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VOTER REGISTRATION AND ELECTION REFORM

Daniel P. Tokaji*

Voter registration matters. Political candidates, parties, and advocacy groups have always understood this, devoting a great deal of time and resources to ensuring that their supporters are registered.¹ Less nobly, there have been frequent attempts by political operatives to impede participation through the adoption and uneven application of registration rules. Examples include the exclusion of urban immigrants, ethnic minorities, and laborers during the nineteenth century,² the mass disfranchisement of southern blacks through most of the twentieth century,³ and the aggressive purging⁴ and caging⁵ practices of recent years. A growing body of social science

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¹ ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 157 (2000); see also Judith Kilpatrick, *Wiley Austin Branton and the Voting Rights Struggle*, 26 U. ARK. LITTLE ROCK L. REV. 641 (2004) (discussing the NAACP's longstanding emphasis on voter registration drives); Kristyna C. Ryan, *Special Sessions: Illinois State Senator Barack Obama*, CBA RECORD, Nov. 2004, at 46, 46 ("After graduating from Harvard, Obama returned to Illinois and organized one of the largest voter registration drives in Chicago history to help Bill Clinton's election campaign.").

² See *infra* Part I.

³ See *infra* Part I.

⁴ See Joaquin G. Avila, *The Washington 2004 Gubernatorial Election Crisis: The Necessity of Restoring Public Confidence in the Electoral Process*, 29 SEATTLE U. L. REV. 313, 329–30 (2005) (describing a discriminatory Texas purge, to which the U.S. Department of Justice objected); Jeffrey A. Blomberg, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 FORDHAM L. REV. 1015, 1037–42 (1995) (arguing that voter purge statutes tend to inhibit minority voting without effectively reducing fraud); Paul M. Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. REV. 625, 645–47 (2002) (noting Florida's pre-election purge of some eligible voters in 2000, while ostensibly purging ineligible felons); James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. RACE & L. 227, 257–60 (2007) (discussing allegations that election officials purged the names of Latino voters in New Jersey).

⁵ See Chandler Davidson et al., *Vote Caging as a Republican Ballot Security Technique*, 34 WM. MITCHELL L. REV. 533 (2008). Although vote caging has garnered greater attention in recent years, the practice is not new. Chandler and his co-authors discuss former Chief Justice Rehnquist's involvement in these tactics, to challenge African-American and Latino voters in Phoenix in the 1950s and 1960s. *Id.* at 543–59.

research assesses the impact of various registration practices on voter turnout.⁶ Voter registration has also attracted the attention of election reformers over the years. Key portions of the Voting Rights Act of 1965 (VRA),⁷ the National Voter Registration Act of 1993 (NVRA),⁸ and the Help America Vote Act of 2002 (HAVA)⁹ are designed to reduce registration barriers. Litigators have increasingly focused on voter registration as well, with disputes over the laws and procedures governing voter registration forming an important part of the growing election law docket.¹⁰ Though voting technology and voter identification issues have typically attracted the lion's share of public attention in the area of election administration,¹¹ the set of legal issues surrounding voter registration have become even more significant.¹² In fact, voter registration became *the* big issue of the 2008 election season, just as were voting machines in 2000 and provisional ballots in 2004.

And yet, for all this activity, legal scholars have paid relatively little attention to voter registration.¹³ There has been some research on federal registration laws, but

⁶ See *infra* notes 365–71 and accompanying text.

⁷ 42 U.S.C. § 1973aa-1a (2000) (language assistance in registration and other voting activities); 42 U.S.C. § 1973d (2000) (repealed 2006) (federal examiners).

⁸ 42 U.S.C. §§ 1973gg to 1973gg-10 (2000).

⁹ 42 U.S.C. § 15483 (Supp. V 2005) (computerized statewide voter lists to speed registration and improve accuracy).

¹⁰ Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 958–59 (2005) (showing increase in election cases); see also Election Law @ Moritz—Major Pending Cases: Sorted by Case Name, <http://moritzlaw.osu.edu/electionlaw/litigation/index.php> (last visited Dec. 1, 2008) (listing important election administration cases regarding voter registration and other issues).

¹¹ See Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1072 (2007).

¹² For a more detailed discussion of recent legal controversies surrounding voter registration, see *infra* Part III.

¹³ Curiously, there seems to have been greater interest in the topic among law students and recent graduates than law professors. See Christopher W. Carmichael, *Proposals for Reforming the American Electoral System After the 2000 Presidential Election: Universal Voter Registration, Mandatory Voting, and Negative Balloting*, 23 HAMLINE J. PUB. L. & POL'Y 255 (2002); Kimberly C. Delk, Comment, *What Will It Take to Produce Greater American Voter Participation? Does Anyone Really Know?*, 2 LOY. J. PUB. INT. L. 133 (2001); Nathan V. Gemmiti, Note, *Porsche or Pinto? The Impact of the "Motor Voter Registration Act" on Black Political Participation*, 18 B.C. THIRD WORLD L.J. 71 (1998); Kevin K. Green, Note, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993*, 22 J. LEGIS. 45 (1996); Jason P.W. Halperin, Note, *A Winner at the Polls: A Proposal for Mandatory Voter Registration*, 3 N.Y.U. J. LEGIS. & PUB. POL'Y 69 (1999); Deborah S. James, Note, *Voter Registration: A Restriction on the Fundamental Right to Vote*, 96 YALE L.J. 1615 (1987); Steven L. Lapidus, Note, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 FORDHAM L. REV. 93 (1983); Mark Thomas Quinlivan, Comment, *One Person, One Vote Revisited: The*

relatively little scholarly analysis of the many registration issues that have found their way to the courts or of the possibilities for future legislative reform.¹⁴ Even within the generally underexamined election law sub-field of election administration, voter registration is an especially underexamined topic.¹⁵

The relative lack of interest in voter registration in the legal academy may partly reflect the lack of cache that election administration matters in general had before 2000. The “nuts and bolts” issues surrounding election administration were of less interest to legal scholars than topics like redistricting and campaign finance regulation, which they tended to view as “more conceptually interesting.”¹⁶ This has changed considerably in recent years, at least partly due to the “constitutionalization” (to borrow Rick Pildes’ term) of the vote counting process in *Bush v. Gore*.¹⁷ Perhaps the fact that voter registration rules remain almost entirely a product of statutory law, having not (yet) been constitutionalized, makes them of only passing interest even to most election law scholars.

The purpose of this Article is to help fill that breach. It examines legislation and litigation surrounding the voter registration process, including the requirements with which voters must comply to register, the public and private entities that assist voters in registering, and the systems used to maintain registration rolls. Part I looks backward, providing historical background on the uses and abuses of registration, while Part II describes the patchwork of laws governing registration today. Part III discusses recent litigation over voter registration, including the maintenance of registration lists, state agency registration, registration drives, and proof of eligibility. During the George W. Bush administration, the U.S. Department of Justice (DOJ) has been disappointingly inactive in enforcing provisions of federal law designed to increase registration, focusing instead on trying to make states remove ineligible voters from the rolls.¹⁸ Enforcement of laws designed to promote

Impending Necessity of Judicial Intervention in the Realm of Voter Registration, 137 U. PA. L. REV. 2361 (1989); Cynthia A. Williams, Note, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. REV. 590 (1990).

¹⁴ Daniel H. Lowenstein, *Election Law as a Subject—A Subjective Account*, 32 LOY. L.A. L. REV. 1199 (1999) (arguing that election law is worthy of study for many reasons, including the growth of litigation).

¹⁵ For more on the general academic disregard of election administration before the 2000 election, see ROY G. SALTMAN, *THE HISTORY AND POLITICS OF VOTING TECHNOLOGY: IN QUEST OF INTEGRITY AND PUBLIC CONFIDENCE* 125–26 (2006), and Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 ELECTION L.J. 118 (2007) (reviewing SALTMAN, *supra*). As noted in the preceding paragraph, social scientists have paid somewhat greater attention to voter registration than have legal scholars.

¹⁶ See Lowenstein, *supra* note 14, at 1202.

¹⁷ See Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 48–50 (2004).

¹⁸ See U.S. Dep’t of Justice, Civil Rights Div., Cases Raising Claims Under National Voter Registration Act, http://www.usdoj.gov/crt/voting/litigation/recent_nvra.html (last visited

the inclusion of all eligible voters has been left mostly to non-governmental organizations. Although these cases have played an important role in protecting registration opportunities and preventing the erroneous exclusion of voters, systemic improvements in voter registration will not come through litigation alone. Part IV looks forward, considering the possibilities for future registration reform. It argues that the reforms should focus on expanding the electorate and discusses reform proposals that might lead to a more representative electorate.

I. REGISTRATION MANIPULATION: A BRIEF HISTORY

A comprehensive history of voter registration lies beyond the scope of this Article.¹⁹ Yet some understanding of this history, as well as the legal rules governing voter registration, is necessary to understand the voting registration controversies of today and the prospects for future reform.

Practically from their inception, voter registration lists have served a dual purpose. They have served the constructive role of ensuring that only eligible voters participate in elections and that they vote only once in each election.²⁰ They have also served the less worthy end of allowing those in control of the administration of elections to impede their political opponents' supporters from participating.²¹ The historical debates over registration—and, in particular, the complaints of voter fraud on the one hand and disfranchisement on the other—reverberate in the access-integrity debate that tends to dominate contemporary discussions of voter registration and election reform.²²

Laws requiring voters to register date back to the early 1800s, although they did not proliferate until the latter part of that century.²³ Massachusetts had voter registration as early as 1801, but voter registration was not the norm prior to the Civil War.²⁴ Early registration systems were weak in comparison to what we know today.²⁵ Lists were originally created by local government officials, who were responsible for

Dec. 1, 2008) (listing the DOJ's docket during the Bush administration and the focus on cases compelling purging of registration lists).

¹⁹ For a more thorough discussion of this history, see RONALD HAYDUK, *GATEKEEPERS TO THE FRANCHISE: SHAPING ELECTION ADMINISTRATION IN NEW YORK* 17–21 (2005), KEYSSAR, *supra* note 1, at 151–59, and SALTMAN, *supra* note 15, at 133–35.

²⁰ See KEYSSAR, *supra* note 1, at 159 (explaining the desire to reform elections).

²¹ *Id.* at 157–60 (explaining the underlying ways in which election reform was used for corrupt purposes).

²² See generally BALANCING ACCESS AND INTEGRITY: THE REPORT OF THE CENTURY FOUNDATION WORKING GROUP ON STATE IMPLEMENTATION OF ELECTION REFORM (2005) (discussing the competing interests of improving access to the electoral process and preventing voter fraud in the context of HAVA).

²³ KEYSSAR, *supra* note 1, at 151.

²⁴ *Id.*

²⁵ HAYDUK, *supra* note 19, at 19.

compiling the names of those eligible to vote in their jurisdiction, usually based on their personal knowledge or on information learned by going door to door.²⁶ They were sometimes connected to poll taxes, with tax assessors' rolls serving as confirmation that voters had paid the required levy and thereby becoming a form of registration list.²⁷ For the most part, personal registration by the voter was not required until the early nineteenth century—in other words, voters were not expected to register themselves.²⁸ That began to change, however, toward the end of the century, when states enacted statutes that “shifted the burden of establishing eligibility from the state to the individual.”²⁹ Between the Civil War and World War I, most states had adopted formal registration requirements, at least in larger urban areas.³⁰

The stated rationale for the implementation of stronger registration requirements was to combat fraud and corruption at the polls.³¹ This was thought to be—and undoubtedly was—most common in larger cities, where election officials could not be expected personally to know everyone coming in to vote.³² Typically, registration was required only in urban areas, only spreading to more rural areas in later decades.³³ There was often an ulterior motive for these laws as well, namely to impede the participation of groups that those running elections wanted to exclude.³⁴ Considerable discretion was invested in authorities to determine the details of voter registration, over such matters as the deadline, locations available for registering, hours those locations would be open, documents needed to register, and how frequently one had to re-register.³⁵ The malleability of these rules frequently became a source of contention between parties and candidates.³⁶

In the North, the call to require voter registration came largely in response to the machine politics of the day.³⁷ These measures were justified by the need to prevent double voting or the use of fictitious names or the names of deceased people.³⁸ And

²⁶ *Id.*

²⁷ RICHARD FRANKLIN BENSEL, *THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY* 42 (2004).

²⁸ Quinlivan, *supra* note 13, at 2365–66.

²⁹ HAYDUK, *supra* note 19, at 19; PAUL KLEPPNER, *WHO VOTED? THE DYNAMICS OF ELECTORAL TURNOUT, 1870–1980*, at 60 (1982).

³⁰ KEYSSAR, *supra* note 1, at 152; *see also* SALTMAN, *supra* note 15, at 134 (“In general, registration laws applied more stringent requirements to cities; the larger the city, the more stringent the requirement.”).

³¹ KEYSSAR, *supra* note 1, at 152.

³² *Id.*

³³ HAYDUK, *supra* note 19, at 19. In fact, until 2006, the State of Wisconsin did not require voter registration in smaller municipalities. STEVEN F. HUEFNER ET AL., *FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES* 113 (2007).

³⁴ Quinlivan, *supra* note 13, at 2366–67.

³⁵ KEYSSAR, *supra* note 1, at 156.

³⁶ *Id.* at 152–53.

³⁷ *Id.* at 157.

³⁸ *See* HAYDUK, *supra* note 19, at 19.

there no doubt was considerable fraud associated with urban politics in the late nineteenth and early twentieth centuries, dominated as it was by strong party bosses.³⁹ Good-government reformers of the day saw this system as rotten to its core.⁴⁰ At the same time, voter registration rules were sometimes used to prevent groups of voters deemed undesirable—particularly workers and recent immigrants from southern and eastern Europe—from voting.⁴¹ Racist motivations and xenophobic rhetoric were not uncommon in the battles to tighten voter recommendation rules in northern cities.⁴²

Voter registration frequently became a partisan battle in the North, with proponents of stricter registration rules tending to be Republican and those resisting such reforms Democrats.⁴³ Shifts in party control over government could mean a change in the rules. New Jersey's experience is exemplary.⁴⁴ Republicans instituted new registration requirements in 1866 and 1867, requiring voters to register on the Thursday before the general election and allowing anybody to challenge those seeking to register.⁴⁵ But in 1868, Democrats gained control of state government and repealed these laws.⁴⁶ In 1870, the Republican Party regained control of state government and re-instituted registration in cities of over 20,000 people, eventually extending it to cities of more than 10,000.⁴⁷ Later, during the Progressive Era of the early twentieth century, reformers sought to limit corruption through laws requiring registration in cities of 5,000 or more, requiring voters to re-register whenever they moved or missed an election, giving prospective voters only four days to register, and requiring those registering not only to identify themselves but also to provide the names of their parents, spouse, and landlord and to describe where they lived.⁴⁸ The new registration laws were followed by a sharp decline in turnout, especially in New Jersey's cities.⁴⁹

Registration requirements were thus partly designed to reduce fraud and partly to reduce the electoral strength of immigrants and blacks.⁵⁰ They succeeded in achieving

³⁹ 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, 381 (1991).

⁴⁰ *Id.* at 382.

⁴¹ KEYSSAR, *supra* note 1; see Cunningham, *supra* note 39, at 383–84.

⁴² Cunningham, *supra* note 39, at 383–84; Quinlivan, *supra* note 13, at 2367.

⁴³ KEYSSAR, *supra* note 1.

⁴⁴ The New Jersey history that appears in this paragraph is drawn from KEYSSAR, *supra* note 1, at 152–53.

⁴⁵ *Id.* at 152.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 153.

⁴⁹ *Id.* at 158.

⁵⁰ Though stricter voter registration rules were designed to reduce the power of political machines, like so many reforms, they sometimes had unintended consequences. Irish political machines in the Northeast were particularly adept at mobilizing their own constituencies (which sometimes included southern and eastern European immigrants), while supporting registration rules designed to impede others from participating. *Id.* at 157.

both goals. While the precise impact of registration laws is difficult to quantify, Alexander Keyssar concludes that “it can be said with certainty that registration laws reduced fraudulent voting and that they kept large numbers (probably millions) of eligible voters from the polls.”⁵¹

While Democrats were typically the ones resisting stricter registration rules in the North, white Democrats in the South used voter registration to disfranchise blacks.⁵² From the 1870s through the turn of the twentieth Century, black participation and representation declined precipitously, as southern white Democrats recovered power.⁵³ Immediately after the Civil War, blacks voted and were elected to office in large numbers, but southern whites succeeded in disfranchising them almost completely in the post-Reconstruction period.⁵⁴ In the South, “good government” was often used as a euphemism for disfranchisement.⁵⁵ There were many means adopted to keep blacks from voting, including intimidation and violence, white primaries, literacy tests, and poll taxes.⁵⁶ But control over voter registration was a critical component of this effort.⁵⁷ Morgan Kousser lists six registration-related tactics that were used to keep blacks from voting:

[1] lengthening residency requirements; [2] requiring periodic voter registration at centrally located [polling] places during working hours and

⁵¹ *Id.* at 158.

⁵² See J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 22 (1999) (“The Southern Democrats’ promises had been violated even as they were uttered.”).

⁵³ Richard H. Pildes, *Democracy, Anti-Democracy and the Canon*, 17 CONST. COMMENT. 295, 301–02 (2000). As Professor Pildes explains, the disfranchisement of blacks was largely accomplished through state constitutional amendments, “[t]he white supremacy purposes of [which] . . . were not disguised.” *Id.* at 302.

⁵⁴ See KOUSSER, *supra* note 52, at 18–23 (describing the plunge in black votes from Reconstruction to post-Reconstruction).

⁵⁵ Daniel P. Tokaji, *Representation and Raceblindness: The Story of Shaw v. Reno*, in RACE LAW STORIES 497, 503 (Rachel F. Moran & Devon Wayne Carbado eds., 2008). One example may be found in North Carolina, which enacted constitutional amendments designed to disfranchise African-Americans in 1900. *Id.* The man who spearheaded these changes, Governor Charles Aycock, was remarkably candid in tying “good government” to the disfranchisement of blacks: “I am proud of my State, . . . because there we have solved the Negro problem. . . . We have taken him out of politics and have thereby secured good government under any party and laid foundations for the future development of both races.” *Id.* (quoting Brief of the Congressional Black Caucus as Amicus Curiae in Support of Appellees at 13–14, *Shaw v. Hunt*, 517 U.S. 899 (1996) (Nos. 94-923, 94-924)).

⁵⁶ Cunningham, *supra* note 39, at 376–77. For a description of the various practices used to disfranchise southern blacks, see KOUSSER, *supra* note 52, at 25–38, and BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 8–10 (1992).

⁵⁷ See Cunningham, *supra* note 39, at 377 (explaining that voter registration provided the mechanism for disfranchisement).

presentation of registration receipts at the polls . . . ; [3] demanding copiously detailed information, which sometimes had to be vouched for by witnesses, before a voter could register; [4] giving registration boards sufficient discretion to allow them to unfairly pad or purge the rolls; [5] not guaranteeing equal party representation on such boards; and [6] permitting widespread challenges to voters at the polls.⁵⁸

Because freedmen tended not to be used to keeping records, administrative requirements tended to have a disproportionate impact on their participation, even if evenly applied.⁵⁹ Of course, these requirements were not evenly applied.⁶⁰ As a practical matter, local officials enjoyed broad discretion in ascertaining voter qualifications, especially those pertaining to "good character" and "understanding" of passages that voters were asked to read.⁶¹ It was therefore easy for them to disfranchise blacks while allowing similarly situated whites to vote.⁶²

Sometimes, local election officials' discretion was codified into law. South Carolina, for example, used registration forms as a form of literacy test by requiring voters to sign their names—a requirement that was expected to keep most blacks from registering.⁶³ The law also allowed the local registrar to add voters who had failed to register by the close of the registration period, if he decided, "upon such evidence as he may think necessary, in his discretion," that they should be added.⁶⁴

The end result of the web of registration requirements, literacy or understanding tests, residence requirements, threats, violence, and other tactics was that over 90% of blacks who had previously been registered were disfranchised by the early 1900s.⁶⁵ In the early 1940s, the black registration rate in every one of the southern states was still under 7%.⁶⁶ Over time, the discretionary registration systems of southern states

⁵⁸ KOUSSER, *supra* note 52, at 34.

⁵⁹ Cunningham, *supra* note 39, at 377–78.

⁶⁰ *Id.* at 380; KOUSSER, *supra* note 52, at 35.

⁶¹ Cunningham, *supra* note 39, at 380.

⁶² *Id.*; see also KOUSSER, *supra* note 52 (describing discriminatory application of facially neutral rules); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1990*, at 48 (1974) (describing key features of southern registration laws, including "the amount of discretion granted to the registrars, the specificity of the information required of the registrant, the times and places set for registration, and the requirement that a voter bring his registration certificate to the polling place").

⁶³ KOUSSER, *supra* note 52, at 35. South Carolina also adopted an "eight-box" law, requiring election officials to shift ballot boxes for each of the eight offices around on election day. This prevented illiterate voters from getting a literate friend to help them, by arranging their tickets before going to the polls. *Id.*

⁶⁴ *Id.* (internal quotation marks omitted).

⁶⁵ KOUSSER, *supra* note 52, at 49, 241.

⁶⁶ James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT*,

became an increasingly vital mechanism by which to keep blacks from voting. Although the Supreme Court mostly turned a blind eye to black disfranchisement in the early part of the twentieth century,⁶⁷ it did strike down the grandfather clause⁶⁸ and the white primary.⁶⁹ This gave greater importance to the discretion afforded the local registrar, “a law unto himself in determining the citizen’s possession of literacy, understanding, and other qualifications,”⁷⁰ as a disfranchisement tool.⁷¹

None of this history is meant to deny that registration laws served and continue to serve a useful purpose. There can be little doubt that machine politics and attendant corruption made registration desirable and even necessary, especially in more heavily populated areas. At the same time, in both the North and the South, voter registration systems often served a more insidious purpose: they were used to keep eligible citizens from voting. Although white Democrats’ disfranchisement of southern blacks is the most notorious example, it is also clear that northern Republicans sometimes manipulated voter registration rules to disfranchise democratic-leaning immigrants and working people. Voter registration has thus been a means not only of promoting election integrity, but also of impeding eligible citizens’ access to the ballot.

II. REGISTRATION LEGISLATION: THE STATUTORY BACKDROP

Like other aspects of American election administration, voter registration today is mostly a creature of state law.⁷² Every state but North Dakota now requires voters to register.⁷³ The remaining states differ significantly in their administration of voter registration on such matters as the deadlines for registration, the type of database used to keep registration lists, the proof required to register, and their restrictions on registration by private entities.⁷⁴ There are, however, some important federal constraints on voter registration. The three most important federal laws regulating registration are the Voting Rights Act of 1965 (VRA), the National Voter Registration Act of

1965–1990, at 351, 354 (Chandler Davidson & Bernard Grofman eds., 1994).

⁶⁷ Daniel P. Tokaji, *The Sordid Business of Democracy*, 34 OHIO N.U. L. REV. 341, 343–44 (2008).

⁶⁸ *Guinn v. United States*, 238 U.S. 347, 365 (1915).

⁶⁹ *Smith v. Allwright*, 321 U.S. 649, 664–66 (1944).

⁷⁰ V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 563 (1949).

⁷¹ Quinlivan, *supra* note 13, at 2370.

⁷² See Tokaji, *The Birth and Rebirth of Election Administration*, *supra* note 15, at 122 (noting the pronounced decentralization of American election administration).

⁷³ U.S. ELECTION ASSISTANCE COMM’N, *THE 2006 ELECTION ADMINISTRATION AND VOTING SURVEY: A SUMMARY OF KEY FINDINGS* 8 (2007), available at http://www.eac.gov/clearinghouse/docs/eds-2006/edsr-final-adopted-version.pdf/attachment_download/file.

⁷⁴ For more on the states’ registration laws, see *id.*, and Electionline.org, Voter Registration Information, [http://www.pewcenteronthestates.org/uploadedFiles/voter%20reg%20info\(1\).pdf](http://www.pewcenteronthestates.org/uploadedFiles/voter%20reg%20info(1).pdf) (last visited Dec. 1, 2008). Litigation over state registration rules and practices is addressed *infra* Part III.

1993 (NVRA), and the Help America Vote Act of 2002 (HAVA).⁷⁵ Part II.A describes the basic requirements of these laws. Part II.B considers statistical information relating to voter registration that suggests there are some persistent problems that these laws have not yet resolved.

A. Federal Laws Governing Registration

1. The Voting Rights Act

The VRA demolished the system of disfranchisement that had kept African-Americans from voting or getting elected into office throughout most of the twentieth century.⁷⁶ A critical component of the VRA's success was that it addressed the system of discretionary and unequal voter registration practices that had kept blacks off the rolls throughout the South.

Even before 1965, Congress had enacted laws aimed at addressing state and local practices that had prevented southern blacks from registering. Among them were provisions contained in 42 U.S.C. § 1971, which were part of the Civil Rights Act of 1957,⁷⁷ and were later amended as part of the Civil Rights Acts of 1960 and 1964.⁷⁸ The 1957 Act prohibited threats and intimidation for the purpose of interfering with the right to vote, empowering the Attorney General to commence actions for injunctive relief.⁷⁹ The 1960 Act allowed federal courts to appoint "voting referees" in places where there was a pattern or practice of denying voting rights, who were allowed to receive applications to be evaluated under then prevail-

⁷⁵ See *supra* notes 7–9. There are other federal laws regulating voter registration, including the Uniformed and Overseas Citizens Absentee Voting Act of 1986, Pub. L. No. 99-410, 100 Stat. 924 (codified as amended in scattered sections of 39 U.S.C., 42 U.S.C.) (UOCAVA); the Voting Accessibility for the Elderly and Handicapped Act of 1984, 42 U.S.C. §§ 1971, 1973ee to ee-6 (2000) (VAEHA); the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 42 U.S.C.) (ADA); the Overseas Citizens Voting Rights Act of 1975, Pub. L. No. 94-203, 89 Stat. 1142 (codified in scattered sections of 42 U.S.C.) (repealed 1986); and the Federal Voting Assistance Act of 1955, Pub. L. No. 84-296, 69 Stat. 584 (codified in scattered sections of 42 U.S.C., 50 U.S.C.) (repealed 1986). The ones mentioned in the text are the most important, in terms of the requirements they impose on voter registration.

⁷⁶ Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 7, 21 (Bernard Grofman & Chandler Davidson eds., 1992).

⁷⁷ Civil Rights Act of 1957, Pub. L. No. 85-315, § 131, 71 Stat. 634, 637–38 (codified at 42 U.S.C. § 1971(a)–(e) (2000)).

⁷⁸ Civil Rights Act of 1960, Pub. L. No. 86-449, § 601, 74 Stat. 86, 90–92 (codified at 42 U.S.C. § 1971(e) (2000)); Civil Rights Act of 1964, Pub. L. No. 88-352, § 101, 78 Stat. 241, 241 (codified at 42 U.S.C. § 1971(a), (c), (g) (2000)).

⁷⁹ §§ 111, 131, 71 Stat. at 637.

ing standards.⁸⁰ The Civil Rights Act of 1964 attempted to address registration inequities by prohibiting the application of different standards to similarly situated voters, and by prohibiting the denial of voting rights based on an “error or omission” in the applicant’s registration form that was “not material” to the determination of whether he or she was qualified to vote.⁸¹

Although the 1957, 1960, and 1964 voting rights provisions have been described as “tepid,”⁸² the federal government commenced 71 cases under them⁸³ and secured several favorable court orders.⁸⁴ Their efficacy was quite limited, however, because case-by-case litigation proved woefully inadequate to address the systemic disfranchisement of black voters in the South.⁸⁵ Litigation was drawn out and could only address a few of the offending jurisdictions.⁸⁶ Even when the federal government obtained favorable court orders, new disfranchising practices sprouted up in place of the ones that had been enjoined.⁸⁷ At the end of the day, only around 36,000 blacks were added to registration rolls in the counties where litigation had been commenced.⁸⁸

Southern intransigence thus necessitated much more aggressive enforcement mechanisms. President Lyndon Johnson asked Attorney General Nicholas Katzenbach to draft the “goddamnedest toughest voting bill he could write,” and that is exactly what happened.⁸⁹ The lynchpins of the bill were the “special provisions” targeted at seven southern states.⁹⁰ One key provision allowed the Attorney General to suspend literacy tests in those states, a ban later made permanent and extended nationwide.⁹¹ Another was section 5, which required covered jurisdictions to obtain “preclearance” of voting changes from either the Department of Justice or the U.S. District Court

⁸⁰ § 601, 74 Stat. at 90; *see also* GROFMAN ET AL., *supra* note 56, at 13.

⁸¹ § 101, 78 Stat. at 241. These provisions remain part of federal law. 42 U.S.C. § 1971(a)(2)(A) & (B) (2000).

⁸² Davidson, *The Voting Rights Act*, *supra* note 76, at 17.

⁸³ GROFMAN ET AL., *supra* note 56, at 15.

⁸⁴ *See, e.g.*, *United States v. Cartwright*, 230 F. Supp. 873, 875–77 (M.D. Ala. 1964) (holding that registration practices resulting in disqualification of 93.3% of black applicants but only 4.6% of white applicants violated the statute); *United States v. McElveen*, 180 F. Supp. 10, 11, 14 (E.D. La. 1960), *aff’d in part sub nom. United States v. Thomas*, 362 U.S. 58 (1960) (finding a violation where a registration purge disfranchised 85% of black voters but only 0.07% of other voters, even though more than half of the other registration cards had similar defects); *United States v. Raines*, 189 F. Supp. 121, 133–34 (M.D. Ga. 1960) (holding that the use of different color registration forms for white and black voters and other differential practices violated the statute).

⁸⁵ GROFMAN ET AL., *supra* note 56, at 12–15; Tokaji, *Representation and Raceblindness*, *supra* note 55, at 504–05; *see* Davidson, *The Voting Rights Act*, *supra* note 76, at 17.

⁸⁶ GROFMAN ET AL., *supra* note 56, at 14.

⁸⁷ *Id.*

⁸⁸ *Id.* at 15.

⁸⁹ Davidson, *The Voting Rights Act*, *supra* note 76, at 17.

⁹⁰ *Id.* at 19.

⁹¹ *Id.*; GROFMAN ET AL., *supra* note 56, at 19, 21.

in Washington, D.C.⁹² This provision proved remarkably successful in stopping the hydra-like adoption of new disfranchisement tactics, once old ones had been enjoined.⁹³ In later years, it would become especially important not only in opening up the registration and voting process to blacks, but also in stopping practices that diluted minority voting rights in places where they were allowed to participate.⁹⁴

Also important in opening up the registration process were provisions allowing the appointment of federal “examiners” to help qualified persons register.⁹⁵ These examiners were authorized to inspect voter registration applications, create lists of eligible voters to be sent to local registrars, and issue registration certificates to eligible voters.⁹⁶ Sections 6 and 7 of the VRA gave the Attorney General the power to send federal examiners into covered jurisdictions, where there were at least twenty meritorious complaints or where needed to enforce constitutionally protected voting rights.⁹⁷ Federal courts were empowered to certify examiners for non-covered jurisdictions where they found constitutional violations justifying equitable relief.⁹⁸ Although examiners targeted only around sixty counties (mostly in Mississippi and Alabama) during the first decade after 1965,⁹⁹ they were very successful in helping black voters register.¹⁰⁰ Within three years, “more than half the majority-black counties in Mississippi and Alabama had achieved majority-black electorates.”¹⁰¹ The use of examiners declined in later years, and these provisions were repealed as part of the Voting Rights Act Reauthorization and Amendments Act of 2006.¹⁰²

Overall, the VRA was a spectacular success in eliminating barriers to registration and participation among southern blacks. Black registration in covered southern

⁹² Davidson, *The Voting Rights Act*, *supra* note 76, at 19; GROFMAN ET AL., *supra* note 56, at 17–18.

⁹³ Tokaji, *Representation and Raceblindness*, *supra* note 55, at 506; *see* GROFMAN ET AL., *supra* note 56, at 16–18. For an enlightening account of the means by which seemingly neutral voting rules were manipulated to keep African-Americans off registration rolls in Alabama before 1965, *see* BRIAN LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* (2007).

⁹⁴ *See* Davidson, *The Voting Rights Act*, *supra* note 76, at 27–30; Tokaji, *Representation and Raceblindness*, *supra* note 55, at 510–11.

⁹⁵ Davidson, *The Voting Rights Act*, *supra* note 76, at 19–20.

⁹⁶ 42 U.S.C. § 1973e (repealed 2006); Davidson, *The Voting Rights Act*, *supra* note 76, at 19–20; Tucker, *The Power of Observation*, *supra* note 4, at 237–38.

⁹⁷ 42 U.S.C. § 1973d (repealed 2006); Tucker, *The Power of Observation*, *supra* note 4, at 236.

⁹⁸ 42 U.S.C. § 1973a(a) (2000); Tucker, *The Power of Observation*, *supra* note 4, at 236.

⁹⁹ Davidson, *The Voting Rights Act*, *supra* note 76, at 19–20.

¹⁰⁰ Alt, *supra* note 66, at 368; Davidson, *The Voting Rights Act*, *supra* note 76, at 19–20; Tucker, *The Power of Observation*, *supra* note 4, at 238.

¹⁰¹ Alt, *supra* note 66, at 369.

¹⁰² Tucker, *The Power of Observation*, *supra* note 4, at 239. Remaining provisions of the VRA still allow the appointment of federal “observers,” who, as the name suggests, are empowered to observe polling places but not to register voters. *Id.*

states increased from 29.3% to 52.1% within two years of the VRA's passage.¹⁰³ More than a half-million blacks were added to the rolls in covered states by the end of 1967.¹⁰⁴ Increases in black registration also led to a significant rise in black turnout.¹⁰⁵ In fact, the disparity in black-white turnout has often been smaller in the South than elsewhere in the country.¹⁰⁶

The VRA was reauthorized in 1970, 1975, 1982, and, most recently, in 2006.¹⁰⁷ In terms of voter registration, the most significant amendment was the addition of the language assistance provisions in 1975.¹⁰⁸ Congress found that language minorities had been "effectively excluded from participation in the electoral process" due to various practices.¹⁰⁹ For example, only 44.4% of Latino citizens, compared with 73.4% of citizens who were English-proficient, were registered to vote in 1972.¹¹⁰

Based on such disparities, Congress adopted two significant amendments to the VRA in 1975.¹¹¹ The first was to expand the coverage formula for purposes of section 5 preclearance, to include jurisdictions in which more than 5% of the voting-age population were of a single language minority group and fewer than 50% of voting-age citizens had registered or voted in the preceding presidential election.¹¹² This change added many covered jurisdictions, including Arizona, Alaska, and Texas.¹¹³ The other language assistance provision requires that language assistance be provided in jurisdictions with more than 5% of citizens belong to a particular language minority group, and the illiteracy rate of that minority group is higher than the national

¹⁰³ Davidson, *The Voting Rights Act*, *supra* note 76; GROFMAN ET AL., *supra* note 56, at 23. For a discussion of more recent gains in black voter registration numbers in Georgia, see Charles S. Bullock III & Ronald Keith Gaddie, *Voting Rights Progress in Georgia*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 16–17 (2006).

¹⁰⁴ GROFMAN ET AL., *supra* note 56, at 21.

¹⁰⁵ *Id.* at 22.

¹⁰⁶ *Id.*

¹⁰⁷ Pub. L. No. 109-246, 120 Stat. 577 (2006); Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, *supra* note 66, at 21, 30–32 [hereinafter Davidson, *The Recent Evolution*]; Davidson, *The Voting Rights Act*, *supra* note 76, at 29–30, 34–42; GROFMAN ET AL., *supra* note 56, at 19–21.

¹⁰⁸ GROFMAN ET AL., *supra* note 56, at 20.

¹⁰⁹ 42 U.S.C. § 1973aa-1a(a) (2000).

¹¹⁰ Jocelyn Friedrichs Benson, *¡Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency Into American Democracy*, 48 B.C. L. REV. 251, 267 (2007).

¹¹¹ For a discussion of Congress' reasons for enacting the language assistance provisions of the VRA in 1975, see Cristina M. Rodríguez, *From Litigation, Legislation: A Review of Brian Landsberg's Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act*, 117 YALE L.J. 1132, 1150–57 (2008).

¹¹² Pub. L. No. 94-73, § 202(b), 89 Stat. 400, 401 (codified at 42 U.S.C. § 1973b(a)(1), (f)(1)–(4) (2000)); GROFMAN ET AL., *supra* note 56, at 20; Davidson, *The Recent Evolution*, *supra* note 107, at 31.

¹¹³ Davidson, *The Recent Evolution*, *supra* note 107, at 31.

average.¹¹⁴ Under both these provisions, written registration forms and oral assistance in filling out those forms is supposed to be provided to limited-English proficient voters.¹¹⁵ These provisions were most recently reauthorized and extended as part of the Voting Rights Act Reauthorization Act of 2006.¹¹⁶

The language assistance provisions of the VRA have increased registration and participation among Latino, Asian-American, and Native American citizens.¹¹⁷ Although quantitative data on the precise impact of the language assistance provisions are hard to come by,¹¹⁸ language minorities' registration and participation have tended to rise in jurisdictions after they come within the VRA's requirements.¹¹⁹ Still, significant gaps remain in voter registration among Latino, Asian-American, and Native American citizens.¹²⁰ In 2002, for example, only 53% of Latino voting-age citizens and 31% of Asian voting-age citizens were registered, compared to 69% of white voting-age citizens.¹²¹ A recent study found that language assistance is frequently inadequate.¹²² Of 361 jurisdictions surveyed, 72% reported providing registration materials for covered language minorities, whereas only 40.9% of jurisdictions provided oral assistance to voters in registering.¹²³ Yet there is also evidence that, where the language assistance requirements are fully implemented, they are quite effective in increasing language minority registration and participation.¹²⁴

¹¹⁴ Pub. L. No. 94-73, § 203(a), 89 Stat. 402, 403 (codified at 42 U.S.C. § 1973b(f) (2000)); GROFMAN ET AL., *supra* note 56, at 20. This trigger was later augmented to include jurisdictions with at least 10,000 voting-age citizens who are members of a language minority group. 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(II).

¹¹⁵ 42 U.S.C. § 1973b(f)(4) (2000); § 42 U.S.C. 1973aa-1a(b)(3) (2000); GROFMAN ET AL., *supra* note 56, at 20; James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 195, 219 (2006).

¹¹⁶ Pub. L. No. 109-246, 120 Stat. 577 (2006).

¹¹⁷ Benson, *supra* note 110, at 270–71; Tucker, *Enfranchising Language Minority Citizens*, *supra* note 115, at 233–34; *see also* SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 121–47 (2006) (discussing the benefits of language assistance).

¹¹⁸ Davidson, *The Voting Rights Act*, *supra* note 76, at 43 (noting that systemic surveys of Native American voter registration increases do not appear to exist). *See generally* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *BILINGUAL VOTING ASSISTANCE: SELECTED JURISDICTIONS' STRATEGIES FOR IDENTIFYING NEEDS AND PROVIDING ASSISTANCE* 4–5 (2008).

¹¹⁹ Benson, *supra* note 110, at 271; James Thomas Tucker & Rodolfo Espino, *Government Effectiveness and Efficiency? The Minority Language Assistance Provisions of the VRA*, 12 TEX. J. C.L. & C.R. 163, 230 (2007).

¹²⁰ Pei-te Lien, *The Voting Rights Act and Its Implications for Three Nonblack Minorities*, in *THE VOTING RIGHTS ACT: SECURING THE BALLOT* 129, 138 (Richard M. Valelly ed., 2006).

¹²¹ *Id.*

¹²² Tucker & Espino, *supra* note 119, at 231.

¹²³ *Id.* at 194–97.

¹²⁴ *See* Benson, *supra* note 110, at 270–72.

2. The National Voter Registration Act

While the VRA targeted practices that impeded racial and language minorities from registering, it did not deal with more general impediments to registration.¹²⁵ The NVRA, by contrast, was aimed at achieving a broad-based increase in registration among all voters, not just racial and language minorities.¹²⁶ At the time of its enactment, it was the most extensive federal intervention in state and local registration systems in history.¹²⁷ The NVRA was enacted in the face of evidence of declining turnout in the preceding decades.¹²⁸ This decline is especially remarkable when one considers that it partly coincides with the re-enfranchisement of African-Americans in the South, the effect of which was to counteract the decline in turnout occurring elsewhere.¹²⁹ Turnout in the United States was also relatively low in comparison to other countries,¹³⁰ a phenomenon that some scholars attributed to registration laws.¹³¹ One study estimated that liberalization of registration laws would increase participation by up to 14%.¹³²

Four months after President Bill Clinton took office in 1993, Congress enacted the NVRA.¹³³ The NVRA's stated goals were to increase registration and participation among eligible citizens while protecting election integrity by promoting the accuracy of voter registration lists.¹³⁴ Although enacted pursuant to Congress's power to regulate *congressional* elections under Article I, Section 4 of the Constitution,¹³⁵

¹²⁵ David A. Bositis, *Impact of the 'Core' Voting Rights Act on Voting and Officeholding*, in *THE VOTING RIGHTS ACT: SECURING THE BALLOT*, *supra* note 120, at 113, 114 (describing the impact that state government attitudes towards expanding voter registration have on minority registration votes).

¹²⁶ Laughlin McDonald, *Federal Oversight of Elections and Partisan Realignment*, in *THE VOTING RIGHTS ACT: SECURING THE BALLOT*, *supra* note 120, at 161, 165.

¹²⁷ It arguably still is, the only possible rival being HAVA, discussed *infra* Part II.C.

¹²⁸ See, e.g., FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* 4 (1988); RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* 9 (1992).

¹²⁹ See DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 341 (4th ed. 2008). But see Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963 (2001) (finding an increase in voter turnout in the South since 1972 and no significant change in turnout among eligible voters outside the South in that period).

¹³⁰ PIVEN & CLOWARD, *supra* note 128, at 4–5.

¹³¹ E.g., G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, in *CONTROVERSIES IN VOTING BEHAVIOR* 56, 78 (Richard G. Niemi & Herbert F. Weisberg eds., 1993).

¹³² *Id.*

¹³³ McDonald, *supra* note 126, at 165.

¹³⁴ Pub. L. No. 103-31, § 2(b), 107 Stat. 77, 77 (1993); see also NAT'L CLEARINGHOUSE ON ELECTION ADMIN., *IMPLEMENTING THE NATIONAL VOTER REGISTRATION ACT OF 1993: REQUIREMENTS, ISSUES, APPROACHES, AND EXAMPLES*, at I-1 (1994).

¹³⁵ Federal appellate courts upheld the NVRA on this ground. See *Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 794–95 (7th Cir. 1995); *Voting Rights Coal. v. Wilson*,

the NVRA effectively changed the registration processes for all elections, given the impracticability and inefficiency of maintaining separate voting lists for federal and state elections.¹³⁶ The main provisions of the NVRA may be divided into three categories: (1) requirements that registration opportunities be made available at certain state and local government offices, (2) partial standardization of the process for registering by mail, and (3) regulation of the process by which state and local entities maintain their voting lists.

The most publicized provision of the NVRA requires that the opportunity to register and to update one's registration be made available at state motor vehicle agencies.¹³⁷ Under the NVRA, voter registration applications are required to be provided as part of the application for a driver's license,¹³⁸ thus causing the law to be nicknamed "Motor Voter."¹³⁹ This requirement, however, is just one of several designed to make it easier to register to vote. The NVRA also requires that registration opportunities be made available at public assistance offices and at offices providing state-funded services to people with disabilities.¹⁴⁰ Those offices are supposed to distribute application forms and assist clients in completing them, unless they refuse assistance.¹⁴¹

In addition to designating certain state offices as voter registration agencies, the NVRA included provisions designed to improve and streamline the process for registering by mail.¹⁴² It required the Federal Election Commission (FEC) to develop a standardized voter registration application, in consultation with states' chief election officials, which states were required to accept and use.¹⁴³ That form may only contain such identifying information as is needed to allow state officials to assess an applicant's eligibility and otherwise to administer elections.¹⁴⁴ Eligible citizens must be added to registration lists if their mail applications are postmarked at least thirty days before the election.¹⁴⁵

60 F.3d 1411, 1413-14 (9th Cir. 1995). The issue never made it up to the U.S. Supreme Court.

¹³⁶ Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 349, 367 & n.133 (2006); Jeffrey A. Blomberg, Note, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 FORDHAM L. REV. 1015, 1033 n.135 (1995).

¹³⁷ Pub L. No. 103-31, § 2(b), 107 Stat. 77, 77 (1993); see also McDonald, *supra* note 126, at 165.

¹³⁸ 42 U.S.C. § 1973gg-3(a)(1) (2000).

¹³⁹ LOWENSTEIN ET AL., *supra* note 129.

¹⁴⁰ 42 U.S.C. § 1973gg-5(a)(2) (2000).

¹⁴¹ 42 U.S.C. § 1973gg-5(a)(4).

¹⁴² See 42 U.S.C. § 1973gg-4 (2000).

¹⁴³ 42 U.S.C. §§ 1973gg-4(a), 1973gg-7 (2000). Upon the enactment of HAVA, these duties were transferred to the newly created Election Assistance Commission. 42 U.S.C. § 1973gg-7, 42 U.S.C. § 15532 (Supp. V 2005).

¹⁴⁴ 42 U.S.C. § 1973gg-7(b).

¹⁴⁵ 42 U.S.C. § 1973gg-6(a)(1)(B) (2000).

Finally, the NVRA includes several provisions regulating the maintenance of voter registration lists by state and local election authorities. States are required to conduct programs that “make [] a reasonable effort to remove the names of ineligible voters from the official lists” due to death or a change in residence.¹⁴⁶ At the same time, it restricts states’ ability to purge voters who may in fact be eligible. States are not allowed to remove voters names from the rolls solely due to their failure to vote.¹⁴⁷ Voters may be removed, however, if they are sent a notice with a prepaid return address card, do not respond, and then do not appear to vote in at least two federal general elections.¹⁴⁸ Any programs to systematically remove ineligible voters from the rolls—commonly known as “purges”—must be completed at least ninety days before federal primary or general elections.¹⁴⁹ The NVRA also contains “fail-safe” provisions for voters who move prior to an election, without giving notice to election officials.¹⁵⁰ Those who move from one address to another, both served by the *same polling place*, are allowed to vote at that polling place.¹⁵¹ Those who move to a location served by a different polling place within the same “registrar’s jurisdiction” (typically the county or, in some states, the municipality) are allowed to correct their voting records and vote on election day.¹⁵² The state may designate whether the old or new polling place should be used by voters who move within the same registrar’s jurisdiction and the same congressional district.¹⁵³

The NVRA’s success in achieving its objectives is a matter of some debate. There is no doubt that the NVRA significantly increased the number of registered voters. Voter registration rose 3.72% nationally between 1994 and 1998.¹⁵⁴ Groups that are statistically less likely to vote, such as those of lower income and those who

¹⁴⁶ 42 U.S.C. § 1973gg-6(a)(4).

¹⁴⁷ 42 U.S.C. § 1973gg-6(b)(2) (Supp. V 2005).

¹⁴⁸ 42 U.S.C. § 1973gg-6(d).

¹⁴⁹ 42 U.S.C. § 1973gg-6(c)(2)(A).

¹⁵⁰ 42 U.S.C. § 1973gg-6(e).

¹⁵¹ 42 U.S.C. § 1973gg-6(e)(1).

¹⁵² 42 U.S.C. § 1973gg-6(e)(2)(A), (f); NAT’L CLEARINGHOUSE ON ELECTION ADMIN., *supra* note 134, at 6-3.

¹⁵³ NAT’L CLEARINGHOUSE ON ELECTION ADMIN., *supra* note 134, at 6-4. If the state does not make such a designation, then voters may choose to vote at either their old polling place or at a central location. They may also go to their *new* polling place to change their records and, if state law allows, to vote in that election. 42 U.S.C. § 1973gg-6(e)(2) (2000); NAT’L CLEARINGHOUSE ON ELECTION ADMIN., *supra* note 134, at 6-4. The statute is silent on where voters should vote if they move within the same registrar’s jurisdiction *but to a different congressional district. Id.*

¹⁵⁴ UNITED STATES FEDERAL ELECTION ASSISTANCE COMMISSION, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 1997–1998, *available at* <http://www.eac.gov/clearinghouse/docs/the-impact-of-the-national-voter-registration-act-on-federal-elections-1997-1998/>. More recently, there have been declines in the number of voters registered through the NVRA, as discussed *infra* Part III.

are less educated, showed especially strong increases in registration.¹⁵⁵ What did not occur, at least in the first several years that the NVRA was in effect, was an overall increase in turnout.¹⁵⁶ That is not to say that the NVRA had *no* effect on turnout, however, given that there are many other variables besides voter registration that can affect turnout.¹⁵⁷ In fact, the NVRA probably did slow the decline in turnout due to other factors.¹⁵⁸

3. The Help America Vote Act

The 2000 election produced another round of attention to election administration, which eventually resulted in the enactment of the Help America Vote Act of 2002.¹⁵⁹ As with the NVRA, the main goal of Congress when enacting HAVA was to promote access while ensuring election integrity. As succinctly expressed by one of the bill's main supporters, Representative Steny Hoyer, the goal was to make it "easier to vote" and "harder to cheat."¹⁶⁰

Registration was a principal focus of the deliberations over election reform that led to enactment of HAVA. A number of studies of the United States' election system came out in the wake of the 2000 election.¹⁶¹ These studies found that the problems with American election administration went well beyond the "hanging chads" that had attracted most of the attention during the Florida recount and judicial proceedings.¹⁶² Prominent among the shortcomings were the voter registration rolls maintained by state and local election authorities.¹⁶³ In fact, the influential Caltech/MIT Voting

¹⁵⁵ Robert D. Brown & Justin Wedeking, *People Who Have Their Tickets but Do Not Use Them: "Motor Voter," Registration, and Turnout Revisited*, 34 AM. POL. RES. 479, 491–98 (2006).

¹⁵⁶ See *id.* at 488; Stephen Knack, *Drivers Wanted: Motor Voter and the Election of 1996*, 32 PS: POL. SCI. & POL. 237 (1999); Michael D. Martinez & David Hill, *Did Motor Voter Work?*, 27 AM. POL. Q. 296, 297 (1999).

¹⁵⁷ See Martinez & Hill, *supra* note 156, at 300.

¹⁵⁸ See Knack, *supra* note 156, at 241.

¹⁵⁹ Pub. L. No. 107-252, 116 Stat. 1666 (2002).

¹⁶⁰ David Nather, *Election Overhaul May Have to Wait in Line Behind Other 'Crisis' Issues*, CQ WKLY., July 27, 2002, at 2034.

¹⁶¹ For a description of the more well-known "hanging chads" problem, see Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613, 621–24 (2001).

¹⁶² See, e.g., CALTECH/MIT VOTING TECH. PROJECT, VOTING: WHAT IS, WHAT COULD BE (2001), http://vote.caltech.edu/drupal/files/report/voting_what_is_what_could_be.pdf; NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (2001); U.S. GEN. ACCOUNTING OFFICE, ELECTIONS: PERSPECTIVES ON ACTIVITIES AND CHALLENGES ACROSS THE NATION (2001).

¹⁶³ See CALTECH/MIT VOTING TECH. PROJECT, *supra* note 162, at 26–35; NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 162, at 26–33; U.S. GEN. ACCOUNTING OFFICE, *supra* note 162, at 51–98.

Technology Project report found that voter registration mix-ups were probably the biggest source of lost votes in 2000, accounting for somewhere between 1.5 and 3 million votes.¹⁶⁴

Among the changes in election administration prescribed by HAVA,¹⁶⁵ the most significant for purposes of voter registration is the requirement that states establish a computerized statewide voter registration list,¹⁶⁶ sometimes referred to as a “statewide registration database.”¹⁶⁷ Prior to HAVA, registration lists were maintained at the local level in all but a handful of states.¹⁶⁸ After the 2000 election, a blue-ribbon commission jointly chaired by former Presidents Carter and Ford recommended that responsibility for registration be placed in the hands of state rather than local governments.¹⁶⁹ Following this recommendation, HAVA requires all states with voter registration (that is, all but North Dakota) to have “a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level . . .”¹⁷⁰ New applications for registration are supposed to include the voter’s driver’s license, if he or she has a current and valid one.¹⁷¹ That information is to be “match[ed]” against state motor vehicle records.¹⁷² States are also required to coordinate their lists with state felony records (in states that deny felons the right to vote) and death records.¹⁷³ HAVA generally retains the NVRA’s requirements pertaining to list maintenance, with a few narrow exceptions.¹⁷⁴

The implementation of state registration databases has proven difficult. States were to have their statewide registration databases in place by January 2004, but could obtain an extension until January 2006.¹⁷⁵ Almost all the states availed themselves of this waiver, and therefore did not have their statewide registration databases in place until 2006.¹⁷⁶ In fact, several states did not have fully functional HAVA databases in

¹⁶⁴ CALTECH/MIT VOTING TECH. PROJECT, *supra* note 162, at 9.

¹⁶⁵ The discussion in the text focuses on HAVA’s provisions concerning voter registration. For a summary of other aspects of HAVA, see Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1214–20 (2005), and Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 428–31 (2004).

¹⁶⁶ 42 U.S.C. § 15483 (Supp. V 2005).

¹⁶⁷ See Tokaji, *Early Returns on Election Reform*, *supra* note 165, at 1216.

¹⁶⁸ NAT’L COMM’N ON FED. ELECTION REFORM, *supra* note 162, at 30.

¹⁶⁹ *Id.*

¹⁷⁰ 42 U.S.C. § 15483(a)(1)(A).

¹⁷¹ 42 U.S.C. § 15483(a)(5)(A)(i)(I). If the voter does not have a driver’s license, then the applicant is to include the last four digits of his or her social security number. *Id.* If the voter has neither a driver’s license number nor a social security number, then the state is to assign a “unique identifying number []” to the voter. 42 U.S.C. § 15483(a)(5)(A)(ii).

¹⁷² 42 U.S.C. § 15483(a)(5)(B)(i).

¹⁷³ 42 U.S.C. § 15483(a)(2)(A)(ii).

¹⁷⁴ See 42 U.S.C. § 15483(a)(2)(A), (a)(4)(A), (b)(1), (b)(4), (b)(5).

¹⁷⁵ 42 U.S.C. § 15483(d)(1).

¹⁷⁶ See Tokaji, *Early Returns on Election Reform*, *supra* note 165, at 1216 (noting that

place by the 2006 general election, and a few still did not as of 2008.¹⁷⁷ The State of Wisconsin, for example, contracted with Accenture to help develop its statewide voter registration system, even though the company lacked experience in creating this type of database.¹⁷⁸ As of 2007, it was still not fully functional and, in particular, did not permit the cross-checking against motor vehicle, felony, and death records required by HAVA.¹⁷⁹ There have also been some serious problems in the matching procedures applied in several states, which threaten to result in some eligible voters names being left off the lists.¹⁸⁰

For purposes of voter registration, three other components of HAVA are worthy of mention. The first is the requirement that states provide provisional ballots to voters whose names do not appear on voter registration lists when they show up to vote.¹⁸¹ This requirement also has its roots in the Carter-Ford Commission report, which had recommended provisional voting to augment states' fail-safe voting procedures under the NVRA.¹⁸² The "vision" articulated in that report was that: "No American qualified to vote anywhere in her or his state should be turned away from a polling place in that state."¹⁸³ Provisional ballots would also allow for mistakes to be caught and voter registration lists to be corrected.¹⁸⁴ Following this recommendation, HAVA requires that voters be allowed to cast provisional ballots if their names do not appear on the list but they state that they are registered and eligible to vote.¹⁸⁵ If the voter is found "eligible under State law to vote," then his or her vote should be counted in accordance with state law.¹⁸⁶

The provisional ballot requirement is thus closely related to problems with voter registration. Indeed, the main reason for requiring states to offer provisional ballots is to provide a back-up, in the event that there are problems with voter registration that

forty-four states sought an extension).

¹⁷⁷ For a summary of the status of the state's registration databases, see electionline.org, Statewide Voter Registration Database Status, <http://www.pewcenteronthestates.org/uploaded/Files/voter%20reg%20db%20status.pdf> (last visited Dec. 1, 2008).

¹⁷⁸ HUEFNER ET AL., *supra* note 33, at 123.

¹⁷⁹ *Id.*

¹⁸⁰ JUSTIN LEVITT ET AL., MAKING THE LIST: DATABASE MATCHING AND VERIFICATION PROCESSES FOR VOTER REGISTRATION (2006), <https://www.policyarchive.org> (follow "view publication" hyperlink) (listing Iowa, South Dakota, Texas, and Washington as states that will reject voters' applications if their information does not match that in the state motor vehicles database). These problems have led to litigation, described *infra* Part III. I discuss the 2008 litigation over registration matching in Daniel P. Tokaji, *Voter Registration and Institutional Reform*, 3 HARV. L. & POL'Y REV. ONLINE (forthcoming 2009).

¹⁸¹ 42 U.S.C. § 15482(a) (Supp. V 2005).

¹⁸² NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 162, at 35.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 36.

¹⁸⁵ 42 U.S.C. § 15482(a)(2).

¹⁸⁶ 42 U.S.C. § 15482(a)(4).

result in voters wrongly being left off the rolls.¹⁸⁷ For this reason, any problems in a state's voter registration system are likely to manifest themselves in a large number of provisional ballots being cast. As discussed below,¹⁸⁸ information from the 2006 election provides reason to believe that there are in fact some serious problems with voter registration in a number of states.

The second part of HAVA especially germane to voter registration has to do with the identification required for voting. HAVA does not require all voters to provide documentary identification, either at the time of registration or when they go to vote.¹⁸⁹ It does, however, impose a limited identification requirement on a subset of voters: those who registered by mail and have not previously voted in a federal election in that state.¹⁹⁰ A voter may meet this requirement by presenting a current and valid photo identification, or a current utility bill, bank statement, government check, pay-check, or other government document that shows the [voter's] name and address.¹⁹¹ A voter is excused from this requirement, however, if he or she follows the NVRA's mail registration procedure and either (a) includes a copy of one of the above identifying documents with the registration application, or (b) includes his or her driver's license number or the last four digits of the social security number with the registration, so long as that information is "match[e]d" with existing state identification records.¹⁹² Voters who do not have the required ID must be provided the opportunity to cast a provisional ballot, though HAVA is silent on the standards to be used in determining whether provisional ballots should be counted.¹⁹³

The third component of HAVA germane to voter registration is the set of provisions creating the U.S. Election Assistance Commission (EAC).¹⁹⁴ Composed of four commissioners (two from each of the major parties), the EAC is generally responsible for overseeing implementation of HAVA's requirements—including the disbursement of funds for election administration improvements provided for under the

¹⁸⁷ See NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 162, at 34–35.

¹⁸⁸ See *infra* notes 209–11 and accompanying text.

¹⁸⁹ As noted above, voters with a driver's license are required to provide it when they register; those who do not have a license are required to provide the last four digits of their social security number. 42 U.S.C. § 15483(a)(5)(A) (Supp. V 2005).

¹⁹⁰ 42 U.S.C. § 15483(b)(1). This requirement also applies to voters who have not previously voted in their jurisdiction, but only if they are within a state that does not have a HAVA-compliant statewide registration database. *Id.*

¹⁹¹ 42 U.S.C. § 15483(b)(2).

¹⁹² 42 U.S.C. § 15483(b)(3). There are also exceptions for UOCAVA and VAEHA voters as well as for those otherwise entitled to vote in a manner other than in person. 42 U.S.C. § 15483(b)(3)(C); see also Uniformed and Overseas Citizens Absentee Voting Act of 1986, Pub. L. No. 99-410, 100 Stat. 924 (codified as amended in scattered sections of 39 U.S.C., 42 U.S.C.) (UOCAVA); the Voting Accessibility for the Elderly and Handicapped Act of 1984, 42 U.S.C. §§ 1971, 1973ee to ee-6 (2000) (VAEHA).

¹⁹³ 42 U.S.C. § 15483(b)(2)(B).

¹⁹⁴ 42 U.S.C. §§ 15321–15472 (Supp. V 2005).

statute.¹⁹⁵ It also is responsible for commissioning research on election administration topics, including voter registration.¹⁹⁶ Significantly, the EAC does not have the power to issue binding regulations regarding HAVA's requirements, including those with respect to voter registration, though it may issue non-binding guidance.¹⁹⁷ The one area in which the EAC is empowered to promulgate rules or regulations is with respect to the NVRA's mail registration procedures.¹⁹⁸

As one commentator has put it, "[t]he EAC was designed to have as little regulatory power as possible."¹⁹⁹ The EAC's lack of regulatory authority, combined with delays in funding the commission, have undoubtedly hampered its effectiveness.²⁰⁰ Compounding these problems have been controversies over the EAC's handling of research it has commissioned, most notoriously its failure to release a report on voter fraud and voter intimidation.²⁰¹ Even within the narrow area over which the EAC does have the power to make binding regulations, the mail registration provisions of the NVRA, the EAC's bipartisan structure—in which there are two members from each party with a majority required to take action—has made it difficult for the EAC to provide helpful guidance.²⁰² A consequence of the EAC's inability to issue binding regulations regarding voter registration has been to push these disputes into the courts.

B. Evidence of Persistent Problems

How well are the states' voter registration systems functioning? On this question, the evidence is decidedly mixed. As described in Part II.A.2, there was an increase in the number of voters registered after enactment of the NVRA. That increase, however, did not translate into an increase in turnout—though it may well have prevented a decline in participation.

More recently, there have been worrisome signs regarding compliance with the federal laws designed to boost voter registration, particularly the NVRA. A 2007 report from the EAC found that voter registration actually *declined* from 2004 to

¹⁹⁵ See Tokaji, *Early Returns on Election Reform*, *supra* note 165, at 1218–20.

¹⁹⁶ 42 U.S.C. § 15322(3); *see also* Tokaji, *Early Returns on Election Reform*, *supra* note 165, at 1219.

¹⁹⁷ 42 U.S.C. §§ 15329, 15501(a) (Supp. V 2005); *see also* Tokaji, *Early Returns on Election Reform*, *supra* note 165, at 1219.

¹⁹⁸ 42 U.S.C. § 15329, § 1973gg-7(a) (2000).

¹⁹⁹ Shambon, *supra* note 165, at 428.

²⁰⁰ *See id.* at 437–38; Tokaji, *Early Returns on Election Reform*, *supra* note 165, at 1219.

²⁰¹ *See* Ian Urbina, *U.S. Panel Is Said to Alter Finding on Voter Fraud*, N.Y. TIMES, Apr. 11, 2007, at A1; Tova Andrea Wang, *A Rigged Report on U.S. Voting?*, WASH. POST, Aug. 30, 2007, at A21; U.S. ELECTION ASSISTANCE COMM'N, REPORT OF INVESTIGATION: PREPARATION OF THE VOTER FRAUD AND VOTER INTIMIDATION REPORT 1–3 (2008), *available at* http://www.eac.gov/eac_ig/docs/fraud-report-redacted-complete.pdf/attachment_download/file.

²⁰² An example is the dispute over Arizona's attempts to require proof of citizenship in order to register, described *infra* Part III.B.4.

2006, going from 176.2 million to 172.8 million.²⁰³ Thirty-two states reported a decrease in the number of voters registered.²⁰⁴ Part of this drop may reflect an expected drop between a presidential and non-presidential election cycle, when voters are removed from the registration rolls for perfectly legitimate reasons. At the same time, there is evidence that a number of states are not fully complying with the NVRA's agency registration requirements, particularly those having to do with public assistance offices. From 1995–96 to 2005–06, the number of registrations from those agencies declined 79%, and surveys of those agencies' clients found that registration opportunities were not being offered as required by federal law.²⁰⁵ As of 2006, just 68% of voting-age citizens were registered to vote.²⁰⁶

Survey information provides more evidence of problems with existing voter registration systems. The EAC's 2006 Election Administration and Voting Survey asked states, for the first time, to indicate the reasons why provisional ballots were rejected.²⁰⁷ The most common reason given was that the voter was found to be "[n]ot registered."²⁰⁸ These accounted for 74,490 of the 170,872 rejected provisional ballots in 2006, or 43.59%.²⁰⁹ This overall percentage does not tell us precisely what caused the voter to show up as not registered. There are several possibilities, including:

- *Voter error.* The voter might be lying or might be mistaken about having registered before the election. Alternatively, the voter might have registered but omitted key information (such as his or her address) that resulted in the voter's name being left off the list.
- *Third-party error.* Groups conducting registration drives prior to elections, such as ACORN and the League of Women Voters, sometimes make mistakes. Those groups may inadvertently fail to submit some of the registration forms collected from would-be voters. Additionally, there have been reports of registration forms being collected by groups

²⁰³ U.S. ELECTION ASSISTANCE COMMISSION, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 2005–2006, at 1 (2007).

²⁰⁴ *Id.*

²⁰⁵ DOUGLAS R. HESS & SCOTT NOVAKOWSKI, UNEQUAL ACCESS: NEGLECTING THE NATIONAL VOTER REGISTRATION ACT, 1995–2007, at 1 (2008).

²⁰⁶ U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2006: POPULATION CHARACTERISTICS 1 (June 2008), *available at* <http://www.census.gov/prod/2008pubs/p20-557.pdf>.

²⁰⁷ U.S. ELECTION ASSISTANCE COMM'N, *supra* note 201, at 21.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

affiliated with one party and not being turned in because the voters sought to register as members of an opposing party.²¹⁰

- *Public agency error.* Many voters register through motor vehicle agencies or other state offices that are required to offer registration opportunities under the NVRA. These agencies can make mistakes, such as failing to pass all the registration forms they receive to local election officials. Voters who filled out voter registration forms when they moved to a state and got their driver's license may therefore appear at the polls to find their names not on the list.
- *Election official error.* Another reason that a voter's name might not appear on the list when he or she appears is that there was a mistake on the part of the state or local official charged with handling registrations. A form might have been received, but never inputted into the voter registration database. Alternatively, there might be data entry errors that result in the voter's name not appearing on the list at the proper precinct.

It is difficult to quantify the extent to which these and other errors were responsible for provisional ballots not being counted on the ground that voters were "not registered." We also do not know the number of voters who were wrongly turned away without being allowed to cast a provisional ballot, or who simply did not show up at all, because their names did not make the list. The information that is available, however, suggests that there are lingering problems with states' registration systems.

III. REGISTRATION LITIGATION: CONTINUING CONTROVERSIES

Further evidence of persistent problems in American voter registration may be found in the many cases on the subject that have made it to court in recent years. Voter registration has been a prominent subject in the growing number of election-related cases in the last several years.²¹¹ Of course, there is not necessarily a straight-line correlation between the number of lawsuits filed and the number of problems. Moreover, election litigation can often have some significant benefits, not only by protecting voters' rights but also by "clarifying the rules of the game" in advance of an election.²¹² Still, the litigation over various aspects of the registration process highlights issues that have yet to be resolved. Part III.A reviews registration-related litigation surrounding the 2004 election. Part III.B discusses the most significant voter registration issues to emerge since then.

²¹⁰ CENTER FOR DEMOCRACY AND ELECTION MANAGEMENT, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 34 (2005), available at <http://www.american.edu/ia/cfer/>.

²¹¹ Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 29 (2007) (showing an increase in election law cases from 1996 to 2006).

²¹² Tokaji, *Early Returns on Election Reform*, *supra* note 165, at 1243–44, 1246.

A. The 2004 Election

In the 2004 election season, a number of registration-related topics arose.²¹³ Among them were whether registration forms should be accepted if certain boxes were left unmarked, such as those having to do with age and citizenship.²¹⁴ HAVA's lack of clarity on the circumstances under which omissions should result in a form being rejected was partly to blame.²¹⁵ Another issue was the alleged failure to process registration forms properly in some counties.²¹⁶ Perhaps the most bizarre registration issue to arise in 2004 was a dispute over a directive from then-Ohio Secretary of State Ken Blackwell requiring that registration forms be on heavy-stock, 80 lb. paper weight to be accepted.²¹⁷ Litigation was avoided in this case when the Secretary of State's office backed down under pressure, announcing that it would accept forms on lesser paper weight.²¹⁸

Closely related to voter registration were cases involving provisional ballots, which were required nationwide for the first time in 2004 as the result of HAVA. The cases that received the most attention had to do with whether provisional ballots should be counted if cast in the "wrong precinct."²¹⁹ There are cases involving the standards to be applied in determining whether provisional ballots should be counted.²²⁰ Especially germane to voter registration was *Schering v. Blackwell*, a case filed on the day of the 2004 general election that challenged the lack of uniformity among Ohio counties on the standards and procedures for counting provisional ballots.²²¹ Of particular importance, for purposes of voter registration, is the extent to which authorities should go in ascertaining whether a voter did in fact try to register, despite the fact that their names did not appear on registration lists. After it became clear that Senator Kerry did not intend to challenge the result of Ohio's election, the *Schering* case was dropped.²²² But had the election been closer, *Schering* could have turned out to be the *Bush v. Gore* of 2004.

²¹³ *Id.* at 1224–27.

²¹⁴ *Id.*

²¹⁵ *Id.* at 1226.

²¹⁶ See Plaintiffs' Memorandum in Support of Their Motion for a Temporary Restraining Order at 1–2, *Citizens Alliance for Secure Elections v. Vu*, No. 1:04cv2147 (N.D. Ohio Oct. 25, 2004) (denying motion for a temporary restraining order); Order, *Citizens Alliance for Secure Elections*, No. 1:04cv2147 (order denying motion for a temporary restraining order).

²¹⁷ Tokaji, *Early Returns on Election Reform*, *supra* note 165, at 1227–28.

²¹⁸ *Id.* at 1228.

²¹⁹ Cases involving this issue were brought in Arizona, Colorado, Florida, Michigan, Missouri, North Carolina and Ohio. *Id.* at 1228 & n.195.

²²⁰ *Id.* at 1231–33.

²²¹ Complaint for Declaratory and Injunctive Relief, *Schering v. Blackwell*, No. 1:04cv755 (S.D. Ohio Nov. 2, 2004).

²²² Stipulation of Dismissal, *Schering*, No. 1:04cv755.

Instead of fighting over the standards for counting hanging-chad punch ballots, the parties and their lawyers would have wound up fighting over the standards and procedures to be followed in counting provisional ballots.²²³

B. Post-2004 Registration Cases

Since 2004, voter registration has remained a prominent topic of litigation. The most significant registration cases can be divided into four categories: (1) list maintenance, (2) state agency registration, (3) registration drives, and (4) proof of eligibility requirements.

1. List Maintenance

One of the most significant areas of litigation involves states' practices in maintaining their voter registration lists, an area that implicates both the NVRA and HAVA. Broadly speaking, there are two facets of list maintenance affected by these laws. The first is the removal of ineligible voters from laws, because they have moved, died, or for some other reason become ineligible to vote.²²⁴ This is sometimes referred to as the "purging" of registration rolls.²²⁵ The second aspect of list maintenance is making sure that all eligible voters are included on voting rolls. As set forth in Part II, the NVRA restricts election authorities from removing voters on the ground that they have not voted.²²⁶ While HAVA requires that registration information be matched against motor vehicle records, it reinforces the NVRA's protection against improper purges by mandating "[s]afeguards to ensure that eligible voters are not removed in error from the official list of eligible voters."²²⁷ There is inevitably some tension between the objectives of removing deadwood from the registration rolls and preventing the exclusion of eligible voters. An overly aggressive program of removing voters believed to be ineligible threatens to result in erroneous deletion of some who are eligible.

A review of the U.S. Department of Justice's NVRA docket during President George W. Bush's administration shows that it has overwhelmingly focused on compelling states to prune their registration rolls, rather than on protecting eligible voters from wrongful exclusion.²²⁸ Since HAVA went into effect, the DOJ has concentrated enforcement on making sure that states have registration systems in place that allow

²²³ Tokaji, *Early Returns on Election Reform*, *supra* note 165, at 1206.

²²⁴ Brennan Center for Justice, Know Your Voting Rights Issues, http://www.brennancenter.org/content/resource/voting_rights_issues_r/.

²²⁵ *Id.*

²²⁶ 42 U.S.C. § 1973gg-6(b)(2) (2000).

²²⁷ 42 U.S.C. § 15483(a)(4)(B) (Supp. V 2005).

²²⁸ See U.S. Dep't of Justice, *supra* note 18.

voters' registration information to be matched against driver's license and social security records and that allow the removal of ineligible voters from the rolls.²²⁹ At the same time, it has been much less active in enforcing those provisions of federal law designed to make sure that eligible voters are included in the voting rolls.²³⁰

Typical of the cases that the DOJ has pursued is *United States v. New Jersey*, which alleged that the state had failed to implement a statewide registration database that allowed for the removal of duplicate registration lists and that contained the driver's license and social security numbers required for the "matching" of voters against other records.²³¹ The DOJ's complaint also accused New Jersey of failing to implement a list maintenance program, as required by HAVA, that would remove people who are ineligible to vote in a jurisdiction because they have moved, died, or

²²⁹ See, e.g., Complaint, *United States v. New Jersey*, No. 06-4889 (D.N.J. Oct. 12, 2006); Consent Decree, Judgment, and Order, *United States v. Maine*, No. 06-86-B-W, 2007 WL 1059565 (D. Me. Dec. 30, 2006); Consent Decree and Order, *United States v. Indiana*, No. 1:86-cv-1000-RLY-TAB (S.D. Ind. July 5, 2006); Complaint, *United States v. Missouri*, No. 05-4391-CV-C-WAK, 2006 WL 1446356 (W.D. Mo. Nov. 23, 2005). A summary of these cases, along with pleadings, may be found at http://www.usdoj.gov/crt/voting/litigation/recent_nvra.html.

²³⁰ The DOJ's actions in this regard are closely related to the alleged "politicization" of its decisions that has attracted a great deal of attention since 2006. See Daniel P. Tokaji, *The Politics of Justice*, ELECTION LAW @ MORITZ, May 22, 2007, http://moritzlaw.osu.edu/blogs/tokaji/2007_05_01_equalvote_archive.html; see also Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 798-819 (2006) (discussing allegations of partisanship in the DOJ's exercise of its preclearance possibilities in the 1990s and 2000s). A number of commentators, including a number of former DOJ employees, have alleged that the Department's actions—particularly in the area of voting rights—were driven by partisan interests rather than the rights of voters. See, e.g., *Changing Tides: Exploring the Current State of Civil Rights Enforcement Within the Department of Justice: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 114-121 (2007) (statement of Joseph D. Rich, Director, Fair Housing Community Development Project); *Oversight Hearing on the Voting Section of the Civil Rights Division of the U.S. Department of Justice: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Dr. Toby Moore, Political Geographer, Voting Section, U.S. Department of Justice); MARK A. POSNER, THE POLITICIZATION OF JUSTICE DEPARTMENT DECISIONMAKING UNDER SECTION 5 OF THE VOTING RIGHTS ACT: IS IT A PROBLEM AND WHAT SHOULD CONGRESS DO? 5-6 (2006), available at <http://www.acslaw.org/files/Section%205%20decision%20making%201-30-06.pdf>.

²³¹ See Complaint at 5-6, *United States v. New Jersey*, No. 06-4889 (D.N.J. Oct. 12, 2006), available at http://www.usdoj.gov/crt/voting/hava/nj_hava_comp.pdf.

committed a disqualifying felony.²³² This case resulted in a stipulation and order, requiring New Jersey to remove such ineligible voters.²³³

While most of the cases brought by the DOJ have resulted in stipulated agreements, the State of Missouri has thus far succeeded in fending off the DOJ's enforcement efforts. In *United States v. Missouri*, the DOJ sued to compel Missouri's Secretary of State to conduct a program of list maintenance that would remove the names of ineligible voters.²³⁴ The district court found that the DOJ had failed to meet its burden of showing that Missouri was out of compliance.²³⁵ While there was some evidence that local election authorities were out of compliance with the NVRA, the DOJ failed to demonstrate that state officials were responsible for those violations.²³⁶ Rather, the district court found that Missouri had satisfied the NVRA's requirements of making "reasonable" efforts to remove ineligible voters.²³⁷

Although the DOJ has been aggressive in forcing states to adopt practices that will remove duplicates and voters believed to be ineligible, it has been much less active in protecting eligible voters from wrongful purges.²³⁸ There is evidence to suggest that this is a serious problem, partly created by the provisions of HAVA relating to list maintenance. HAVA requires that registration information be "matched" against motor vehicle records, but is less than specific about how that matching should be conducted or on what should happen in the event that no match is found.²³⁹ It also requires states to make sure that "eligible voters are not removed in error" but, again, is less than precise about just what steps states should adopt to prevent the removal of eligible voters.²⁴⁰ The EAC's lack of regulatory authority leaves it powerless to mandate that states apply particular procedures designed to protect voters from unlawful exclusion.²⁴¹

²³² *Id.* at 6–7. Other cases in which the United States has sued to compel states to remove deceased voters include *United States v. City of Philadelphia*, No. 06-4592 (E.D. Pa. Oct. 13, 2006), and *United States v. Pulaski County*, No. 4-04-CV-389 (E.D. Ark. Apr. 19, 2004). A summary and key pleadings from these cases are available at http://www.usdoj.gov/crt/voting/litigation/recent_nvra.html.

²³³ Stipulation and Order, *United States v. New Jersey*, No. 06-4889 (D.N.J. Oct. 12, 2006), available at http://www.usdoj.gov/crt/voting/hava/nj_hava_cd.pdf.

²³⁴ *United States v. Missouri*, No. 05-4391-CV-C-NKL, 2007 U.S. Dist. LEXIS 27640 (W.D. Mo. Apr. 13, 2007).

²³⁵ *Id.* at *34.

²³⁶ *Id.* at *27; see also *United States v. Missouri*, No. 05-4391-CV-C-NKL, 2006 U.S. Dist. LEXIS 32499, at *20–24 (W.D. Mo. May 23, 2006) (finding that the Missouri Secretary of State lacked authority under state law to enforce NVRA violations by local authorities).

²³⁷ *United States v. Missouri*, 2006 U.S. Dist. LEXIS 32499, at *26.

²³⁸ See U.S. Dep't of Justice, *supra* note 18, 262.

²³⁹ 42 U.S.C. § 15483(a)(5)(B) (Supp. V 2005). For more on the problems created by this provision, see Equal Vote Blog, <http://moritzlaw.osu.edu/blogs/tokaji/2008/11/reforming-registration.html>.

²⁴⁰ § 15483(a)(4)(B).

²⁴¹ See *supra* notes 199–202 and accompanying text.

As documented in a 2006 report released by the Brennan Center for Justice, a too-stringent matching procedure could result in eligible voters being dropped from registration rolls. That report concluded that many states have adopted registration list practices that “create unwarranted barriers to the franchise.”²⁴² There are several reasons why voters’ names might not match, despite the fact that they have provided accurate information on their registration form. Those reasons include data entry errors, transposition of first and last names, and the use of middle names and nicknames.²⁴³ A voter registration record might show a voters name as Ann Smith, for example, when the driver’s license record shows the same person’s name as Ann Marie Smith. Similarly, a registration record might show a voter’s name as Juan Garcia-Lopez, while a driver’s license record shows it as Juan Lopez. If states apply overly stringent “matching” protocols, voters’ names may be deleted if they do not perfectly match information available in other databases (such as motor vehicle records). In some states, matching failed between 20 and 30% of the time.²⁴⁴ The states that the Brennan Center found to be applying overly stringent matching procedures included Iowa, South Dakota, Texas, and Washington.²⁴⁵

The EAC’s lack of regulatory authority, combined with the DOJ’s lack of interest in policing states that exclude eligible voters from their lists, has left it to private parties to enforce the provisions of the NVRA and HAVA designed to prevent the exclusion of eligible voters. The Brennan Center has represented plaintiffs in Washington and Florida, seeking to prevent those states from applying overly stringent matching procedures that would exclude eligible voters.²⁴⁶ These cases have yielded mixed results.

In Washington, plaintiffs succeeded in obtaining a preliminary injunction preventing the Secretary of State from applying a matching protocol that would disqualify eligible voters, and ultimately the district court’s preliminary injunction order explained that HAVA’s matching procedure was intended as an “administrative safeguard” for maintaining registration lists, rather than a restriction on voter eligibility.²⁴⁷ In other words, HAVA did not contemplate that voters would be removed from state registration databases simply because there was no “match” with driver’s license or social security records. The court found that HAVA’s identification requirement confirmed this reading.²⁴⁸ That provision requires a limited category of voters—first-time voters who registered by mail—to produce identification, *unless* that voter’s information had been matched at the time of registration. As the court explained, this

²⁴² See JUSTIN LEVITT ET AL., MAKING THE LIST: DATABASE MATCHING AND VERIFICATION PROCESSES FOR VOTER REGISTRATION ii (2006).

²⁴³ *Id.* at 4.

²⁴⁴ *Id.* at ii.

²⁴⁵ *Id.*

²⁴⁶ See Fla. State Conference of NAACP v. Browning, 522 F.3d 1153 (11th Cir. 2008); Wash. Ass’n of Churches v. Reed, 492 F. Supp. 2d 1264 (W.D. Wash. 2006).

²⁴⁷ Wash. Ass’n of Churches, 492 F. Supp. 2d at 1268, 1271.

²⁴⁸ *Id.* at 1268–69.

language confirmed that “HAVA requires matching for the purpose of verifying the identity of the [first-time] voter [who registered by mail] before casting or counting that person’s vote, but *not as a prerequisite to registering to vote*.”²⁴⁹ The court therefore concluded that the state erred in cancelling, deleting, or otherwise rejecting voters because their identifying information could not be matched.²⁵⁰

In contrast, Florida plaintiffs were unsuccessful in obtaining relief against an allegedly restrictive matching procedure. In *Florida State Conference of the NAACP v. Browning*, plaintiffs challenged Florida statutes that required “matching” of voter’s registration information against driver’s license or social security records, as a condition of registration.²⁵¹ In reversing a preliminary injunction issued by the district court, the majority concluded that Florida’s law did not conflict with HAVA, so as to justify a facial challenge.²⁵² While assuming that HAVA did not *require* matching as a precondition to registration, the majority declined to find that HAVA *prohibited* some form of matching in order to register.²⁵³ Judge Barkett dissented, concluding that Florida’s law would prevent voters from having their votes counted, based on minor errors on their registration form that would prevent a “match” from occurring.²⁵⁴ Even if those voters later attempted to correct that error through the provisional voting process, she explained, their votes would not be counted.²⁵⁵ Taken together, the Washington and Florida decisions leave considerable uncertainty about what states can and cannot do when it comes to deleting voters from registration lists based on a failure to match.²⁵⁶

²⁴⁹ *Id.* at 1269 (emphasis added).

²⁵⁰ *Id.* at 1271. A similar issue later arose in the State of Wisconsin. The Brennan Center and I co-wrote a letter, opposing a proposal to require voters to cast provisional ballots absent a “complete match.” Letter from Wendy Weiser et al., to Kevin Kennedy, Dir., Wis. Gov’t Accountability Bd. (July 14, 2008), *available at* <http://moritzlaw.osu.edu/blogs/tokaji/BC&TokajiLtr-WIGAB.pdf>. Wisconsin’s Government Accountability Board subsequently decided not to adopt the provisional ballot proposal. *See* Equal Vote Blog, *supra* note 239.

²⁵¹ 522 F.3d at 1155.

²⁵² *Id.* at 1171.

²⁵³ *Id.* at 1168. The court also declined to find that Florida’s law conflicted with 42 U.S.C. § 1971. *Id.* at 1172–75. In subsequent proceedings on remand, the district court rejected plaintiffs’ renewed motion for a preliminary injunction after an evidentiary hearing. Order Denying Motion for Preliminary Injunction, *Fla. State Conference of NAACP v. Browning*, No. 4:07CV-402-SPM/WCS (N.D. Fla. June 24, 2008), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Browning-Order-6-24-08.pdf>.

²⁵⁴ *Fla. State Conference of the NAACP*, 522 F.3d at 1189 (Barkett, J., dissenting in part).

²⁵⁵ *Id.* at 1179. She also disagreed with the majority’s conclusion that Florida’s law was consistent with 42 U.S.C. § 1971 and the U.S. Constitution. *Id.* at 1181–88.

²⁵⁶ One other decision regarding list maintenance bears mentioning. In *Segue v. Louisiana*, plaintiffs sought to challenge that state’s post-Katrina procedures for striking voters from registration lists. No. 07-5221, 2007 U.S. Dist. LEXIS 74428 (E.D. La. Oct. 3, 2007). Under this procedure, a letter was first sent to Louisiana registered voters believed to have re-registered in another state, giving them thirty days to provide proof that their out-of-state registration had been cancelled. *Id.* at *3. Absent a response, a “Letter of Irregularity” was sent to voters

2. State Agency Registration

Another significant area of registration-related litigations involves the NVRA's requirement that public agencies offer registration opportunities to those whom they serve.²⁵⁷ Of particular note is the sharp decline in registrations coming from public assistance agencies from the mid-1990s to the mid-2000s.²⁵⁸ A recent report found that the number of voter registration applications from public assistance agencies in 2005–06 was a small fraction of what it had been ten years earlier—despite the fact that roughly 40% of voting-age citizens from low-income households remain unregistered.²⁵⁹ Survey evidence also indicates that registration opportunities are not being made available as required by the NVRA.²⁶⁰

As with the NVRA and HAVA requirements aimed at preventing the wrongful exclusion of voters from registration lists, this is an area in which the DOJ has been relatively dormant in recent years.²⁶¹ The DOJ brought a case early in the Bush administration regarding the State of Tennessee's failure to enforce the NVRA's public agency assistance requirements. *United States v. Tennessee*, filed in 2002, challenged Tennessee's failure to make voter registration opportunities available at state motor vehicle and public assistance offices as the NVRA required.²⁶² That case resulted in a consent decree that produced a significant rise in registration from public assistance agencies.²⁶³ In fact, Tennessee has become the national leader among states in terms of registering voters at public assistance offices, tallying 120,962 from 2005–2006—more than twice as many as the next highest-ranking state²⁶⁴—despite the fact that Tennessee ranks sixteenth in overall population among the fifty states.²⁶⁵

requiring them to appear in person within twenty-one days to explain why their names should not be removed. *Id.* at *3–4. The district court granted defendants' motion for summary judgment for lack of standing, finding that none of the plaintiffs had demonstrated a violation, because they could not show that their registration had been cancelled. *Id.* at *10–12. Were other courts to apply similarly stringent standing rules in challenges to registration practices, it could prevent many cases from getting into court, since it will often be difficult for plaintiffs to show that they were affected—and, even if plaintiffs' names are wrongly stricken, defendants may reinstate them once a complaint is brought, thus potentially mooted the case.

²⁵⁷ See HESS & NOVAKOWSKI, *supra* note 205, at 11, 13; U.S. Dep't of Justice, *supra* note 18.

²⁵⁸ HESS & NOVAKOWSKI, *supra* note 205, at 3, 15–16.

²⁵⁹ *Id.* at 1, 17.

²⁶⁰ *Id.* at 1.

²⁶¹ *Id.*

²⁶² See U.S. Dep't of Justice, *supra* note 18.

²⁶³ HESS & NOVAKOWSKI, *supra* note 205, at 8.

²⁶⁴ See *id.* at 15.

²⁶⁵ U.S. Census Bureau, U.S. Dep't of Commerce, Resident Population of the 50 States, the District of Columbia, and Puerto Rico, <http://www.census.gov/population/www/cen2000/maps/files/tab02.pdf> (last visited Dec. 1, 2008). The DOJ's website mentions one other case having to do with the NVRA's public agency requirements. See U.S. Dep't of Justice, *supra*

In light of the success of the Tennessee case in producing increases in voter registration at public assistance offices, and the sharp decline in voter registration from other states, one would think that the DOJ would pursue similar consent decrees in other states. Its failure to do so is difficult to justify. One innocent explanation is that the welfare rolls have declined since the mid-1990s.²⁶⁶ While this is surely true, it cannot explain the DOJ's failure to enforce the NVRA's public agency requirements for at least three reasons. First, while the number of people receiving cash assistance has indeed declined, the food stamp program actually had several hundred thousand additional participants by the mid-2000s.²⁶⁷ Second, survey evidence of public assistance clients shows that they are not being offered registration as federal law requires, at least in many states.²⁶⁸ Third, this explanation overlooks the fact that in states where there *have* been significant enforcement efforts, public agency registration has improved significantly.²⁶⁹ In addition to Tennessee, the experience of North Carolina illustrates this point. Prior to any lawsuit being commenced, state officials cooperated with nonprofit voting rights groups, making a concentrated effort to improve agency registration.²⁷⁰ The result of this cooperation was a five-fold increase in registrations per month in early 2007, achieved without the need for a lawsuit.²⁷¹ The experiences of Tennessee and North Carolina support the conclusion that, where the NVRA's agency registration requirements are enforced and complied with, they do in fact result in an increase in voter registration.

The DOJ's inactivity has left enforcement of the NVRA's public agency registration requirement in the hands of private plaintiffs. A lawsuit against Ohio officials has thus far been unsuccessful in attempting to compel state authorities to comply with the NVRA's provisions by making registration available at public assistance offices.²⁷² In Missouri, however, voters and voting rights groups secured a prelimi

note 18. In *United States v. New York*, the DOJ targeted New York's public college and public university system, alleging that they were failing to offer registration to students with disabilities as required by the NVRA. *Id.* According to the DOJ's website, that case remains in litigation. *Id.*

²⁶⁶ See *Hearing on the National Voter Registration Act, Section 7: The Challenges that Public Assistance Agencies Face, Before the Subcomm. on Elections of the H. Comm. on H. Administration*, 110th Cong. 137–46 (2008) (statement of David B. Muhlhausen, Senior Policy Analyst, Heritage Foundation).

²⁶⁷ HESS & NOVAKOWSKI, *supra* note 205, at 6.

²⁶⁸ *Id.* at 5–7.

²⁶⁹ *Id.* at 1.

²⁷⁰ LISA J. DANETZ & SCOTT NOVAKOWSKI, EXPANDING VOTER REGISTRATION FOR LOW-INCOME CITIZENS: HOW NORTH CAROLINA IS REALIZING THE PROMISE OF THE NATIONAL VOTER REGISTRATION ACT 3–4 (2007), available at http://www.demos.org/pubs/NVRA_updated.pdf.

²⁷¹ *Id.* at 4–5.

²⁷² The district court in *Harkless v. Blackwell*, 467 F. Supp. 2d 754 (N.D. Ohio 2006), found that ACORN and individual voters lacked standing because they could not show that they

nary injunction requiring Missouri's Department of Social Services to provide voter registration applications to their clients.²⁷³

In the face of mounting criticism of its failure to enforce voting rights laws, the DOJ finally sent out letters to thirteen states in late 2007, asking them to explain their low number of public assistance registrations.²⁷⁴ There have also been efforts by private groups to bring states with low agency registration numbers into compliance with the NVRA.²⁷⁵ Given the small number of registrations and lackluster enforcement of the past several years, this is an area in which there is much work to be done. The DOJ should devote greater attention to this area than it has during the George W. Bush administration.

3. Registration Drives

Although most new registrations now come from motor vehicle offices or other state agencies,²⁷⁶ these mechanisms do not reach all citizens.²⁷⁷ Over 43% of registrations come from other channels.²⁷⁸ Private actors serve as a vital link in the chain, with voter registration drives conducted by the parties and by other groups still accounting for a substantial portion of voters newly registering and updating their registration information.²⁷⁹ In a number of states, groups that engage in voter registration activities have brought suit to challenge restrictions placed on their attempt to register voters.²⁸⁰ The main issue in these cases was whether restrictions on voter registration

were injured by defendants' conduct. *Id.* at 759–61. ACORN, the court concluded, would engage in registration drives whether or not Ohio officials complied with state law. *Id.* The court also found that the Ohio Secretary of State and the Director of the Ohio Department of Job and Family Services were not proper defendants. *Id.* at 767–69. The case is currently on appeal. U.S. Court of Appeals for the Sixth Circuit, Pending Cases—Northern District of Ohio, http://www.ca6.uscourts.gov/case_reports/rtpendingDistrict_OHN.pdf; see Election Law @ Moritz, <http://moritzlaw.osu.edu/electionlaw/litigation/HarklessvBlackwell.php> (last visited Dec. 1, 2008).

²⁷³ Ass'n of Cmty. Orgs. for Reform Now v. Scott, No. 08-CV-4084-NKL, 2008 U.S. Dist. LEXIS 53580 (W.D. Mo. July 15, 2008).

²⁷⁴ HESS & NOVAKOWSKI, *supra* note 205, at 13.

²⁷⁵ See, e.g., Press Release, Demos, Federal Court Orders Missouri Department of Social Services to Comply Immediately with Federal Voter Registration Law (July 16, 2008), available at <http://www.reuters.com/article/pressRelease/idUS204912+16-Jul-2008+PRN20080716>.

²⁷⁶ U.S. ELECTION ASSISTANCE COMM'N, *supra* note 201, at 34 tbl.2b.

²⁷⁷ See R. Michael Alvarez et al., *How Hard Can It Be: Do Citizens Think It Is Difficult to Register to Vote?*, 18 STAN. L. & POL'Y REV. 382, 383, 391 (2007).

²⁷⁸ U.S. ELECTION ASSISTANCE COMM'N, *supra* note 201, at 34 tbl.2b.

²⁷⁹ PROJECT VOTE, RESTRICTING VOTER REGISTRATION DRIVES 1–2 (2006), available at http://projectvote.org/fileadmin/ProjectVote/Policy_Briefs/Project_Vote_Policy_Brief_5_Restricting_Voter_Registration_Drives.pdf.

²⁸⁰ See, e.g., Ass'n of Cmty. Orgs. for Reform Now v. Cox, No. 1:06-CV-01891-JTC, 2006

groups violated the NVRA and the First Amendment to the U.S. Constitution.²⁸¹ In general, the states asserted that their laws are needed to make sure that voter registration forms are properly submitted and that voters' private information is protected, while voter registration groups claimed that stiff penalties for noncompliance violated their free speech and association rights.²⁸²

Most of this litigation activity involved registration carried on by non-party organizations, sometimes referred to as "third party" registration drives.²⁸³ One such case, *Association of Community Organizations for Reform Now v. Cox*, was brought in Georgia prior to the 2006 general election.²⁸⁴ That case challenged a regulation that prohibited non-party groups from copying registration forms they collected during registration drives, but instead required those forms to be "sealed by the applicant" before being returned to registrars.²⁸⁵ This prevented non-party groups like the Association of Community Organizations for Reform Now (ACORN) from checking the registration forms before submitting them. It also prevented those groups from monitoring election officials, to make sure that the registration forms they submitted made it on to the rolls. Those who violated Georgia's regulation were subject to civil and criminal penalties, including a \$5000 fine for each violation.²⁸⁶ The court determined that the regulation was consistent with the NVRA, because registration forms would be accepted and processed regardless of whether there was a violation—the only penalty was on the non-party group that had failed to comply, not the voter.²⁸⁷ However, the court found that the regulation infringed on the First Amendment rights of non-party groups.²⁸⁸ "Of particular concern," in the district court's view, was that those groups "are unable to utilize their quality control measures to ensure that the [registration] workers are not submitting fraudulent registration applications."²⁸⁹ In addition, the regulation impeded the First Amendment activities of ACORN and similar groups, by making it more difficult for them to "contact voters to encourage them to vote and advocate their positions . . ."²⁹⁰ Given the lack of evidence that any non-party groups had misappropriated voters' registration informa-

U.S. Dist. LEXIS 87080 (N.D. Ga. Sept. 27, 2006).

²⁸¹ *Id.*

²⁸² *Id.*; see also PROJECT VOTE, *supra* note 279, at 2–4.

²⁸³ I use the term "non-party" rather than "third-party" here, since the latter is often used to refer to parties other than the two major parties, such as the Green or Libertarian parties.

²⁸⁴ *Ass'n of Cmty. Orgs.*, 2006 U.S. Dist. LEXIS 87080.

²⁸⁵ *Id.* at *7.

²⁸⁶ *Id.* at *9.

²⁸⁷ *Id.* at *13–14.

²⁸⁸ *Id.* at *20–21.

²⁸⁹ *Id.* at *18.

²⁹⁰ *Id.*

tion, the ostensible justification for the regulation, the court preliminarily enjoined Georgia's law.²⁹¹

In Ohio, voter registration groups were also successful in challenging restrictions on voter registration drives under the First Amendment.²⁹² In early 2006, the Ohio legislature enacted a comprehensive statute overhauling the administration of elections in the state.²⁹³ Among its provisions were various restrictions on non-governmental entities engaged in voter registration.²⁹⁴ In *Project Vote v. Blackwell*, groups engaged in voter registration drives targeting low-income and minority communities challenged some of the restrictions imposed by the new statute, and the Secretary of State's implementation of it.²⁹⁵ Particularly problematic, in the plaintiffs' view, were requirements that (1) all "compensated" registration workers pre-register and receive online training from the Secretary of State's Office, and then sign an affirmation attesting to their completion of this requirement with each registration form; (2) all voter registration workers *personally* return the registration forms they collect to election authorities, rather than submitting them to the groups for which they work; and (3) all compensated election workers who help voters in completing registrations disclose their identity and employer on the forms.²⁹⁶

The court found the pre-registration, training, and affirmation provisions violative of the NVRA's requirement that state programs purporting to protect the integrity of the voting rolls be "uniform, [and] nondiscriminatory,"²⁹⁷ because they applied only to a "*selected class of persons*"—namely, those who were "compensated."²⁹⁸ There was no persuasive evidence that such workers created a greater risk of mistakes than uncompensated workers.²⁹⁹ Moreover, these rules would have an undue burden on poor and elderly registration workers, likely to be less adept at using the Internet and thus unable to meet the online registration requirement.³⁰⁰

²⁹¹ *Id.* at *19–22. The case remains pending and is in discovery as this article goes to press. See Election Law @ Moritz, <http://moritzlaw.osu.edu/electionlaw/litigation/acorn.php> (last visited Dec. 1, 2008).

²⁹² See *Project Vote v. Blackwell*, 455 F. Supp. 2d 694 (N.D. Ohio 2006) (granting a preliminary injunction); see also *Project Vote v. Blackwell*, No. 1:06-cv-1628, 2008 U.S. Dist. LEXIS 9878 (N.D. Ohio Feb. 11, 2008) (granting partial summary judgment).

²⁹³ *Project Vote*, 455 F. Supp. 2d at 698.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 699.

²⁹⁶ *Id.*

²⁹⁷ 42 U.S.C. § 1973gg-6(b)(1) (2000).

²⁹⁸ *Project Vote*, 455 F. Supp. 2d at 703.

²⁹⁹ "Defendants submitted evidence that between 19 and 30 voter registration cards were fraudulently submitted by a 'compensated' individual" in one Ohio county, but the court found this slender evidence fell far short of showing that compensated workers presented a greater problem generally. *Id.* at 704.

³⁰⁰ *Id.* at 703–04.

The *Project Vote* court concluded that there were First Amendment problems with the second and third requirements of Ohio law.³⁰¹ The requirement that registration workers directly return voter registration forms “severely chill[ed] participation in the voter registration process,” because anyone trying to help someone else register might innocently run afoul of this provision and would thereby become subject to felony charges.³⁰² The high likelihood of innocent mistakes—on the part of a family member or registration worker—would chill the provision of such assistance.³⁰³ The court rejected the State’s explanation that these restrictions were needed to prevent the submission of phony registration forms—for example, ones purporting to register “Mickey Mouse”—reasoning that some sort of screening by registration groups would actually make it *less* likely that voters would submit such forms.³⁰⁴ As for the compelled disclosure of compensated workers’ information required on Ohio’s form, the court found a direct impact on the associational rights of plaintiffs.³⁰⁵ It relied on cases such as *NAACP v. Alabama*, which prohibited disclosure of information disclosing individuals’ group affiliations on the ground that such disclosure would chill their associational rights.³⁰⁶ The court also found the Ohio provision discriminatory, because it applied only to those receiving compensation.³⁰⁷

Florida has also been a hotspot for litigation over registration drives, with two state laws regulating registration groups’ activities having been challenged in recent years.³⁰⁸ In 2005, Florida enacted a law imposing stiff fines on non-party organizations engaged in registration drives that failed to submit registration applications in a timely manner.³⁰⁹ Those groups were held strictly liable for failing to meet the registration deadlines imposed by the law.³¹⁰ The *League of Women Voters of Florida*, the lead plaintiff in the case, claimed that the prospect of heavy fines had led it to halt its voter registration activities for the first time.³¹¹ The district court found that Florida’s 2005 law impermissibly discriminated against non-party groups like the

³⁰¹ *Id.* at 705.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at 706.

³⁰⁵ *Id.*

³⁰⁶ 357 U.S. 449 (1958).

³⁰⁷ *Project Vote*, 455 F. Supp. 2d at 707. The court found the discriminatory character of Ohio’s law problematic under both the First Amendment and the NVRA. *Id.* at 706–07.

³⁰⁸ See *League of Women Voters of Fla v. Browning*, No. 08-21243, 2008 U.S. Dist. LEXIS 62726 (S.D. Fla. Aug. 6, 2008); *League of Women Voters of Fla v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006). Such default rules can have the effect of steering people toward desirable activity. For discussion of how such rules can guide decisionmaking, see RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

³⁰⁹ *League of Women Voters*, 447 F. Supp. 2d at 1322–23.

³¹⁰ *Id.* at 1323.

³¹¹ *Id.* at 1325.

League, by covering their activities but not those of party-affiliated groups engaged in voter registration.³¹² Given the State's failure to demonstrate that the law was necessary to further its alleged interest in preserving the integrity of the voting rolls, the court preliminarily enjoined the 2005 law.³¹³

In 2007, after this preliminary injunction was issued, Florida passed a new law regulating registration drives.³¹⁴ This law differed from the 2005 law in that it removed the distinction between non-party and party-affiliated groups and significantly reduced the amount of fines to which noncompliant organizations were subject. In particular, it created a \$1000 annual cap on the amount of fines that could be levied against voter registration groups.³¹⁵ The amended version of the law was challenged in *League of Women Voters of Florida v. Browning*, with plaintiffs arguing that certain provisions of the 2007 law violated their First Amendment rights.³¹⁶ In particular, plaintiffs argued that the law's provisions imposing liability on individual registration workers and registration groups were vague, and that they imposed an impermissible burden on non-party groups' speech and association rights.³¹⁷ This time, the district court rejected plaintiffs' motion for a preliminary injunction, based on a facial challenge to Florida's 2007 law.³¹⁸ The court found that the law eliminated the distinction between party-affiliated and non-party organizations, which had previously been held unconstitutional.³¹⁹ It found the scope of the law sufficiently clear to apprise groups of the prohibited conduct,³²⁰ and rejected plaintiffs' argument that the law imposed a "severe" burden that should trigger strict scrutiny.³²¹ In reaching this conclusion, the district court relied in part on the Supreme Court's recent decisions in *Washington State Grange v. Washington State Republican Party*³²² and *Crawford v. Marion County Election Board*,³²³ reasoning that these cases set a high bar for plaintiffs seeking to mount a facial challenge to election laws.³²⁴ If followed by other courts, this standard would make it very difficult to obtain preliminary relief against restrictions on registration, given the difficulty of proving a severe burden in advance of a partic-

³¹² *Id.* at 1335.

³¹³ *Id.* at 1339.

³¹⁴ *League of Women Voters of Fla. v. Browning*, No. 08-21243, 2008 U.S. Dist. LEXIS 62726, at *7 (S.D. Fla. Aug. 6, 2008). The law became effective in January 2008.

³¹⁵ *Id.* at *13.

³¹⁶ *Id.* at *39–40.

³¹⁷ *Id.* at *37–39.

³¹⁸ *Id.* at *76.

³¹⁹ *Id.* at *13, *67.

³²⁰ *Id.* at *55–56.

³²¹ *Id.* at *68–69.

³²² 128 S. Ct. 1184 (2008) (upholding the Washington primary system).

³²³ 128 S. Ct. 1610 (2008) (upholding an Indiana voter ID law).

³²⁴ *League of Women Voters of Fla.*, 2008 U.S. Dist. LEXIS 62726, at *26–27, *41–42, *45–46.

ular regulation being implemented. The case challenging Florida's 2007 law remains pending in the Eleventh Circuit as this Article goes to press.

One final issue pertaining to registration drives bears mentioning. In contrast to the cases discussed above, this one has to do with restrictions imposed by the federal government rather than the states. Under a regulation of the Department of Veteran's Affairs (VA), "partisan activities" are prohibited at VA facilities.³²⁵ After representatives of a local Democratic Party were rebuffed in their attempt to register voters at a VA facility in northern California, they brought suit to challenge the application of this regulation to voter registration drives.³²⁶ In *Preminger v. Principi*, the Ninth Circuit upheld the denial of a preliminary injunction, reasoning that the VA's application of this regulation was reasonable and viewpoint neutral.³²⁷ The Federal Circuit subsequently rejected a facial challenge to the VA regulations,³²⁸ and the district court rejected plaintiffs' as-applied challenge.³²⁹ After trial, the district court found that plaintiffs lacked standing to make their as-applied claims, while noting that the evidence presented "raise[d] substantial questions as to whether the VA's existing policy of allowing a single non-partisan group—the League of Women Voters—to conduct voter registration activities is effective in ensuring that any resident who wishes to register has a meaningful opportunity to do so."³³⁰ The Ninth Circuit affirmed the decision on other grounds, holding that the VA's regulations were viewpoint neutral.³³¹ The VA subsequently "clarified" its policy, allowing election officials and non-partisan groups to conduct voter registration in its facilities so long as they coordinate to avoid disrupting patient care.³³²

Given that our voter registration system depends on the activities of private entities engaging in registration drives, state and federal restrictions on these activities pose a significant concern. There is, moreover, reason to be worried about the evenhandedness of legislative bodies or administrators regulating the registration process. As with other election laws, those entities will inevitably have an incentive to adopt rules beneficial to their party. It is no surprise, for example, that the Ohio and Florida restrictions were enacted by Republican legislative bodies and signed by Republican

³²⁵ 38 C.F.R. § 1.218(a)(14) (2007).

³²⁶ *Preminger v. Principi*, 422 F.3d 815 (9th Cir. 2005).

³²⁷ *Id.* at 824–26.

³²⁸ *Preminger v. Sec'y of Veterans Affairs*, 498 F.3d 1265 (Fed. Cir. 2007).

³²⁹ *Preminger v. Nicholson*, No. C 04-2012 JF, 2007 U.S. Dist. LEXIS 21296 (N.D. Cal. Mar. 7, 2007). This order granted partial summary judgment to the defendants, but left open the question of whether the regulations had been applied in a discriminatory manner. *Id.* at *12–15.

³³⁰ *Preminger v. Nicholson*, No. C 04-2012 JF, 2008 U.S. Dist. LEXIS 9207 (N.D. Cal. Jan. 28, 2008).

³³¹ *Preminger v. Peake*, No. 08-15714, 2008 WL 3168617 (9th Cir. Aug. 8, 2008).

³³² Press Release, U.S. Dep't of Veterans Affairs, VA Clarifies Voter Registration Regulations (Sept. 8, 2008), available at <http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=1564>.

governors, given the perception—and likely reality—that registration drives tend to reach democratic-leaning voters who are less likely to be reached through other means.³³³ To the extent courts deny standing to plaintiffs in these cases or restrict the availability of facial challenges, there is great potential for mischief on the part of partisan elected or appointed officials.

4. Proof of Eligibility

A final area of registration-related litigation concerns the requirements that voters must meet in order to register to vote. This is related to the issue of voter identification, which recently came before the Court in *Crawford v. Marion County Election Board*.³³⁴ But while *Crawford* focused on the requirements that voters must meet at the time they appear to vote, the issue most germane to registration is what proof of eligibility voters must produce at the time of registration. HAVA requires that registration applications include the voter's driver's license number or, in the alternative, social security number if he or she has one.³³⁵

Some states have moved to impose more onerous requirements on voters in order to register. One example is the State of Georgia, whose registration form informed voters that they were required, pursuant to state statutes, to provide their full social security numbers in order to register.³³⁶ A federal district court struck down this requirement under 42 U.S.C. § 1971, concluding that this information was not "material" to determining whether the person was qualified to vote.³³⁷ On the other hand, a district court in Florida upheld the state's requirement that voters check boxes indicating that they had not been convicted of a felony and had not been adjudicated mentally incompetent.³³⁸ Because they related to a voter's qualifications, these requirements were held to be "material" under 42 U.S.C. § 1971.³³⁹

Probably the most onerous recent registration requirement is one imposed as part of Arizona's Proposition 200. Among the requirements of that law is that county

³³³ See Elizabeth Newlin Carney, *Stampede of New Voters Taxing the System*, NAT'L J., Sept. 27, 2008, http://www.nationaljournal.com/njmagazine/nj_20080927_6758.php?related=true&story1=nj_20080927_6758&story2=null&story3=null (reporting on Democratic voter registration efforts and allegations of vote suppression by those seeking to restrict registration drives).

³³⁴ 472 F.3d 949 (7th Cir. 2007).

³³⁵ 42 U.S.C. § 15483(a)(5)(A) (Supp. V 2005).

³³⁶ *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1275 (N.D. Ga. 2005).

³³⁷ *Id.* at 1276. The court also found the requirement impermissible under the Federal Privacy Act. *Id.* at 1274–76.

³³⁸ *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1212–13 (S.D. Fla. 2006).

³³⁹ *Id.* The court also found the challenged requirements to be consistent with the VRA, the NVRA, and HAVA. *Id.* at 1213–16. In a later order, the court upheld a requirement that voters correct their applications twenty-nine days before the election against a constitutional challenge. *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1340 (S.D. Fla. 2008).

recorders “reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship.”³⁴⁰ The law also set forth the documents that would be accepted as proof of citizenship: a driver’s license (or non-operating identification license), birth certificate, passport, or naturalization document.³⁴¹ Such requirements are especially worrisome, given survey evidence showing that many eligible citizens lack readily available proof of citizenship.³⁴²

The main issue in the challenge to Arizona’s registration requirements is whether they violated the NVRA’s requirement that states accept the uniform federal registration form.³⁴³ Under the NVRA, states are required to “accept and use” the federal mail registration form originally developed by the Federal Election Commission and now under the authority of the EAC.³⁴⁴ The EAC is responsible for the contents of both this form and the state-specific instructions that accompany it.³⁴⁵ Those instructions do not specify that voters must provide proof of citizenship, in order to have their registrations accepted. The issue in *Gonzalez v. Arizona* is whether Arizona was compelled to accept and use the federal form, notwithstanding Proposition 200’s imposition of a more onerous requirement.³⁴⁶ The district court concluded that Arizona was free to impose such requirements and was not required to accept the federal form.³⁴⁷

The district court relied not on the “accept and use” requirement, but on a different section of the NVRA, 42 U.S.C. § 1973gg-7.³⁴⁸ Subsection (a) of that provision says that the EAC should develop the federal form, in consultation with states’ chief election officers. Subsection (b) sets forth what the federal form is supposed to include, including an attestation that the voter meets eligibility requirements and a sig-

³⁴⁰ ARIZ. REV. STAT. ANN. § 16-166(F) (2008).

³⁴¹ *Id.*

³⁴² See Brennan Center for Justice, Citizens Without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification, http://www.brennancenter.org/page/-/d/download_file_39242.pdf (observing that 7% of U.S. citizens surveyed said they did not have ready access to U.S. passports, naturalization papers, or birth certificates).

³⁴³ 42 U.S.C. §§ 1973gg to gg-10 (2000). In addition to these registration requirements, Proposition 200 also imposed requirements that voters must satisfy at the time of voting. These were before the Court in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), in which the Court vacated the court of appeals order enjoining Arizona’s voter identification requirements. *Id.* at 6. The Supreme Court did not rule on the registration requirements of Arizona’s law, only the ID requirements applicable to voters appearing at the polls. *Id.* at 6–8.

³⁴⁴ § 1973gg-4(a).

³⁴⁵ The form and accompanying instructions may be found on the EAC website, at <http://www.eac.gov/voter/Register%20to%20Vote>.

³⁴⁶ 435 F. Supp. 2d 997, 1001 (D. Ariz. 2006).

³⁴⁷ *Id.* at 1003.

³⁴⁸ *Id.* at 1002–03. The following analysis of *Gonzalez* appeared in substantially similar form in The Arizona NVRA Decision, <http://moritzlaw.osu.edu/blogs/tokaji/2006/06/arizona-nvra-decision.html> (June 20, 2006, 20:54 EST).

nature line under penalty of perjury. The court interpreted subsection (b) to allow the federal form to include other requests for information, in addition to what is specified in the statute.³⁴⁹

On this point, the district court's analysis is in error. The issue before the court was not what the federal form may or should include. It was instead whether, given what the federal form does in fact say, a state may demand additional proof of eligibility on top of what the form calls for. Section 1973gg-7(b) does not speak to that question. If Arizona believed that the federal form should be amended to allow it to demand proof of citizenship, it was free to take it up with the EAC in the first instance, through the consultation process described in 1973gg-7(a). It would then be up to the EAC to determine whether the form should be amended to accommodate Arizona's concern. What Arizona instead attempted to do was to make an end run around the consultation between the EAC and state election officials required by federal law. The court's reliance on § 42 U.S.C. 1973gg-7(b) was thus a distraction from the real issue: whether the "accept and use" language allows states to demand additional information, beyond what the federal form requires. If followed by other courts, this analysis would make it all too easy for states to make an end run around the NVRA's mail registration requirements. They could, for example, refuse to accept the federal form unless registrants completed elaborate supplemental forms mandated by the state, or supplied proof of eligibility not possessed by many applicants (such as government-issued photo ID). It also presents the potential for considerable voter confusion, given that it allows Arizona to reject voter registration applications that fully comply with the instructions contained on the federal form.

Unfortunately, the district court's order denying a preliminary injunction was affirmed in a cursory order from the Ninth Circuit, which similarly avoided the issue of whether states must "accept and use" the federal form notwithstanding Proposition 200, if returned without the required proof of citizenship.³⁵⁰ The district court entered a final judgment.³⁵¹ The appeal remains pending as this Article goes to press, with plaintiffs making claims under the U.S. Constitution and the VRA as well as the NVRA.³⁵² While Arizona's registration requirements have not yet been replicated in other states, this remains an important issue to watch, since it implicates not only

³⁴⁹ *Gonzalez*, 435 F. Supp. 2d at 1000.

³⁵⁰ *Gonzalez v. Arizona*, 485 F.3d 1041, 1050–51 (9th Cir. 2007).

³⁵¹ Order; Findings of Fact and Conclusions of Law, *Gonzalez v. Arizona*, No. CV-06-1268-PHX-ROS (D. Ariz. Aug. 20, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Arizona-Order-8-20-08.pdf>. Plaintiffs have appealed this judgment. Notice of Appeal, *Gonzalez*, No. CV-06-1268-PHX-ROS (Sept. 16, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Arizona-Notice-9-16-08.pdf>.

³⁵² Pleadings, orders, and other documents filed in the case are available at Election Law @ Moritz, <http://moritzlaw.osu.edu/electionlaw/litigation/gonzalez.php> (last visited Dec. 1, 2008).

the states' authority to impose proof requirements on those who register but also the EAC's ability to ensure consistency in registration practices across the states.

C. The Necessity and Insufficiency of Litigation

What general lessons may be drawn from the registration-related litigation of the last few years? First, it is clear that federal courts have an important role to play in policing voter registration. Due to the DOJ's lackluster enforcement of federal statutes designed to improve access to voter registration, lawsuits brought by private parties have assumed a greater prominence in the ongoing battle to make registration more accessible. The weakness of the EAC—which lacks regulatory authority outside of one narrow area and which has a structure that makes it difficult to reach agreement even in that area—heightens the importance of the federal judiciary in resolving disputed statutory questions. In addition, the pervasive partisanship of state and local administrators makes it essential for there to be a relatively neutral forum for the resolution of constitutional issues, such as those that arise in the context of registration drives.

All these realities make it especially important that courts be generous in finding a private right of action and standing in cases alleging that rights protected by HAVA and other federal election laws have been violated.³⁵³ Otherwise, the DOJ will be left with a virtual monopoly on decisions about what registration cases are litigated, limiting federal courts' ability to clarify and enforce federal law. To the extent that courts deny private rights of action or standing, Congress should consider amending federal statutes to expressly allow private lawsuits, to the extent the Constitution allows.³⁵⁴

In the future, it is imperative that the DOJ focus on enforcing the provisions of the NVRA and HAVA designed to remove registration barriers, rather than simply making states remove ineligible voters as it has done during the past several years. The DOJ has been somewhat more active in enforcing the language assistance provisions of the VRA, though it has focused less on language assistance at the registration stage than at the polls.³⁵⁵ Voting rights groups would also do well to focus more intently on enforcement of the VRA's language assistance provisions at the registration stage.³⁵⁶ But while better enforcement of existing registration laws will make

³⁵³ See, e.g., *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572–74 (6th Cir. 2004) (finding a private right of action under 42 U.S.C. § 1983 and standing on the part of organizational plaintiffs to enforce HAVA's provisional voting requirements).

³⁵⁴ See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007) (finding congressional authorization of a lawsuit by states against the EPA to be “of critical importance to the standing inquiry”).

³⁵⁵ See U.S. Dep't of Justice, *supra* note 18.

³⁵⁶ The VRA includes a private right of action that would encompass such claims. 42 U.S.C. § 1973a (2000) (allowing any “aggrieved person” to bring a claim for violation of statutes enforcing constitutional voting rights under the Fourteenth or Fifteenth Amendments). It is

a difference at the margins, it will not likely be sufficient to eliminate barriers to participation. It is therefore necessary to consider potential changes to federal and state laws governing registration.

IV. REGISTRATION REFORM: DEVELOPING A NEW AGENDA

A. Toward a More Representative Electorate

In thinking about possible directions for legislative reform to voter registration, it is helpful to return to the values that have dominated the debate over election reform since 2000: access and integrity.³⁵⁷ As demonstrated by the history of registration recounted in Part I, the tension between these values is nothing new. As long as there have been voter registration lists, they have served the dual purposes of curbing electoral corruption and preventing eligible voters from participating. The federal laws described in Part II have helped reduce barriers to registration and participation, as has the litigation enforcing voters' statutory and constitutional rights set forth in Part III.

These goals have been accomplished, moreover, without increasing voter fraud or otherwise allowing ineligible people to vote. Although the NVRA may have increased the deadwood on voting rolls, the claims that it has made it easier for voters to vote twice or otherwise to cheat is unsubstantiated. There have been instances of private registration groups submitting voter registration cards with obviously fake names like Mary Poppins, Jeffrey Dahmer, or Dick Tracy.³⁵⁸ These appear to be the result of registration drives in which workers have sought to pad their numbers without actually doing the work for which they were hired. But there is little evidence of people actually voting under these fictitious names.³⁵⁹ In other words, instances of registration fraud have rarely if ever translated into voter fraud.³⁶⁰ Nor is there any evidence that the provisions of HAVA designed to expand access have resulted in an

puzzling that there have been so few private lawsuits enforcing the VRA's language assistance provisions, especially in the registration process.

³⁵⁷ See, e.g., THE CENTURY FOUNDATION, BALANCING ACCESS AND INTEGRITY: THE REPORT OF THE CENTURY FOUNDATION WORKING GROUP ON STATE IMPLEMENTATION OF ELECTION REFORM (2005), available at <http://www.tcf.org/Publications/ElectionReform/baicomplete.pdf>.

³⁵⁸ Joe Mahr, *Voter Fraud Case Traced to Volunteer: 124 Registrations Falsified, Allegedly for Crack Cocaine*, THE BLADE (Toledo, Ohio), Oct. 19, 2004, at A1.

³⁵⁹ See Job Serebrov & Tova Wang, *Voting Fraud and Voter Intimidation: [Draft] Report to the U.S. Election Assistance Commission on Preliminary Research & Recommendations* 6 ELECTION L.J. 330, 333 (2007) ("There is widespread but not unanimous agreement that there is little polling place fraud, or at least much less than is claimed, including voter impersonation, 'dead' voters, noncitizen voting, and felon voters.").

³⁶⁰ *Id.*

increase in voter fraud. To the contrary, its statewide database requirement is likely to reduce what little cheating now goes on in American elections, by making it more difficult to maintain dual registrations or to impersonate another voter—instances of which are already exceedingly rare.³⁶¹

While the existing election administration system is quite effective in promoting integrity, there is considerable room for improvement when it comes to access. Overall turnout in the United States lags behind that of all industrialized democracies except Switzerland.³⁶² The link between registration and turnout has long been recognized.³⁶³ As one recent study put it: “The registration requirement offers an obvious clue for the relatively low turnout in U.S. elections compared to other countries, which do not have such requirements.”³⁶⁴ Of course, voter registration is not the only reason for the relatively low turnout in the U.S., and probably not the most significant one.³⁶⁵ But more restrictive registration rules can depress participation by eligible voters.

This might not be so problematic, were the voters who do participate representative of the citizenry as a whole, but that is not the case. People of lower socioeconomic status, as well as younger people, are less likely to vote.³⁶⁶ There is also a relationship between race and voter turnout, with more diverse states tending to have stricter registration requirements and lower turnout.³⁶⁷ Minority voters are

³⁶¹ See generally LORRAINE C. MINNITE, *THE POLITICS OF VOTER FRAUD* (2007), available at http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf; see also *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1619 & n.12 (2008) (noting that there was no evidence of any instances of voter impersonation fraud at polling places at any time in Indiana’s history, and identifying only a single voter confirmed to have committed in-person voter fraud in any state in recent history); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 646–47 (2007) (suggesting that anecdotal evidence of voter fraud overstates its frequency). That is not to deny that having deadwood on the rolls, including fictitious names, is a bad thing. There are undoubtedly administrative costs to election authorities from having those names on the list and having to send out mailings to those addresses. At the same time, registration fraud should not be confused with voter fraud. The former has financial costs, but only the latter presents a genuine threat to electoral integrity. And the latter remains quite uncommon.

³⁶² DAVID HILL, *AMERICAN VOTER TURNOUT: AN INSTITUTIONAL PERSPECTIVE* 8–9, 149 (2006).

³⁶³ See U.S. Census Bureau, U.S. Dep’t of Commerce, *Voting & Registration: Current Population Survey*, <http://www.census.gov/population/www/socdemo/voting.html> (last visited Dec. 1, 2008).

³⁶⁴ MICHAEL S. LEWIS-BECK ET AL., *THE AMERICAN VOTER REVISITED* 104 (2008).

³⁶⁵ The use of first-to-the-post elections instead of proportional representation is one of the factors that is very likely responsible for low turnout in the United States. See Michael A. McCann, *A Vote Cast; A Vote Counted: Quantifying Voting Rights Through Proportional Representation in Congressional Elections*, 12 KAN. J.L. & PUB. POL’Y 191 (2002); Halperin, *supra* note 13, at 100.

³⁶⁶ RAYMOND E. WOLFINGER & STEPHEN J. ROSENSTONE, *WHO VOTES?* 23–25 (1980) (studying the relationship between education and turnout); Halperin, *supra* note 13, at 102–03.

³⁶⁷ Kim Quaille Hill & Jan E. Leighley, *Racial Diversity, Voter Turnout, and Mobilizing*

registered and vote at lower rates than whites, and more likely to view the registration process as difficult.³⁶⁸ Although the long-standing conventional wisdom is that voters and non-voters do not differ dramatically in their political preferences, that view is increasingly under fire. Recent social science research shows that voters tend to be more conservative than non-voters on class-based issues like health insurance, education, and union organization.³⁶⁹

The social science evidence thus tends to show: (1) that there is a close link between registration and turnout, (2) that certain groups (including people who are younger, less educated and minorities) are less likely to register and vote, and (3) that there are significant policy differences between those who vote and those who do not. For those who believe that election results should mirror the preferences of all citizens, this puts a premium not merely on expanding the *number* of voters who participate, but on adopting reforms that will help make the electorate *more representative* of the citizenry. Potential reforms to the registration process should therefore be measured by these yardsticks.

B. Reform Possibilities

While access and integrity are often referred to as the twin goals of election reform, it is a mistake to assume that promoting one requires sacrificing the other. Our election system must promote greater participation by all eligible citizens, while remaining resistant to fraud and other forms of electoral manipulation.³⁷⁰ At the same time, a reform that increases registration or broadens the electorate will not necessarily result in more voter fraud. Not every apparent liberalization of the registration and voting process will necessarily result in higher turnout or a more representative electorate.³⁷¹

The social science evidence is far from crystal clear on the precise effects of different potential reforms. It thus cannot be said with certainty which changes to the registration process will result in greater participation among demographic groups

Institutions in the United States, 27 AM. POL. Q. 275, 279–80, 291 (1999).

³⁶⁸ Lien, *supra* note 120, at 139; Alvarez et al., *supra* note 277, at 398.

³⁶⁹ Jan E. Leighley & Jonathan Nagler, Who Votes Now? And Does It Matter? (Mar. 7, 2007), http://www.nyu.edu/gsas/dept/politics/faculty/nagler/leighley_nagler_midwest2007.pdf. But see LEWIS-BECK ET AL., *supra* note 364, at 98 (finding that non-voters were much more likely to vote for the Democratic presidential candidate in 1996, but were much more evenly split between the Democratic and Republican candidates in 2000 and 2004).

³⁷⁰ BALANCING ACCESS AND INTEGRITY, *supra* note 22, at 2.

³⁷¹ In fact, some reforms may actually make the electorate *less* representative, even though they result in a marginal increase in overall turnout. See Adam J. Berinsky, *The Perverse Consequences of Electoral Reform in the United States*, 33 AM. POL. RES. 471 (2005) (arguing that some reforms designed to make voting easier have actually increased the socioeconomic bias of the electorate).

underrepresented in the current electorate. In this respect, the highly decentralized character of the American electoral system actually provides a significant benefit: It allows for experimentation at the state or local level, while containing any negative side effects arising from reforms that do not work as expected. Maryland can experiment with changes to its registration system without voters in Virginia being adversely affected if that experiment goes awry.

What follows are various possible registration reforms that policy makers at the local, state, and federal level might consider. The list starts with more modest reforms and then proceeds, roughly in ascending order, to those likely to be viewed as more dramatic, hence more difficult to enact.

1. Registration Portability

One relatively simple reform is to make it easier for registered voters to stay registered when they move across county or municipal lines within a state. Michael McDonald has coined the phrase “registration portability” to refer to a system in which registered voters can vote at their new polling place, even if they have not updated their registration information prior to election day.³⁷² While the NVRA’s fail-safe provisions protect voters who move within the same registrar’s jurisdiction (i.e., county or municipality), they do not cover those who move from one jurisdiction to another within the same state.³⁷³ Nine states and the District of Columbia now allow full registration portability within the state, meaning that voters who move anywhere within a state can transfer their registration to their new address on election day.³⁷⁴ Although this reform will not improve participation among all groups that are underrepresented in the current electorate, recent movers are more likely to participate in states with full registration portability.³⁷⁵ HAVA’s statewide voter registration database requirement makes this reform much more manageable, since it readily allows local election officials to determine whether someone who recently moved into their jurisdiction was previously registered elsewhere.³⁷⁶ On the list of potential registration reforms, this should be the easiest and least controversial to implement.

2. Automatic Voter Registration

³⁷² Michael P. McDonald, *Portable Voter Registration*, 30 POL. BEHAV. (forthcoming 2008), available at <http://springerlink.com/content/f2276m7786p212t0/fulltext.pdf>.

³⁷³ See *supra* notes 150–53 and accompanying text.

³⁷⁴ McDonald, *supra* note 372 (manuscript at 10). These states are: Idaho, Maine, Minnesota, New Hampshire, Wisconsin, Wyoming, Iowa, Montana, and North Carolina.

³⁷⁵ *Id.* (manuscript at 21).

³⁷⁶ See *supra* Part II.A.3.

Although portable registration will help already registered voters participate after they move, it will do nothing to increase registration among other potential voters. One way of including these voters is have citizens automatically registered when they interface with certain governmental entities. The “motor voter” provisions of the NVRA can be viewed as one form of automatic voter registration, since it provides that an application for a driver’s license “shall serve” as a voter registration application, unless the applicant fails to sign the registration form.³⁷⁷ Another possibility is to register high school students automatically at the time of their graduation, provided that they meet eligibility requirements. This reform would target a group that is underrepresented in the electorate and has the potential to increase participation among this group.

3. Election Day Registration

Of all potential registration reforms, election day registration (EDR) is the one with the strongest track record of increasing voter participation.³⁷⁸ Nine states now allow voters to register and vote on election day.³⁷⁹ A key advantage of election day registration is that it allows voters who are not previously registered, including those who become engaged in politics during the period just before election day, to participate. One study found that Maine, Minnesota, and Wisconsin (all of which adopted EDR in the mid-1970s) saw increases in their turnout after adopting EDR and sustained their high turnout rates in the years that followed, even as turnout in other states declined.³⁸⁰ This accords with research in other states, which finds a consistently positive increase in turnout associated with EDR.³⁸¹ One study found that average turnout with EDR is 59%, compared to 53% with a thirty-day closing date for registration.³⁸² Overall, EDR is estimated to increase turnout by 5 to 10%.³⁸³ The increase

³⁷⁷ 42 U.S.C. § 1973gg-3(a)(1) (2000).

³⁷⁸ PEW CENTER ON THE STATES, ELECTION-DAY REGISTRATION: A CASE STUDY (2007), http://www.pewcenteronthestates.org/report_detail.aspx?id=32754.

³⁷⁹ See *supra* note 376.

³⁸⁰ Mark J. Fenster, *The Impact of Allowing Day of Registration Voting on Turnout in U.S. Elections from 1960 to 1992: A Research Note*, 22 AM. POL. Q. 74, 80, 84 (1994).

³⁸¹ *Id.* at 84.

³⁸² See Craig Leonard Brians & Bernard Grofman, *Election Day Registration’s Effect on U.S. Voter Turnout*, 82 SOC. SCI. Q. 170, 170, 176–77 (2001) (finding a 7% increase with EDR in the average state).

³⁸³ Fenster, *supra* note 380, at 74, 84 (estimating that national EDR would increase turnout 5%); Benjamin Highton, *Easy Registration and Voter Turnout*, 59 J. POL. 565, 568 (1997) (finding turnout approximately 10% higher in states with EDR or no registration).

does not appear to yield a partisan advantage for either Democrats or Republicans.³⁸⁴ EDR can, however, help bring in younger voters as well as new state residents.³⁸⁵

Despite the increase in voter participation, EDR has its detractors. The most commonly made argument against EDR is that it will increase the likelihood of voter fraud, to the extent that ineligible people try to vote on election day.³⁸⁶ The available evidence does not support the conclusion that EDR results in an increase in voter fraud. A recent study found only ten cases of documented voter fraud in EDR states between 1999 and 2005.³⁸⁷ Of these, only one was a case of voter impersonation at the polls, and that case was unrelated to that state's EDR law.³⁸⁸ The study included a survey of county prosecutors, who reported only a handful of documented cases of voter fraud.³⁸⁹ In sum, "the collective evidence suggests there has been very little voter fraud in EDR states over the past several election cycles."³⁹⁰ The implementation of statewide voter registration databases, which under HAVA must now be coordinated with state motor vehicle, criminal, and death records, makes it even more difficult for an ineligible person to vote without detection.³⁹¹

While the turnout benefits of EDR are widely recognized, another advantage has received less attention: allowing EDR can almost entirely eliminate the need for provisional ballots. That is primarily due to the fact that voters whose registration forms are mishandled need not cast a provisional ballot in EDR states. Instead, they may simply register at the polls. Consider, for example, a voter whose name does not appear on registration lists when she appears at the polling place due to an error by an election official, a motor vehicle agency, a registration-drive volunteer, or even the voter herself. In each of these circumstances, the voter's name would

³⁸⁴ Brians & Grofman, *supra* note 382, at 177–78 (analyzing aggregate data from 1980–1996 EDR states).

³⁸⁵ See R. MICHAEL ALVAREZ & JONATHAN NAGLER, ELECTION DAY VOTER REGISTRATION IN IOWA 3 (2007), available at <http://www.demos.org/pubs/updatedIOWA.pdf> (estimating that turnout of those aged eighteen to twenty-five would increase by 10.7% with EDR); Stephen Knack & James White, *Election-Day Registration and Turnout Inequality*, 22 POL. BEHAV. 29, 29 (2000) (noting an increase among younger voters and recent movers relative to non-movers with the adoption of EDR).

³⁸⁶ See generally David Schultz, *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483 (2008) (discussing the prominence of the fear of voter fraud).

³⁸⁷ LORRAINE C. MINNITE, ELECTION DAY REGISTRATION: A STUDY OF VOTER FRAUD ALLEGATIONS AND FINDINGS ON VOTER ROLL SECURITY (2007), http://www.issuelab.org/research/election_day_registration_a_study_of_voter_fraud_allegations_and_findings_on_voter_roll_security.

³⁸⁸ *Id.* at 7. The incident involved a seventeen-year-old New Hampshire high school student who "subbed" for his father and illegally impersonated him in a 2004 Republican presidential primary. *Id.* The polling site was the student's high school, and a teacher reported the fraud. *Id.*

³⁸⁹ *Id.* at 2, 4.

³⁹⁰ *Id.* at 4.

³⁹¹ 42 U.S.C. § 15483(a)(2)(A), (a)(5)(B) (Supp. V 2005).

not appear on the registration list for the proper polling place when she shows up to vote on election day. In a state without EDR, that voter would be relegated to the provisional voting process. In an EDR state, by contrast, the voter would be permitted to register and vote on election day, provided that she satisfies state requirements for confirming eligibility.

Data on provisional voting confirm that EDR states are much less reliant on provisional ballots than other states. In the 2004 election, for example, the EDR states of Maine, Wisconsin, and Wyoming all had 0.05% or less of their registered voters cast provisional ballots.³⁹² Maine had only 483 provisional ballots cast statewide, while Wisconsin had only 374, and Wyoming had just 95.³⁹³ In Minnesota, there were zero provisional ballots cast in the 2004 presidential election.³⁹⁴ By contrast, almost 2% of Ohio's registered voters—a total of 157,714 people—cast provisional ballots in 2004.³⁹⁵ Quite clearly, a much larger number of provisional ballots cast increases the likelihood of a close election turning into a disputed election. It is not difficult to imagine the nightmare scenario that would have emerged in Ohio in 2004, had the margin of victory been closer. The two candidates would have wound up arguing over whether provisional ballots should be counted in counties across the state, just as they argued over whether punch card ballots should be counted after the 2000 election in Florida.

Greater participation in our democracy is thus only one of the benefits of EDR. Adopting EDR can virtually eliminate the need for provisional ballots and, with it, a potential source of contestation and litigation over close elections. It can also eliminate the numerous problems associated with provisional ballots that I have already mentioned. Put more simply, EDR promotes the value of *finality* as well as access, and does so without sacrificing electoral integrity.

4. Registration Federalization

HAVA transferred responsibility for the maintenance of voter registration lists from the local to the state level.³⁹⁶ This makes it easier to track voters when they move across jurisdictional lines within a state, facilitating registration portability. It is much more difficult, however, to track voters when they cross state lines. State registration systems lack the interoperability that would allow one state automatically to notify another when voters move.³⁹⁷ One possible solution is to transfer responsi

³⁹² KIMBALL W. BRACE & MICHAEL P. McDONALD, FINAL REPORT OF THE 2004 ELECTION DAY SURVEY: SUBMITTED TO THE U.S. ELECTION ASSISTANCE COMMISSION 6-9 tbl.6a (2005).

³⁹³ *Id.* at 6–14.

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ 42 U.S.C. § 15483(a)(2)(A), (a)(5)(B) (Supp. V 2005).

³⁹⁷ See R. MICHAEL ALVAREZ & THAD E. HALL, THE NEXT BIG ELECTION CHALLENGE: DEVELOPING ELECTRONIC DATA TRANSACTION STANDARDS FOR ELECTION ADMINISTRATION

bility for the maintenance of voter registration lists from the states to the federal level. In theory, such a reform could result in nationwide registration portability, while also enhancing the integrity of our election system by making it more difficult for the same voter to maintain registrations in two or more states. It would also eliminate the variation among states in terms of the deadline for registration, where registration forms may be found, how they may be submitted, what proof of eligibility is required, and even the regulation of registration drives.³⁹⁸ This is likely to reduce confusion, especially for those moving across state lines.

While the federalization of voter registration may sound simple, it would actually entail an enormous overhaul of the United States' registration system. As discussed in Part II, the implementation of HAVA's requirement of statewide registration databases has proven to be an enormous challenge; moving from statewide databases to a single national database would surely pose much greater challenges. This would be very costly, although those costs might eventually be offset by the economies of scale arising from having one registration system rather than fifty. The real issue is whether the federal government would really do a better job than the states at maintaining a national registration list. The most logical federal agency to handle this task would be the EAC but, given the host of troubles it has experienced in its first few years of operation, it is not clear whether it is up to the task.³⁹⁹

Accordingly, institutional reform would have to accompany the federalization of registration lists. There are undeniable advantages to giving the federal government control over voter registration, especially when it comes to tracking voters who move across state lines. But without a federal agency that can be trusted to discharge its list-keeping responsibilities in a neutral manner, registration federalization would be a risky proposition.

5. Universal Voter Registration

If the principal goal of our voter registration system is to ensure that as many eligible voters as possible are registered, the best way of accomplishing that objective might well be to transfer responsibility from the individual voter to the government. Our present system does place some responsibility for registering voters on the government, such as the public agencies covered by HAVA. But many voters are registered through other means, including registration drives by the parties or non-party groups and by voters tracking down and turning in registration forms on their own. In our present system, ultimate responsibility for registering lies with the voter.

In place of the personal registration system that has predominated since the early twentieth century, the federal government might take upon itself the job of making

20 (2005), available at <http://www.vote.caltech.edu/media/documents/AlvarezReport.pdf>.

³⁹⁸ Hasen, *supra* note 10, at 964.

³⁹⁹ See *supra* text accompanying notes 194–202.

sure that all eligible citizens are registered to vote. Universal registration differs from automatic voter registration, in that the government would make much more of an affirmative effort to make sure that citizens register, rather than simply allowing them to register when citizens interface with government for other reasons. Shifting the burden of registering voters to the government could also reduce or eliminate our dependence on private groups like ACORN and the League of Women Voters, which register voters who might not be reached through other means.

While this would be very different from the current American election system, it is common among industrialized democracies.⁴⁰⁰ One possibility is a census-type model, in which a government agency would actually send its employees out door-to-door, seeking to register all eligible voters.⁴⁰¹ Richard Hasen has proposed combining universal voter registration with government-issued voter identification cards containing biometric information like a fingerprint, which he suggests could be a palatable political compromise for Democrats and Republicans.⁴⁰² Putting aside such political considerations, there is no particular reason why universal registration needs to be paired with mandatory voter ID, a policy proposal that has generated fierce opposition and that is unwarranted given the scarce evidence of voter impersonation—the only type of fraud that an ID requirement would correct.⁴⁰³ It would be possible to implement universal registration with or without voter ID. There would undoubtedly be costs, but these must be weighed against the value of increasing registration rolls and making them more representative of the public.

While universal registration has substantial appeal, there are reasons to be skeptical about whether the federal government is up to the task of taking over state registration systems. The same concerns that attend the federalization of voter registration apply with even greater force to a system in which the EAC, or some other federal agency, would take over responsibility for registering voters. There is obviously a partisan divide over voter registration, with Democrats tending to favor more open access and Republicans more stringent rules.⁴⁰⁴ Given the EAC's bipartisan structure, it is hard to see how that body could come to agreement on a fair way in which to implement universal voter registration, even if Congress were to require it.

There is no particular reason why universal registration needs to be implemented at the federal level first. In fact, there are good reasons for allowing individual states to experiment with universal registration, before implementing it across the country.⁴⁰⁵

⁴⁰⁰ Carmichael, *supra* note 13, at 302.

⁴⁰¹ Hasen, *supra* note 10, at 969 (suggesting that the Department of the Census undertake this task of universal registration).

⁴⁰² *Id.* at 969–70.

⁴⁰³ See Overton, *supra* note 361, at 631; Schultz, *supra* note 386.

⁴⁰⁴ Hasen, *supra* note 10, at 970; *supra* Part I.

⁴⁰⁵ The Brandeisian concept of states serving as laboratories for trying “novel social and economic experiments without risk to the rest of the country” provides a compelling argument for allowing this. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis,

No state currently employs a census-like universal registration model, but there would be no constitutional barrier to a state deciding to do so. The federal government might even provide funding for states to engage in a pilot project with universal registration, and then conduct research to evaluate its results, in terms of increasing turnout and making the electorate more representative. Universal registration is thus one of the reform proposals with respect to which the decentralization of our election system might actually be a blessing, allowing states to experiment with reforms before implementing them nationally.

6. Compulsory Registration and Voting

If our only goal were to ensure that as many people as possible participate in elections, the best way of doing so would simply be to require that all eligible citizens register and vote. As foreign as this idea may sound to American ears, there is little doubt that such a reform would both increase turnout and make the electorate more representative. Forty-three countries have some form of compulsory voting,⁴⁰⁶ including Australia, Belgium, and Italy.⁴⁰⁷ Not surprisingly, these countries have much higher turnout than the United States.⁴⁰⁸ Overall, countries with compulsory voting have turnout that is ten to fifteen points higher than those without it.⁴⁰⁹ Interestingly, compulsory voting laws seem to increase turnout even when formal penalties for non-participation are rare.⁴¹⁰ This is perhaps best explained by the fact that such laws help to reinforce the social norm of voting, even when there is little or no enforcement.⁴¹¹

Given the inadequacy of other reforms in accomplishing more than a marginal increase in turnout, compulsory registration and voting have considerable appeal.⁴¹² It would also have the advantage of ensuring an electorate that is representative of the citizenry, something that does not necessarily occur with other reforms designed to spur greater turnout.⁴¹³ This in turn has the potential to force political parties to

J., dissenting).

⁴⁰⁶ DAVID M. FARRELL & IAN MCALLISTER, *THE AUSTRALIAN ELECTORAL SYSTEM: ORIGINS, VARIATIONS AND CONSEQUENCES* 124 (2006).

⁴⁰⁷ LOWENSTEIN ET AL., *supra* note 129, at 343; Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2170–71 (1996).

⁴⁰⁸ LOWENSTEIN ET AL., *supra* note 129, at 343.

⁴⁰⁹ Hasen, *supra* note 407, at 2171 n.144.

⁴¹⁰ *Id.* at 2170–72; *see also* Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295, 312–13 (2003).

⁴¹¹ Hasen, *supra* note 407, at 2166; *see also* Sean Matsler, Note, *Compulsory Voting in America*, 76 S. CAL. L. REV. 953, 968 (2003).

⁴¹² *See* Matsler, *supra* note 411, at 957.

⁴¹³ *See* Berinsky, *supra* note 371, at 483–84 (arguing increase in turnout spurred by reforms is the result of retaining transient voters and not stimulating non-voters to register).

take greater account of the policy preferences of groups that they would otherwise under value or ignore.⁴¹⁴

Despite the advantages of compulsory registration and voting, it seems highly unlikely that there will be a national mandate for it anytime soon. For those across the political spectrum, mandatory registration and voting undoubtedly seem antithetical to core values of our democracy. Many on the left would surely view a requirement that everyone register and vote as overly paternalistic and unduly intrusive of the personal liberty interest in *not* participating in elections. They may also object on privacy grounds, since some citizens may prefer not to have their names on the registration rolls in order to protect their right to be left alone. Those on the right might object on the ground that it would compel people who are ill-informed to participate in elections, threatening to further erode the quality of democratic discourse.⁴¹⁵

While this is not the place to engage in an extensive debate on the pros and cons of adopting compulsory voting in the United States, there is one complication that bears mentioning in the context of voter registration. Compulsory registration and voting would require a much more effective and reliable system of voter registration than the one we have now, one that would include all citizens who are eligible to vote. This is no small task, raising all of the concerns that were discussed in the context of registration federalization and universal voter registration regarding the federal government's capacity to compile and maintain a comprehensive voter list. As with other dramatic reforms to voter registration, it would probably be unwise to implement compulsory voting at the federal level—even if one believes that the advantages of such a reform outweigh its costs in terms of liberty, privacy, and the potential inclusion of ill-informed voters. It is not at all clear that the federal government has the capacity to manage this task.

What would make more sense is for *states* to experiment with compulsory registration and voting. This would not seem to create any equal protection problems with respect to voters in other states, since American elections (even for the President) do not cross state lines. Citizens subjected to mandatory registration and voting requirements might object that it violates their individual rights, though being called to appear at the polls seems less intrusive than other burdens that citizens are expected to bear—like appearing for jury duty and registering with the Selective Service.⁴¹⁶ Allowing individual states to implement compulsory registration and voting would allow researchers to study the costs and benefits of this reform. This would in turn allow policy makers in other states and at the federal level to make a more informed decision about whether this is a reform worth emulating or modifying.

⁴¹⁴ Heather Lardy, *Is There a Right Not to Vote?*, 24 OXFORD J. LEGAL STUD. 303, 313 (2004).

⁴¹⁵ For a possible response to this problem, see Hasen, *supra* note 407, at 2171.

⁴¹⁶ See Hasen, *supra* note 407, at 2176.

CONCLUSION

If the discussion of potential reforms seems inconclusive, this may be explained by the fact that there is much that we still do not know about voter registration. What we *do* know is that, throughout its history, registration has served both the laudable purpose of promoting the integrity of the electoral process and the less worthy purpose of excluding eligible voters. We also know that the laws enacted by Congress in recent decades—most notably the VRA, the NVRA, and HAVA—have had a salutary impact on voter registration, making it more accessible and improving the accuracy of registration lists. As states gain more experience with the statewide registration database mandated by HAVA, the accuracy and integrity of voter registration will no doubt improve. Courts also have a vital role to play in this process, particularly given the anemic condition of the EAC. With better DOJ enforcement of the NVRA and other laws designed to enhance access to voter registration, it is likely that even more voters could be brought into the electoral process, without any harm to electoral integrity.

We also know that there are legal reforms adopted in some states that have increased turnout and made the electorate more representative of the citizenry as a whole. The best examples of such reforms are election day registration and registration portability. These reforms have been shown to increase the number of people voting and having their votes counted, without any increase in fraud. They should be exported to other states, and even made part of federal law. At the same time, they are not panaceas. Although EDR and registration portability will increase participation among some groups who are less likely to vote, especially recent movers, they will probably not increase turnout more than 10% or eliminate the registration and participation gap.

What we do *not* know is whether more dramatic registration reforms would accomplish this end, without having adverse consequences that outweigh their benefits. Among the reforms worthy of consideration are the federalization of voter registration, universal voter registration, and compulsory registration and voting. Given the uncertainty about the federal government's ability to handle a massive shift of responsibility in its direction, and genuine doubts about their efficacy, it is questionable whether Congress will adopt any of these reforms in the near future. In the meantime, there is room for states to experiment with these and other possible changes to their registration systems. The federal government can and should assist these efforts, by providing funding for pilot projects aimed at increasing registration and participation. We should, in other words, take seriously the idea of states as laboratories for democracy, by funding states interested in experimenting with registration reforms, on everything from registration portability to automatic voter registration to compulsory registration and voting. In this way, the hyper-decentralization of the United States' election administration system might actually be turned to our advantage.