Nov. 15, 2008), http://articles.sun-sentinel.com/2008-11-15/news/0811150020_1_voter-s-signature-absentee-ballots-military-ballots.

31. Nina Perales et al., *Voting Rights in Texas: 1982-2006*, MALDEF, 18-19, 25-26 (June 2006), http://www.maldef.org/resources/publications/TexasVRA.pdf.

32. *See* United States v. Waller County, Texas, No. 4:08-cv-03022, ¶¶ 3, 6(b)(i) (S.D. Tex. Oct. 17, 2008) (consent decree), *available at* http://www.justice.gov/crt/about/vot/sec_5/waller_cd.pdf. The U.S. Department of Justice sued, and the subsequent settlement required that these registration forms be accepted. *Id.* ¶¶ 14-15.

33. *Id.* ¶ 6(b)(ii).

34. *See* Agreed Entry and Order in Resolution of Motion for Temporary Restraining Order at 1, Brown v. Rokita, No. 1:08-cv-01484 (S.D. Ind. Nov. 3, 2008). On the eve of the election, the state settled a lawsuit and agreed to accept these registration forms. *Id.* at 1-2.

35. Myung Oak Kim, *Secretary of State Stands by Registration Check-Box Policy*, ROCKY MTN. NEWS (Oct. 22, 2008), http://www.rockymountainnews.com/news/2008/Oct/22/secretary-of-state-stands-by-registration-check/; *see* COLO. REV. STAT. § 1-2-204(2)(f.5), (3)(c) (2008); COLO. CODE REGS. § 1505-1 (2.6.3) (2008); Letter from Maurice G. Knaizer, Colo. Deputy Attorney Gen. & Monica M. Márgurz, Colo. Assistant Solicitor Gen., to Mike Coffman, Colo. Sec'y of State (Oct. 24, 2008), http://brennan.3cdn.net/d79a4060e5464ecb06_kam6ivbyr.pdf.

The Help America Vote Act of 2002 (HAVA) requires an applicant for voter registration to provide on the registration form her driver's license number, if she has one, and otherwise the last four digits of her Social Security number, if she has one. 42 U.S.C. § 15483(a)(5)(A)(i) (2006). The federal law does not require an applicant to indicate specifically when she does not have a driver's license number. *Id.*

36. *See* State *ex rel*. Myles v. Brunner, 899 N.E.2d 120, 121-22 (Ohio 2008). The Ohio Supreme Court required that the state process the absentee ballot applications even when the checkbox was not marked. *Id.*

and rejected some provisional ballots from voters who signed but did not print their names or who signed and printed their names in the wrong place on the ballot.[37]

The litany from 2008 is no anomaly. In every single election cycle, errors occur. Some are major, some are minor; some are novel, some familiar. And in every single cycle, these errors prove outcome determinative somewhere.[38] For William Davignon and Michael

37. *See* State *ex rel*. Skaggs v. Brunner, 900 N.E.2d 982, 991-92 (Ohio 2008) (per curiam). The Ohio Supreme Court required that the state reject provisional ballots that did not include both name and signature. *Id.*

38. Consider just a few examples from the preceding years:

2007: Mansfield v. McShurley, 911 N.E.2d 581, 582-83 (Ind. Ct. App. 2009) (adjudicating the validity of absentee ballots that an official failed to initial before sending); Margaret McHugh, *Votes Are In but Results Are Still Out*, STAR-LEDGER (Newark, N.J.), Mar. 2, 2007, *available at* 2007 WLNR 4055056 (reporting on a vote disputed because of officials' failure to list voters' first and last names in the correct order on the voter rolls).

2006: Edgmon v. State, 152 P.3d 1154, 1155, 1158-59 (Alaska 2007) (resolving the impact of voters' failure to list mailing address in addition to residential address on ballots); Jeff Shields, *Provisional Ballots May Hold Key in Chesco*, PHILA. INQUIRER, Nov. 23, 2006, at B1 (describing multiple minor errors on the face of provisional ballot envelopes).

2005: Harrison v. Stanley, 193 S.W.3d 581, 582-83, 585-86 (Tex. Ct. App. 2006) (reviewing signatures on absentee ballot envelopes deemed not to match signatures on the associated ballot applications, despite testimony from the voters that all relevant materials were theirs); *Judge Rejects Disputed Ballots from Primary*, ST. LOUIS POST-DISPATCH, Mar. 30, 2005, at B2 (reporting on absentee ballots that were "either not signed or not notarized"); Frank Juliano, *Recounts Could Shake Up Milford Boards*, CONN. POST, Nov. 10, 2005 (reporting on an official's failure to sign absentee ballots next to a date stamp).

2004: *In re* Primary Election Ballot Disputes 2004, 857 A.2d 494, 504-05 (Me. 2004) (determining the impact of voters' failure to fill in checkboxes on the ballot, which led to—inter alia—the defeat of a write-in candidate who was running *unopposed*); Greg Moran, *Re-election of Murphy Will Stand, Judge Rules*, SAN DIEGO UNION-TRIB., Feb. 3, 2005, at A-1 (describing an election controversy centering on voters' failure to fill in a checkbox next to the name of a write-in candidate).

2003: Mary Beth Lane, *Incumbent Will Remain Mayor of Cambridge*, COLUMBUS DISPATCH, Jan. 9, 2004, at 5D (reporting on voters' failure to cast ballots in the proper precinct).

2002: Editorial, *Count All Valid Votes*, DENVER POST, Nov. 21, 2002, at B-6 (describing voters' failure to check boxes on provisional ballots explaining the reason for casting the provisional ballots); John Fund, Op-Ed., *We May HAVA Problem*, WALL ST. J. (Oct. 18, 2004), http://online.wsj.com/article/SB122485692267966609.html (same); Kenneth Heard, *Absentee Ballot Lawsuit Ousts Mayor*, ARK. DEMOCRAT-GAZETTE, Feb. 3, 2003, at 9 (reporting on voter's failure to submit "required affidavits from medical personnel" with absentee ballot cast for medical reasons); David Snyder, *Write-in Mayoral Bid Wins in Md. Court*, WASH. POST, July 31, 2002, at B1 (describing an election dispute over whether votes should be counted despite failure to include first name of write-in candidate); Todd von Kampen, *Write-in Mayoral Bid Dashed*, OMAHA WORLD HERALD, Feb. 7, 2003, at 1b (reporting on voters' failure to fill in a checkbox next to the name of a write-in candidate).

2001: Dayhoff v. Weaver, 808 A.2d 1002, 1005-13 (Pa. Commw. Ct. 2002) (describing the

Carney, lightning struck *twice*. In both 2001 and 2003, Davignon beat Carney by one vote for a county legislative seat; the first time, the election depended on an absentee ballot signed on the wrong line, and the second time, a timely ballot with a missing time stamp.[39] To be sure, it is unusual to see outcome-determinative errors in consecutive races between the same candidates. But for most election participants, once is more than enough.

II. THE NEED FOR A PRINCIPLE TO RESOLVE ERRORS

Election errors like those above are the inevitable consequences of election procedures. These procedures serve a critical purpose: they help a community arrive at a reliable shared understanding of the individuals empowered to represent and govern it, which in turn—at least classically—secures the consent of those governed.[40] Election procedures regulate who can vote for whom, when, and how, and the means by which those preferences are acknowledged and tallied to produce a representative vested with the authority of the state. Some of these procedures aim to protect the integrity or perceived integrity of the election against attempts to manipulate the results; others aim to make the election easier for a bureaucracy with limited resources to administer. It is not possible to run a reliable election without pervasive procedural regulations.[41]

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failure to spell a candidate's name correctly, write a candidate's name on the proper ballot line, and fill in a checkbox next to the write-in candidate's name).

39. Carney v. Niagara Cnty. Bd. of Elections, 778 N.Y.S.2d 631, 632 (App. Div. 2004); Carney v. Davignon, 735 N.Y.S.2d 263, 265 (App. Div. 2001).

40. *See* JOHN LOCKE, *The Second Treatise of Government*, *in* POLITICAL WRITINGS 261, 310 (David Wootton ed., Hackett 2003) (1690).

41. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) ("[A]s 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." (quoting Storer v. Brown, 415 U.S. 724, 730 (1974))).

Though rules are crucial for the successful execution of an election, they are not definitional in the same way as they are, say, in sport. A game of baseball is a game of baseball and not a game of lacrosse or dodgeball or cricket or jai alai because of its rules. In contrast, and as fifty states' varying election procedures confirm, the essential character of an election is not defined by the procedures put in place. Election procedures are merely safeguards to make possible the equitable determination of the eligible community's preferences; they are means, not ends.

Consider, for example, just some of the regulations affecting a would-be absentee vote in California: officials must prepare a specific application form, with particular notices and particular requests for information;[42] the voter must complete the application with specified information in specified locations on the specified form;[43] the voter must ensure that the application is received by specified officials within a designated period;[44] officials must process the application according to specific criteria;[45] officials must prepare the actual ballots, with specified notices and instructions;[46] officials must deliver the appropriate absentee ballot, enclosure envelope, and ballot pamphlet to the voter at a specified address within a designated period;[47] the voter must complete the enclosure envelope, with specified information in specified locations;[48] the voter must complete the absentee ballot itself;[49] the voter must enclose the absentee ballot in the proper manner within the enclosure envelope;[50] the voter must ensure that the ballot and envelope are delivered by specified means to specified officials within a designated period;[51] officials must compare information on the envelope with information on other election records in a specified manner;[52] and officials must transmit the envelopes to the entity responsible for counting ballots within a specific time frame.[53] My point is not that these regulations are undue or onerous, but rather that the

42. CAL. ELEC. CODE §§ 3006, 3007.5 (West 2012).
43. *Id.*
44. *Id.* § 3001.
45. *Id.* §§ 3009, 3013.
46. *Id.* § 3011.
47. *Id.* §§ 3009, 3010, 3023.
48. *Id.* § 3011.
49. *Id.* § 3017.
50. *Id.* § 3011.
51. *Id.* § 3017.
52. *Id.* § 3019.
53. *Id.* §§ 14420, 15101.

regulations are plentiful.[54] This, in turn, breeds plentiful opportunities for error.

Some departures from the prescribed procedures may be the result of attempts to manipulate the system—intentional cheating by those who believe that violating the procedures is more likely to lead to their desired outcome. Some departures may be the result of misunderstanding or mistake by voters or officials who are not familiar with each element of the rules, or who, pressed for time, inaccurately complete a procedure. Whatever the cause, errors are inevitable. And that leaves the problem of what to do when they occur.

A. The Democratic Function of an Election

Acknowledging the imperfection of human endeavor, an election system needs *some* decision rule to determine the extent to which deviations from the procedural ideal should be accommodated. Such a rule should be grounded in the rationales for holding elections as an initial matter. Thus, before discussing the candidates for a rule resolving election errors, it is useful to review exactly what it is that we as a society seek to accomplish through the election process.

First and foremost, the purpose of an election is to allow a community to approve particular individuals to represent and govern the community and, when repeated, to ensure that those chosen are responsive to the community's wishes. In this sense, the point of an election is to produce an agreed-upon winner or set of winners. An identified winner, however, does not alone suffice; otherwise, we could toss coins or roll dice to determine our representatives.[55] Instead, we expect the winner of an election to accurately represent,

54. Indeed, in some states, the plentiful regulations may be difficult even for trained officials to parse. *See* State *ex rel.* Skaggs v. Brunner, 900 N.E.2d 982, 991 (Ohio 2008) ("[O]ur analysis of the pertinent [election] statutes again reveals that they present a quagmire of intricate and imprecisely stated requirements, including internal inconsistencies and multiple affirmations and declinations, some of which even the parties appear to confuse in their respective merit briefs.").

55. Indeed, sortition—the selection of governing bodies by random lot—has a rich history of discussion as an alternative to elections, dating back to ancient Athens. *See, e.g.*, Oliver Dowlen, *Sorting Out Sortition: A Perspective on the Random Selection of Political Officers*, 57 POL. STUD. 298, 298 (2009); Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1290-91 (1984).

as best we can ascertain, the collective leadership choice of the polity. This, in turn, requires that an election aggregate the individual preferences of those who comprise the community.[56]

However, choosing a winner—even choosing the "right" winner—is not an election's sole purpose. Modern survey science allows us to poll a comparatively modest representative sample of the eligible electorate to arrive at a statistically certain victor the vast majority of the time; instead of holding an election for governor or senator, we could simply ask several thousand randomly selected electors on Election Day whom they preferred, and we would quite often be confident that we could get the statewide answer precisely right.[57] Yet even with full confidence that it would produce the correct result, a poll seems an unacceptable substitute for an election. This is because elections fulfill an additional societal function: they allow each eligible member of the community to participate in the act of choosing a representative, and thereby not only foster the strength of the community as a community,[58] but also secure community members' consent to be governed.[59] Indeed, as scholars have long recognized, the expressive and participatory elements of an election explain each citizen's decision to cast a ballot far better than the remote possibility that her ballot would change the final instrumental result.[60]

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56. As Professor Arrow demonstrated long ago, when there are more than two available choices, no election system to aggregate individual preferences will always arrive at a universally agreed-upon articulation of the collective choice of the polity. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 3 (2d ed. 1963). Put differently, the choice of aggregation mechanism has the capacity to change the outcome identified as the collective decision. *See id.* That said, each election system used in the United States represents at least a defensible approach to obtaining a plausible articulation of the polity's collective choice.

57. *Cf., e.g.*, David Chaum, *Random-Sample Elections*, RS-ELECTIONS.COM, http://rs-elections.com/Random-Sample%20Elections.pdf (last visited Sept. 26, 2012).

58. *See* Ellen D. Katz, *Race and the Right to Vote After* Rice v. Cayetano, 99 MICH. L. REV. 491, 512-13 (2000); Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 368, 374, 376-77 (1993).

59. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."); LOCKE, *supra* note 40, at 309-11.

60. *See* Morris P. Fiorina, *The Voting Decision: Instrumental and Expressive Aspects*, 38 J. POL. 390, 393 (1976); Andrew Gelman et al., *What Is the Probability Your Vote Will Make a Difference*?, ECON. INQUIRY (forthcoming), *available at* http://www.stat.columbia.edu/~gelman/research/published/probdecisive2.pdf (calculating an American's average chance at casting the decisive vote in the 2008 presidential election at 1 in 60 million); Michael P.

Elections as we know them also fulfill a third purpose: cost-efficiency. If we wished to gather the preferences of the eligible electorate while also ensuring an opportunity for each member of the electorate to participate, we could send trusted government teams to canvass the eligible electors one-by-one. The duration and expense of such an enterprise, with safeguards for accuracy and the prevention of coercion, would be significant. Elections, while costly, are a comparatively efficient means to (theoretically) assess the preferences of the legitimate electorate while (theoretically) permitting participation by all such electors.

Thus, elections have at least three aims: to accurately select community representatives by aggregating the preferences of the eligible community members, to allow participation in that endeavor by as many of the eligible members of the community as possible, and to accomplish these two objectives in a cost-efficient manner. When errors occur in the course of an election, a principle to address those errors should track the reasons for holding the election in the first instance. It should, that is, promote the most accurate assessment of eligible community members' preferences, with the broadest participation by eligible members of the community, at the least cost.

B. Decision Rules for Error

Unfortunately, the most straightforward decision rules for the resolution of errors are also the least adequate under these conditions. At one pole, for example, a decision rule might call for the counting of every ballot for which it is possible to count a vote, no matter how egregious the departure from prescribed regulations. Such a rule would allow substantial cause to question the reliability

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McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963, 966, 968 (2001) (finding that turnout increases substantially in years with a presidential race, precisely when the incremental probability of a determinative vote is least); William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25, 25 (1968).

Moreover, courts have recognized these participatory values of the election process as legally protected. *See, e.g.*, United States v. Cunningham, No. 3:08cv709, 2009 WL 3350028, at *9-10 (E.D. Va. Oct. 15, 2009) (ordering the belated counting of unlawfully excluded ballots despite the undisputed fact that they "will have no effect on the outcome of the November 4, 2008 federal election").

of the election's aggregation of preferences—ballots would be counted when cast by unknown individuals, from unknown addresses, which might or might not represent the lone votes of eligible members of the community. Indeed, such a rule would call for the counting of multiple ballots cast by the same individual or by individuals who acknowledge that they are not within the contemplated jurisdiction. This is not a principle for resolving errors that inspires confidence in the election results.

The converse rule is more often proposed, but just as flawed. This rule permits zero tolerance for error, with no ballot counted upon any departure from prescribed procedures. Such a leaden emphasis on formalities would extend not only to errors like a voter's failure to register or indicate a choice of candidate on the ballot, but also to voter errors like entering both a given name and surname in the space designated for one or the other, and to official errors like failing to initial an absentee ballot or hitting the wrong key in data entry. Indeed, true zero tolerance suggests that, in the California absentee ballot described above,[61] the ballot should not be counted if the election official failed to include a ballot pamphlet in the mailing packet.[62] Procedural violation, by any actor for any reason, would lead inevitably and uniformly to default. This sort of hard line fails for the same reason as its considerably softer counterpart above: it does not inspire confidence in the election's results. Given the number of regulations and the number of minor violations of those regulations that are inevitable in any large-scale election, a true zero-tolerance rule would exclude too many ballots of eligible electors to constitute a reliable representation of the community's aggregate preferences.

The prevailing method in practice is to muddle along under a third approach, which neither courts nor commentators have recognized as inadequate. This approach embraces the rough intuition that some errors should not be "charged" to the voter in counting her ballot.[63] The states have developed different names for this

61. *See supra* text accompanying notes 42-53.

62. *See* CAL. ELEC. CODE § 3023 (West 2012).

63. Legislatures could clearly designate those regulations that require invalidation for any error, or for a given category of defined errors, and those that do not. Perhaps none have done so with sufficient precision. But even if it were possible to rely on a legislature to designate the precise remedy for each and every deviation from the substantial regulatory structure

concept. When state legislatures create such a rule, they usually do so by statutory declarations that election regulations are to be construed liberally in favor of the voter.[64] When the judiciary imposes such a rule in the absence of legislative guidance, they usually frame the issue in terms of "substantial compliance" with the election regulation in question, distinguishing between major and minor errors.[65] Professor Rick Hasen has identified this approach as the "Democracy Canon" of construction, in which ambiguous statutes are to be construed in voter-friendly fashion.[66]

The central critique of such a decision rule is that there is little to ground the rule beyond the preferences of the decision maker. "Minor" errors are not self-defining, nor is "substantial" compliance with a regulation. The words give no guidance to determine whether failure to notarize an absentee ballot is a minor error or a major one. The same is true for other errors: mistakenly writing today's date rather than one's date of birth on a voter registration form, or transposing two digits of a twenty-digit driver's license number; casting a ballot at a pollsite table next to the one representing the precinct to which the voter is assigned; or missing the deadline to register—or to vote—by a day, or an hour, or a minute. All are errors. But no principle inherent in the concepts of "minor" error or "substantial" compliance indicates when the error in question crosses the line at which the error is to be regarded as particularly consequential.[67] As a result, judicial decisions to disregard error, or to refuse to disregard error, appear dangerously ad hoc.[68]

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required to run a reliable election, the legislature would still itself need a decision rule to determine which regulations should result in precluding the counting of a valid ballot, and which should not.

64. *See, e.g.*, Hasen, *Democracy Canon*, *supra* note 9, at 71, 79-80 & nn.49-52.

65. *See, e.g.*, *id.* at 85.

66. *See id.* at 71, 123. In addition to the jurisdictions that have turned to the Democracy Canon as a rule of statutory construction without legislative prompting, Professor Hasen notes at least twelve states that also seem to have built it into portions of their state code. *Id.* at 79-80 & nn.49-52.

67. *See* Edward B. Foley, *Appendix: The Devilish Details of the Coleman-Franken Dispute* 6 (2011) (unpublished manuscript), *available at* http://moritzlaw.osu.edu/electionlaw/docs/foley-eljapp.pdf ("'[S]ubstantial compliance,' at least without some rigorous subsidiary definition, is a vague and amorphous standard.").

68. *See, e.g.*, Miller v. Treadwell, 245 P.3d 867, 869-71, 877-78 (Alaska 2010) (excusing misspellings of a write-in candidate's name, but refusing to excuse a failure to mark a box next to the name of a write-in candidate); Dayhoff v. Weaver, 808 A.2d 1002, 1009, 1012 (Pa.

Moreover, the magnitude of an error is unlikely to be the best measure of whether that error is significant to the appropriate resolution of an election. A tiny slip of the finger during data entry, changing a birth year from 1987 to 1997, makes a twenty-five-year-old look fifteen—and ineligible to vote. A big mistake, such as leaving the date of birth entirely blank, yields a similar question about eligibility. In this context, size really does not matter.

Some jurisdictions and commentators have tacked on a principle for resolving errors based on the fault of the offender.[69] Errors that are the voter's "fault" become preclusive; those that are not are forgiven, when it is possible to do so and still log a vote in favor of an identified candidate. It should first be noted that such assessments, when they occur, are fairly rudimentary, with little analysis of comparative contribution to the error; after all, as with most wrongs, rarely is one actor the exclusive causal agent.[70] For example, if the instructions on a form are ambiguous, and a voter completes that form incorrectly, accurate allocation of fault for the resulting error will be difficult at best.

Even if it were possible to assign blame clearly and cleanly to either voter or nonvoter, as I have investigated elsewhere, "fault" is

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Commw. Ct. 2002) (excusing misspellings of a write-in candidate's name and attempts to write a candidate's name on the improper ballot line, but refusing to excuse a failure to mark a box next to the name of a write-in candidate); *see also* Adkins v. Huckabay, 755 So. 2d 206, 216-18 (La. 2000) (reviewing past Louisiana decisions that were ostensibly issued under a uniform "substantial compliance" standard but yielded wildly variant results).

69. *See, e.g.*, IND. CODE ANN. § 3-11.7-5-1.5 (LexisNexis 2012) (counting flawed ballots, if officials caused the errors); N.Y. ELEC. LAW § 16-106(1) (McKinney 2010) (counting flawed ballots of eligible voters, but only if officials caused the errors); *Franken Appeal*, 767 N.W.2d 453, 461-62 (Minn. 2009) ("Although we have used a substantial compliance standard to judge errors by election officials, we have held voters strictly to statutory requirements."); Master's Report—Conclusions of Law and Findings of Fact 8-9, Neil v. Howard (*In re* Election Contest, Dist. 48) (House of Representatives of the State of Tex. Feb. 12, 2011), *available at* http://www.tlc.state.tx.us/Neil_v_Howard/Master%27s%20Report.pdf (forgiving voter's failure to file form due to pollworker error); Edward B. Foley, *The Provisional Ballots of Unregistered Voters*, ELECTION LAW @ MORITZ (Apr. 5, 2005), http://moritzlaw.osu.edu/electionlaw/comments/2005/050405.php (proposing a postelection evaluation of registration errors based on fault); *cf.* Foley, *supra* note 67, at 6 (coining the term "constructive compliance" to distinguish flaws based on official error from those based on voter error).

70. Nor are these decisions always entirely consistent about the degree to which fault will render an error preclusive. *See, e.g.*, Womack v. Foster, 8 S.W.3d 854, 868-69, 871 (Ark. 2000) (excusing the omission of voter numbers on absentee ballots because of official mistake, but refusing to excuse the omission of reasons for voting absentee on applications because of official mistake).

at best an imperfect decision rule for the resolution of most of these errors.[71] The frame of fault implies that voters should be punished for errors for which they are primarily responsible, by refusing to count their ballots.[72] But for the many election errors reflecting mistake rather than malfeasance, such punishment seems out of place, given the precepts on which punishment is normally justified.

For example, precluding the counting of a ballot cast by an eligible elector has little retributive merit. An error in the completion of a form or in the marking of a ballot delivers little psychic damage to the body politic; there is correspondingly little retributive value in punishing voters for mistakes they did not intend to commit. Mistakes in complying with election regulation seem an unduly slight target for social vengeance.[73]

A more serious argument may be premised on use of "fault" as a means to avoid externalization of the cost of a wrong. Election officials presumably rely on voter compliance with election regulations in order to develop efficient protocols of their own. When a voter errs, officials' attempts to compensate for that error may incur administrative costs; punishing that error by refusing to count the associated ballot may be a means to avoid the extra cost. Indeed, it

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71. *See* Justin Levitt, *Fault and the Murkowski Voter: A Reply to Flanders*, 28 ALASKA L. REV. 39, 43-44 (2011).

72. *Id.* at 44.

73. This Article unabashedly adopts an inclusive vision of democracy, with a normative emphasis on increased participation by eligible electors, and procedural regulation deployed primarily to ensure that eligibility. *See, e.g.*, S. REP. NO. 103-6, at 3 (1993) ("It must be remembered that the purpose of our election process is not to test the fortitude and determination of the voter, but to discern the will of the majority.").

As Spencer Overton has chronicled, this is not the only possible vision; some believe that procedural regulations fulfill the independent normative function of screening the electorate for "merit" by weeding out electors who are unable to comply. *See* Spencer Overton, *A Place at the Table:* Bush v. Gore *Through the Lens of Race*, 29 FLA. ST. U. L. REV. 469, 476-79 & n.29 (2001). In this view, discounting the ballots of those who fail to comply with election regulations is not an expression of social vengeance, but a related expression of the lesser "worth" of those ballots. *See id.* at 479. *See generally* Roger Clegg, *Who Should Vote*?, 6 TEX. REV. L. & POL. 159, 163-64 (2001) (questioning the denigration of procedural rules more likely to disqualify "voters who are less informed and less conscientious about the voting process"); Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370 (1991) (chronicling the use of procedural requirements to promote voting by more educated and informed citizens and discourage voting by others).

may even be a sufficiently stark punishment to deter voter carelessness in general.

That said, the deterrent value of a "fault"-based approach to election error can be easily overstated. The morass of election rules breeds many opportunities for missteps. Before deciding to pay more attention to any specific regulation, a voter must be able to adequately assess her own capacity for error with respect to the procedure in question. It is far from clear that voters are that self-aware. Furthermore, in the event that an error does occur, the feedback mechanism in most jurisdictions is not sufficiently developed to communicate to the errant voter—or voters generally—when the mistake occurred. Many voters casting provisional or absentee ballots do not know whether those ballots are counted; those who are informed that their ballots have been rejected are rarely told the underlying cause with any specificity.[74] If voters do not understand the circumstances in which errors are likely to occur, it will be difficult to deter mistakes, no matter how stark the punishment.

Without the systemic impact of an effective deterrent, it is not clear that the use of "fault" as a premise for determining the consequence of error actually avoids substantial cost. Once an error has occurred, if that error is to be disregarded only if the voter is not primarily at fault, some procedure is needed to ascertain the proper allocation of blame. Such a fact-finding procedure will inevitably entail incremental cost.

For example, consider a photo-finish election in which hundreds or thousands of provisional ballots have been cast.[75] Somewhere along the way, errors led to these provisional ballots: perhaps a voter registered improperly, or perhaps an official improperly processed an accurate registration form; perhaps a voter arrived at the

74. For example, over half of the provisional ballots rejected in 2008 were reported as rejected because the voter was not validly registered within the state. *See* U.S. ELECTION ASSISTANCE COMM'N, 2008 ELECTION ADMINISTRATION AND VOTING SURVEY 51 (2009), *available at* http://bit.ly/NwMDiC. Assume that such a voter made what she thought was an attempt to register. Even if she comes to understand that her ballot was rejected, and even if she comes to understand that her ballot was rejected because of a registration problem, it is not clear whether she will understand *why* her attempt to register was not successful, with sufficient specificity to avoid similar problems in the future.

75. Provisional ballots, required by federal law in every state without Election Day registration, are ballots that officials must offer to a voter whenever a dispute concerning that voter's eligibility exists. 42 U.S.C. § 15482(a) (2006).

wrong precinct, or perhaps an official failed to locate the voter in the correct pollbook; perhaps a voter failed to respond adequately to a legitimate challenge of her qualifications, or perhaps her qualifications were improperly challenged. The source of the error is rarely immediately apparent. In order to determine which ballots may be counted in a fault-based regime, records and recollections will have to be reviewed in order to properly apportion fault. This review is not cost-free.[76] And even if impeccably conducted, it still leads to the discarding of a substantial number of ballots cast by voters who are actually eligible to vote, who submitted their materials in timely fashion, and who will not understand how to avoid the same problems—or new ones—in subsequent elections. This Article suggests that those resources might be better spent.

When election errors inevitably occur, rather than focusing on the magnitude of the error or the blameworthiness of the perpetrator, I suggest a different guidestar: materiality. In some respects, this is a simple, almost tautological, proposition: an election error should only matter if it makes a difference in achieving an election's primary purposes. Yet this is *not* the principle currently driving the resolution of most election errors. The discussion below represents the first extended discussion of materiality in the election context. As it shows, materiality is a principle better suited to resolving inevitable errors than the available alternatives. Indeed, given the opportunity to reevaluate materiality as an election progresses, the concept may have even more utility in the election context than in other legal arenas.

76. Indeed, such a review may be quite expensive. *See, e.g.*, Hunter v. Hamilton Cnty. Bd. of Elections, 850 F. Supp. 2d 795, 823-30, 833 (S.D. Ohio 2012) (describing the extended process of reviewing errors to attempt to allocate fault, including more than four hundred subpoenas, eight hundred questionnaires, and a three-week hearing, that finally resolved a juvenile court judicial race more than fourteen months after Election Day).

III. THE MATERIALITY PRINCIPLE

A. Materiality in Other Contexts

"Materiality" can be a protean concept. But in developing an operational understanding of materiality as applied to election errors, it is not necessary to start from scratch. The concept has been developed as an important principle in many areas, including the law of contract,[77] tortious[78] and criminal fraud,[79] securities transactions,[80] prosecutorial conduct,[81] legal ethics,[82] employment discrimination,[83] and civil procedure.[84] It is possible to distill from

77. Materiality has at least three applications in contract law. First, among merchants, the outcome of a "battle of the forms" depends on materiality: proposed alterations of terms in an acceptance to an offer will not be considered part of the generated contract if they "materially alter" the offer itself. U.C.C. § 2-207(2)(b) (2002). Second, a misrepresentation in the formation of a contract may render the contract voidable, but only if the misrepresentation is material. RESTATEMENT (SECOND) OF CONTRACTS § 162(2) (1981). Third, the materiality of a breach of contract determines remedies available to the party on the breach's receiving end: a material breach allows the offended party to suspend its own performance and seek rescission of the contract, whereas an immaterial breach allows only an action for damages without excusing the offended party's own performance of contract obligations. 23 RICHARD A. LORD, WILLISTON ON CONTRACTS § 63.3 (4th ed. 1990).

78. RESTATEMENT (SECOND) OF TORTS § 538(1) (1977) ("Reliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material.").

79. Federal criminal liability for fraud, and for many false statements under oath or to federal government officials, attaches only if the falsification regards a material fact. *See, e.g.*, 18 U.S.C. § 1621 (2006); Neder v. United States, 527 U.S. 1, 20-25 (1999); United States v. Gaudin, 515 U.S. 506, 509 (1995).

80. In securities law, several related regulations amount to a requirement that regulated entities accurately and publicly disclose any fact that is material. *See* 15 U.S.C. §§ 78m(j), (*l*), 78n(e), 7241(a) (2006); 17 C.F.R. §§ 240.10b-5, 240.14a-9, 243.100(a) (2011).

81. A prosecutor has a constitutional obligation to disclose to a defendant all evidence that is material to either guilt or punishment. *See* Cone v. Bell, 556 U.S. 449, 469 (2009); Brady v. Maryland, 373 U.S. 83, 87 (1963).

82. An attorney has a duty to report potential malpractice to her client, but only if the mistake in question is material. Benjamin P. Cooper, *The Lawyer's Duty to Inform His Client of His Own Malpractice*, 61 BAYLOR L. REV. 174, 195 (2009).

83. An employer's adverse action against an employee must be material in order to be actionable under Title VII of the Civil Rights Act of 1964. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 75-76 (2006) (Alito, J., concurring in the judgment) (recognizing that *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), established a materiality test, albeit using a different term).

84. A court may not grant summary judgment if there is a genuine dispute over a material fact. FED. R. CIV. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

examinations of materiality in these other contexts a few common principles—an exercise that I believe to be the first attempt of its kind. Together, these principles can provide guidance for our voting inquiry.

First, materiality is used as a gauge for the legal significance of an action or piece of information, often a mistake or misdeed. If the action or information is material, certain legal consequences follow; if not, the legal consequences are different. Materiality is thus a toggle switch rather than a spectrum: the question is not whether the item considered is more material or less material, but instead whether it has reached a threshold level of significance, at which point a categorical change in the legal nature of the action or information is triggered.

Second, materiality has a referent. An action or piece of information evaluated for materiality is material or immaterial *to* a particular decision, such as a decision to make a purchase,[85] perform a service,[86] or deliver a verdict.[87] As such, materiality cannot be evaluated in the abstract; that which is material for some decisions may be wholly immaterial for others. Courts and scholars agree that this renders the materiality threshold heavily context- and fact-dependent.[88]

Third, materiality has an object: a particular fact, a particular statement, a particular action, or a particular change. It is important to keep the discussion of materiality anchored to the particular act or item for which materiality is at issue. In the contractual context, for example, the obligations of a contract between mer-

85. *See, e.g.*, Basic, Inc. v. Levinson, 485 U.S. 224, 231-32, 234 (1988) (decision to purchase a regulated security); U.C.C. § 2-207(2)(b) (2002) (decision to purchase goods).

86. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 162(2) (1981) (decision to enter a contract for services).

87. *See, e.g.*, FED. R. CIV. P. 56(c) (decision to render a civil verdict); United States v. Bagley, 473 U.S. 667, 682 (1985) (Blackmun, J., joined by O'Connor, J.) (decision to render a criminal verdict).

88. *See Basic*, 485 U.S. at 236 ("Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive."); Weinstock v. United States, 231 F.2d 699, 702 (D.C. Cir. 1956) ("Materiality [in the false statement context] must be judged by the facts and circumstances in the particular case."); SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150, 45,152 (Aug. 19, 1999) ("[M]agnitude by itself, without regard to the nature of the item and the circumstances in which the judgment has to be made, will not generally be a sufficient basis for a materiality judgment [regarding accounting misstatements].").

chants will turn upon whether there has been a material alteration to an offer: that is, whether an alteration that has not expressly been accepted creates a legally recognized change to the offer as a whole.[89] This requires *two* analyses: whether the term being altered is a material term, and whether the nature of the alteration to that term is material.[90] Neither an insignificant change to an otherwise material term, nor a significant change to an immaterial term, will materially alter the offer as a whole.

Fourth, that which is material has probative weight and consequence for the decision in question, beyond mere relevance. Exactly how much consequence the material element must have is a particularly thorny question, and there is little transsubstantive scholarship examining the nature of the significance that an action or piece of information must have before it becomes material. Yet a review of the various substantive silos above indicates a rough consensus. That which is material is not merely pertinent to a decision, but has the realistic potential to influence or affect—that is, change[91]—the decision at issue.[92] It is not necessary to establish "but for" causation to establish materiality; no legal doctrine requires proof that a reasonable decision maker *would* select a different course absent the action or information to be evaluated for materiality.[93] It is necessary, however, to find at least a substantial question as to whether the reasonable decision maker would do so.[94]

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89. *See* U.C.C. § 2-207.

90. *See id.*

91. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 899 (4th ed. 2000) (defining "influence," inter alia, as both "sway" and "modify"); *id.* at 28 (defining "affect," inter alia, as "[t]o ... effect a change in").

92. *See* Kungys v. United States, 485 U.S. 759, 771 (1988) (defining a fact as material if it is "predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision"). Courts have utilized the *Kungys* standard in a variety of contexts referring to materiality. *See, e.g.*, Neder v. United States, 527 U.S. 1, 16 (1999) (criminally false statements generally); Jordan v. Fed. Express Corp., 116 F.3d 1005, 1015-16 (3d Cir. 1997) (ERISA disclosure); Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 585 F. Supp. 2d 1233, 1268 (D. Or. 2008) (designation as a terrorist organization).

93. *See, e.g.*, *Kungys*, 485 U.S. at 771 (rejecting a test of materiality examining whether a decision would have been different absent a misrepresentation); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448-49 (1976) (same).

94. There is a substantial debate, beyond the scope of this Article, about the extent to which a determination of materiality should account for a particular decision maker's individual characteristics in allocating responsibility for alleged misconduct between private individuals. *See, e.g.*, Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 78-79 (2006)

Thus, a disputed fact is material for purposes of summary judgment only if the fact in question "might affect the outcome of the suit."[95] In securities law, information is material, and therefore subject to accurate and public disclosure, "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote," or that a "reasonable investor" would consider it important in making an investment decision[96]—that is, that the information would "have a significant propensity to affect the voting [or investment] process."[97] A false statement to a government official is material if it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it [is] addressed."[98] Evidence relating to a defendant's guilt or punishment is constitutionally material when "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[99] In each of these areas, and others, materiality distinguishes actions or information that reasonably call a given decision into substantial question from those that do not.

Finally, and central to this Article, there have been a few fleeting discussions acknowledging that the materiality of an action or piece

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(Alito, J., concurring in the judgment). In the voting context, the relevant decision maker is an election official. The law tends to avoid ascribing legal significance to individual variations among state actors when assessing the reasonableness of government decisions.

95. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

96. *TSC Indus.*, 426 U.S. at 449; *see also* Basic Inc. v. Levinson, 485 U.S. 224, 231-32, 234 (1988).

97. *TSC Indus.*, 426 U.S. at 449 (emphasis omitted) (quoting Mills v. Electric Auto-Lite Co., 396 U.S. 375, 384 (1970)); *see also Basic*, 485 U.S. at 231-32, 234; SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150, 45,151 (Aug. 19, 1999) ("The omission or misstatement of an item in a financial report is material if, in the light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item.").

98. United States v. Gaudin, 515 U.S. 506, 509 (1995) (quoting *Kungys*, 485 U.S. at 770) (internal quotation marks omitted). More generally, a fraudulent misrepresentation "is material if a reasonable man would attach importance to [the misrepresented fact's] existence or nonexistence in determining his choice of action in the transaction in question." RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (1977). In the formation of a contract, the misrepresentation of a fact is considered material "if it would be likely to induce a reasonable person to manifest his assent"—that is, if it is likely to cause a person to enter a contract when she might not otherwise do so. RESTATEMENT (SECOND) OF CONTRACTS § 162(2) (1981).

99. Cone v. Bell, 556 U.S. 449, 469-70 (2009) (citing United States v. Bagley, 473 U.S. 667, 682 (1985) (Blackmun, J., joined by O'Connor, J.)).

of information can change over time. In these other disciplines, actions or pieces of information that are initially immaterial may become material at some later point, based on their aggregate significance or a changed context. For example, in evaluating legal malpractice, a mistake may appear at first to be immaterial, with negligible impact on the client; if contextual factors change, however, the consequences may develop such that the initial error later becomes material.[100] Similarly, a financial misstatement that is immaterial on its own may become material when aggregated with other misstatements.[101] In the voting context, as described more fully in Part III.B.3, the significance of this facet of materiality operates in the opposite direction: errors that once were material may become immaterial at a later point.

B. The Meaning of Materiality in the Election Context

The principles above are helpful in distilling a sophisticated understanding of materiality. This Section applies the above taxonomy to election-related errors.

The translation of the first principle above is straightforward: materiality becomes a toggle switch for determining when an error should prevent the counting of an otherwise valid vote. If an error is material, the associated ballot should not be counted. If, instead, an error is immaterial, it should not cause disenfranchisement.

The second principle above is also relatively straightforward to apply in the election arena. Facts or objects are material *to* particular decisions. In the election context, as discussed above, the primary purpose of the enterprise is to discern the political preference

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100. Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 791 (2008).

101. *See* SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150, 45,153 (Aug. 19, 1999) ("Matters ... could potentially cause future financial statements to be materially misstated, even though the auditor has concluded that the adjustments are not material to the current financial statements. This may be particularly the case where immaterial misstatements recur in several years and the cumulative effect becomes material in the current year." (citation omitted)). Or, conversely, inside information about a proposal never consummated may be material when the proposal is made but may lose its impact over time. *See* Joan MacLeod Heminway, *Materiality Guidance in the Context of Insider Trading: A Call for Action*, 52 AM. U. L. REV. 1131, 1206-08 (2003).

of eligible members of the political community.[102] The materiality inquiry takes its lead from the same mandate, with two potential referents. First, error generally should be evaluated to determine whether it is material to ensuring that a ballot is cast by an elector who is eligible; second, error on a ballot itself should be evaluated to determine whether it is material to determining the preference of the elector.

The third principle counsels attention to the particular object of the materiality inquiry. The superficial answer, evident from the discussion above, is that the materiality of an error should be the touchstone. But as in contract law, this is usefully separated into two analyses: whether the underlying regulatory provision that has been violated is material, and whether the error or omission itself is material.[103] Neither an insignificant error in an otherwise material regulation nor a significant error in an immaterial regulation should become a material error in the determination of disenfranchisement.

1. Materiality of the Underlying Regulatory Provision

In identifying whether an error is material to determining a would-be voter's eligibility or political preference, the first inquiry is therefore to assess whether the underlying regulatory request or command is material to determining the voter's eligibility or electoral preference. If the underlying regulation is immaterial, then a flaw in that information must also be immaterial, no matter how substantial the flaw.

In some cases, this inquiry is trivial. For example, if the underlying regulation is irrelevant to determining the voter's qualifications, it cannot be material in that inquiry. Consider a voter who refuses to provide her race on a voter registration form.[104] The voter's race —the underlying information sought—is irrelevant to her qualifications to vote. A fortiori, the underlying information must be immaterial to an eligibility inquiry. And a fortiori, any perceived

102. *Supra* text accompanying notes 55-56.

103. *See supra* text accompanying note 90.

104. *See, e.g.*, Op. Ga. Attorney Gen. No. 95-35 (Aug. 4, 1995), *available at* http://law.ga.gov/opinion/95-35.

flaw in the voter's answer to that immaterial question must itself be immaterial.

In other circumstances, the underlying information will be relevant to a final decision but not necessarily material. A piece of information is relevant if it has even an iota of use in determining a voter's qualifications or deciphering the voter's intended candidate.[105] A voter's telephone number, for example, may be relevant to the determination of her eligibility because it allows an election official to contact the voter directly to ask probative questions; moreover, the number's area code and exchange may increase or decrease the chance that a voter lives in the appropriate district.

However, though a voter's telephone number may be relevant to determining her qualifications, it is not, on its own, material to that determination. As discussed in the fourth principle above, materiality demands more significance.[106] That which is material influences a reasonable decision maker's decision. It need not alone be outcome determinative, but it must have at least enough probative weight to create substantial doubt or uncertainty about the outcome. If the other information on a registration form indicated eligibility, a flaw in a telephone number would not cause a reasonable registrar to substantially question whether the voter in question was eligible to vote.

2. Materiality of the Error Itself

Thus, in applying the materiality principle developed in this Article, decision makers faced with flawed performance in the execution of an election requirement must first determine whether the underlying regulatory objective is material. At this point, however, the analysis is at most halfway complete. There remains the materiality of the error itself. That is, one must determine whether the error in question raises a substantial question for a reasonable decision maker about the voter's eligibility or ballot choice.

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105. *See, e.g.*, FED. R. EVID. 401 ("Evidence is relevant if it has any tendency to make a [consequential] fact more or less probable than it would be without the evidence.").

106. *See supra* text accompanying notes 91-94.

Several types of errors may be presumptively immaterial. For example, an error may exist in the *form* of the information conveyed, even when the substance of the information conveyed is clear and unambiguous. Consider a voter registration form requiring the voter's date of birth, XX/XX/XXXX. The regulation exists to extract the voter's age, which is unquestionably material: a voter's age is a substantive element of qualification to vote in every state in the country. Yet the materiality of the underlying information does not automatically render material any flaw in the expression of that information. Writing "November" instead of "11" as the month of birth, even when "11" is clearly called for, is not an error that is material to determining whether the voter is of lawful voting age. As such, it should not serve as an error that enables disenfranchisement.

More controversially, and more contrary to current practice, the same principle applies if a voter marks a candidate's circle on a ballot with an unambiguous check mark when the regulation calls for the voter to fill in the circle, or if a voter both fills in a candidate's circle and unlawfully writes the same candidate's name in the space for a write-in choice. There are certainly circumstances when the improper form of information may in fact create doubt about the substance it intends to convey; for example, if instructions require checking an adjacent box to vote for a candidate, marking an "X" over Candidate Smith's name may not indicate whether the voter intended to vote for Smith or convey her displeasure with Smith. That error would be material. But when the information's form alone is at error, and that flaw does not create substantial doubt or uncertainty about the qualifications of the affected voter or her intended preference, the flaw is immaterial.

An error may also be immaterial if information material to a voter's qualifications or preference does not appear in a particular *designated location*, even though the information is unambiguously provided elsewhere to the same regulatory actor. For example, a voter who presents the last four digits of her Social Security number in the voter registration form's box designated for her birthdate and presents her birthdate in the Social Security number box has erred —twice. But as long as the information conveyed is unambiguous,

neither error casts her eligibility in doubt. Both should therefore be regarded as immaterial.

These are not the only types of immaterial errors. Consider the electors whom Waller County refused to register in 2008 because they failed to provide ZIP codes on their registration forms.[107] As long as the voter provides a street address and city indicating that she lives in a particular location, the lack of a ZIP code does not cast into doubt her qualifications to vote for the candidates running for office in her precinct. No reasonable decision maker would believe that error alone to be material to eligibility.

The ZIP code example above reflects that in election law, as elsewhere, materiality must be evaluated in the context of other information available to the decision maker.[108] Indeed, this principle is not limited to the information on a given form. I suggest that the materiality of a flaw can and should rely on other reliable contextual information readily available to election officials. Such an approach contributes to ensuring that voting regulations focus on substantive qualifications and actual voter intent, rather than procedural hiccups. Consider a seventy-five-year-old elector, physically appearing before an official, with no doubt about her identity. If she mistakenly offers the current date instead of her birthday on a voter registration form, her form will contain a substantial error. The unambiguous visual evidence, however, renders that error immaterial in assessing her qualifications. Reliable evidence that a flaw is immaterial can come from sources other than the immediate vicinity of the flaw itself.

The question of the extent to which context may be considered, of course, is different from the question of a duty to seek that information out. Recognizing that information available to election officials beyond the four corners of a form may render a flaw on that form immaterial does not itself imply the existence of an affirmative duty to seek or elicit the curative information in question. Such a duty might well involve substantial incremental cost and is not necessary to the argument advanced here. My argument on the contextual nature of materiality demands only that when curative information has been presented, an official may not ignore the information that

107. *See supra* notes 31-32 and accompanying text.

108. *See supra* text accompanying notes 85-88.

resolves a pending question simply by asserting that her evaluation of materiality is confined to the source of the error itself.

3. The Dynamic Reassessment of Materiality

That realization, in turn, leads to the insight at the heart of this Article: a determination about the materiality of an election error can and should rely on information that becomes available to government actors at different points in time. Thus far, this Article has addressed only errors for which materiality is a known quantity at the time the error is committed. Even with this limitation of the principle, materiality would still be a superior basis for resolving election errors than the available alternatives—more votes would be counted when the eligibility of the elector and her intended candidates were not in doubt, with limited incremental cost for the decision maker. But the materiality principle begins to bear far more serious fruit with the insight that it is dynamic.

The evaluation of the materiality of an election error—at least with respect to a voter's qualifications—should not be confined to the initial appearance of the error in question. At the moment the error is first evaluated, it is material if it creates real and reasonable doubt as to whether the individual in question is qualified. But that which is immaterial at time t—say, a voter's omission of his apartment number on his registration form, which does not create any doubt about his residency in a particular precinct—may become material at time $t + 1$, if there later arises reliable evidence calling into question whether he lives in his apartment building at all.[109] Conversely, that which is material at time t—say, a voter's failure to affirm his citizenship on his registration form—may become immaterial at time $t + 1$ if it later becomes clear that the voter is a

109. There are few practical applications of the progression from immaterial to material mistake in the election context. At virtually any point in an election cycle before a regular ballot is cast or an absentee or provisional ballot is separated from its ballot envelope, if a substantial question concerning an individual's eligibility arises, election officials (and often private actors) have multiple procedural means to challenge that voter's status and prevent the vote from counting if the voter is in fact ineligible. There will usually be no incremental benefit, at that point, in relying on the materiality principle to resurrect a past error that has become material as the reason to block the vote, because the information giving rise to the change in materiality will itself suffice as independent cause.

citizen. At the time when there is no longer a doubt about the individual's qualifications, the earlier error becomes immaterial. In this Article, I suggest that the original error should therefore not provide cause to deprive the individual newly known to be eligible of her valid vote.

Some applications of this concept, though not identified as such, are readily observable in current practice. The easiest such example is an election official's discovery of a mistake. If a data entry clerk hits an errant key while typing a registrant's personal information into a computerized registration system, that keystroke becomes an error in the individual's record. That error may lead to legitimate questions about, for instance, the individual's true identity. The instant that the error is discovered as such, however, it becomes instantly immaterial, because the individual's qualifications are no longer in doubt. The same is true if the error was caused by the applicant instead of an election official; once the error is discovered as an error, and reliable and accurate information is provided instead, the original flaw is no longer material to determining the voter's qualifications.

The example above depends on the direct correction of flawed information. Errors may also be rendered immaterial by new information resolving eligibility questions raised by an original flaw.

Such an example can also be found in current practice, though it is a bit more difficult to spot. The Help America Vote Act of 2002 (HAVA) was a wide-ranging piece of federal legislation.[110] One of its provisions requires voters with a current and valid driver's license to provide that license number on their voter registration form, and requires other voters to provide the last four digits of their Social Security number if they have one.[111] That number, and the voter's name and date of birth, are compared to motor vehicle or Social Security records.[112] For certain voters—those who are registering by mail and have not yet voted in the state—the comparison becomes part of an identity verification requirement: either the information must match, or the voter must show one of several enumerated

110. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified in 42 U.S.C. §§ 15301-15545 (2006)).

111. 42 U.S.C. § 15483(a)(5)(A)(i) (2006).

112. *Id.* § 15483(a)(5)(B).

forms of documentary identification, before the voter may vote a regular ballot.[113]

In this Article's parlance, the HAVA provision establishes a regime to test voter qualifications in a manner acknowledging that the materiality of a piece of information may vary over time. HAVA requires states to test the identity of new voters registering by mail.[114] It establishes one means to do so by demanding that states ask for information—the driver's license number or Social Security digits—used to probe such applicants' identities. If the information on the registration form matches information held in the records of government databases, the applicant's identity is confirmed.[115] However, if an error on the registration form or in a corresponding government database record causes a mismatch, the individual's identity could be called into question.

At that moment, time *t*, with the error in the record undiscovered, the mismatch is certainly relevant, and perhaps material,[116] to

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113. *Id.* § 15483(b). For a general explanation of the matching regime, see Nathan Cemenska, *HAVA's Matching/ID Requirement: A Meaningless Tale Told By ... Congress*, 12 RICH. J.L. & PUB. INT. 27 (2008).

114. 42 U.S.C. § 15483(b).

115. *Id.* § 15483(b)(3)(B).

116. Evidence from challenges to state laws implementing variants of this HAVA provision has revealed that approximately 20-30 percent of registration forms initially fail to match corresponding records in motor vehicle or Social Security systems, largely because of typographical errors and other inconsequential inconsistencies between databases, although the error rate can be reduced with sustained and focused attention by officials to the issue. Brief of Appellees at 12, Fla. State Conference of the NAACP v. Browning (*Browning I*), 522 F.3d 1153 (11th Cir. 2008) (No. 07-15932); *see also* Fla. State Conference of NAACP v. Browning (*Browning II*), 569 F. Supp. 2d 1237, 1243-45 (N.D. Fla. 2008); Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 4-5, *Browning II*, 569 F. Supp. 2d 1237 (No. 4:07-cv-402) (Doc. 135); SARAH WHITT, WIS. GOV'T ACCOUNTABILITY BD., A STATISTICAL ANALYSIS OF HAVA CHECKS IN WISCONSIN at ii, 4 (Jan. 15, 2009), http://elections.state.wi.us/docview.asp?docid=15857&locid=47.

It is intriguing to contemplate the impact of this known error rate on the materiality of a mismatch to a voter's qualifications. Existing quantitative evidence has shown that most attempts to match succeed. *See* Ian Urbina, *States' Actions to Block Voters Appear Illegal*, N.Y. TIMES (Oct. 8, 2008), tbl., http://graphics8.nytimes.com/packages/pdf/national/09voting_states.pdf. Existing quantitative evidence has also shown that a substantial number of attempts to match fail because of inconsequential errors like typos. *See, e.g.*, Brief of Appellees, *supra*, at 10-11, 42. There is no rigorous quantitative evidence to indicate how many of the failed match attempts are due to inconsequential errors and how many actually indicate ineligibility, though some election officials have acknowledged that "most" failed matches are due to typographical errors or errors in the matching process. *See* Fourth Declaration of Glenn T. Burhans, Jr., in Support of Plaintiffs' Supplemental Memorandum

determining the voter's qualifications. Yet HAVA does not contemplate rejecting outright registration forms with a mismatch. Instead, it allows mismatched voters to show a piece of documentary identification, at time $t + 1$, up to and including at the polls.[117] Once the voter provides her documentary identification, her identity is no longer in doubt. And because the original error in the mismatch, whatever its source, has become immaterial to determining her qualifications, it no longer interferes with the vote: the voter may vote a regular ballot, like all other eligible and registered electors.

Although both of the examples above are drawn from existing practice, the dynamic nature of the materiality decision has never before been articulated as such in the election context. Indeed, present standard operating procedure is to assess election errors only when they occur, ignoring the potential to reassess with more complete information. For example, once an error has occurred in voter registration, or in the absentee balloting process, that error in practice normally proves determinative for the entire election cycle.

This is a lost opportunity. Indeed, the case for the dynamic assessment of materiality is substantially stronger in the election context than in most other legal arenas. In these other environments, the materiality inquiry usually involves a retroactive counterfactual: a hypothetical ex post look at whether a decision maker might have acted differently had a prior action or piece of information been different.[118] The materiality of misinformation in, or information omitted from, a securities disclosure, for example, is

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of Law in Support of Plaintiffs' Motion for Preliminary Injunction, at Exhibit 15, *Browning II*, 569 F. Supp. 2d 1237 (No. 4:07-cv-402) (Doc. 147).

Even if "most" of the failed matches are caused by errors rather than ineligible voters, a mismatch is certainly *relevant* to the determination of eligibility. It is less clear, however, given the context of the known error rate, whether a mismatch should be material—that is, whether a mismatch should cause a reasonable decision maker to substantially question a voter's qualifications. There is no ready guide, at present, for determining when certain categories of information are sufficiently unreliable that they should not have the realistic potential to influence a reasonable decision maker.

117. 42 U.S.C. § 15483(b)(2)(A)(i).

118. In the most common legal counterfactual inquiry, the investigation into causation, the question usually concerns "but for" cause: for example, whether a decision maker *would* have acted differently with different stimuli. *See* Robert N. Strassfeld, *If ... : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 345-46 (1992). The materiality counterfactual is a milder version of the same: whether a decision maker *might* have acted differently with different stimuli.

often gauged after financial damage has been done; the question is whether different disclosure might have caused an investor or potential investor to act differently.[119] Similarly, the materiality of other wrongful disclosures or failures to disclose—false statements, prosecutorial evidence, tortious misrepresentations—usually depends on a retroactive counterfactual.[120] Because the relevant decision point has already passed, the utility in allowing materiality to change over time in these circumstances is confined to gauging the magnitude of remedial and/or retributive liability.[121]

This is not so in the election context, in which an initial evaluation of materiality usually occurs before the ultimate decision point. The decision impacted by the materiality of an error on most required election records is a decision about the eligibility of a would-be voter. The ultimate decision on that issue can usually be either deferred or repeatedly reevaluated, until the vote is certified.

Consider an error on a voter registration form. When the form is submitted, the election official must assess whether that error is material: given the form as submitted, he must ask whether a reasonable decision maker would have a significant question about the would-be voter's substantive qualifications. For some errors, the answer will be yes; for others, it will be no.

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119. *See supra* notes 96-97 and accompanying text.

120. *See supra* notes 77-79, 81 and accompanying text.

121. There may still be substantial utility in allowing materiality to change over time in these contexts, within the liability inquiry. Consider the same securities disclosure discussed in the text. An omitted disclosure may be wholly immaterial at time t, when it is first excluded from a financial report. It may then become material at time $t + 1$, when external circumstances change so as to render the omission likely to impact an investment decision. The decision to invest or not to invest may occur at time $t + 2$. Thereafter, once it is clear that damage has occurred, a fact-finder must evaluate materiality retroactively, looking back to $t + 2$ to determine whether the omitted disclosure was material then. It will still be useful, in this context, to recognize that the materiality of the omitted disclosure may change, from time t to time $t + 2$.

The observation that materiality may change over time does not lead inexorably to one normative conclusion about whether the law should recognize a change in materiality in these other contexts. In the example of securities disclosures, for instance, the decision to fix the materiality of a misrepresentation at the time that it is made, or the decision to allow the materiality of the misrepresentation to change over time, will tend to shift the costs of the misrepresentation onto the reporting entity or onto the consumer, depending on whether misrepresentations are more likely to move from material to immaterial, or vice versa. It is beyond the scope of this Article to present either an empirical or normative assessment of these costs.

In an election cycle, these need not be the final answers. There will be multiple opportunities to reassess the materiality of that error in context, as other information comes to officials' attention. Perhaps the voter later contacts a registrar with additional curative information. Perhaps the error is uncorrected until Election Day, when the voter is able to submit a segregated provisional ballot with additional curative information. Or perhaps she is summoned before a court overseeing a postelection proceeding. All of these represent opportunities to collect additional information and to reassess the materiality of the registration form's original error. Only the fact that the materiality of the error may change over time gives full effect to these multiple decision points. The dynamic reassessment of materiality converts the inquiry from a focus on the accuracy of the election official's initial assessment and consequent assignment of fault, to a focus on the substantive qualifications of the individual in question. As discussed below, this latter focus better serves the values of the voting process as a whole.

C. Implications of the Materiality Principle

Recognizing the dynamic nature of materiality, particularly for questions involving a voter's eligibility, would yield tangible consequences for the election system. In this Section, I first give more robust shape to the materiality principle by reviewing some of the practical adjustments necessary to give it life in the election context. I then explain the benefits and potential concerns of evaluating —and reevaluating over time—election errors through the lens of materiality.

1. Accommodating a Dynamic Assessment of Materiality

In practice, several aspects of the administrative process would change if election errors were evaluated under a dynamic materiality principle. In pre-election and Election Day administration, officials would favor procedures allowing them to reassess the materiality of an error as available information changes. Such procedures would preserve the flexibility of the decision process, avoiding the conversion of early assessments into premature "final answers."

Provisional ballots, for example, are an existing expression of this principle that account fairly well for a limited set of errors. Consider a voter at the polls whom the volunteer pollworker cannot readily find in the precinct's register of voters, often known as a pollbook. Federal law provides that she should be offered a provisional ballot.[122] On election day, her provisional ballot is collected and segregated, and later evaluated to determine whether she was actually on the rolls when the ballot was cast.

If at the moment a voter presents herself to vote her name cannot be found in the pollbook, all that is certain is that an error occurred. At that moment, the error is material to determining whether the voter is eligible, because a reasonable decision maker would find a substantial question about the voter's eligibility: she may not be a resident of the jurisdiction, she may never have attempted to register, or the registration may have been legitimately canceled. Yet her valid registration may later be found, improperly purged or entered with a typographical error making it difficult to find in the pollbook. Allowing the voter to vote a provisional ballot at the polls provides an opportunity to effectuate a valid vote if an error in the precinct book appears material at the time but is later found to be immaterial.

The existing provisional ballot regime in most states, however, is insufficient to realize the potential of a dynamic assessment of materiality in other circumstances. At present, an error in the registration process is often frozen in place at the end of the registration period. If the error is uncorrected at the end of the registration period, the would-be voter's application is rejected, leaving her unregistered. This freeze has consequences down the road. If the voter ventures to the polls, she will not be listed in the pollbook; she may be given a provisional ballot, but state law rarely allows such ballots to be counted, no matter what evidence of eligibility the voter provides. Many states deem invalid a provisional ballot cast by a voter whose earlier attempt to register has been rejected.[123]

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122. 42 U.S.C. § 15482.

123. *See, e.g.*, ARIZ. REV. STAT. § 16-584(E) (LexisNexis 2012); ARK. CODE ANN. § 7-5-308(d)(2) (West 2011); COLO. REV. STAT. § 1-8.5-106 (2011); FLA. STAT. § 101.048(2)(b)(2) (2011); GA. CODE ANN. § 21-2-419(c)(3) (2011); 10 ILL. COMP. STAT. ANN. 5/18A-15(b)(3)

A different approach to errors in the registration process would better permit a dynamic assessment of materiality, in which initial errors may be resolved later. Some states perform data entry on registration forms despite potential flaws and preserve those records for future revision, often in some sort of "provisional" or "pending" status.[124] This practice permits the reevaluation of a registrant's eligibility in the event that material flaws become immaterial at a later point.

In such a system, errors can be corrected based on new information, whenever that information arrives. Consider our elector who substitutes the current date for her birthdate on a registration form.[125] Her proper birthdate may become clear before the election, on Election Day, or in some sort of postelection proceeding. Preserving the provisional status of the registration allows the earlier error to be recognized as inconsequential whenever it becomes immaterial in determining her eligibility.

In this context, it is important to distinguish the voter's legal status under the materiality principle from administrative procedures designed to facilitate the smooth conduct of the election. Just as the obligation to accept corrective information when it is presented does not imply an obligation for officials to seek that information out,[126] so too the obligation to accept corrective information does not imply an obligation to immediately reflect that new status in every pre-election procedure.

For example, voter registration is not only a means to test eligibility but also a means to facilitate planning for Election Day. Many states will use the rolls as they exist at the registration deadline to print pollbooks of voters whose eligibility is unquestioned. If a voter presents information rendering a registration error immaterial, but does so during a period that would interfere with the printing of the pollbooks, there is no need driven by the

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(LexisNexis 2012); IND. CODE ANN. § 3-11.7-5-3 (LexisNexis 2012); LA. REV. STAT. ANN. § 18:566.2(A) (2012); MD. CODE ANN., ELEC. LAW § 11-303(d)(4)(i) (LexisNexis 2012); MICH. COMP. LAWS § 168.813(1) (2011); MO. REV. STAT. § 115.430(5)(1) (2011); OHIO REV. CODE ANN. § 3505.183(B)(1) (LexisNexis 2012).

124. *See, e.g.*, MONT. CODE ANN. § 13-2-110(5)(b) (2011); WASH. REV. CODE § 29A.08.107 (LexisNexis 2012).

125. *See supra* paragraph accompanying note 108.

126. *See supra* paragraph preceding Part III.B.3.

materiality principle to reflect her updated status on the pollbooks themselves. The important thing is that the change in the materiality of her registration error makes it possible for her to cast a ballot, albeit a provisional ballot, that is legally valid and will be recognized as such by the end of the election cycle.

The absentee ballot system presents another opportunity for application of the dynamic nature of materiality. Preserving absentee ballot materials for a limited period after Election Day would allow jurisdictions to recognize changes in the materiality of errors over time. If a jurisdiction preserves even ballot envelopes with flaws that cast doubt on the voter's qualifications, and information rendering the flaws immaterial comes to light in a postelection process, the absentee ballots within could be counted.

Absentee ballot applications present a more difficult problem. While federal law requires that provisional ballots be provided to every voter who arrives at the polls and claims to be eligible and registered,[127] absentee ballots are not usually delivered in response to flawed applications. That is, in most circumstances, a flawed application will end the absentee process, with no opportunity to reflect the elector's substantive preferences if the error is later overcome.[128] It should be possible, however, for jurisdictions to avoid prematurely closing off the absentee process at the application stage, if they wish to avoid disqualifying voters on the basis of flaws that might later become immaterial. In the event of an absentee ballot application with a flaw sufficient to call the voter's qualifications into question, the equivalent of a provisional absentee ballot might still be sent to the applicant to preserve that potential voter's preference. The return envelopes of such absentee ballots could be clearly labeled and segregated when they arrive. They would remain segregated until the original flaw is resolved or explained (and the ballot is rendered valid), or the vote becomes final (with the ballot still invalid), whichever comes first. Such a procedure would preserve the ability to resolve uncertainties about eligibility until the last possible decision point in the election.

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127. 42 U.S.C. § 15482(a).

128. *See, e.g.*, N.M. STAT. ANN. § 3-9-4(E), (F) (West 2012).

2. Counting Votes Pursuant to the Materiality Principle

The changes above would preserve administrative flexibility to evaluate and reevaluate the materiality of errors throughout the election cycle. When errors are revealed to be immaterial, I argue that the corresponding ballots should be counted.

Using the materiality of errors as a standard for counting ballots —even without a dynamic reassessment of that materiality—would have significant consequences. For example, in the event of an error on the ballot's face, many jurisdictions now usually determine whether that error is "technical" or "substantial."[129] Materiality regularizes the inquiry. If the error renders the voter's choice ambiguous, the error would be material and the ballot invalid; if it does not, the error would be immaterial and the ballot countable. Similarly, an error on a prerequisite form, such as a registration form, need not jeopardize the vote's validity if that error is not material in determining the voter's eligibility to vote for the election in question. The same would follow for a prerequisite procedure, like the casting of a provisional ballot in the proper precinct. In each case, by definition, the only votes to be counted are those for which no reasonable decision maker would have a substantial question about either the voter's eligibility or the voter's ballot preference.

Allowing for the dynamic reassessment of an error's materiality would have greater consequences still. In assessing the validity of a provisional ballot, officials now normally compare the material accompanying the provisional ballot to registration records.[130] They

129. *See, e.g.*, COLO. REV. STAT. § 1-1-103(3) (2012) ("Substantial compliance with the provisions or intent of this code shall be all that is required for the proper conduct of an election to which this code applies."); KAN. STAT. ANN. § 25-3002(b)(1) (2012) (declaring that no ballot shall be invalidated by any "technical" error); MO. REV. STAT. § 115.453(3) (2012) ("The judges shall count votes marked substantially in accordance with [these rules] when the intent of the voter seems clear."); NEV. REV. STAT. ANN. § 293.127(1)(c) (West 2011) (requiring only substantial compliance with election regulations in the event of an outcome-determinative dispute); TEX. ELEC. CODE ANN. § 65.009(a) (West 2011) ("Failure to mark a ballot in strict conformity with this code does not invalidate the ballot."); UTAH CODE ANN. § 20A-4-105(6)(b) (West 2012) ("The counters may not invalidate a ballot because of mechanical and technical defects in voting or failure on the part of the voter to follow strictly the rules for balloting."); W. VA. CODE ANN. § 3-6-5(g) (West 2012) ("Except as otherwise specifically provided in this chapter, no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice.").

130. *See* 42 U.S.C. § 15482(a)(4).

discern whether the voter in question was validly registered; if there is a flaw in the registration, the officials may have to assess the magnitude of the flaw or the party at fault for the flaw.[131] Processing an absentee ballot adds the extra step of assessing whether the voter in question submitted a valid application, and is properly identified as the applicant, by the relevant deadline; there too, in the event of a flaw in the absentee procedures, officials may have to assess the magnitude of the flaw or the party at fault for the flaw.[132] A dynamic conception of materiality would, without adding to the quantum of investigation, shift the focus of the relevant inquiries: in the event of a flaw, officials would assess whether the other information newly available renders that flaw immaterial. If a reasonable decision maker would no longer question the voter's eligibility or ballot preference based on the original flaw, the vote should be valid.

As above, counting votes pursuant to the materiality principle need not involve substantial additional administrative burden. The materiality principle does not demand incremental procedures to seek information bearing on the validity of a vote; it merely changes

131. *See, e.g.*, COLO. REV. STAT. § 1-1-103(3) (2012) ("Substantial compliance with the provisions or intent of this code shall be all that is required for the proper conduct of an election to which this code applies."); NEV. REV. STAT. ANN. § 293.127(1)(c) (West 2011) (requiring only substantial compliance with election regulations in the event of an outcome-determinative dispute); Lanier v. Revell, 605 S.W.2d 821, 822-23 (Tenn. 1980) (distinguishing between "major" and "minor" errors in the registration process); Emery v. Robertson Cnty. Election Comm'n, 586 S.W.2d 103, 107 (Tenn. 1979) (overlooking errors in registration materials based on an official's mistake); Alvarez v. Espinoza, 844 S.W.2d 238, 243 (Tex. Ct. App. 1992) (per curiam) (overlooking errors in registration procedures based on an official's mistake).

132. *See, e.g.*, CAL. ELEC. CODE § 3009(c) (West 2012) (allowing an absentee ballot to count "[i]f the voter substantially complies" with official directions); COLO. REV. STAT. § 1-1-103(3) (2011) ("Substantial compliance with the provisions or intent of this code shall be all that is required for the proper conduct of an election to which this code applies."); KY. REV. STAT. ANN. § 117.087(4) (West 2011) (establishing prima facie evidence that an absentee ballot will count if the associated envelope "substantially compl[ies]" with the applicable statutes); NEV. REV. STAT. ANN. § 293.127(1)(c) (West 2011) (requiring only substantial compliance with election regulations in the event of an outcome-determinative dispute); Jones v. Jessup, 615 S.E.2d 529, 531 (Ga. 2005) (evaluating failure to sign an application for an absentee ballot, failure to write place of birth, and incorrect substitution of the date of voting an absentee ballot for a date of birth, for "substantial compliance" with the law); Foust v. May, 660 S.W.2d 487, 490 (Tenn. 1983) (refusing to invalidate absentee ballots due to a "technical omission, on the part of the registrar").

the standard by which votes are evaluated when there is cause to undertake an evaluation.

For example, consider one of the over three thousand jurisdictions where votes are cast using optically scanned ballots, which function much like the answer forms for standardized tests.[133] Election procedures often specify that a voter wishing to vote for a write-in candidate must fill in an empty oval or box next to the line on which the candidate's name is to be written.[134] These procedures help ensure that the optical-scan ballot reader is able to flag ballots on which there is a write-in vote, even if the system itself cannot process the identity of the chosen candidate; without the filled-in oval, normal tabulation procedures might not reveal the existence of a write-in preference.[135] Yet even without filling in the oval, a voter who has accurately written in the name of a valid candidate—and only that name—for a given office has unambiguously demonstrated the wish to vote for that individual. Such votes occur relatively frequently.[136] The materiality principle does not demand that election officials undertake a special search for all such ballots if those ballots would not otherwise be discovered in the normal course. It merely requires that if the ballot is discovered, and a question arises about whether that ballot represents a valid vote, the vote be counted if the missing oval does not amount to a flaw material in determining the voter's preference.

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133. *Election Equipment 2012*, VERIFIED VOTING FOUND., http://www.verifiedvoting.org/verifier (last visited Sept. 26, 2012).

134. *See, e.g.*, ALASKA STAT. § 15.15.360(d)(2) (2012); GA. CODE ANN. § 21-2-480(b)(1) (2011); ME. REV. STAT. ANN. tit. 21-A, § 696(2)(D) (2011); MO. REV. STAT. § 115.456.2(4)(a) (2006); MONT. CODE ANN. § 13-15-206(5)(b) (2011); NEB. REV. STAT. § 32-816(1) (2010); N.H. REV. STAT. ANN. § 659:17(2) (2012); N.M. STAT. ANN. § 3-8-49(A), (D) (West 2012); N.Y. ELEC. LAW § 7-106(5)(3), (7) (McKinney 2010); UTAH CODE ANN. § 20A-3-106(5)(a)(ii) (LexisNexis 2012); *see also* CAL. ELEC. CODE § 15342(a) (West 2012), *amended by* 2011 Cal. Legis. Serv. ch. 190 (A.B. 503) (West).

135. THERON JI ET AL., AN ANALYSIS OF WRITE-IN MARKS ON OPTICAL SCAN BALLOTS 1 (Aug. 8, 2011) (presented at 2011 Electronic Voting Technology Workshop/Workshop on Trustworthy Elections), *available at* http://www.cs.berkeley.edu/~daw/papers/writein-evt11.pdf. In contrast, the write-in attempt may be discovered in an audit, a recount, or any other postelection proceeding examining ballots on which no vote for the office in question was revealed during initial processing.

136. Though it is not clear that these results are representative, one study found that 16 percent of ballots with legible write-in votes in a single election—hundreds of ballots—did not fill in a corresponding bubble. *Id.* at 12.

Similarly, in a postelection process to contest disputed election results, many states provide the opportunity for litigants to present evidence regarding the validity of individual ballots, including testimony by—or concerning—the corresponding voters.[137] The materiality principle does not demand that states offer such an opportunity. But as long as the forum exists, the state should also welcome evidence by which voters could prove their substantive eligibility, rendering flaws from the pre-election process immaterial.

3. The Value of the Materiality Principle

The procedures above would allow the ballots of eligible voters to be cast and counted, once—and only once—no lingering doubt remains concerning the voter's eligibility or ballot preference. Most such manifestations of the materiality principle would take place in a relatively low-stakes context: the vast majority of elections, including a substantial number for which the outcome is effectively preordained,[138] produce a clear winner on Election Day. In these "unexceptional" elections, recognizing the dynamic nature of materiality has a comparatively limited impact on the election as a whole. Still, the concept manages to fulfill the primary purposes of a decision rule for election errors better than the available alternatives.

In these "unexceptional" elections, society's interest in producing an agreed-upon representative is not at stake, no matter what rule is used to process election errors. Instead, the primary value in holding the election and not simply anointing the presumptive

137. *See, e.g.*, ALA. CODE § 17-16-48 (2012); ARK. CODE ANN. § 7-5-806 (2012); CAL. ELEC. CODE § 16502 (West 2012); COLO. REV. STAT. §§ 1-11-206, -209 (2011); GA. CODE ANN. § 21-2-525(b) (2011); HAW. REV. STAT. ANN. § 11-175 (LexisNexis 2012); IDAHO CODE ANN. § 34-2107 (2012); 10 ILL. COMP. STAT. ANN. 5/23-1.8b,-14,-15 (LexisNexis 2012); IOWA CODE §§ 58.5, 59.2, 59.3, 61.11, 62.11, 62.17 (2012); KAN. STAT. ANN. § 25-1447(a) (2011); KY. REV. STAT. ANN. §§ 120.165, 120.195 (LexisNexis 2012); LA. REV. STAT. ANN. § 18:1411 (2012); MICH. COMP. LAWS §§ 168.747-748 (2012); MO. REV. STAT. § 115.561 (2011); NEB. REV. STAT. ANN. § 32-1103 (LexisNexis 2012); N.J. STAT. ANN. § 19:29-7 (West 2012); OHIO REV. CODE ANN. § 3515.12 (LexisNexis 2012); TEX. ELEC. CODE ANN. §§ 221.009-.010 (West 2011); WASH. REV. CODE ANN. § 29A.68.050 (LexisNexis 2012).

138. Richard Winger reports that 39.5 percent of state legislative races in 2008 were not contested by one of the two major parties. Richard Winger, *Republicans, Democrats Fail to Run Against Each Other in 39.5% of State Legislative Elections This November*, BALLOT ACCESS NEWS (Oct. 24, 2008), http://bit.ly/VXeiz.

winner is in ensuring that as many individuals as possible comprising the eligible electorate feel like they have fully participated.[139] The static conception of materiality—which preserves the ability of a vote to be counted despite errors that appear immaterial when they are committed—mildly realizes this goal, and does so better than a regime that refuses to acknowledge the immateriality of any error or that penalizes eligible voters for their own errors even when the errors do not leave any question about their eligibility.

The dynamic conception of materiality realizes the value better still, for the simplest of reasons: it maximizes the potential to tally ballots cast by individuals who are unquestionably eligible members of the community, without compromising any safeguards that prevent ineligible voting. That is, the materiality principle increases the accuracy of the election's assessment of the eligible electorate's preferences by taking more of those voters' preferences into account. It also increases the ability of eligible electors to participate fully in determining their representatives. Errors that leave reasonable doubt about a voter's eligibility remain preclusive. Those that do not, yield, so that more eligible members of the community can fully participate in the process.

The value of this dynamic conception of materiality increases dramatically in disputed elections. Though most elections are not close, many are, and a substantial portion are sufficiently close to run into "overtime," when the margin of victory is smaller than the

139. To achieve the participatory goal of the election process, the voter must believe not only that she will be able to cast a ballot but also that the ballot will be accepted and the preference recorded. *See supra* text accompanying note 60. Having a ballot rejected, particularly for a mistake eventually revealed to be immaterial, distinguishes the rejected voter from the remainder of the community—it is a statement of exclusion and renunciation rather than inclusion and embrace. That said, there are apparently limits to the importance of this value. Before Election Day, it is crucial that a voter believe that her ballot will be counted as intended, even if it is unlikely to be instrumental in the election outcome. But when voters actually run into difficulty at the polls, in unexceptional elections in which the outcome is not in doubt, relatively few individuals casting provisional ballots return after Election Day to correct problems. The expressive benefits of the franchise are apparently sufficient for electors to confront the logistical hassles of voting once per cycle, but by the end of the evening of Election Day, with winners declared and the community of voters no longer engaged as tangibly in a joint endeavor, few voters overall are motivated to spend additional energy correcting mistakes. If the ultimate validity of the ballot were a more significant component of the expressive value of voting, we would expect substantially more interest in resolving provisional ballot issues in the days following even unexceptional elections.

perceived margin of error or uncertainty.[140] If pre-election or Election Day errors are shown to be immaterial in a postelection proceeding, legitimate ballots cast by eligible voters that would otherwise be discarded may be counted. And because postelection proceedings are triggered by photo-finish elections, a dynamic assessment of materiality could well change the result of the closest races, ensuring greater accuracy in our most closely fought contests.

For example, allowing the materiality of errors to change over time would have radically changed the analysis, and potentially the result, of the 2008 Franken-Coleman contest for a Minnesota U.S. Senate seat.[141] In that race, which was ultimately certified with a margin of 312 votes out of 2.9 million cast,[142] thousands of absentee ballots remained uncounted because of alleged errors on absentee ballot envelopes.[143] These errors primarily involved violations of two sets of procedural rules designed to ensure that absentee ballots were lawfully cast by eligible electors. The first set of rules required that the voter—the same person at the same address listed on the application for the absentee ballot—sign the ballot envelope in a designated space, reflecting the voter's affirmation that she cast the ballot in question and that she was an eligible elector.[144] The second set of rules required that a registered voter or notary public witness the casting of the ballot and signing of the ballot envelope, and provide certain information on the envelope to document his or her identity and participation in the process.[145]

The focus of the Franken-Coleman contest quickly settled into a dispute about whether Minnesota law demanded "substantial

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140. The term "overtime" casually refers to postelection proceedings utilized in close elections. *See, e.g.*, Liz Robbins, *In Overtime, Tight Race for Senate Rests with Vote Counters*, N.Y. TIMES, Mar. 22, 2012, at A25. For a discussion of the resort to litigation upon narrow margins of victory, see Hasen, *supra* note 4, at 938-39, 946-59.

141. For a comprehensive review of the contest, see generally Edward B. Foley, *The Lake Wobegone Recount: Minnesota's Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 129 (2011).

142. *Franken Appeal*, 767 N.W.2d 453, 456 (Minn. 2009).

143. *See id.* at 458-62; *Franken Trial*, No. 62-CV-09-56, 2009 WL 981934, ¶¶ 84-85, 129-38 (Minn. Dist. Ct. Apr. 13, 2009); Foley, *supra* note 141, at 132 n.12.

144. *See* MINN. STAT. §§ 203B.07-.08, .12 (2008) (amended in 2010); MINN. R. 8210.0500-.0600 (2008) (amended in 2010); *Franken Appeal*, 767 N.W.2d at 460.

145. MINN. STAT. § 203B.07(2); MINN. R. 8210.0500-.0600. As noted, these rules have since been modified, in part due to the problems revealed in the 2008 election. *See* MINN. STAT. §§ 203B.07-.08, .12 (2010); MINN. R. 8210.0500-.0600 (2010).

compliance" or "strict compliance" with the procedural regulations of the absentee ballot process, including the two sets of rules above.[146] If "substantial compliance" were the touchstone, many of the disputed absentee ballots might have been lawfully cast and therefore counted in the contest process.[147] If, instead, "strict compliance" were required, the disputed absentee ballots would more likely have remained excluded from the count.[148]

Ultimately, the Minnesota Supreme Court determined that Minnesota law demanded "strict compliance" with Minnesota procedures, dependent, in part, on fault.[149] Some mistakes by election officials could be forgiven,[150] but mistakes by voters, even when immaterial, would render their ballots invalid.[151] Most of the absentee ballots in question revealed mistakes by voters that, when held to a purported "strict compliance" standard, were rejected.[152]

In truth, though the trial court purported to require "strict compliance" with the relevant statutes for voter errors, even this rule was not applied consistently. For example, Minnesota law required rejecting a ballot if the certificate on the ballot envelope

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146. *See, e.g.*, *Franken Appeal*, 767 N.W.2d at 460-62.

147. *See* Foley, *supra* note 141, at 149-50. As Professor Foley notes, there is no reliable evidentiary record definitively establishing the number of ballots with defects that would have counted based on "substantial compliance" with the election laws. *Id.* at 154 & n.160. In part, the inability to establish a definitive number is due not only to the lack of evidence marshaled by litigants concerning the nature of the errors on each ballot (and the denial of public review of the ballots themselves), *id.*, but also the inherent subjectivity in distinguishing errors that reflect "substantial compliance" with a mandatory standard and those that do not.

148. *See Franken Appeal*, 767 N.W.2d at 462; Foley, *supra* note 141, at 149-50. *But see* Foley, *supra* note 67, at 5-10 (noting that several thousand of the rejected absentee ballots may have actually satisfied a strict compliance standard).

149. *Franken Appeal*, 767 N.W.2d at 461-62; *Franken Trial*, No. 62-CV-09-56, 2009 WL 981934, ¶¶ 131-34 (Minn. Dist. Ct. Apr. 13, 2009).

150. Not all mistakes by election officials led to the counting of the associated ballots. Election officials were required by statute to provide registration forms to any unregistered voter requesting an absentee ballot, MINN. STAT. § 203B.06(4) (2008); some apparently failed to do so, and the would-be voters did not become registered. Order for Delivery of Ballots to Office of the Minnesota Secretary of State for Review by the Court at 10-12, *Franken Trial*, No. 62-CV-09-56 (Minn. Dist. Ct. Mar. 31, 2009). Despite the official error, the court did not count ballots by these unregistered voters. *Id.* Similarly, ballots were rejected when cast by electors who did not sign their absentee ballot envelopes because officials had covered the appropriate signature lines with stickers. Order Following Hearing at 13-14, *Franken Trial*, No. 62-CV-09-56 (Minn. Dist. Ct. Feb. 13, 2009).

151. *Franken Appeal*, 767 N.W.2d at 461-62.

152. *See id.* at 462; *Franken Trial*, 2009 WL 981934, ¶¶ 83-85, 92-93, 131-38.

was not "completed as prescribed in the directions for casting an absentee ballot."[153] Those directions, in turn, identified a particular location for the voter's name, address, and signature, and a particular location for the name, address, signature, and title of a witness.[154] Yet ballots were accepted if the voter signed in an incorrect location, despite the state's directions.[155] In contrast, ballots were rejected if the witness was a notary public who did not include an official seal, despite the fact that the absentee ballot directions mentioned no such seal requirement.[156]

The point of the above discussion is not that the Minnesota courts erred in choosing "strict" or "substantial" compliance, or that they erred in applying that standard. Rather, the example reflects the fact that whatever the outcome of such a choice, the standard actually applied leaves substantial opportunity for judicial officials to determine which errors to forgive and which errors to hold preclusive. Moreover, the standard itself provides no meaningful guidance as to how this exercise of judicial discretion should be directed.

Using the materiality principle, the Minnesota courts might have found a superior resolution to the controversy without substantial further cost and without provoking future deviations from proper procedure.[157] On Election Day in Minnesota, many of the errors on the disputed absentee ballot envelopes might legitimately have been material, creating doubt about the voter's identity or eligibility, or the degree to which the ballot was cast free of coercion. On that day, the officials charged with evaluating absentee ballots were justified

153. MINN. STAT. § 203B.12(2) (2008).

154. MINN. R. 8210.0500-.0600 (2008).

155. Order for Delivery of Ballots to Office of the Minnesota Secretary of State for Review by the Court, *supra* note 150, at 15-16.

156. Order Following Hearing, *supra* note 150, at 14-15. Minnesota law listed several other requirements not pertinent to notarization; these requirements, and the requirement to complete the absentee ballot certificate "as prescribed in the directions," were expressly identified as the exclusive reasons to reject a ballot. MINN. STAT. § 203B.12(2) ("There is no other reason for rejecting an absentee ballot.").

157. Minnesota law did not at the time appear to permit the application of the materiality principle to absentee ballots. However, a federal statute—not raised by either party in the contest—might not only permit, but require, its application. Civil Rights Act of 1964, Pub. L. No. 88-352, § 101(a), 78 Stat. 241 (1964) (codified at 42 U.S.C. § 1971(a)(2)(B) (2006)); *see infra* Part IV.B.

in declining to count the ballots as long as reasonable doubt about the elector's qualifications or legitimate preferences remained.

When the election returns established that the race was close enough for a postelection process, however, the opportunity arose for the materiality principle to do more meaningful work.[158] Individual voters gave testimony in the course of the contest litigation.[159] In many circumstances, it is likely that the testimony reliably established that the electors in question were eligible to vote on Election Day and had actually cast the disputed ballots, free of undue influence.[160] Once the testimony established that the individuals were, on Election Day, substantively qualified to vote in the election, the earlier errors on the absentee ballot envelopes calling that eligibility into question became immaterial. Recognizing the dynamic nature of materiality would have made it possible to count the ballots in question.

Indeed, postelection procedures will often make such assessments possible. Many postelection proceedings provide a suitable forum for verifying the eligibility of voters whom errors have snagged at an earlier stage.[161] Documentation can be examined, usually under judicial supervision.[162] Candidates and parties, facing victory or loss, have the incentive to deliver voters for personal testimony. Voters with the ability to ensure that their ballot—suddenly potentially decisive—is counted have the incentive to make themselves available. If flaws leave a voter's eligibility in doubt on Election Day, the postelection process provides a reasonably structured opportunity to resolve that doubt conclusively.

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158. *Cf.* Edward B. Foley, *State Law Issues Loom Large in* Coleman v. Franken *Appeal*, ELECTION LAW @ MORITZ (May 5, 2009), http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=6075 (contrasting the information available, and time constraints operative, for election-night determinations and for determinations during "a month-long review process conducted by an absentee ballot board").

159. *Franken Trial*, 2009 WL 981934, ¶ 23, att. A n.1.

160. *See, e.g.*, Edward B. Foley, *Factual Points and Uncertainties Relevant to the* Coleman v. Franken *Appeal*, ELECTION LAW @ MORITZ (May 14, 2009), http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=6149 ("The process that the trial court employed permitted voters to testify that the two signatures were theirs and that the local officials had wrongly rejected their ballot[s] on this ground.").

161. *See supra* note 137 and accompanying text.

162. *See, e.g.*, *Franken Trial*, 2009 WL 981934, ¶¶ 24-25.

Capturing this opportunity best serves the purposes of the election process. Even in an unexceptional election, the materiality principle fosters eligible electors' sense that they have been able to participate in their own governance. In "election overtime," the participatory value to each voter is starkly multiplied because each voter is keenly aware that her disputed ballot adds tangibly and concretely to the prospect of victory for her favored candidate.

Moreover, in "overtime," the materiality principle fulfills an interest largely absent from unexceptional elections. In "overtime," there is a legitimate dispute concerning the identity of the candidate who best represents the expressed preferences of the eligible electorate. The materiality principle—and particularly the dynamic reassessment of materiality—best resolves this dispute. It maximizes the accuracy of the election's result by maximizing the chances that an eligible elector's ballot is able to be counted—by definition, without any associated increase in the likelihood that an unreliable ballot is tallied. The materiality principle is a comparatively low-cost means to ensure that the election results are as accurate in what they purport to measure as they can be.

4. Potential Concerns

Giving life to the materiality principle, even in an unexceptional election in which the winning candidate is never in doubt, may raise several objections. I turn briefly to those concerns in this Subsection.

a. Opportunistic Behavior

First, some may believe that the materiality principle will create an opening for opportunistic behavior, by encouraging voters to violate procedures that are necessary to ensure a reliable election. In most circumstances, however, rational voters will not intentionally violate election procedures relying on the chance that a breach will eventually be found immaterial. Even when an election's result is not in doubt, voters want to know that their votes will count[163]

163. *See supra* notes 60, 139 and accompanying text.

—and that impulse provides a sufficient deterrent to knowing malfeasance or lazy fatalism. A voter will tend to follow the state's rules to the best of her ability, because it will always be easier to attempt to comply with the rules in the first instance than to try to later dispel the doubt that a material error creates. Consider the example of a registration flaw: sending in one accurate form will always entail less effort than sending in a flawed form and later taking the steps necessary to understand and correct the error if it turns out to be material.[164] Nor do postelection proceedings present additional opportunities for the strategic presentation of falsified "corrections" to earlier errors. In the white-hot crucible of a recount or contest, all eyes are focused on the bona fides of each disputed ballot and each disputed ballot's elector; opportunities for fraud are, if anything, starkly diminished.

For most violations of election regulations, forgiving immaterial errors does not create substantial incentives for opportunistic ex ante misbehavior. In some cases, however, the nature of the regulation creates an incentive for strategic actors to deviate from strict procedural rules in order to gain a meaningful tactical advantage. In such circumstances, the materiality principle advanced in this Article is ill-advised as a decision rule for error.

Deadlines represent one such category. There are several important deadlines involved in the practical administration of elections: deadlines to register to vote,[165] to apply for an absentee ballot,[166] and to cast a ballot in the election.[167] And just as homework and tax forms are regularly submitted at the last possible moment, voters too act primarily on the brink of these deadlines, and some-

164. In more formal terms, for voters who wish their votes to count, the net costs of strategic noncompliance include the cost to determine which breaches of election regulations are likely to be immaterial, and the costs to correct breaches when the voter's determination is incorrect, less the negligible savings of strategic noncompliance for breaches believed likely to be immaterial. Those costs will almost always exceed the costs of initial good-faith compliance.

165. *See, e.g.*, VA. CODE ANN. § 24.2-416 (2012) (closing registration "during the 21 days before a primary or general election").

166. *See, e.g.*, *id.* § 24.2-701(B)(2) (requiring that an application by mail for an absentee ballot "be made to the appropriate registrar no later than 5:00 p.m. on the seventh day prior to the election in which the applicant offers to vote").

167. *See, e.g.*, *id.* § 24.2-603 ("The officers of elections shall list the names of all qualified voters in line before the polling place at 7:00 p.m. and permit those voters and no others to vote after 7:00 p.m.").

times beyond them.[168] Without questioning the utility or necessity of these deadlines, it is not difficult to contemplate that voters would indeed seek to capitalize on a rule forgiving "immaterial" lapsed deadlines by intentionally complying with election procedures belatedly. In the case of most election errors, the incremental effort required to compensate for the error is its own deterrent to intentional violation of the relevant rule. However, when deadlines are involved, there is little incremental cost to waiting, and therefore little natural deterrent. The preclusive effect of a lapsed deadline may therefore be necessary to ensure compliance in the normal course. An untimely registration form should not be evaluated based on the materiality principle, because constantly increasing untimeliness will result. A timely form with errors, on the other hand, may safely be treated by the materiality principle without fear of undue opportunism.

Errors in marking the ballot itself also present an unusual case, counseling for application of the materiality principle but not its dynamic incarnation. When a ballot is marked in erroneous fashion, it is one thing to evaluate that ballot on its face for questions about the materiality of the error: that is, to evaluate whether a reasonable decision maker could substantially question the voter's intended choice. This is the static version of the materiality principle, and in Alaska's 2010 U.S. Senate race, with Lisa Murkowski running against Joe Miller and Scott McAdams as a write-in candidate,[169] the materiality principle would have counseled in favor of counting write-in ballots for "Lisa Murkowsky" but not for "Senator M."

Dynamically reassessing the materiality of errors in selecting a candidate on the ballot—presumably by taking postelection testimony to ascertain a voter's intent—presents too large a risk that the proffered evidence will be unreliable. In every other postelection application of the dynamic aspect of materiality, the voter's ballot preferences are firmly established; the only question concerns the voter's eligibility on Election Day, which is not easily retroactively fabricated. This is not so for ballot markings. The temptation for a

168. *See, e.g.*, Declaration of Glenn T. Burhans, Jr., In Support of Motion for Preliminary Injunction at Exhibit E, *Browning I*, No. 4:07-cv-402 (N.D. Fla. Sept. 17, 2007) (Doc. 6).

169. *See supra* text accompanying notes 19-23.

voter casting a ballot for "Senator M." to change her mind in a postelection proceeding, or for a voter to vote strategically for "Senator M." in order to preserve postelection options, presents a substantial risk of opportunism not present in other circumstances. Though erroneous markings on the ballot itself present fruitful territory for a static conception of materiality, this is one category of error for which the materiality determination should be fixed in time.[170]

b. Cost

A second concern is that, even if voters do not intentionally produce forms with flaws, some may expect that the materiality principle will substantially increase the burden on officials. In most circumstances, this fear should also remain unrealized.

As articulated here, the state's obligation under the materiality principle would be relatively modest.[171] When faced with a voter's attempt to fulfill an election requirement, the state need not undertake any incremental procedure to test for error or seek corrective information; if error exists, the state need not undertake an expensive investigation into the source of the blame.[172] Rather, when presented initially with an apparent error, the same decision maker recognizing the error need only determine whether that error is material. If not, the voter or vote proceeds as if the violation had not

170. Other regulatory categories with a risk of misaligned incentives if immaterial errors are forgiven include some requirements of candidates, parties, and initiative proponents. *See, e.g.*, DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 397-400 (4th ed. 2008) (presenting examples concerning deviations in the text of ballot initiatives and late replacements to party nominees represented on the ballot).

171. Indeed, in other legal contexts, the state's duty to mitigate harm in a process that it controls and which directly governs fundamental rights is far more substantial. *See, e.g.*, *supra* note 81 (describing a prosecutor's duty, under the Constitution and applicable rules of professional ethics, to disclose affirmatively all evidence tending to negate guilt or mitigate the severity of the offense for punishment).

172. *See, e.g.*, Hunter v. Hamilton Cnty. Bd. of Elections, 850 F. Supp. 2d 795, 823-30, 833 (S.D. Ohio 2012) (describing the extended process of reviewing errors to attempt to allocate fault, including more than four hundred subpoenas, eight hundred questionnaires, and a three-week hearing, that finally resolved a juvenile court judicial race more than fourteen months after Election Day); *cf. id.* at 818-22, 825-28 (describing the various pollworker errors, only some of which were deemed legally meaningful).

occurred. If so, the voter enters a parallel state in which her ability to express a ballot preference is preserved but rendered provisional.

Dynamic reassessment adds little to the workload. When presented with an apparent correction, the state need merely accept the proffered information. It need not, however, give immediate effect to the correction. When, in the course of the election cycle, the state is otherwise obligated to assess the legitimacy of a vote of questionable validity, the state need merely account for the information it has been given to determine whether an initial flaw remains material.

Consider a jurisdiction recognizing the dynamic nature of materiality. This jurisdiction's officials would review registration forms, just as they do today. Given an error reasonably calling a voter's qualifications into question, they would deny her full registration, just as today. If she corrected the problem before the registration deadline, she would be registered, just as today. If she corrected the error at a later point, she would be asked to vote a provisional ballot, just as today; that ballot's validity would later be assessed, just as today. No incremental steps are necessary beyond the simple tasks of preserving the evidence of the correction for review at the appropriate point and creating the legal possibility of acknowledging the evidence's relevance. The materiality principle is merely an interpretive rule to gauge the validity of a disputed ballot, based on a mild expansion of the available evidentiary pool. It should not notably increase either the quantity of provisional ballots cast or the effort required of officials to resolve them.[173]

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173. In contrast, the absentee context may present modest incremental costs. The only practical means within any given election cycle to give meaning to a change in the materiality of an error on an absentee ballot application is to allow the absentee voter to cast a ballot that has the potential to be counted if the error becomes immaterial. This would likely result in a number of "provisional" absentee ballots sent by election officials and cast by voters, equal to the number of absentee applications presently rejected because of eligibility concerns. As of 2011, this number is not reliably recorded nationwide. The Election Assistance Commission's Election Administration and Voting Survey—the most comprehensive proxy available—tracks the disposition of absentee ballots, but not absentee ballot applications. *See* ELECTION ASSISTANCE COMM'N, 2010 U.S. ELECTION ADMINISTRATION & VOTING SURVEY sec. C, *available at* http://bit.ly/oIwkdw.

Accommodating such ballots would require a tracking system to segregate and identify absentee ballots that are presumptively invalid, corresponding to applications with flaws that appear material. Most jurisdictions should already have similar tracking mechanisms to identify absentee ballots cast by, inter alia, new voters who have registered by mail and whose

Nor would the conception of materiality advanced in this Article substantially increase the volume or cost of postelection litigation. Elections in which the count of disputed provisional and absentee ballots[174] exceeds the margin of victory are likely to proceed to enhanced postelection scrutiny under *any* standard that permits counting a disputed provisional or absentee ballot, whether or not materiality is the touchstone. If, for example, fault is the measure by which errors are evaluated, a postelection proceeding will have to assess disputed evidence attributing blame for the errors' existence. Modifying the object of the inquiry to the errors' materiality should not add substantially to either the quantum or duration of postelection proceedings. Once a case-by-case review begins, recognizing the materiality principle merely helps to get the answer right.

c. Bias

Third, some may anticipate that the materiality principle increases the potential for bias or perceived bias in the system. One expression of this bias concerns the affected electorate. Procedural rules theoretically apply equally to similarly situated electors, but it may be that officials have at their disposal information to resolve eligibility questions more readily for a select portion of the electorate. That is, officials might be better equipped to render certain errors immaterial for only certain electors, or certain electors might themselves be better equipped to render errors immaterial, skewing the pool of ballots ultimately recognized as valid.

One rejoinder to this concern looks to further empirical study. With the cooperation of election officials, it should be possible to test whether there are currently significant demographic differences among the populations of eligible electors who attempt to register,

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identity has not already been verified under HAVA. *See* 42 U.S.C. § 15483(b) (2006); *supra* text accompanying notes 109-15. For those that do not, giving effect to the dynamic nature of materiality entails an incremental burden.

174. If jurisdictions adopt the materiality principle in the absentee context and allow for the submission of "provisional" absentee ballots, the number of disputed absentee ballots may increase, which might lead to a modest increase in the number of elections in which disputed absentee ballots are potentially outcome determinative. The absence of relevant data makes the size of the potential increase difficult to assess. *See supra* note 173.

those who attempt to vote, and those whose ballots are actually counted. It would be interesting to further test whether the application of either the materiality principle or the dynamic reappraisal of materiality exacerbated or mitigated any existing level of skew.

A second rejoinder to the bias concern is conceptual. As long as every voter has the legitimate opportunity to render an error immaterial, their differential ability to take advantage of this process becomes no different than any other resource more readily available to some voters by virtue of their socioeconomic class, or to some officials by virtue of the socioeconomic class they serve. Such differences are regrettable and worthy of both public and private resources working toward equalizing access. But they are not reasons to deny the eligible electors who happen to be better off their legitimate opportunity to cast a valid ballot.

A different expression of bias in the system concerns the preferences of the decision makers themselves. Gauging the materiality of an error amounts to a judgment call and thereby admits flexibility into the decision process. Studies have shown that in the election arena, when there is room for flexibility, bias—particularly partisan bias—has the potential to infect even the judgment of decision makers who perceive themselves to be acting neutrally.[175]

This is indeed a serious consideration. The issue is mitigated by the burden of proof of the materiality inquiry, which renders the inquiry less flexible than it may at first appear. Given a violation of prescribed regulations, the question is not whether a voter *is* or *is not* eligible, but whether a reasonable decision maker could substantially question whether the voter is or is not eligible; not whether a voter intended to choose candidate *X* or *Y*, but whether a reasonable decision maker could substantially question whether the voter intended to choose *X* or *Y*. The materiality principle only provides that an error should be discounted when that error no longer leaves any reasonable decision maker with a substantial question about a voter's eligibility or candidate choice. The relevant decision is one step removed from the ultimate answer sought, and

175. *See, e.g.*, Kyle C. Kopko, Sarah McKinnon Bryner, Jeffrey Budziak, Christopher J. Devine & Steven P. Nawara, *In the Eye of the Beholder? Motivated Reasoning in Disputed Elections*, 33 POL. BEHAV. 271, 272-73 (2011).

at a fairly high threshold of certainty. That distance may provide a sufficient cushion to overcome decision-making bias.

An additional response to this concern is that the relevant choice is not between the flexibility of a materiality standard or the inflexible—and thereby bias-resistant—application of every precise rule on the books. In practice, as described above, no jurisdiction truly adopts a zero-tolerance rule for all violations of all electoral regulations.[176] Instead, administrative and judicial decision makers currently decide that certain rules are merely precatory, or that transgressions of other rules are to be forgiven if the transgressions are "minor" or "insubstantial" or not the "fault" of the voter.[177] Each of these standards is a form of flexibility, susceptible to the bias of the decision maker. Even beyond the choice of which rules to forgive, a decision that purports to apply rules strictly may bend in some applications but not others.[178] Indeed, to the extent that the materiality principle is grounded in concrete references to a voter's eligibility or clear choice of candidate, the grounding provides *less* opportunity for the infection of bias than the available alternatives.

d. Due Process

Fourth, and specific to the reevaluation of materiality in a postelection process, some might question whether allowing the materiality of an error to change after Election Day involves changing the rules in a manner that threatens due process.[179] Procedures regulating the conduct of an election are set before the election is held, and the conception of materiality suggested in this Article would allow some citizens' votes to be counted despite a failure to abide by these regulations. Particularly when an election is sent into "overtime" because of a few disputed votes, there is a strong interest in ensuring that the process to resolve the election comports with the stable rule of law. This interest in abiding by preestablished rules may be seen to conflict with the societal

176. *See supra* Part II.B.

177. *See supra* notes 63-66 and accompanying text.

178. *See supra* text accompanying notes 153-56.

179. *See* Roe v. Alabama, 43 F.3d 574, 580 (11th Cir. 1995); *see generally* Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691 (2001).

interest in discerning, as accurately as possible, the true preference of the eligible electorate.

The dynamic conception of materiality, when acknowledged as a principle built into the regulatory structure from the outset, may help to resolve—or avoid—this "tragic choice."[180] It serves as an interpretive meta-rule, recasting procedural protections for determining the eligibility of the individual voter not as fixed "thumbs up" or "thumbs down" moments, but rather as checkpoints along the road. At time *t*, a citizen whose eligibility is reasonably in question will have been flagged as presumptively ineligible; if, at time $t + 1$, the question has been resolved, the flag can be removed. This is no deviation from the rule of law; under the dynamic conception of materiality, the governing rules *contemplate* a conditional adjustment of status.[181] Such a meta-rule can and should be declared well before Election Day and should be implemented uniformly throughout the election cycle. A postelection rule change deviating from ex ante expectations is neither necessary nor warranted.

e. Bush v. Gore

The prospect of the exercise of individual judgment with respect to the counting of votes after an election also inevitably draws comparisons to *Bush v. Gore*.[182] It is sufficient for present discussion to recall that the case found a constitutional equal protection violation in counties' quasi-adjudicatory decisions that different standards would apply to similar ballots, both within and across

180. *See generally* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978) (identifying circumstances forcing choices between deeply held conflicting values).

181. Similarly, a conception of material error that permits eligible voters to vote despite minor errors in procedural prerequisites should not be considered a "dilution" of the votes of those who managed to navigate procedural waters without flaw, even if the particular application of materiality is determined after the election. *See, e.g.*, *Roe*, 43 F.3d at 581. The voters who fall victim to errors later proved to be immaterial are by definition eligible electors. Allowing those votes to count does not dilute the votes of other eligible electors by expanding the electorate beyond any ex ante expectation held by any member of the electorate. *Cf.* Curley v. Lake Cnty. Bd. of Elections & Registration, No. 45D01-0810-PL-00082, at 21 (Ind. Super. Ct. Oct. 22, 2008) (emphasizing, in the context of a dispute over early voting locations, that "[t]he casting of ballots by other lawfully registered voters within the relevant jurisdiction is *democracy*, not vote dilution"), *aff'd*, 896 N.E.2d 24 (Ind. Ct. App. 2008).

182. 531 U.S. 98 (2000).

jurisdictions.[183] Indeed, the Court apparently believed that even absent differences in the declared rules applied by different decision makers, a general "intent of the voter" standard would be constitutionally insufficient in a postelection proceeding without more narrowly defined, administrable standards.[184] Though virtually no procedural rule is sufficiently free of ambiguity to preclude entirely the possibility of local variation, there is little question that requiring officials to exercise judgment in determining the changing materiality of an election error expands the risk of inconsistency that so concerned the Court.[185]

Still, as explained above, the materiality standard is one step removed from the generalized discretion that the Court confronted in *Bush v. Gore*.[186] The materiality standard does not ask decision makers to determine whether a voter is eligible, but rather to determine whether there is any significant doubt about whether the voter is eligible; it does not ask them to discern the intent of the voter, but rather to determine whether there is any significant doubt about the intent of the voter. The distinction is meaningful and likely to reduce disagreement and local inconsistency in the application of the principle. It does not eliminate the possibility that some local officials will accept evidence of eligibility that others discount. However, the evidentiary burden embedded in the inquiry—that an error becomes immaterial only upon eliminating *any* reasonable doubt caused by the flaw—does limit the opportunity for wild variance.[187]

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183. *Id.* at 106-07.

184. *Id.* at 106; *cf.* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2514-15 (2003) (suggesting, by analogy to the jurisprudence of speech permit cases, a potential violation of equal protection principles in the delegation of overbroad discretion, even without proof of disparate practice).

185. *See* Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569, 570 (2006) (noting the conflict between "binding officials to clear rules known in advance" and "allowing officials to exercise informed discretion in individual cases"); Tokaji, *supra* note 184, at 2420-21 (reviewing the tension between preserving discretion and preserving equality).

186. *See supra* paragraph following note 175.

187. If further indicia of consistent applicability are required, there are ways to raise the standard further still; for example, the materiality principle might only be applied in postelection contests by groups of multiple decision makers, and only when they unanimously conclude that an error is immaterial. *Cf., e.g.*, N.M. STAT. ANN. § 1-1-5.2(B)(4) (West 2012) ("For paper ballots that are hand-tallied, a vote shall be counted if ... the presiding judge and election judges for the precinct unanimously agree that the voter's intent is clearly

Moreover, most postelection proceedings will be conducted under the supervision of a central judicial or administrative actor.[188] In the aftermath of the *Bush v. Gore* controversy, such figures will likely be highly attuned to the potential for intra- or interjurisdiction variance and may be able to regulate local decision making in the event that it appears likely to produce divergent results.

f. Perceived Politicization

Bush v. Gore also invokes a related concern: the risk that postelection reassessments of eligibility, even if consistent and principled, will further the appearance that the election administration process, and judicial actors who may be overseeing postelection proceedings, are politicized.[189] If an election is sufficiently close to have entered into a postelection process, individual evaluations of eligibility or ballot preference could well determine the winner. And assessments of materiality with respect to voter intent are related directly to votes counted or uncounted for particular candidates. It is difficult to be comfortable with nuanced postelection assessments of voter eligibility or intent, even if they are executed with absolute neutrality, when the party on the losing end will likely view them as fraught with political favoritism.

These latter two objections—both dependent on the mild expansion of postelection exercises of judgment in the interest of arriving at a more inclusive, accurate result—are substantial and worth serious consideration. The prevailing thrust in contemporary scholarship, certainly, is to avoid any increase in the flexibility of the postelection process.[190] Yet the only way to evaluate the overall

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discernable.").

188. *See* Miller v. Treadwell, 736 F. Supp. 2d 1240, 1244 (D. Alaska 2010) (distinguishing *Bush v. Gore* based on the use of a single decision maker for a postelection proceeding permitting the use of discretion); Douglas, *supra* note 7.

189. *See, e.g.*, LOWENSTEIN ET AL., *supra* note 170, at 398 (presenting the "serious danger" that when procedural rules are to be waived in cases of "substantial compliance," judges' rulings "will be affected by their political preferences").

190. *See, e.g.*, NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 60 (2001), *available at* http://tcf.org/publications/pdfs/pb246/99_full_report.pdf; Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 GEO. WASH. L. REV. 1193, 1203-04 (2005); Kopko et al. *supra* note 175; Nathaniel Persily, *"Celebrating" the Tenth Anniversary of the 2000 Election Controversy: What the World Can*

impact of the potential inconsistency and politicization caused by allowing the materiality of pre-election errors to vary even after Election Day is in relation to the other options available for assessing disputed ballots.

I take as a given that a postelection process takes place only if a pre-election process to resolve immaterial errors has failed. The choice of decision rule is then distilled to five basic options. One, hold a new election.[191] Two, count no votes that are in any way connected to a violation of established procedure, and thereby risk not only granting victory to a candidate who did not earn a plurality of the votes of the eligible electorate attempting to express a preference,[192] but also creating public dissatisfaction in the procedural fairness of an election decided purely by technical error. Three, count some votes related to a violation of established procedure, based perhaps on fault or magnitude of the error, even when some of the rejected votes are known to be cast by eligible members of the community—with the same risk of an inaccurate result and a process perceived as unjust.[193] Four, count the votes of eligible

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Learn From the Recent History of Election Dysfunction in the United States, 44 IND. L. REV. 85, 87 (2010); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1246-49 (2005).

191. *See* Huefner, *supra* note 8, at 283-84, 317-19 (discussing concerns with new elections); Steven J. Mulroy, *Right Without a Remedy? The "Butterfly Ballot" Case and Court-Ordered Federal Election "Revotes,"* 10 GEO. MASON L. REV. 215, 240-43 (2001) (analyzing both partial and complete "revotes").

192. I use "plurality" here as a convenient shorthand, because it is the measure that determines the winners of public office in most American jurisdictions. *See, e.g.*, CAL. ELEC. CODE § 15452 (West 2012); CONN. GEN. STAT. ANN. § 9-173 (West 2012); TEX. ELEC. CODE ANN. § 2.001 (West 2011). The materiality principle, however, is consistent with any voting rule, including alternatives to the plurality-win system. *See, e.g.*, LANI GUINIER, THE TYRANNY OF THE MAJORITY (1994) (describing alternatives to plurality voting); Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy: The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*, 95 COLUM. L. REV. 418, 432-41 (1995) (book review) (same); Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 251-56 (same).

193. It is useful to recall the astute assessment of the Florida Supreme Court:

> We first take note that the real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration.... By refusing to recognize an otherwise valid exercise of the right to a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right....

citizens when errors are, or have become, immaterial, in an effort to come as close as possible to an accurate understanding of the electorate's preferences without diluting the electorate pool. Or five, acknowledge the futility of any attempt to accurately determine the plurality choice when an election is sufficiently close, and decide the victor by lot.[194]

In some ways, this last option presents the most serious challenge to the materiality principle. I acknowledge the substantial appeal in delivering to a random procedure those scenarios in which the margin of *irreducible* error exceeds the margin of victory. But I also suggest that once we have entrusted a selection process to a popular election, there exists a moral imperative to attempt to reduce apparent error whenever possible, at least until the winner is decisively established. Even when our "capacity for accurate tabulation" makes it epistemologically impossible for us to determine the electorate's expressed preference,[195] we are obligated to make the attempt to the best of our ability, in order to fulfill the purpose of the election to the best of our ability. The argument applies with even greater strength to any nonrandom resolution: among comparatively equal-cost alternatives, the preferred option should be the one that yields the most accurate result. Postelection process is expensive and time consuming, and the exercise of any discretion risks the appearance of politicizing the process if decision makers do not conduct themselves in a manner beyond reproach. Fault- or magnitude-based decision rules are not free from this risk. Even if suboptimal, the materiality principle may be the least bad of the available alternatives.[196]

> [A] majority of the voters in the Second District preferred Mr. Boardman over Mr. Esteva in October, 1973. This must not be overlooked. If we are to countenance a different result, one contrary to the apparent will of the people, then we must do so on the basis that the sanctity of the ballot and the integrity of the election were not maintained, and not merely on the theory that the absentee ballots cast were in technical violation of the law.

Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975).

194. *See generally, e.g.*, Pitts, *supra* note 8.

195. *Id.* at 746 (quoting Charles Fried, Letter to the Editor, '*A Badly Flawed Election': An Exchange*, N.Y. REV. BOOKS (Feb. 22, 2001), www.nybooks.com/articles/archives/2001/feb/22/a-badly-flawed-election-an-exchange/); *see also* Huefner, *supra* note 8, at 323.

196. In this respect, I may place different weights on the varying values of the election process than other scholars. I agree with the prevailing assessment of the benefit of resolving immaterial errors before the election whenever possible, and the benefit of providing a forum

IV. SOURCES OF LAW FOR THE MATERIALITY PRINCIPLE

A. The Federal Constitution

As described in this Article, the materiality principle has a curious—and uncertain—constitutional status. Relatively few plaintiffs challenging state election regulations have framed their claims by contending that the Federal Constitution prohibits precluding the vote of an eligible elector due to immaterial errors.[197] Even fewer courts have issued decisions on those grounds.[198] And though courts that have construed state regulations to forgive immaterial errors may have been motivated by canons of constitutional avoidance,[199] they generally have not isolated a federal constitutional materiality principle as the reason for their action.

Even if not articulated as such, the materiality principle is in some ways consistent with the Court's current understanding of constitutional protections against undue infringement of the right

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to help voters turn material errors into immaterial ones. *See, e.g.*, Foley, *supra* note 190, at 1204-05 & n.69. However, in those circumstances when an election proceeds with errors unresolved and the result is left in doubt, several scholars seem to place greater weight on the swift declaration of a winner. *See id.* at 1203-05; Huefner, *supra* note 8, at 292-93; John Copeland Nagle, *How Not to Count Votes*, 104 COLUM. L. REV. 1732, 1762 (2004). In contrast, I would place greater weight on ensuring that the official elected represents the knowable expressed preference of the eligible electorate, even if that determination lingers.

It may also be that the difference in weighting is largely illusory, distorted by the outsized presence of the 2000 election. The above scholars' preference for a date-certain winner may be driven by the imperatives of a presidential contest. A contested election for President involves unique difficulties, driven by the strong need for the polity to have a recognized chief executive on Inauguration Day. *See* Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1267-69, 1271-73 (2006). In contested elections for state executives, there is comparatively less at stake in ensuring that the election's winner is recognized by the start of a term; the consequences of an election lingering beyond the first day of the session are still less dire when the race concerns one individual within a multimember legislative delegation. It is not clear whether other scholars' apparent preference for speed over accuracy, when—and only when—the two are irreconcilable, extends beyond the presidential context.

197. For a rare example, see Complaint ¶¶ 131-39, Wash. Ass'n of Churches v. Reed, 492 F. Supp. 2d 1264 (W.D. Wash. 2006) (No. 2:06-cv-726).

198. *Cf.*, *e.g.*, *Browning II*, 569 F. Supp. 2d 1237, 1256 (N.D. Fla. 2008) (refusing to find a constitutional burden when error precluded individuals from casting a valid ballot, but also refraining from discussing circumstances in which that error had been rendered immaterial).

199. *See* Hasen, *Democracy Canon*, *supra* note 9, at 96-100.

to vote. The Court has established a balancing test to identify unconstitutional impositions on the right to vote: courts "must weigh the character and magnitude of the asserted injury" to the right to vote "against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden [an elector's] rights."[200] Further, the Court has clarified, "however slight that burden may appear ..., it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"[201]

In this balancing formula, the materiality principle relates primarily to the state's interest. Once an error is revealed to be immaterial, no longer creating any reasonable doubt about the elector's qualifications or ballot preference, there are few state interests that justify allowing that error to have a continuing preclusive effect.[202] If the constitutional balancing test is designed to ensure that eligible voters are not unnecessarily prevented from casting a valid ballot, the materiality principle seems particularly consonant with that value.

That said, most applications of the materiality principle are probably farther afield from the Court's current understanding of constitutional restraints on states. For example, the Court has rarely, if ever, endorsed such a granular approach to the state's interests in election regulation. The analysis above depends on a particularly narrow tailoring of the state's regulatory scheme: rather than allowing the state to justify its regulations in abstract terms (e.g., procedure *X* is necessary to ensure that voters are eligible), the materiality principle would focus on the state's justification under particular conditions (e.g., procedure *X* is necessary to ensure that voters are eligible even when there exists other, irrefutable proof of eligibility). The Court seems to countenance such intrusive federal constitutional supervision only when the regula-

200. Burdick v. Takushi, 504 U.S. 428, 434 (1992) (internal quotation marks omitted).

201. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008) (plurality opinion) (quoting Norman v. Reed, 502 U.S. 279, 288-89 (1992)); *see also id.* at 210-11 (Souter, J., dissenting).

202. *See supra* text accompanying notes 73-74 (addressing arguments concerning the state's interests in deterrence); *see also supra* Part III.C.4.b (addressing arguments concerning the state's interests in avoiding incremental administrative cost).

tion in question exacts a particularly severe burden.[203] And although the appropriate constitutional measurement of burden remains in flux,[204] it is difficult to imagine, absent an egregious fact pattern, the Court of *Bush v. Gore* finding a sufficient burden to validate a constitutional claim premised on the state's obligation to compensate for avoidable mistake. If the materiality principle has a constitutional home at all, it at best represents a seldom-expressed and severely underenforced constitutional norm.[205]

B. The Civil Rights Act of 1964

Fortunately, the legal imprimatur of the materiality principle does not depend on deciding whether it has or has not been—or should or should not be—constitutionalized, in whole or in part, in outcome-determinative contexts or in the normal course. Congress has taken matters into its own hands.

Section 101(a) of the landmark Civil Rights Act of 1964 contains a provision directly referencing election-related errors:

> No person acting under color of law shall ... deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.[206]

It is somewhat surprising how little attention this provision—the "materiality provision" of the Civil Rights Act—has received. I am aware of no sustained scholarly examinations of the provision, and it is seldom addressed in published judicial decisions.[207]

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203. *See* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 336-37 (2007).

204. *See* Justin Levitt, *Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens*, 9 ELECTION L.J. 19, 32-33 (2010) (noting that courts offer varying assessments of burden based on harm to an individual, a subgroup, or the electorate as a whole, and relying inconsistently on both absolute magnitude and proportion).

205. *Cf.* Hasen, *Democracy Canon*, *supra* note 9, at 96-100.

206. 42 U.S.C. § 1971(a)(2)(B) (2006) (as amended).

207. In part, this may be because when the materiality provision has been invoked, it is often in the context of emergency litigation shortly before an election. Such litigation is frequently resolved in practice by settlement or consent decree. *See, e.g.*, Agreed Entry and

The materiality provision appears to adopt much of the vision of materiality proposed in this Article. The provision generally prohibits disenfranchisement based on certain immaterial errors, determined by whether the errors cast the substantive eligibility of the elector in doubt.[208]

Congress had ample reason in 1964 to be concerned by such disenfranchisement. The substantial legislative record for the materiality provision focused on techniques by which many local registrars discriminated against racial minorities.[209] Extensive

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Order in Resolution of Motion for Temporary Restraining Order, Brown v. Rokita, No. 1:08-cv-01484 (S.D. Ind. Nov. 3, 2008); Second Amended Order at Exhibits A-E, NAACP v. Harris, No. 1:01-cv-00120 (S.D. Fla. Sept. 19, 2002); Complaint ¶ 133, NAACP v. Harris, No. 1:01-cv-00120 (S.D. Fla. Feb. 14, 2002). Such litigation may also be resolved by cursory determinations on hasty motions for temporary or preliminary relief. *E.g.*, Order, Citizens Alliance for Secure Elections v. Vu, No. 1:04-cv-2147 (N.D. Ohio Oct. 27, 2004); Order, Van Hollen v. Gov't Accountability Bd., No. 08-cv-4085 (Wis. Cir. Ct. Oct. 23, 2008). Such resolutions are rarely analyzed by commentators or other tribunals.

208. Initially, the provision's focus on whether the elector is "qualified under State law" may seem ambiguous: out of context, it is not clear whether this refers to substantive qualifications (for example, the voter's personal characteristics, such as identity, age, citizenship, residence, and lack of a disenfranchising conviction), or procedural qualifications (the actions—like registration—that a state requires of each citizen in order to vote).

The latter path, however, swiftly renders the provision meaningless. By definition, errors that do not impact a procedural qualification carry no risk of disenfranchisement. That is, every error for which state law would deny an individual's vote is necessarily an error in a state's procedural qualification. It follows that every error for which state law would deny an individual's vote is material to determining whether she is procedurally qualified to vote under state law.

If the materiality provision addressed only procedural qualifications, the analysis above shows that it would have absolutely no effect. Because every error that causes disenfranchisement is necessarily material to determining whether the voter is procedurally qualified, the provision would allow the state to disenfranchise for *every* error that causes disenfranchisement. Conversely, it would prohibit disenfranchisement only for errors that by definition do not disenfranchise. Even in the vigorous battle regarding the utility of canons of construction, the rule against surplusage, which requires that statutes be interpreted to avoid rendering a provision meaningless if at all possible, is one of the most widely accepted. *See, e.g.*, Beck v. Prupis, 529 U.S. 494, 506 (2000) (referencing "the longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous").

Instead, if the materiality provision is to have any meaning, the inquiry must involve not procedural but rather substantive qualifications of state law: identity, age, citizenship, residency, and lack of disenfranchising felony conviction or mental incapacitation.

209. *See Hearings on H.R. 7152 Before the H. Comm. on the Judiciary*, 88th Cong. 2720 (1963) [hereinafter *House Hearings*] (statement of Robert F. Kennedy, U.S. Att'y Gen.); H.R. REP. NO. 88-914, pt. 1, at 19 (1963); H.R. REP. NO. 88-914, pt. 2, at 5 (1963); 110 CONG. REC. 12,837 (1964) (statement of Sen. Harrison A. Williams); *id.* at 9113 (statement of Sen. Kenneth B. Keating); *id.* at 6741 (statement of Sen. Philip A. Hart); *id.* at 6715-16 (statement

testimony showed that registrars rejected black applicants on the basis of purported "errors" on application forms that were hypertechnical, or entirely invented, while they ignored more substantial glitches entirely when the applicants were white.[210] Among the more infamous examples was a registration application rejected because the would-be registrant, required to account for her age in years, months, and days, missed the mark by one day because the day had not yet ended.[211] Another application was rejected because the applicant's state was misspelled as "Louiseana."[212] Still other applications were rejected because the applicant identified her skin color as "Negro" instead of "brown," or "brown" instead of "Negro,"[213] or based on the fact that an applicant "underlined 'Mr.' when [he] should have circled it."[214]

Though the primary motivation for the sponsors of the materiality provision was clearly the confrontation of racial discrimination, Congress drafted the provision to embrace errors or omissions beyond those used to discriminate based on race. Some courts have either presumed this to be an oversight or found that Congress intended an exclusive racial focus given the overwhelming devotion of the Act as a whole to race; these courts have held the provision inapplicable to disenfranchisement absent allegations of racial discrimination.[215] It is more likely, however, that the materiality provision's nonracial scope reflects a conscious decision befitting the

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of Sen. Kenneth B. Keating); *id.* at 6650 (statement of Sen. Jacob K. Javits); *id.* at 6530 (statement of Sen. Hubert H. Humphrey); *id.* at 1693-94 (statement of Rep. Emanuel Celler); *id.* at 1628 (statement of Rep. Seymour Halpern); *id.* at 1593 (statement of Rep. Leonard Farbstein); 109 CONG. REC. 5954 (1963) (statement of Sen. Philip A. Hart).

210. *See supra* note 209.

211. *Hearings on S. 1731 and 1750 Before the S. Comm. on the Judiciary*, 88th Cong. 101 (1963) [hereinafter *Senate Hearings*] (statement of Robert F. Kennedy, U.S. Att'y Gen.); *see also* 110 CONG. REC. 6715-16 (1964) (statement of Sen. Kenneth B. Keating) (recounting similar rejections).

212. *Senate Hearings*, *supra* note 211, at 101.

213. 110 CONG. REC. 6733 (1964) (statement of Sen. Philip A. Hart); *id.* at 6530 (statement of Sen. Hubert Humphrey).

214. *Id.* at 1693-94 (statement of Rep. Emanuel Celler).

215. *See, e.g.*, Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 839 (S.D. Ind. 2006); Malinou v. Bd. of Elections, 271 A.2d 798, 803 (R.I. 1970); *cf. House Hearings*, *supra* note 209, at 2720 (explaining that errors are immaterial if forgiven for white citizens but made determinative for black citizens). *But see* Ball v. Brown, 450 F. Supp. 4, 7 (N.D. Ohio 1977) (reviewing cases construing various portions of § 1971 to be applicable beyond racial discrimination).

general principle. The text of most other sections of the Civil Rights Act of 1964 ties the relevant right in question to racial discrimination.[216] The text of the materiality provision does not,[217] which is a distinction noted in the contemporaneous legislative debates.[218]

The scope of the materiality provision is not coextensive with the materiality principle that I propose in this Article: the provision of the Civil Rights Act is limited, for example, to errors or omissions on *records* or *papers* involved in the voting process.[219] And in tying materiality determinations to a voter's eligibility, the provision is at

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216. *See, e.g.*, Pub. L. No. 88-352, § 201(a), 78 Stat. 241 (1964) (prohibiting discrimination in public accommodations "on the ground of race, color, religion, or national origin"); *id.* § 301(a) (concerning discrimination in use of public facilities "on account of [ ] race, color, religion, or national origin"); *id.* § 402 (concerning lack of equal educational opportunities "by reason of race, color, religion, or national origin"); *id.* § 601 (prohibiting discrimination in programs receiving federal aid "on the ground of race, color, or national origin"); *id.* § 703(a) (prohibiting employment practices discriminating "because of [an] individual's race, color, religion, sex, or national origin").

217. *See Browning I*, 522 F.3d 1153, 1173 (11th Cir. 2008) ("The text of the resulting statute, and not the historically motivating examples of intentional and overt racial discrimination, is thus the appropriate starting point of inquiry in discerning congressional intent.").

218. *See* H.R. REP. NO. 88-914, pt. 1, at 77 (1963) (minority report); 110 CONG. REC. 6723-24 (1964) (statements of Sen. Samuel J. Ervin & Sen. Kenneth B. Keating); *id.* at 6642 (statement of Sen. Strom Thurmond); *id.* at 5878-79 (statement of Sen. Robert Byrd); *id.* at 1532-33 (statement of Rep. Edwin E. Willis); 109 CONG. REC. 5116-17 (1963) (statement of Sen. Kenneth B. Keating).

Moreover, throughout the passionate debate about the constitutionality of the materiality provision, authority for the provision was expressly tied not only to the antidiscrimination mandate of the Fourteenth and Fifteenth Amendments, but also to Congress's race-neutral power to regulate federal elections under Article I, Section 4 of the Constitution. *See* 110 CONG. REC. 6723-24 (1964) (statements of Sen. Samuel J. Ervin & Sen. Kenneth B. Keating); *id.* at 1522 (statement of Rep. Emanuel Celler). This provides some, albeit admittedly limited, indication that at least the sponsors intended the provision to be applied even absent racial bias.

The invocation of Article I, Section 4 raises an intriguing question about whether applying the materiality provision in race-neutral fashion to votes cast for presidential electors exceeds the power granted to Congress by Article I. Several commentators have raised the issue of the distinction between the authority afforded Congress over congressional elections and the authority afforded Congress over presidential elections. *See, e.g.*, Richard L. Hasen, *"Too Plain for Argument?" The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees Through Direct and Equal Primaries*, 102 NW. U. L. REV. 2009, 2016-18 (2008); *see generally* Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851 (2002). Thus far, courts have consistently glossed over any difference. *See* Burroughs v. United States, 290 U.S. 534, 544-48 (1934). A more robust explication of the issue is well beyond the scope of this Article.

219. 42 U.S.C. § 1971(a)(2)(B) (2006).

best awkwardly applied to the original *Bush v. Gore* problem: errors or omissions on the face of the ballot itself.[220]

That said, the provision's coverage is surprisingly broad, even beyond its race-blind application.[221] First, though the materiality

220. These errors are on papers—ballots—that are certainly requisite to voting under the statute, and the errors seem to have no bearing on determining whether the individual in question is qualified to vote under state law. Facially, the materiality provision of the Civil Rights Act would seem to apply. *See supra* text accompanying note 206.

However, the provision's express reference to the voter's qualifications implies that its intent is to limit disputes about eligibility to those circumstances in which a voter's qualifications are truly in question. The ballot itself has nothing to do with individual qualifications; American ballots are largely secret ballots, with no link between the face of the ballot and any given individual. *See generally* Allison R. Hayward, *Bentham and Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote*, 26 J.L. & POL. 39, 48-50 (2010).

Just as the provision cannot refer to "procedural" qualifications because such a construction would preclude its application to *any* error, *see supra* note 208, the provision also cannot refer to errors on the ballot's face because such a construction would require its application to *every* plausible error. Other than writing on the ballot face "I am John Smith and I am not eligible to vote," no error on a secret ballot can be material to determining the qualifications of the individual who cast it. That is, if the materiality provision applied to errors on the ballot's face, no such error could ever prevent the ballot from counting. The provision seems at best an awkward fit in such circumstances.

221. In addition to the breadth reviewed below, the materiality provision was amended, one year after its passage, to apply to state and local elections as well as their federal counterparts. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 15, 79 Stat. 437 (1965). This expansion presents some curious issues similar to those raised in note 218, *supra*, and similar to the issues of congressional power now generating some controversy with respect to the Voting Rights Act as a whole. *See, e.g.*, Shelby Cnty. v. Holder, 679 F.3d 848 (D.C. Cir. 2012) (addressing a constitutional challenge to section 5 of the Act); Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 100 U. PA. L. REV. 377, 399-404 (2012) (discussing constitutional controversy with respect to section 2). The materiality provision's expansion cannot be justified based on Congress's Article I power to regulate elections for U.S. Senators and Representatives. Instead, sponsors cited congressional power to effectuate the Fourteenth Amendment's guarantee of due process and prohibition of arbitrary treatment, as well as its power to enforce the Fifteenth Amendment. *See, e.g.*, 111 CONG. REC. 15,652 (1965) (statement of Rep. Emanuel Celler).

A full examination of the impact of the Court's "New Federalism" on the materiality provision, much less the full Voting Rights Act, is well beyond the scope of this Article, but a few notes tracing the contours of the difficulty are in order. It remains unclear, for example, whether the Fifteenth Amendment provides a more generous basis for congressional action than the Fourteenth Amendment. *Compare* Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 235-46 (D.D.C. 2008) (finding greater congressional enforcement authority under the Fifteenth Amendment, given its more limited substantive scope), *rev'd on other grounds sub nom.* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009), *with* Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 449-62 (D.D.C. 2011) (finding that enforcement powers concerning racial discrimination in voting under the Fourteenth and Fifteenth Amendments are essentially coextensive), *aff'd* 679 F.3d 848 (D.C. Cir. 2012).

provision was motivated by disenfranchisement tied to ostensible errors by a prospective registrant, the text of the provision is not limited to errors or omissions by would-be voters.[222] Indeed, such a limitation was removed from the bill. As passed by the House of Representatives, the provision prohibited officials from "deny[ing] the right of any individual to vote ... because of an error or omission *of such individual* on any record or paper relating to any ... act requisite to voting, if such error or omission is not material."[223] As amended and signed into law, however, the "limiting language" tying the error to the would-be voter was deleted.[224] The enacted text states that immaterial errors or omissions on any record or paper requisite to voting—whether perpetrated by the voter, an election official, or a third party—cannot be used to deny qualified individuals the right to vote.[225]

Second, the text of the provision is also not limited to registration errors or omissions. Any immaterial error on a record or paper involved in an "act requisite to voting" falls within its facial scope.[226] For purposes of the materiality provision, "voting" includes "all

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Enforcement power under the Fourteenth Amendment, at least, has been sharply restricted since the Voting Rights Act was passed; the precise extent of those limits is still the subject of much debate. *See generally* City of Boerne v. Flores, 521 U.S. 507 (1997); Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1 (2007); Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 FORDHAM L. REV. 799 (2006). It is an open question whether the Court would accept the proposition that Congress was acting properly under its Fourteenth Amendment power in this context; that is, in banning the use of immaterial errors to deny qualified citizens the right to vote, no matter the race of the voter, it is not clear that the Court would find Congress acting in a manner directly congruent and proportional to demonstrated constitutional violations. Then, as now, there were plentiful examples of states and localities barring an effective vote in state and local elections on the basis of trivial errors that did not call a voter's fundamental eligibility into question, and perhaps the volume of this evidence would suffice to establish undue constitutional burden. *See, e.g.*, 1961 U.S. COMM'N ON CIVIL RIGHTS, VOTING 54-86 (1961). However, given the continuing confusion over the contours of the Court's jurisprudence of constitutional voting rights, it is not certain that the Court would believe that blocking the vote on the basis of such errors amounted to an unconstitutionally undue burden on the right to vote. *See supra* text accompanying notes 200-05.

222. 42 U.S.C. § 1971(a)(2)(B) (2006).

223. H.R. 7152, 88th Cong. § 101(a) (as passed by House of Representatives, Feb. 10, 1964) (emphasis added).

224. 110 CONG. REC. 12,817 (1964) (explaining changes made by substitute Amendment No. 656).

225. 42 U.S.C. § 1971(a)(2)(B).

226. *Id.*

action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast."[227] This is a federal law with substantial, though not unlimited, reach.[228]

Thus far, however, each of the few courts or commentators examining the materiality provision of the Civil Rights Act has artificially limited its application—by failing to recognize that the materiality of a particular error can vary over time. This oversight has fostered an understanding of materiality that is poorly suited to both the statute and the election process as a whole.

Consider as an example *Florida State Conference of NAACP v. Browning*, which offers the most extensive interpretation of the materiality provision to date.[229] The case concerned a state variant of the provision of the Help America Vote Act requiring a voter to provide her driver's license or Social Security number on a voter registration form, and asking officials to attempt to match that number and other information to motor vehicle or Social Security

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227. *Id.* § 1971(a)(3)(A), (e).

228. By referring to flaws "on any record or paper" that may interfere with the vote, Congress declined to create a specific statutory remedy for the array of nondocumentary glitches that impact every election. Still, there are plenty of requisite election records or papers with the potential for flaws, some of which raise intriguing questions under the statute.

Consider, for example, the absentee process. In one respect, no part of the absentee process is "requisite" to voting, because states need not offer absentee balloting at all. As long as a jurisdiction conducting elections permits in-person voting on Election Day, it has fulfilled its constitutional obligation. *See* McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807-08 (1969). Yet from a closer view of the voting process, once the state invites voters to utilize an absentee ballot procedure, it may render the individual stages of that procedure "requisite" to voting. *See, e.g.*, United States v. Boards, 10 F.3d 587, 589 (8th Cir. 1993) (finding an absentee ballot application to be a "prerequisite to voting" because an *absentee voter* must first apply for such a ballot (quoting 42 U.S.C. § 1973*l*(c)(1) (1988))). That is, because of the compressed nature of the election cycle, the voting process is path dependent: by the time that an error in the absentee process is discovered, that process may, either legally or practically, represent the only voting option available to the citizen in question. Some jurisdictions, for example, preclude any attempt to vote on Election Day once an absentee ballot is mailed, even if the absentee ballot is rendered invalid due to an error. *See, e.g.*, N.M. STAT. ANN. § 1-6-16(A) (LexisNexis 2012); UTAH CODE ANN. § 20A-3-301(2) (West 2011); W. VA. CODE ANN. § 3-3-9(b) (West 2012). For such voters, the absentee ballot becomes a paper relating to an act requisite to voting at least at the moment it is cast.

229. 522 F.3d 1153 (11th Cir. 2008). Full disclosure: the author of this Article was co-counsel for the plaintiffs in the case.

records.[230] Under HAVA, mismatches can be cured all the way through Election Day and potentially beyond, by showing a range of permissible documentary identification at any time after the original error—that is, any time after the original mismatch—no matter whose fault the mismatch may be.[231] Florida instead adopted a fault-based approach: at the time of the lawsuit, mismatches caused by state error could be repaired only by showing the original driver's license or Social Security card; mismatches caused by applicant error could not be repaired after the registration deadline at all.[232] That is, a voter mismatched because she transposed two digits of her driver's license number on the registration form would be unable to cast a valid ballot—despite verifying her identity by showing identification at the polls—because of the earlier error in the registration process.

The Eleventh Circuit analyzed the Florida law under, inter alia, the materiality provision of the Civil Rights Act.[233] The court became stymied, however, by a static construction of materiality. Despite the statutory text, the court focused on the materiality of the underlying information sought, rather than the materiality of the error on the record.[234] It believed that evaluating the materiality of the error itself would lead to absurd results.[235] The only way to evaluate the materiality of an error, the court presumed, was to gauge the magnitude of the mistake. Big errors would be material, small ones would not.[236] The only way to gauge the magnitude of a mistake, in turn, would be to compare the mistake to the accurate information.[237] And with accurate information in hand, the original mistake, no matter how large, never impacts the determination of

230. *See id.* at 1156; *supra* text accompanying notes 111-17.

231. *See supra* text accompanying notes 116-17.

232. FLA. STAT. § 97.053(6) (2006). The law has since been amended to allow voters to correct their own errors as well. FLA. STAT. ANN. § 97.053(6) (LexisNexis 2012).

233. *Browning I*, 522 F.3d at 1173-74.

234. *Compare id.* at 1174-75 ("The mistaken premise in this argument is that the materiality provision refers to the nature of the error rather than the nature of the underlying information requested."), *with* 42 U.S.C. § 1971(a)(2)(B) (2006) ("No person acting under color of law shall ... deny the right of any individual to vote in any election because of an error or omission ... if such *error or omission* is not material in determining whether such individual is qualified under State law to vote." (emphasis added)).

235. *See Browning I*, 522 F.3d at 1174-75.

236. *Id.* at 1175 n.23.

237. *See id.*

the voter's qualifications.[238] Thus, reasoned the court, because no error could be deemed material once it was possible to gauge the error's magnitude, the Civil Rights Act could not possibly have intended to focus on the materiality of the error.[239]

The Eleventh Circuit was driven toward the magnitude of an error as a measurable standard for materiality only because it believed it could not find *all* errors immaterial once they are supplanted by accurate information. Recognizing the dynamic nature of materiality, though, releases the court from its own logical box: it allows decision makers to distinguish between meaningful errors and nonmeaningful errors, based not on size but on time. At the moment the erroneous information is first evaluated, it is material, and may prevent the would-be voter from voting without violating federal law, if it creates real and reasonable doubt as to whether the individual in question is qualified or not. If such an error is never corrected, it continues to be material, and may continue to block the would-be voter from casting a valid ballot. If such an error is corrected or superseded, and the accurate information revealed, the error will always become immaterial—but that is precisely what the statute should contemplate. At the time when there is no longer a doubt about the individual's qualifications, the earlier and newly immaterial error cannot be used as a procedural hitch to deprive the eligible individual of a vote.

That is, the fact that many of the errors on prerequisite forms can later be mooted—that errors that had once been material can later be revealed as immaterial—does not strip the materiality provision of meaning. To the contrary, because it allows eligible voters to vote when there is no longer any doubt about their qualifications, recognizing the dynamic nature of materiality would give the Civil Rights Act's materiality provision precisely the meaning that was intended.

C. State Law

Beyond the Civil Rights Act, federal law does not presently seem to impose the materiality principle upon states. But states might

238. *See id.*
239. *See id.* at 1174-75.

impose the principle on themselves. As mentioned above, Professor Rick Hasen has identified a "Democracy Canon" of statutory interpretation, with roots at least as early as 1885;[240] under this canon, state courts generally favor the validity of expressed preferences of eligible voters in the interpretation of ambiguous election-related statutes.[241] This canon of construction would, in many ways, seek to construe state law consistently with the materiality principle when errors are at issue. Under the Democracy Canon, eligible citizens would be permitted to vote valid ballots, despite violations of procedural regulations, when there is at least some ambiguity as to the regulations' mandatory or directory nature.[242]

Professor Hasen's descriptive account of the Democracy Canon seems accurate, and I agree with its ultimate normative goals. Nevertheless, I share the hesitation of scholars who have criticized the application of substantive canons of construction as an exercise in inconsistency.[243] Given the futility of squeezing all plausible ambiguity from legislative codes, the search for statutory ambiguity seems to depend largely on the will of the judge in question; deciding when a statute is or is not sufficiently ambiguous to deploy the Democracy Canon does not seem meaningfully removed from equally indeterminate estimations of "substantial" compliance with procedural regulations.[244]

Instead of relying on canons of construction, I would prefer to see states adopt the materiality principle expressly, as a statutory basis for determining not how election procedures are construed, but when they may be applied to preclude the vote of an elector. The materiality principle does not question the validity or propriety of any given electoral regulation in safeguarding the reliable administration of an election, and it does not assert that the regulation

240. Hasen, *Democracy Canon*, *supra* note 9, at 71.

241. *See id.* at 71, 84.

242. *See id.*

243. *See*, *e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 27-29 (1997).

244. *See supra* text accompanying notes 65, 68; *see also* Hasen, *Democracy Canon*, *supra* note 9, at 122-23 (suggesting deployment of the Democracy Canon to count write-in votes without marked boxes next to the write-in space, despite a state election law stating that "no write-in vote shall be counted unless the voting space next to the write-in space is marked or slotted").

adopts different meanings in different contexts. It merely states that the regulation in question should yield when its particular purpose in ensuring that only eligible voters cast valid ballots is no longer served. Legislative majorities that reliably represent pluralities of their communities should be eager to see such statutes in place.

Some states have already adopted the materiality principle, although mostly in discrete scenarios, for certain ballots in certain circumstances. Several states, following the model set by the federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) for overseas voters,[245] have adopted this materiality principle with respect to misspellings in the name of a write-in candidate.[246] At least six states have enacted broader materiality provisions, beyond the write-in context.[247]

At least at one point, Alabama appeared to have gone farther still. In 1993, the Alabama Supreme Court ratified not merely a version of the static materiality principle but a procedure recognizing the

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245. 42 U.S.C. § 1973ff-2(c)(3) (2000) ("Any abbreviation, misspelling, or other minor variation in the form of the name of a candidate or a political party shall be disregarded in determining the validity of the ballot, if the intention of the voter can be ascertained.").

246. *See, e.g.*, ALASKA STAT. ANN. § 15.15.360(d)(5) (West 2012) (adopting the same standard for write-in ballots generally); ARK. CODE. ANN. § 7-5-205(4) (West 2012) (same); IND. CODE § 3-12-1-1.7(a)(4) (2012) (same); MISS. CODE ANN. § 23-15-523(7)(c) (West 2011) (same).

247. *See, e.g.*, COLO. REV. STAT. ANN. § 1-8.5-105 (West 2012) (allowing a provisional ballot to count, despite the omission of information, if an official is able to determine that the elector was eligible); MASS. GEN. LAWS ANN. ch. 54, § 97 (West 2012) ("No [absentee] ballot ... shall be rejected for any immaterial addition, omission or irregularity in the preparation or execution of any writing or affidavit required by [the laws regulating the absentee voting process]."); NEB. REV. STAT. § 32-1002(6) (2011) (allowing a provisional ballot to count, despite errors or omissions in registration materials or on the ballot itself, if the errant or omitted "information is not necessary to determine the eligibility of the voter to cast a ballot"); N.Y. ELEC. LAW app. § 6210.13(a)(2) (McKinney 2011) ("A vote for any candidate or ballot measure shall not be rejected solely because the voter failed to follow instructions for marking the ballot. If, for any reason, it is impossible to determine the choice of the voter for any candidate or ballot question, the vote for that candidate or ballot question shall be considered void."); N.D. CENT. CODE ANN. § 16.1-07-31(1) (West 2011) ("If a voter's mistake or omission in the completion of a document [related to absentee voting] does not prevent determining whether a covered voter is eligible to vote, the mistake or omission does not invalidate the document."); R.I. GEN. LAWS § 17-20-24(a) (2012) (allowing an absentee ballot to count, despite immaterial errors, omissions, or irregularities); *see also* Adkins v. Huckabay, 755 So. 2d 206, 218 (La. 2000) (adding to a "substantial compliance" standard the caveat that an error in absentee balloting will only be preclusive if it "adversely affects the sanctity of the ballot and the integrity of the election," which may amount to a materiality standard).

dynamic component of materiality as well. In *Williams v. Lide*,[248] the court addressed a county commissioner's race that left one candidate ahead by four votes on Election Day, and his opponent ten votes ahead five months later.[249] Of particular relevance, several voters cast absentee ballots accompanied by flawed affidavits.[250] The trial court discounted errors on these affidavits unrelated to the voters' addresses, signatures, and reasons for voting absentee—that is, errors that were immaterial to ensuring the voters' eligibility.[251] Yet several disputed ballots with material flaws remained. So the trial court took testimony from the voters in question, allowing the voters to present evidence rendering some of the earlier flaws immaterial.[252] Despite serious (but not strategic) errors in the original paperwork, once those errors became immaterial, the associated ballots were counted.[253] Other states can best realize the purposes of their election procedures by adopting, and codifying, the *Williams* court's approach.[254]

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248. 628 So. 2d 531 (Ala. 1993) (per curiam).

249. *Id.* at 533.

250. *Id.* at 536.

251. *Id.*

252. *Id.*

253. *Id.* The extent to which Alabama currently maintains this approach is not clear. Particularly in the wake of *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), which struck as a violation of due process an allegedly inconsistent exercise of postelection leniency by the Alabama Supreme Court, *id.* at 581, inconsistency seems to have—ironically—increased. Some more recent Alabama cases purport to follow *Williams* while finding errors to be preclusive, but it is possible that the errors in question in those cases were effectively deemed material. *See, e.g.*, Washington v. Hill, 960 So. 2d 643 (Ala. 2006); Eubanks v. Hale, 752 So. 2d 1113 (Ala. 1999). Others seem to adopt a view of compliance far removed from materiality, and have found error in the *Williams* trial court process of allowing postelection testimony to cure earlier errors. *See, e.g.*, Townson v. Stonicher, 933 So. 2d 1062, 1064-67 (Ala. 2005) (refusing to accept identification that did not precisely meet the statutory standard, and refusing to permit later introduction of the proper identification at trial).

254. Michigan very nearly took up the challenge in 2012, in a bill ultimately vetoed by the governor. The bill added a new requirement that voters attest to their citizenship on absentee ballots, but allowed voters to correct, in postelection proceedings, their failures to comply. *See* S.803 § 766a, 96th Leg., Reg. Sess. (Mich. 2012) ("If an election is contested in a court, an absent voter ballot that was not counted because the absent voter did not answer the citizenship question in writing to the clerk before the polls closed on election day ... may be counted if the court determines that the voter was a citizen at the time of the election in question.").

CONCLUSION

Despite general concern about the aggregate decline of competitive elections,[255] photo-finish races will not disappear. When an election heads into "overtime," it tests the capacity of the infrastructure of our democracy to deliver a result that is both inclusive and reliable, and that is *perceived* to be both inclusive and reliable. In the 2000 presidential election, that capacity broke down in the face of numerous errors by voters and officials, with serious and lingering consequences. Nearly a decade later, our conceptual approach to election-related errors remains inadequate, particularly in the event of races close enough to head into "overtime."

This Article suggests one component of a solution, dependent upon the robust application of a materiality principle found, inter alia, in an underrecognized provision of the Civil Rights Act of 1964. Reorienting the analytical framework for evaluating the consequences of election procedures in light of this materiality principle may be able to resolve some of the conflict between the need for regulations to administer elections and the ultimate purposes those regulations are intended to fulfill. Particularly by recognizing the dynamic nature of that materiality, it is possible to resolve election-related flaws in a manner better tailored both to the rationale for election procedures and to the more foundational reasons why we vote.

255. *See, e.g.*, Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 OHIO ST. L.J. 1121, 1123-25 (2007); David Lublin & Michael P. McDonald, *Is It Time to Draw the Line?: The Impact of Redistricting on Competition in State House Elections*, 5 ELECTION L.J. 144, 155 (2006).