

Note

Not Registered to Vote? Sign This, Mail It, and Go Hire a Lawyer

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[T]he United States is one of the few industrialized democracies that places the onus for registration on the voter. In other democracies, the government facilitates voting instead of making it harder, by taking upon itself the responsibility to register eligible voters.¹

Introduction

In the Michigan primary election on August 3, 2004, Ruth Moore and her 72-year-old husband went to vote at their usual polling station in the Saginaw Town Hall.² When they arrived, however, a poll worker informed them that they were not registered to cast a ballot at the Town Hall and directed them to another voting location two miles away.³ At the new polling location a different election worker told

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¹ See WENDY WEISER, MICHAEL WALDMAN & RENÉE PARADIS, BRENNAN CTR. FOR JUSTICE, UNIVERSAL VOTER REGISTRATION: POLICY SUMMARY 2 (2008), available at http://brennan.3cdn.net/27dfe0578eaa840369_glm6bne8d.pdf.

² See *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 419 (E.D. Mich. 2004).

³ *Id.*

the Moores that they were still at the incorrect location.⁴ Ms. Moore then spoke with a friend who told her that the Moores' names were in fact on the voter rolls at the Town Hall, so Mr. and Mrs. Moore headed back, presented their information to the Town Hall poll worker, and were permitted to vote.⁵ The Moores were fortunate because, despite the confusion and inconvenience, they were actually registered to vote. The greater harm occurs when voters arrive at the polls only to find that they were never on the voter-registration rolls⁶ in the first place and are legally prevented from casting a regular ballot.⁷

Elections in the United States are “highly decentralized,” with the vast majority of administrative responsibilities—voter registration, poll-worker training, vote tabulation—performed by state and local election officials.⁸ Nonetheless, Congress still has a free hand to influence the administration of federal elections, and in the past forty years Congress has stepped in to establish goals and benchmarks aimed at increasing voter participation and combating voter disenfranchisement.

The major statute through which Congress intended to increase voter participation is the National Voter Registration Act of 1993⁹ (“NVRA”). The express purpose of the NVRA is to make it easier for citizens to register to vote by mandating that states provide uniform voter-registration services at state agencies and libraries, and via a mail-in registration form.¹⁰ A decade later, in the wake of the tumultuous 2000 presidential election which exposed significant flaws in the decentralized electoral system, Congress passed the Help America Vote Act of 2002 (“HAVA”) to establish minimum election-administration standards for federal elections.¹¹ It also created the indepen-

⁴ *Id.*

⁵ *Id.*

⁶ The “rolls” is the official list of citizens who are registered and eligible to vote.

⁷ See Josh White, *Va. Voters Complain of Missing Registrations*, WASH. POST, Nov. 8, 2008, at B1 (reporting that Virginia election officials “[investigated] allegations that some Virginians were unable to cast ballots [in the 2008 Presidential election] because voter-registration groups did not submit their official registration forms”).

⁸ ERIC A. FISCHER & KEVIN J. COLEMAN, CONGRESSIONAL RESEARCH SERV., NO. RL34363, ELECTION REFORM AND LOCAL ELECTION OFFICIALS: RESULTS OF TWO NATIONAL SURVEYS 1 (2008), available at <http://www.fas.org/sgp/crs/misc/RL34363.pdf>.

⁹ National Voter Registration Act of 1993 (NVRA), 42 U.S.C. §§ 1973gg to 1973gg-10 (2006).

¹⁰ 42 U.S.C. § 1973gg(a)–(b).

¹¹ Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1668 (codified at 42 U.S.C. §§ 15301–15545 (2006)).

dent, bipartisan Election Assistance Commission (“EAC”) to assist states and municipalities with meeting HAVA requirements.¹²

Absent federal, state, and local collaboration, though, these statutes cannot be effective. The NVRA requires state and local compliance with all—not just some—of its registration provisions. There must be consistent application and interpretation of the key portions of HAVA—namely the electronic-database and provisional-ballot sections.¹³ States must proactively modernize their hopelessly outdated voter-registration systems. And finally, federal oversight of any non-compliance must be aggressively pursued so that states are induced to adhere to the letter of the law. Individual failures at any point, by any relevant agent, contribute to voter disenfranchisement and decrease democratic participation.

Despite passage of these major voting-rights bills, thousands of citizens continue to be disenfranchised each and every election for mistakes that could easily be avoided. These problems occur both when voters seek to register and when they arrive at the polls to cast their ballots. The causes range from voter errors to clerical errors by state employees, from mistaken computer purges to overworked and undertrained election officials, and from election fraud to political gamesmanship. Although no electoral system is perfect, in a country with tens of thousands of voting schemes, even “almost perfect” will inevitably shortchange too many voters.

This Note argues that because states can no longer be trusted to correct errors in the election process, Congress must step in and build on the reforms instituted in the NVRA and HAVA to make voter registration easier for qualified citizens. The focus on voter-registration statutes and procedures is particularly relevant because registration problems were among the most prevalent voter complaints in the 2008 presidential election.¹⁴ Citizens from around the country reported that on November 4, 2008, they were mistakenly purged from the rolls before the election or that their voter-registration forms were not forwarded to the local board of elections by third-party registration groups or state agency officials.¹⁵

¹² 42 U.S.C. §§ 15321–15330.

¹³ *Id.* §§ 15482–15483.

¹⁴ See ELECTIONLINE.ORG, THE PEW CTR. ON THE STATES, BRIEFING: ELECTION 2008 IN REVIEW 8 (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/ElectionInReviewPDF%20Final.pdf>.

¹⁵ *Id.*

This Note proposes two solutions to address these problems. First, Congress must pass legislation mandating that states create and administer electronic registration for all voters. The second proposal is that Congress grant the EAC limited but binding authority to issue guidelines and directives in specific areas of election administration that pertain to voter registration.

Part I of this Note briefly discusses the historical evolution of voter suffrage in the United States and introduces the three major federal statutes that govern national voter-registration initiatives. Part II explores how state efforts to comply with these statutes solved some voter-registration problems while simultaneously creating new problems. It also examines how state noncompliance with federal law contributes to voter disenfranchisement. Part III offers two legislative solutions to cure what are, ultimately, state-created barriers to voter registration and democratic participation. Part IV considers potential problems with the proposed scheme and addresses likely counter-arguments.

I. Congress Inserts Itself in the Election-Administration Game

Although voter registration is traditionally a state function, the federal government has stepped in to pass significant legislation on three occasions since 1965. This Part addresses the historical background leading up to federal intervention and then introduces the Voting Rights Act of 1965¹⁶ (“VRA”), the NVRA, and the most recent congressional foray into election law, HAVA.

A. What’s That You Say About Universal Suffrage?

An examination of how the NVRA and HAVA have contributed to current voting-registration problems must be viewed in the proper historical context.¹⁷ Although there are very few voter-qualification restrictions in most jurisdictions today,¹⁸ universal voter suffrage was

¹⁶ Voting Rights Act of 1965 (“VRA”), 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006).

¹⁷ This Note only touches on the historical background of voting in the United States. For a more thorough analysis, see generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

¹⁸ Forty-eight states (Maine and Vermont are the exceptions) prohibit a total of 5.3 million incarcerated felons from voting and vary in procedures and guidelines for restoring voting rights. In some states they are restored upon release from prison, but in others probation or parole must be completed and restitution paid. For a comprehensive list, see BRENNAN CTR. FOR JUSTICE, *VOTING AFTER CRIMINAL CONVICTION*, http://www.brennancenter.org/content/section/category/voting_after_criminal_conviction/ (last visited Nov. 30, 2009).

not championed by the Framers of the Constitution.¹⁹ In fact, “[a]t the country’s birth, there were few believers in [it, and it was not] until 1868, with the passage of the Fourteenth Amendment, [that] the phrase ‘right to vote’ appear[ed] in the federal Constitution.”²⁰ Because state governments routinely and affirmatively acted to prevent or revoke extension of the franchise to women, minorities, the indigent, and uneducated citizens,²¹ Congress and the states twice amended the Constitution to ensure that the right to vote was guaranteed for all citizens.²²

Voter registration was itself viewed unfavorably in the early years of the Republic, and it was not until the period between the Civil War and World War I that most states officially implemented voter-registration procedures.²³ The intended goals of these formal measures were “to eliminate fraud and also bring an end to disruptive election-day conflicts at the polls.”²⁴ However, as courts struck down facially discriminatory laws that prevented blacks and the poor from voting, the manipulation of voter registration became a key tool for political machines—both Democratic and Republican, in the North and in the South—to keep their opponents’ supporters from casting ballots.²⁵ States and localities employed creative methods to complicate voter registration. The institution of various tests and restrictive eligibility standards²⁶—designed to keep citizens from properly registering—nullified the potential opposing votes in a less-than-obvious manner.²⁷

¹⁹ See KEYSSAR, *supra* note 17, at 317.

²⁰ *Id.*

²¹ See GARRINE P. LANEY, CONGRESSIONAL RESEARCH SERV., NO. 95-896, THE VOTING RIGHTS ACT OF 1965, AS AMENDED: ITS HISTORY AND CURRENT ISSUES 2–4 (2008), available at <http://wikileaks.org/leak/crs/95-896.pdf> (discussing Southern states’ implementation of poll taxes, grandfather clauses, and literacy tests designed to make voting difficult for minority and undereducated voters). See generally KEYSSAR, *supra* note 17.

²² U.S. CONST. amend. XV (extending the right to vote to African American males); U.S. CONST. amend. XIX (extending the right to vote to women).

²³ KEYSSAR, *supra* note 17, at 151–52 (“[M]ost antebellum proposals for registration systems were rejected as unnecessary and partisan.”).

²⁴ *Id.* at 152.

²⁵ *Id.* at 155–59.

²⁶ See Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 459–60 (2008) (listing literacy tests, poll taxes, extended-residency requirements, and exceedingly detailed information to be vouched for by witnesses).

²⁷ See KEYSSAR, *supra* note 17, at 228–32.

B. *The VRA: “The Goddamndest Toughest Voting Rights Act” Possible Stops State-Sponsored Disenfranchisement*²⁸

In 1965, Congress enacted the VRA “to assure that the right of citizens of the United States to vote is not denied or abridged.”²⁹ The scope of the VRA is purposefully sweeping, originally intended to overcome “Southern intransigence” on civil rights and voting rights.³⁰ Estimates suggest that millions of eligible citizens were denied the opportunity to vote in the ninety-nine years between Reconstruction and its enactment in 1965.³¹ Among other things, it still prohibits election laws that discriminate by race or color, suspends literacy tests, requires federal review of new voting laws in some jurisdictions, and provides for federal examiners to review voting lists and approve poll watchers.³² Trumpeted as “the most effective civil rights statute enacted by Congress,”³³ the VRA has been reauthorized four times since 1965 and remains in force.³⁴

C. *The NVRA: Congress Has Some Unfinished Business*

Although successful in eliminating significant state-sponsored barriers to voting, because the VRA is predominantly prophylactic in nature, it does not address every obstacle to voter registration. In par-

²⁸ See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 23 (4th ed. 2007) (quoting President Lyndon Johnson’s instructions to Attorney General Nicholas Katzenbach).

²⁹ Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (codified at 42 U.S.C. § 1973b(a)(1) (2006)).

³⁰ See Tokaji, *supra* note 26, at 463.

³¹ KEYSAR, *supra* note 17, at 158.

³² 42 U.S.C. §§ 1973–1973f (2006).

³³ Civil Rights Div., U.S. Dep’t of Justice, *The Statutes We Enforce*, <http://www.justice.gov/crt/voting/overview.php#vra> (last visited Nov. 30, 2009); see also Tokaji, *supra* note 26, at 464–65 (“Overall, the VRA was a spectacular success in eliminating barriers to registration and participation among southern blacks. Black registration in covered southern states increased from 29.3% to 52.1% within two years of the VRA’s passage.”).

³⁴ See LANEY, *supra* note 21, at 8 (“Federal intervention in state regulation of the electoral process was restricted to jurisdictions in which there was evidence that voting discrimination had occurred.”). However, on June 22, 2009, the Supreme Court raised serious questions about the constitutionality of the VRA in *Northwest Austin Municipal Utility District No. One v. Holder*, 129 S. Ct. 2504, 2512 (2009) (“[T]he Act imposes current burdens and must be justified by current needs. The Act also differentiates between the States . . . [in ways that can only] be justified in some cases.”). Although the Court declined to directly address the constitutionality of Section 5 of the VRA in its narrow opinion, it seems likely that VRA opponents will continue to challenge the Act in courts—bolstered by language in the opinion suggesting that the Act has served its useful purpose. *Id.* at 2516 (“In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today.”).

ticular, the poor and uneducated are still disproportionately impacted by procedural hurdles to registration, resulting in lower turnout and participation.³⁵ In 1993, Congress determined that its “unfinished business” was to reduce the remaining obstacles to voting, thereby increasing electoral participation.³⁶ Congress thus passed the NVRA, assuming that by increasing the number of citizens registered to vote they would stem a turnout trend that had declined in fifteen consecutive federal elections between 1960 and 1990.³⁷

The NVRA’s fourfold purpose is to increase the number of registered voters, increase the participation of eligible voters in federal elections, and maintain up-to-date and accurate voter rolls, all while ensuring the integrity of the voting process.³⁸ Congress held extensive hearings on the NVRA, finding that the right “to vote in Federal elections is a fundamental Constitutional right . . . [for which] Congress has a Constitutionally based authority to enact national registration standards for elections for Federal office.”³⁹

The NVRA pursues its goals in two distinct ways. First, it expands the number of locations and opportunities for citizens to apply to register to vote.⁴⁰ Prior to its enactment, state registration procedures were varied and nonuniform.⁴¹ Accordingly, under the NVRA, each state⁴² that requires voters to register for federal election must also offer registration forms—or opportunities to register in person—to individuals when they apply for a driver’s license or license re-

³⁵ See KEYSSAR, *supra* note 17, at 320–21.

³⁶ See H.R. REP. NO. 103-9, at 3 (1993), *reprinted in* 1993 U.S.C.C.A.N. 105, 106–07 (“[The VRA] eliminated the more obvious impediments to registration, but left a complicated maze of local laws and procedures, in some cases as restrictive as the outlawed practices, through which eligible citizens had to navigate in order to exercise their right to vote.”).

³⁷ This determination was based on public opinion polls, witness testimony, and research compiled by the Congressional Research Service that found eighty percent of registered voters cast ballots in presidential elections but just sixty percent of eligible adults were registered voters. *See id.*

³⁸ *Id.* at 5–6, 1993 U.S.C.C.A.N. at 109–10.

³⁹ *Id.* at 3, 1993 U.S.C.C.A.N. at 107; *see also infra* Part IV.A (discussing federalism concerns about federal regulation of voter-registration efforts).

⁴⁰ U.S. ELECTION ASSISTANCE COMM’N, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 2005–2006, at 5 (2007), *available at* http://www.eac.gov/program-areas/research-resources-and-reports/copy_of_docs/the-impact-of-the-national-voter-registration-act-on-federal-elections-2005-2006/attachment_download/file.

⁴¹ *Id.*

⁴² Six states are not subject to the NVRA because they do not require voters to register (North Dakota) or they offer election-day registration (Idaho, Minnesota, New Hampshire, Wisconsin, and Wyoming). *Id.* at 4.

newal.⁴³ States must also offer the same opportunity at any office that provides public assistance or services to persons with disabilities.⁴⁴

Vehicle-licensing offices were chosen (lending to the statute's "Motor Voter" nickname) because "87 percent of people 18 years and older have driver's licenses, while an additional 3 or 4 percent have . . . an identification card issued by a State motor vehicle agency."⁴⁵ Essentially, every application for a driver's license must be treated like an application for registration (unless the individual opts not to sign the registration form), and every change of address submitted for driver's-license renewals must be treated as a change of address for voter-registration purposes.⁴⁶

Agencies providing public assistance were selected by Congress to ensure that the poor and disabled (many of whom do not have or do not require a driver's license or state-issued ID card) were not excluded.⁴⁷ These agency officials are required to affirmatively offer a voter application to every citizen they serve and must also help fill it out if the applicant makes such a request.⁴⁸ Finally, in addition to this proactive assistance at state agencies, the NVRA mandates that each state accept a federally created, standardized voter-registration form through the mail.⁴⁹ Leaving nothing to chance, Congress delineated the specific information that must be included on this standard form and vested authority for preparation and distribution of the form in the federal government, rather than leaving it to each state to administer.⁵⁰

The second way in which the NVRA achieves its goals is by requiring states to implement enhanced voter-registration maintenance procedures to protect the integrity of the voter rolls.⁵¹ Specifically, it established uniform and nondiscriminatory methods of identifying and removing names from the voter rolls to ensure that names were removed for legitimate reasons only: at the request of the registrant, by

⁴³ 42 USC § 1973gg-3(a)(1), (c)(1) (2006).

⁴⁴ *Id.* § 1973gg-5(a).

⁴⁵ U.S. ELECTION ASSISTANCE COMM'N, *supra* note 40, at 5.

⁴⁶ 42 USC § 1973gg(3)(a), (d). *But cf.* THOM FILE, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2006, at 12 (2008) (showing current population-survey results illustrating that just 20.6% of respondents, when asked how they registered to vote, reported registering at a motor-vehicle agency).

⁴⁷ U.S. ELECTION ASSISTANCE COMM'N *supra* note 40, at 5.

⁴⁸ 42 U.S.C. § 1973gg-5. The EAC, created by HAVA, is responsible for the standardized voting form. *See id.* § 15322.

⁴⁹ *Id.* § 1973gg-4.

⁵⁰ *Id.* § 1973gg-7.

⁵¹ *Id.* § 1973gg-6.

reason of felony conviction or mental incapacity, due to death of the registrant, or because the voter is no longer a resident of the specific jurisdiction.⁵² Legislative history suggests that a key concern was abuse of the purging efforts, so Congress specifically prevented states from removing voters from the rolls for failure to vote or failure to respond to a change-of-address notification.⁵³ This latter topic is the focus of a subsequent federal statute.⁵⁴

D. *HAVA: Katherine Harris and Ken Blackwell Inadvertently Help Expose the Problems of U.S. Election Administration*

The drawn-out 2000 presidential election highlighted many of the problems afflicting the U.S. election system⁵⁵—with voter-registration problems among the most egregious.⁵⁶ Studies and investigations conducted subsequent to the election estimate that approximately four to six million votes cast for President were not counted in the election.⁵⁷ In Florida, the public focus of the disastrous election, thousands of qualified voters were erroneously purged from voter rolls, “a disproportionate number of them African Americans.”⁵⁸ Public outcry over the disputed election results and a clear realization that the U.S. election system was in need of a massive overhaul prompted Congress to pass HAVA. This comprehensive law created a new federal agency to oversee election administration, the EAC, and it also established standards for voting systems, electronic voter-registration lists, provisional ballots, voter information, identification of voters, and absentee, military, and overseas ballots.⁵⁹

⁵² *Id.*

⁵³ H.R. REP. NO. 103-9, at 16 (1993), reprinted in 1993 U.S.C.C.A.N. 105, 120.

⁵⁴ This change was necessitated by the electronic-database provision of HAVA. See *infra* Part II.E.

⁵⁵ For a brief background on the disputed 2000 presidential election and the problems—confusing ballots, malfunctioning computers, incorrect voter rolls—which resulted in voters being turned away at the polls, see Brian Kim, *Help America Vote Act*, 40 HARV. J. ON LEGIS. 579, 579–80 (2003), and Herbert E. Cihak, *The Help America Vote Act: Unmet Expectations?*, 29 U. ARK. LITTLE ROCK L. REV. 679, 680 (2007).

⁵⁶ See Tokaji, *supra* note 26, at 470–71 (citing numerous studies released after the 2000 election, including a Caltech/MIT study that estimated as many as 3 million votes may have been lost in the election due to voter-registration errors); see also ERIC A. FISCHER & KEVIN J. COLEMAN, CONGRESSIONAL RESEARCH SERV., NO. RL32685, ELECTION REFORM: THE HELP AMERICA VOTE ACT AND ISSUES FOR CONGRESS 1 (2008), available at <http://wikileaks.org/leak/crs/RL32685.pdf> (same).

⁵⁷ Kim, *supra* note 55, at 584.

⁵⁸ Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1209 (2005).

⁵⁹ *Id.* This Note does not address voting equipment or electronic voting; rather, its focus is

Concerns that thousands of voters may have been turned away at polling locations because they were not properly registered led to the creation of the provisional ballot.⁶⁰ Under HAVA, citizens who arrive at their polling location only to be told that they are not permitted to cast a ballot⁶¹ must be offered a provisional ballot.⁶² Voters may cast these special ballots, but they will only be counted if the voters are determined to be registered in the jurisdiction where they physically voted.⁶³ It has been suggested that “aggressive use of provisional ballots can help reduce by fifty percent the number of votes lost due to faulty registration lists.”⁶⁴

HAVA also mandated that by 2006, each state was to create and utilize a comprehensive, uniform, and computerized statewide voter-registration list containing the names and registration information of every legally eligible voter in the state.⁶⁵ The purposes of employing such a list are to increase access to the polls (ensuring that no eligible voter is prevented from casting a ballot) and prevent unauthorized voting by ineligible citizens.⁶⁶ Not every state had fully adopted this HAVA provision by 2007,⁶⁷ but for most states a key result is that election administration in this arena has essentially been taken out of the hands of local officials and vested in the state.⁶⁸

limited to the following key provisions of HAVA relating most closely to voter registration: provisional ballots, the electronic registration database, and the authority of the EAC.

⁶⁰ H.R. REP. NO. 107-329, pt. 1, at 37–38 (2001).

⁶¹ 42 U.S.C. § 15482 (2006). Although the typical reason that an individual has been denied the opportunity to cast a regular ballot is based on a valid effort to prevent unregistered or improperly registered citizens from voting, campaign operatives often engage in voter caging, a process of selectively challenging citizens’ bona fide registrations in an opponent’s high-turnout precincts with the design of “slow[ing] the voting process and discourag[ing] legitimate voters waiting in line for voting.” See Chandler Davidson et. al., *Vote Caging As a Republican Ballot Security Technique*, 34 WM. MITCHELL L. REV. 533, 538 (2008).

⁶² 42 U.S.C. § 15482.

⁶³ *Id.* In Ohio, for example, the Secretary of State instructs County Boards of Elections not to count ballots cast in the “wrong precinct.” Guidelines for Determining the Validity of Provisional Ballots, Directive 2008-101 (Ohio Sec’y of State Oct. 24, 2008), available at <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-101.pdf>.

⁶⁴ See Kim, *supra* note 55, at 592.

⁶⁵ 42 U.S.C. § 15483(a)(1)(A).

⁶⁶ ELECTIONLINE.ORG, THE PEW CTR. ON THE STATES, THE HELP AMERICA VOTE ACT AT 5, at 23 (2007), available at <http://www.pewcenteronthestates.org/uploadedFiles/HAVA.At.5.pdf>.

⁶⁷ *Id.* at 24–26.

⁶⁸ *Id.* at 23 (“State election departments and other agencies are now linked, while counties have the ability to compare records to better identify duplicates, deceased voters, or those who relocated to other areas.”).

Congress also delineated additional restrictions on removing or purging voters from the official rolls.⁶⁹ More efficient administration of the law is now possible because of the ease with which duplicate records can be identified, computerized methods for purging these duplicates from the lists, and real-time information sharing between jurisdictions. But this efficient list maintenance has had the adverse effect of increasing election litigation.⁷⁰

Finally, HAVA created the EAC, a bipartisan advisory commission “charged with developing guidance to meet HAVA requirements, adopting voluntary voting system guidelines, and serving as a national clearinghouse of information about election administration. . . . Other responsibilities include maintaining the national mail voter registration [and holding] public meetings and hearings to inform the public about its progress and activities.”⁷¹

As is clear from the mission statement and text of HAVA, Congress specifically denied the EAC the power to issue rules, promulgate regulations, or act in any fashion that would require state action (notwithstanding issuance of the national voter-registration form).⁷² Relegated to the position of a check-writing agency⁷³ and a clearinghouse for information, the EAC leaves the most significant decisionmaking responsibilities to state election officials.⁷⁴

E. Did These Bills Work? Kind of . . .

Ultimately, the efforts since 1993 to reform voter registration deserve mixed reviews. Congress expected that both the NVRA and HAVA would increase participation in the democratic process by eliminating barriers to voter registration—based on the assumption that registered voters are more likely to vote.⁷⁵ An analysis of census data in the ten years following passage of the NVRA (1993 to 2003) suggests that the number of citizens registered to vote increased at a lower rate than the general population growth (one-half percent, as

⁶⁹ See 42 U.S.C. § 15483(a)(2).

⁷⁰ See Tokaji, *supra* note 26, at 478–82.

⁷¹ U.S. Election Assistance Comm’n, About the EAC, <http://www.eac.gov/about> (last visited Nov. 30, 2009); see also 42 U.S.C. § 15322.

⁷² 42 U.S.C. § 15329.

⁷³ See Vassia Gueorguieva, *Election Administration Bodies and Implementation Tools*, 13 GEO. PUB. POL’Y REV. 95, 105 (2008) (noting that even this power of the purse is limited because “unlike the grants that the FEC disburses, which limit the activities of their recipients, EAC’s grants come with a great deal of discretionary power awarded to their recipients and thus have a lower degree of coerciveness associated with them”).

⁷⁴ 42 U.S.C. § 15326.

⁷⁵ See *infra* Part II.E.

opposed to a population growth of one percent).⁷⁶ Further, voter registration suddenly declined by three million voters between 2004 and 2006.⁷⁷ The reasons for this drop cannot readily be determined, although the EAC suggests that it corresponds to the timing of HAVA-inspired election reforms and may be the result of states more efficiently managing their databases and eliminating duplicate registrations.⁷⁸ If that is the sole reason, then such efficient election administration should be celebrated.

Viewed in another context, however, the fact that almost sixty-five million eligible citizens were not registered to vote in 2006⁷⁹—up from approximately fifty million unregistered voters in 2004⁸⁰—suggests that the HAVA and the NVRA goals of increased voter registration and participation were not nearly as successful. This is borne out by available data. Even though the raw number of Americans who voted in the recent 2008 presidential election was the highest ever, the sixty-one percent turnout failed to eclipse the pre-HAVA and NVRA high-water mark set in 1968.⁸¹ Equally troubling is that twenty-five percent of respondents to the 2006 Current Population Survey conducted by the U.S. Census Bureau reported that they were unregistered, not because they were disinterested in politics, but because they missed a deadline, did not know how to register, or did not meet residency requirements—all issues ostensibly covered by the NVRA and HAVA.⁸²

II. Some Problems Are Fixed While New Ones Are Created

The end goal of increased voter participation in federal elections has not been realized despite HAVA and the NVRA. It should be of great concern to Congress that millions of citizens would have registered to vote but for a procedural bar or lack of information.

⁷⁶ See FILE, *supra* note 46, at 2 tbl.1.

⁷⁷ U.S. ELECTION ASSISTANCE COMM'N, *supra* note 40, at 8–9 (“Between 2004 and 2006[,] 32 states and territories reported actual decreases in registration numbers . . . [and] the national registration rate decreased from 79.9 percent of the [voting age population] in 2004 to 76.6 percent in 2006.”).

⁷⁸ *Id.* at 9.

⁷⁹ See FILE, *supra* note 46, at 3.

⁸⁰ WEISER, WALDMAN & PARADIS, *supra* note 1, at 3.

⁸¹ See ELECTIONLINE.ORG, *supra* note 14, at 2 (“[A]bout 130 million Americans cast ballots leading up to and on November 4, the most in the history of the United States. Approximately 61 percent of the voting eligible population cast ballots, a modest increase over the 60 percent who cast ballots in 2004. It was the highest turnout since 1968.”).

⁸² FILE, *supra* note 46, at 14 tbl.5.

State efforts to implement these laws have resulted in voter disenfranchisement (or lack of extension of the franchise), results that are completely antithetical to the intent of the legislation. This Part analyzes possible reasons for such results (including state noncompliance with key provisions of the law), discusses how the requirements of HAVA and the NVRA created barriers to registration, and examines the structural difficulties that arise when states attempt to satisfy conflicting requirements of the two statutes.

A. *State Agencies Just Don't Want to Follow the (Federal) Law*

The NVRA and HAVA did not nationalize the registration process. Rather, the states retain control over their own registration systems for state elections and are required to adopt the specific federal mandates (such as the national voter-registration form and centralized voter database) only for the administration of federal elections.⁸³ The practical effect, however, is that states are required to integrate the federal-election changes into their own state-election systems because it would be duplicative and inefficient to maintain two separate voter-registration programs—one for state elections and the other for federal elections.⁸⁴

Nonetheless, evidence suggests that states are not properly or readily complying with the federal-election mandates of the NVRA. A recent Project Vote report noted that the number of registrations recorded by state public-assistance agencies fell by almost eighty percent in the decade following the initial NVRA reporting period.⁸⁵ These findings were based on hundreds of spot-checks and surveys conducted at public-assistance agencies in eight states where voter-registration numbers had declined, leading to the suspicion that there was substantial noncompliance.⁸⁶ The investigation revealed that state

⁸³ See R. Michael Alvaraz & Thad E. Hall, *Rational and Pluralistic Approaches to HAVA Implementation: The Cases of Georgia and California*, 35 *PUBLIUS* 559, 563–64 (2005) (“The modest role for the federal government in HAVA means that the reform powers in HAVA were largely delegated to state election officials. This decision is interesting in part because most states had played a relatively small role in election administration prior to 2000. State laws typically make a state election official the final arbiter of election results and give the power to promulgate rules . . . but the responsibility for election management rests largely with local election officials.”).

⁸⁴ See *id.*

⁸⁵ DOUGLAS R. HESS & SCOTT NOVAKOWSKI, *UNEQUAL ACCESS: NEGLECTING THE NATIONAL VOTER REGISTRATION ACT, 1995-2007*, at 3 (2008), available at <http://www.demos.org/pubs/UnequalAccessReport-web.pdf>.

⁸⁶ *Id.* at 5–7. The eight states were Arizona, Colorado, Florida, Maryland, Missouri, New Mexico, North Carolina, and Ohio.

agencies either did not have registration forms on hand to distribute to citizens, or simply failed to offer registration assistance to citizens as required by the NVRA.⁸⁷ The report explained that the agencies were not necessarily violating every NVRA provision, but that state officials were complying in disjointed and piecemeal fashion “at all of the required points of contact [with potential applicants], including interactions conducted via mail, telephone or Internet.”⁸⁸

These troublesome activities occur at state departments of motor vehicles (“DMVs”), the primary agencies intended to process voter-registration forms. In New Jersey, the Department of the Public Advocate recently conducted a field investigation and found that ninety percent of people leaving the DMV “were neither handed the required voter registration form nor verbally asked whether they wished to register to vote.”⁸⁹

In Ohio, the failure of Department of Job and Family Services employees to offer two northeast Ohio women voter-registration forms upon their visit to state offices prompted the women to sue then-Secretary of State J. Kenneth Blackwell for Ohio’s failure to comply with the NVRA.⁹⁰ On appeal, the Sixth Circuit explained that “[t]here is widespread noncompliance with the NVRA’s requirements. The Secretary has limited her activities to the maintenance of a toll-free telephone number that county DJFS offices may call to receive more voter registration application forms.”⁹¹ In November 2009, the State of Ohio settled with Harkless and agreed to a series of reforms intended to bring the State into compliance with the NVRA.⁹² Nonetheless, it is troubling that private citizens, with the backing of community-organizing groups, are bringing suit to enforce federal law instead of the Department of Justice (“DOJ”).⁹³

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Ronald K. Chen & Alexander Gladney, *Compliance With the Motor Voter Law in New Jersey*, N.J. L.A.W., Aug. 2007, at 50.

⁹⁰ See *Harkless v. Blackwell*, 467 F. Supp. 2d 754, 756 (N.D. Ohio 2006), *rev’d sub nom. Harkless v. Brunner*, 545 F.3d 445, 447 (6th Cir. 2008).

⁹¹ *Harkless v. Brunner*, 545 F.3d 445, 447 (6th Cir. 2008).

⁹² *Settlement Agreement Reached in Harkless v. Bruner*, LAWYERS’ COMMITTEE FOR CIVIL RIGHTS UNDER LAW, Dec. 15, 2009, <http://www.lawyerscommittee.org/newsroom/clips?id=0114>. The State agreed to integrate a voter registration form with each welfare-benefit-request form, to expand voter-registration opportunities to additional state agencies, to conduct at least 20 unannounced annual spot checks of state agencies for compliance, and to conduct regular reviews of its voter-registration policies. See generally *Settlement Agreement, Harkless v. Bruner*, No. 1:06-CV-2284 (N.D. Ohio Nov. 25, 2009), available at http://www.lawyerscommittee.org/admin/voting_rights/documents/files/Harkless-Settlement.pdf.

⁹³ A compelling explanation for why private parties insert themselves into registration ef-

Motivation aside, the evidence suggests that the congressional goals of increased voter registration and elevated voter turnout are not being achieved due, in part, to widespread state violations of the NVRA and lax federal oversight.

B. Is It Really a Solution if You Can't Identify the Problem?

The goals of the NVRA can be reached only with the assistance of the states. When states do not make voter-registration accessible, organized third parties often step in to fill the void. These groups—political parties, community organizers such as the Association of Community Organizations for Reform Now (“ACORN”), church groups, campaigns—assist citizens in filling out voter-registration applications and mail them to the appropriate state elections office.⁹⁴ Many of these third-party registration groups are accused at the national level of perpetrating voter fraud⁹⁵ despite the facts that local

forts is because DOJ enforcement of the NVRA is more focused on aggressively compelling states to trim their registration rolls rather than policing states to protect voters from being excluded. Tokaji, *supra* note 26, at 478–79 (“A review of the U.S. Department of Justice’s NVRA 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.”). The DOJ has filed just two lawsuits in the last thirteen years to enforce state voter-registration requirements. Civil Rights Div., U.S. Dep’t of Justice, Voting Section Litigation, http://www.usdoj.gov/crt/voting/litigation/caselist.php#nvra_cases (last visited Nov. 30, 2009) (showing a complete listing of the DOJ NVRA docket). And despite being presented with evidence of extensive state noncompliance, DOJ leadership ignored career attorneys in the Voting Section and refused to pursue such enforcement. HESS & NOVAKOWSKI, *supra* note 85, at 13. When congressional leaders sought an explanation from Attorney General Alberto Gonzalez for the DOJ’s lackluster efforts to enforce voting-rights laws, he ignored them completely. *Id.* (“[A] 2005 letter from 30 members of Congress to [Gonzalez] requesting an investigation into NVRA Section 7 non-compliance went unanswered.”). It was not until late 2007, and even then only after mounting pressure from the new Democratic Congress, that the DOJ began sending letters to states seeking explanations for the inadequate voter-registration efforts. *Id.*

⁹⁴ See *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 698 (N.D. Ohio 2006) (explaining that these groups encourage “citizens to register to vote . . . through various face-to-face interactions across the state. [These initiatives] typically occur at community events, religious services, workplaces, schools, malls and other places where citizens congregate. [Individuals also] go door-to-door to register voters in residential communities, speaking with residents on their front porches or inside their homes”).

⁹⁵ See Kris Alingod, *Boehner Continues Efforts to Have Funding for ACORN Halted*, ALL HEADLINE NEWS, Dec. 8, 2008, <http://www.allheadlinenews.com/articles/7013338421>; Editorial, *The ACORN Storm*, WASH. POST, Oct. 25, 2008, at A14 (cautioning that Republican rhetoric of ACORN perpetrating massive voter fraud is unwarranted because the evidence of actual fraud at the ballot box is “scant”); Editorial, *Picking on ACORN*, L.A. TIMES, Sept. 25, 2009 (cautioning that recent allegations of illegal activity by ACORN employees in tax-counseling services does not prove that voter-registration efforts by the same group were improper or illegal); Editorial, *Remember ‘Voter Fraud’? Scandal Was Mickey Mouse*, PALM BEACH POST, Nov. 20, 2008

election officials universally believe that voter fraud is *not* a serious problem in their jurisdiction,⁹⁶ states do not collect adequate data on voter fraud,⁹⁷ and overwhelming empirical evidence suggests that widespread, quantifiable voter fraud simply does not exist.⁹⁸

Curiously, states subject these groups to overaggressive and, in Ohio at least, illegal state regulations simply for working to increase voter registration.⁹⁹ These state actions are similar to the NVRA-enforcement efforts by the DOJ—the focus is not to increase voter registration but instead to curtail alleged fraud or abuse.¹⁰⁰ As one commentator suggests, this focus on *voter-initiated* fraud, for which there is no empirical support, distracts states from engaging in prevention of *voter-targeted* fraud.¹⁰¹ The problem is thus magnified: not only are grassroots efforts to compensate for state inaction deemed invalid in the name of fraud prevention, but efforts to stem voter-initiated fraud (like database purging, photo-identification laws, and registration itself) contribute to disenfranchisement and conflict with the goals of increased voter registration and participation.¹⁰²

(reiterating that, despite the accusations of voter-registration fraud, there were no signs of election shenanigans at the polls on election day).

⁹⁶ FISCHER & COLEMAN, *supra* note 8, at 40 fig.31.

⁹⁷ For an analysis of voter fraud in California and Georgia—concluding that future research and a better understanding of voter-registration fraud would be enhanced if the EAC issued guidelines to the states for collecting and reporting data on their election-fraud cases—see generally R. Michael Alvarez & Frederick J. Boehmke, *Correlates of Fraud: Studying State Election Fraud Allegations*, in ELECTION FRAUD 99–111 (R. Michael Alvarez et al. eds., 2008).

⁹⁸ Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 7 (2009) (“There is little empirical or systematic evidence to support the contention that voter-initiated fraud is widespread, be it ineligible voters seeking to vote or eligible voters casting multiple ballots in several locations.”); see also Memorandum from the Congressional Research Service to the House Judiciary Committee re: Association of Community Organizations for Reform Now (ACORN) 1 (Dec. 22, 2009) (finding that there have been no “reported instances of individuals who were improperly registered by ACORN attempting to vote at the polls”).

⁹⁹ See *Project Vote*, 455 F. Supp. 2d at 703–04 (holding that an Ohio statute which required compensated voter-registration workers to “pre-register with the Secretary of State, undergo an ‘online-only’ Internet training program, and submit an affirmation for each batch of voter registration forms returned [was]—on its face—not a uniform and non-discriminatory attempt to protect the integrity of the electoral process” because the regulations applied only to a select group of registration workers and excluded those workers who lacked access to the internet).

¹⁰⁰ See *supra* Part II.A.

¹⁰¹ See Benson, *supra* note 98, at 6–7 (“‘Voter-initiated’ fraud [encompasses] fraudulent and deceptive acts that voters commit, such as casting votes in the name of other individuals, voting multiple times, or otherwise impersonating a voter [and] ‘[v]oter-targeted’ fraud incorporates deceptive acts that others commit that are aimed at defrauding voters. . . . [This includes] the use of ‘force, coercion, violence, restraint, or inflicting harm to induce or compel that person to vote’ . . . and ‘destroying completed voter registration applications.’”).

¹⁰² See *id.* at 12.

C. *HAVA, Meet H.A.L.—a Central Database Is Born*

HAVA's reforms were intended to streamline the voter-registration process, but state implementation of centralized voter databases has contributed to a cascading series of errors. The mandate to develop computerized statewide lists suddenly thrust state chief election officers into the role of administering and regulating roughly 9,000 local election jurisdictions.¹⁰³ "Previously, in most states, each county was responsible for its own list. This resulted in spotty and inconsistent standards for keeping the lists up to date, and little practical ability to keep track of voters who moved across county lines."¹⁰⁴

Thus, requiring a single official database, it was argued, would increase accuracy and limit errors as well as fraud.¹⁰⁵ The database requirement is closely related to the federal proof-of-eligibility provisions, which require applicants to provide their driver's-license or Social Security number when registering to vote.¹⁰⁶ Voters who have neither of these are issued a unique identifier by the state.¹⁰⁷ Several states have moved to implement more stringent and onerous requirements on citizens attempting to register.¹⁰⁸

These requirements often conflict, and a lack of clarity or guidance in HAVA on properly maintaining these lists has resulted in varied state programs with disparate requirements.¹⁰⁹ The traditional method employed by the states to ensure that the list is not overrun with duplicates or false registrations is to match the voter-registration information provided by the voter (such as driver's-license number or the last four digits of the Social Security number) with information in another government database (such as the DMV database or that of the state Social Security commission).¹¹⁰ Thus, the methodology employed by the state in matching the information from two or more

¹⁰³ See FISCHER & COLEMAN, *supra* note 8, at 2.

¹⁰⁴ See JUSTIN LEVITT, WENDY R. WEISER & ANA MUÑOZ, BRENNAN CTR. FOR JUSTICE, MAKING THE LIST: DATABASE MATCHING AND VERIFICATION PROCESSES FOR VOTER REGISTRATION 1 (2006), available at http://brennan.3cdn.net/96ee05284dfb6a6d5d_j4m6b1cjs.pdf.

¹⁰⁵ *Id.* at 1–2.

¹⁰⁶ 42 U.S.C. § 15483 (2006); see also Richard L. Hasen, *Fraud Reform? How Efforts to ID Voting Problems Have Become a Partisan Mess*, SLATE, Feb. 22, 2006, <http://www.slate.com/id/2136776/> (discussing the controversial aspects of these provisions).

¹⁰⁷ 42 U.S.C. § 15483(a)(5)(A)(ii).

¹⁰⁸ See Tokaji, *supra* note 26, at 491–92 (discussing attempts by Georgia, Florida, and Arizona to extract information from registration forms, including full Social Security Numbers, affirmation that the voter is or is not a felon, and proof of citizenship); see also Benson, *supra* note 98, at 16.

¹⁰⁹ LEVITT, WEISER & MUÑOZ, *supra* note 104, at 7.

¹¹⁰ *Id.*

databases—whether it is stringent or flexible and accommodating—will determine how many names are routinely purged from the voter rolls.¹¹¹ A Brennan Center survey identified four critical areas in which the states differed in voter matching and list administration: match criteria,¹¹² failed match,¹¹³ incomplete information,¹¹⁴ and correcting errors.¹¹⁵ The less accommodating the standard is in dealing with errors (i.e., the more stringent the matching criteria), the more likely it is that voters will be purged from the voter files.

In its study, the Brennan Center determined that *some* states were implementing policies intended to adhere to the NVRA and minimize the burden to the potential applicant.¹¹⁶ However, other states based their practices on their own interests in election administration and created “unwarranted barriers” for citizens wishing to register.¹¹⁷ Consequently, the mere administration of these database lists can be contrary to the goals of increased voter registration and participation.

¹¹¹ See Tokaji, *supra* note 26, at 481 (discussing how applying too stringent of a matching procedure results in eligible voters being removed from registration lists).

¹¹² LEVITT, WEISER & MUÑOZ, *supra* note 104, at 7 (“Some states use a fairly flexible standard, to account for typos and other mistakes; other states use a very exacting standard that does not compensate for these kinds of errors. The more exacting the standard, the more likely that a minor error prevents an eligible match—decreasing the chance that the state’s database stays clean.”).

¹¹³ *Id.* (“Some states implement the limited identification procedure required by HAVA for first-time voters who register by mail; other states place additional burdens on the voter or reject the application outright.”).

¹¹⁴ *Id.* (“[S]tates vary in the way in which they treat . . . missing, illegible, or incomplete identifying number[s]. Some states check whether the right number can be located in another database, or assign a new unique identifier and then register the applicant; other states immediately reject the application.”).

¹¹⁵ *Id.* at 8 (“[S]tates vary in . . . [resolving] errors in the matching process. All states notify the voter when a problem occurs, but they differ in the form such notice takes and the process by which errors can be resolved.”).

¹¹⁶ *Id.* at ii (noting that Nebraska and Oregon have instituted policies to “help clean the registration rolls, to provide those new voters who are subject to identification requirements with a convenient alternative means to confirm their identity, and to promote the smooth administration of a process that enables every eligible citizen to vote”).

¹¹⁷ *Id.* (“Iowa, South Dakota, Texas, and Washington . . . report that they will reject the application of citizens whose information cannot be matched to the state’s motor vehicles database or the database of the Social Security Administration, barring the applicant entirely from the polls. And Maryland will reject such applicants unless they provide certain identification documents by the registration deadline.”).

D. How Do You Spell Success? “Sea of Paper”

The NVRA mandates that state agencies assist individuals who wish to register to vote,¹¹⁸ although recent census data show that over thirty percent of voters registered in some other manner—such as registering by mail, at the poll on election day, or at a registration booth.¹¹⁹ The typical process undertaken by a voter to ensure that she can cast a vote in the upcoming election can be characterized as follows:

1. A citizen fills out a national voter-registration form or a third-party registrant assists the voter by filling out the required fields on the form with the voter present.¹²⁰
2. The form is mailed to the state election agency.¹²¹
3. The state office forwards the registration form to the local election board.
4. A staffer at the local election board inputs the data from the registration form into its computer database, which is then merged into the centralized state computer database.¹²²

The inefficiency of such a system and potential for mistakes is staggering. The California Secretary of State describes this procedure as a “sea of paper” that inundates local officials each year: “California’s paper-based registration system ‘results in an enormous number of errors, some just because you’re trying to decipher people’s handwriting.’”¹²³ Further, states voluntarily reported that they provide very little, if any, training to agency officials.¹²⁴

Mistakes are likely to occur because of this outdated, low-tech approach. Only five states permit online registration, which takes the

¹¹⁸ 42 U.S.C. § 1973gg-5.

¹¹⁹ FILE, *supra* note 46, at 12.

¹²⁰ This process also applies to state agencies where the voter requests the help of state official, who is obliged to assist. 42 U.S.C. § 1973gg-5(a).

¹²¹ Most state agencies also use the U.S. Postal Service. Only eighteen states enter voter-registration information electronically at the agencies and then transfer that information to the state election office. See U.S. ELECTION ASSISTANCE COMM’N, *supra* note 40, at 12.

¹²² For additional steps local registration officials take to ensure that the registration is valid, see LEVITT, WEISER & MUÑOZ, *supra* note 104, at 2–4.

¹²³ Eliza Newlin Carley, *Toward a Better Registration System*, NAT’L J., Dec. 15, 2008, http://www.nationaljournal.com/njonline/rg_20081211_4869.php (quoting California Secretary of State Debra Bowen).

¹²⁴ “Only 6 States report that they provide at least biennial training to all other agencies Seven States report that they provide no training at all, while 27 additional States did not respond[.]” U.S. ELECTION ASSISTANCE COMM’N, *supra* note 40, at 12.

detailed, clerical input out of the hands of the untrained state employees and properly places it in the hands of the voter.¹²⁵

E. Lions and Tigers and Purging—Oh My!

The NVRA's mandate to increase voter-registration totals is at cross-purposes with HAVA's enhanced requirement that states utilize their own state law to better manage and aggressively purge their voter rolls.¹²⁶ Cognizant of the potential for abuse, Congress limited voter-removal procedures in the NVRA to death or change in address of the resident, or by reason of criminal conviction or mental incapacity.¹²⁷ Congress explicitly rejected any plan that would permit removal based on failure to vote.¹²⁸ However, these changes—primarily designed to prevent voter disenfranchisement—led to bloated lists full of duplicates, deceased voters, and other errors. Congress sought to stem these problems by mandating the creation of electronic statewide voter databases and requiring that states establish and implement new guidelines for purging voters from the databases.¹²⁹ The result is that states now carry out purges one of two ways: either manually or electronically.

The older, manual-purge method relies on United States Postal Service (“USPS”) notification. Specifically, postcards are mailed to voters to confirm that their address is current, thereby ensuring that the registration is valid.¹³⁰ If the postcard is returned, the registration is deemed invalid. The voter may then be purged from the voter rolls regardless of the reason the card gets returned—whether it is because the USPS erred, the voter moved without filing a change-of-address card, a third party erred in completing the application, or the state agent processing the original voter-registration form made an error in transcription.¹³¹

¹²⁵ Arizona and Washington have implemented online voter registration. See Edward B. Foley, *Online Voter Registration Is the Answer*, ELECTION LAW @ MORITZ, June 13, 2006, <http://moritzlaw.osu.edu/electionlaw/comments/2006/060613.php>; see also, e.g., WASH. REV. CODE ANN. § 29A.08.123 (West 2009). Laws allowing online registration have also passed in Utah, Colorado, and Oregon. COLO. REV. STAT. ANN. § 1-2-202.5 (West 2009); 2009 Or. Laws Ch. 914 (H.B. 2386); UTAH CODE ANN. § 20A-2-206 (West 2009).

¹²⁶ The key limitation is to prevent removal from the voter rolls for failure to vote. See 42 U.S.C. § 1973gg-6(c)–(d) (outlining how states may properly purge voters).

¹²⁷ *Id.* § 1973gg-6(a)(3)–(4).

¹²⁸ *Id.* § 1973gg-6(b)(2).

¹²⁹ See *id.* § 15483(a)(1)(A).

¹³⁰ *Id.* § 1973gg-6(c).

¹³¹ See *id.* § 1973gg-6(a)(4)(B) (instructing the registrar to proceed under § 1973gg-6(d) if a notice is returned undelivered); *id.* § 1973gg-6(c)–(d) (describing the voter-removal process).

There is also a surprising lack of uniformity on exactly when a person is registered: whether it is when a voter fills out the application and signs it, when the application is submitted to the state, when the applicant's information is entered into the computer database, or upon successful delivery of the USPS postcard. On this issue, the Sixth Circuit has weighed in by prohibiting Michigan from removing voters from the election rolls when a postcard is returned to the board of elections because it concluded that a voter is *already* registered at that point.¹³² Varying state laws, however, lead to varying results.

Electronic purges occur after information in the centralized voter-registration database is compared with information contained in another government database to identify duplicates or other mistakes.¹³³ In this context, a match means that the voter's registration is valid and the name remains on the voter rolls. However, states utilize different methods to determine whether the information in the electronic database can be confirmed; evaluation standards range from very flexible to highly restrictive.¹³⁴ This lack of standardization permits each state to implement its own plan to address duplicates, invalid registrations, or situations where there is not enough information to make a conclusive decision.¹³⁵ Because once voters are removed from the rolls they are prevented from casting a regular ballot, voter-purge methods have been litigated effusively since 2004.¹³⁶ Such was the case in the run-up to the 2008 presidential election when the Ohio Republican Party attempted to enjoin the Secretary of State from allowing nearly 200,000 Ohioans to cast regular ballots on the ground that their names did not "match" information from Ohio's Bureau of Motor Vehicles database.¹³⁷ The Supreme Court vacated the Sixth

¹³² See *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 386, 389 (6th Cir. 2008) (ruling that a voter is properly registered before the postcard is mailed and that the mere return of the card is not a valid reason for purging voters; the court enjoined the Michigan Secretary of State from purging such voters).

¹³³ See *supra* Part II.C.

¹³⁴ LEVITT, WEISER & MUÑOZ, *supra* note 104, at 7

¹³⁵ See *id.*

¹³⁶ See Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 968–69 (2005) (noting that thirty-two lawsuits were brought in 2004 specifically relating to registration controversies, and in that year's disputed Washington gubernatorial election much of the controversy revolved around ineligible unregistered citizens casting votes).

¹³⁷ *Ohio Republican Party v. Brunner*, 544 F.3d 711, 713–14 (6th Cir.), *vacated*, 129 S. Ct. 5 (2008); see also Ian Urbina, *Court Ruling May Impede Thousands of Ohio Voters*, N.Y. TIMES, Oct. 16, 2008, at A28 (describing how partisan politics may have played a role in the timing of the challenge by the Republican party).

Circuit's order requiring the State to individually verify each voter,¹³⁸ but this controversy still shows that state discretion in implementing HAVA can have tremendous and varied implications for voter purges, depending on the stringency of the process implemented.

No matter which method is employed, there remains a constant tension between aggressive management of the lists and an overly cautious approach designed to prevent unintended disenfranchisement of qualified voters, because of the ease with which voters can erroneously be removed from the voter-registration database.¹³⁹

F. Provisional Ballots to the Rescue (as Long as You're Not from Toledo)

The most egregious error frequently occurs when a voter appears at the polling location but is prevented from voting. Congress, therefore, created provisional ballots to combat this disenfranchisement by ensuring that any person turned away from a poll can still cast a ballot that will be counted—provided that individual is an eligible voter.¹⁴⁰ However, “[b]ecause HAVA’s requirements for provisional ballots represent minimum standards, and because states were free to enact a provisional ballot regime of their own design, states differed in the manner by which they would count provisional ballots.”¹⁴¹ The critical difference among the many states involves the interpretation of the jurisdictional requirement.¹⁴² HAVA does not include a uniform definition of “jurisdiction.”¹⁴³ It instead gives state election officials the discretion to accept or reject the provisional ballots of properly registered voters who cast their votes in a jurisdiction other than where they currently reside—such jurisdictions can be precincts, cities, towns, counties, or even the entire state.¹⁴⁴ Consider the following excerpt from *Stealing Democracy*:

[O]n Election Day 2004, Brandi Stenson went with her mother and brother to their local polling place at St. Eliza-

¹³⁸ Ohio Republican Party v. Brunner, 129 S. Ct. 5, 6 (2008).

¹³⁹ See Tokaji, *supra* note 26, at 478.

¹⁴⁰ 42 U.S.C. § 15482(a) (2006) (“[If] the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot . . . at that polling place . . . [if he states that he is] (2)(A) a registered voter in the jurisdiction in which the individual desires to vote; and (B) eligible to vote in that election.”).

¹⁴¹ Gerald M. Feige, Comment, *Refining the Vote: Suggested Amendments to the Help America Vote Act's Provisional Balloting Standards*, 110 PENN ST. L. REV. 449, 453 (2005).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 453–54 (citing 42 U.S.C. § 1977g-6(j) (2000)).

both Seton School in Toledo, Ohio. The Stensons joined one of three lines. When they finally reached the front, the poll worker [told them their names were not in the book. They] knew they were registered, and Brandi and her mother started asking questions. But other voters were waiting, so the poll worker gave them provisional ballots. All three voted provisionally. . . . “We were in the right building. We were in the wrong lines,” Brandi said.

Because the Stensons stood in the Precinct 4N line rather than their assigned precinct’s line (which was in the same room), not only were their names missing from the voting rolls but elections officials refused to count their provisional ballots.¹⁴⁵

The same thing happened to fifty other individuals that day at the same school.¹⁴⁶ Although the Stensons were properly registered, their votes were invalidated because the State of Ohio interpreted a precinct to exclusively consist of one line of people among three adjacent lines in the same room.¹⁴⁷ It is doubtful that such a narrow interpretation of HAVA was intended by Congress when creating provisional ballots.¹⁴⁸ Worse, the problem experienced by the Stensons was quite foreseeable. Immediately prior to the 2004 election, three courts in the span of seven days issued divergent interpretations on the jurisdictional requirement’s meaning.¹⁴⁹ Nonetheless, no poll workers took the initiative to instruct the Stensons on where they could properly vote.

The importance of provisional-ballot tabulation is immeasurable. In the 2008 presidential primaries, more than 120,000 provisional ballots were cast in Ohio, of which twenty percent were rejected, while in

¹⁴⁵ SPENCER OVERTON, *STEALING DEMOCRACY* 46 (2006).

¹⁴⁶ *Id.* at 46–47.

¹⁴⁷ *Id.*

¹⁴⁸ “It is [the Senate’s] intent that the word ‘jurisdiction,’ for the purpose of determining whether the provisional ballot is to be counted, has the same meaning as the term ‘registrar’s jurisdiction’ in section 8(j) of the National Voter Registration Act [which means, essentially, the whole county].” 148 CONG. REC. S2535 (daily ed. Apr. 11, 2002) (statement of Sen. Christopher Dodd, Chairman, Senate Comm. on Rules and Admin.); see 42 U.S.C. § 1973gg-6(j) (2006) (defining “registrar’s jurisdiction” as either an incorporated city or a larger geographic area such as a county).

¹⁴⁹ *Compare* Bay County Democratic Party v. Land, 347 F. Supp. 2d 404, 411 (E.D. Mich. 2004) (issuing an injunction compelling the counting of out-of-precinct provisional ballots), *with* Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 579 (6th Cir. 2004) (overturning a preliminary injunction issued by the district court to compel the counting of out-of-precinct provisional ballots), *and* Fla. Democratic Party v. Hood, 342 F. Supp. 2d 1073, 1081 (N.D. Fla. 2004) (finding that HAVA did not require counting out-of-precinct ballots).

Illinois more than seventy percent of the state's 15,000 provisional ballots were rejected.¹⁵⁰ Whenever there is a breakdown in the voter-registration process (such as transcription error or mistake by a poll worker) the emergency default procedure is to issue a provisional ballot. Once utilized, other encumbrances may still prevent an eligible citizen from casting a vote.¹⁵¹ The National Campaign for Fair Elections recently released a study finding that the most pressing problems in election administration are undertrained poll workers and undermanned polls, election-machinery breakdowns, registration-rolls problems, and confusion over voter-identification problems.¹⁵² In other words, even if a voter is properly registered and casts a *regular* ballot, there is a chance that the vote may not be counted. When casting provisional ballots, voters who are (or believe that they are) properly registered might arrive at the polling location only to be instructed that their name is not on the voter list and consequently cannot cast a regular ballot. Because every state is different, though, voters who happen to be standing in the correct building, but incorrect line, may or may not have their provisional ballot counted.

The decentralized voter system in the United States is antiquated at best, and dysfunctional at worst. The NVRA and HAVA offer states a guide that they could follow to make voter registration easier, increase voter participation, and decrease preventable voter disenfranchisement. However, even though society and technology have evolved, state procedures have not. If the states refuse to affirmatively update and modernize voter-registration procedures, then the federal government must once again step in and take care of some unfinished business.

III. How Can There NOT Be a Better Way?

The goals of HAVA and the NVRA are not being realized. Between 1994 and 2006, the percentage of registered citizens only increased by one-half percent, and the percentage of registered voters who reported that they actually voted declined.¹⁵³ This section proposes a legislative solution to correct the demonstrated problems of

¹⁵⁰ Evan Perez, *Provisional Ballots Get Uneven Treatment*, WALL ST. J., Oct. 28, 2008, at A4.

¹⁵¹ See generally Feige, *supra* note 141, at 456–57 (suggesting solutions to correcting the jurisdictional problems associated with HAVA's vagueness).

¹⁵² NAT'L CAMPAIGN FOR FAIR ELECTIONS, ELECTION PROTECTION 2008 PRIMARY REPORT: LOOKING AHEAD TO NOVEMBER 1 (2008), available at http://lccr.3cdn.net/b7d38d90b13908ec1c_tjm6byw6h.pdf.

¹⁵³ FILE, *supra* note 46, at 2 tbl.1.

(1) voter disenfranchisement, (2) the failure to increase voter registration among qualified electors, and (3) the failure to increase democratic participation through voting. Collectively, states are either ill prepared or unwilling to address and correct the factors that cause these issues. Only congressional action will reform the election system in a fashion that modernizes the way people register to vote, eliminates confusion at the polls, standardizes the process of purging the voter rolls (while balancing the rights of the voter with the need to prevent fraud), and allows for a uniform interpretation of the HAVA and the NVRA provisions that preempt state law.

Part III.A discusses the need to implement online and electronic voter registration and offers a model statute to amend the NVRA. Part III.B proposes granting the EAC authority to promulgate rules and issue binding guidelines.

A. *Hey Congress, the Digital Divide Isn't That Big Any More*

In an increasingly technological world, the United States no longer needs to rely exclusively on an old-fashioned method of voter registration and registration updating. The federal government should join those states who have already implemented an online voter-registration system.¹⁵⁴ This Note proposes the following legislation amending the NVRA:¹⁵⁵

Registration Act (42 U.S.C. § 1973gg et seq.)

Findings and purposes — § 1973gg(a):

[The Congress finds that—]

- (4) the digital divide is receding and more Americans are becoming computer literate;
- (5) increased voter registration can be achieved in a safe and protected manner online;
- (6) younger Americans and minorities find paper or traditional voter-registration procedures more complicated than other subsets of the population;¹⁵⁶

¹⁵⁴ See Foley, *supra* note 125.

¹⁵⁵ For another piece of model legislation, see MODEL BILL TO ENABLE VOTERS TO VERIFY THEIR REGISTRATION STATUS AND RECORDS AND TO LOCATE THEIR POLLING PLACES (Brennan Ctr. For Justice 2005), available at http://www.brennancenter.org/page/-/download_file_35001.pdf.

¹⁵⁶ See R. Michael Alvarez, Thad E. Hall & Morgan Llewellyn, *How Hard Can It Be: Do Citizens Think It Is Difficult to Register to Vote?*, 18 STAN. L. & POL'Y REV. 382, 406 (2007).

(7) the percentage of registered voters is only marginally higher than 1994, when the National Voter Registration Act took effect;¹⁵⁷

(8) approximately four to eight million new voter registrations are processed every four years,¹⁵⁸ placing an enormous strain on state and local election officers; and

(9) voter-registration-related litigation based on HAVA and the NVRA provisions has risen substantially since 2000.

Mail and Electronic Registration — § 1973gg-4

(b) Electronic Registration — Online Registration

Each State shall develop, administer, and make available to its citizens the ability to register to vote online and the ability to review, update, and correct any errors in the voter's registration profile.

The information required for online registration shall be the same as required by the voter-registration application form prescribed by the Election Assistance Commission.

The state shall make information publicly available that instructs voters how to access and fill out the online application. The state shall also provide assurances that the private information will be secure in transmission from the citizen's computer to the state server.

The state shall provide assistance to applicants on completing voter registration via:

(1) toll-free telephone service between 8:00 AM and 10:00 PM on weekdays, and on at least two weekends per month between 9:00 AM and 5:00 PM;

(2) e-mail; and

(3) real-time internet chatting sessions during business hours,

unless the applicant refuses such assistance.

The state shall take appropriate measures to ensure that the online registration is safe and secure and that no unauthorized individuals will have access to the information transmitted.

Voter Registration Agencies — § 1973gg-5

(4)(A) At each voter registration agency, the following services shall be made available:

(iv) Dedicated computer(s) that are configured to allow citizens to access the state's online voter-registration system so

¹⁵⁷ FILE, *supra* note 46, at 2 tbl.1.

¹⁵⁸ *Id.*

that they may register in person. Each state shall make the presence and availability of the computers conspicuous. Assistance shall be provided to applicants on completing voter registration online, unless the applicant refuses such assistance.

This proposed legislation would not prevent voters from registering at state DMVs, offices that provide social services, or through third-party organizing groups. It is intended to reduce disenfranchisement at the polls due to clerical or transcription errors by state agencies,¹⁵⁹ or nonsubmission of registration forms by third-party registration groups.¹⁶⁰

The mobility of the U.S. population is quite fluid. In 2000, the U.S. Census Bureau reported that 8.4% of the population moved from one state to another in the preceding five years.¹⁶¹ Offering online registration for these voters alone would lessen the burden on local election officers who otherwise have to process the paperwork necessary to register these individuals.

Allowing citizens to enter their own information into a secure website to register or update their registration would be quicker. It also would solve two dilemmas. First, instead of relying on postal delivery of voter applications from one office to another followed by the manual entry of data by local election officials, registrants would simply log on to a computer and enter the required information to complete the process in a matter of minutes. Second, with the exception of states that permit election-day voter registration, there are mandatory cut-off dates after which applicants may no longer register.¹⁶² Allowing online registration would eliminate the possibility that a voter's application will get lost in the mail, but more importantly, permit more citizens to register closer to election day because election offices would be less burdened by the crush of last-minute applications.

In addition to avoiding the paper blizzard that inundates election-administration offices, offering the opportunity to register and update voter information online would incorporate procedural safeguards di-

¹⁵⁹ See U.S. ELECTION ASSISTANCE COMM'N, *supra* note 40, at 13.

¹⁶⁰ See White, *supra* note 7, at B1.

¹⁶¹ MICHAEL P. McDONALD, BROOKINGS INST., EVERY ELIGIBLE VOTER COUNTS: CORRECTLY MEASURING AMERICAN TURNOUT RATES 3 (2004), available at <http://www.brookings.edu/views/papers/20040909mcdonald.pdf>.

¹⁶² *Id.* ("Some states have an explicit requirement that an individual has maintained residency for a given period, while others are implicitly set with the registration deadline. Thirty-three states have a 28-day or more effective residency requirement.").

rectly into the system to prevent fraud or abuse. Arizona has employed online registration since 2002, and Washington State since 2008.¹⁶³ Both programs have operated successfully, efficiently, and with no evidence of fraud from the date of implementation.¹⁶⁴ Seventy percent of all voters now register online in Arizona.¹⁶⁵ Within the first three months of implementation, Washington registered nearly thirty-three percent of new voters online—far exceeding the initial estimate of twenty percent.¹⁶⁶ In both Arizona¹⁶⁷ and Washington,¹⁶⁸ only citizens with a valid driver's license or state identification card may register online, ensuring that the state already has a digital copy of the voter's signature. This makes the database-matching process easier,¹⁶⁹ and also keeps the cost of implementation and administration relatively low. Washington State spent just over \$200,000 for web design, database management, and other related costs.¹⁷⁰ Finally, online registration would be more convenient for the younger voters who are presumably more computer literate but actually find registration more confusing than older voters.¹⁷¹

B. Power to the People (Who Work at the EAC)

Until there is a fundamental overhaul of the U.S. election system, the onus remains on citizens to proactively register to vote; State governments merely establish the regulations for this and administer the process. But the evidence suggests that states disregard their responsibilities under the NVRA¹⁷² and interpret HAVA provisions in such a fashion that the impact is counter to the intent of Congress;¹⁷³ this strongly suggests that Congress has more work to do.¹⁷⁴ The VRA,

¹⁶³ Kate Brown, Oregon Secretary of State, Online Voter Registration: Statement Before the Rules Committee of the Oregon House of Representatives (Jan. 28, 2009), available at <http://www.sos.state.or.us/executive/speeches/2009/01/0128.html>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*; see also H.B. 1528, Fiscal Note, 60th Leg., Reg. Sess., at 2 (Wash. 2007), available at <https://fortress.wa.gov/ofm/fnspublic/legsearch.asp?BillNumber=1528&SessionNumber=60>.

¹⁶⁷ Ariz. Dep't of State, How to Register to Vote in Arizona, http://www.azsos.gov/election/How_To_Register.htm (last visited Nov. 30, 2009).

¹⁶⁸ WASH. REV. CODE ANN. § 29A.08.123 (2009).

¹⁶⁹ *Id.*

¹⁷⁰ See Brown, *supra* note 163.

¹⁷¹ See Alvarez, Hall & Llewellyn, *supra* note 156, at 406.

¹⁷² See *supra* Part II.A.

¹⁷³ See *supra* Part II.E.

¹⁷⁴ Congress enacted the NVRA because, although it considered the VRA a success, the goal of ensuring the registration of all qualified electors was not yet met. See H.R. REP. NO. 103-9, at 3 (1993), reprinted in 1993 U.S.C.C.A.N. 105, 106.

the NVRA, and HAVA have impressively addressed major voter-registration problems in the last forty years, but new problems have arisen since their enactment. Further, because Congress specifically denied the EAC “the []ability to issue binding regulations regarding voter registration,” voting disputes have been pushed into courts.¹⁷⁵ Courts should not be placed in the position of interpreting similar voting disputes every two years. Elections are the ultimate political question, and it should be left to the political branches of government to establish the rules of the game for federal elections.

Consequently, this Note advocates granting the EAC narrow power to issue binding guidelines on the following specifically delineated set of issues.

1. Oversight of State Online Voter-Registration Initiatives

The EAC should be tasked with developing minimum parameters for education and notification concerning the state online voter-registration systems proposed above. This would include promulgating rules that detail security standards and minimum specific website content. The EAC would monitor state compliance with applicable federal law and also serve as a clearinghouse for valuable information to which state or local agencies may not have immediate access. The enhanced role of the EAC, particularly the monitoring mission, would send a strong message to the states that the failure to comply will likely result in adverse action against them.

2. Create and Administer a Central Voter-Registration Website

The EAC is currently responsible for editing and distributing the national registration form,¹⁷⁶ so it follows that they should also be responsible for a central website that directs voters to every official state voter-registration website. Citizens would be able to navigate to the EAC website, select their state from an easy-to-use menu, and proceed to the appropriate state election website. This would be an efficient method that poses a tremendously low cost to the federal government and virtually no burden on the states.

¹⁷⁵ See Tokaji, *supra* note 26, at 474.

¹⁷⁶ 42 U.S.C. § 15322 (2006).

3. *Establish Minimum Efforts that States Must Make to Determine the Validity of Registrations*

Currently, there are two methods states use to purge individuals from the voter rolls—the individualized, manual method that relies on postcard notification and the electronic database-matching system.¹⁷⁷ The current manual method is far too limited and has invited court action. The EAC must delineate clearer and rigorous methods instructing states on how to verify if a voter's address matches that in the central voter file. These steps should include outreach via phone, email, fax, and social-networking sites in addition to the postal service. The need for stronger measures to prevent properly registered voters from falling off the rolls is critical because, with the exception of states that allow election-day registration, once voters arrive to cast their ballots at the polls they are no longer permitted to fix or update their registration.¹⁷⁸

On the topic of electronic voter matching, the EAC should be empowered to clarify the standard that states must achieve, as well as promulgate rules on the specific methods states may use, in managing and administering the central voter databases. Reports and peer-reviewed studies from other disciplines suggest that high error rates—rates that may exceed twenty-five or thirty percent—are typical when one database is used to match information from another.¹⁷⁹ Although best practices are regularly determined through trial and error, experimentation by the states in an arena as fundamental as voter suffrage is not preferred. Among the specific areas in which the EAC should solicit comments for binding guidelines are the following: match criteria (i.e., flexible or substantial), online and offline outreach to voters once a registration is determined to be insufficient, length of time information should be preserved offline following a purge, protocol and procedures for how a purge can occur, and which officials may authorize a purge of voters' information from the voter file. Certainly some degree of flexibility needs to be granted to the states to maintain their own voter files, but the default must be to err on the side of preserving names on the voter rolls rather than purging them.

¹⁷⁷ See *supra* Part II.C, E.

¹⁷⁸ See 42 U.S.C. § 1973gg-6(a) (requiring that voter registrations be submitted either 30 days prior to the election or when state law so provides, whichever is the lesser).

¹⁷⁹ See LEVITT, WEISER & MUÑOZ, *supra* note 104, at 23.

4. *Promulgate Rules Clarifying HAVA's Provisional-Ballot Language*

The EAC must swiftly implement clear and binding guidelines that establish standard meanings for disputed terms in HAVA, particularly the meaning of jurisdiction. As discussed above, HAVA requires provisional ballots to be accepted only if cast in the jurisdiction where the voter is registered.¹⁸⁰ Congressional intent on the precise definition of jurisdiction is not clear and the federal courts have split because they may only interpret its meaning through the lens of the applicable state law. Providing a uniform standard to be followed by all states would ensure that every vote cast in a federal election receives equal treatment. It would also give election officials and poll workers clear guidance on how to address situations where the potential voter does not appear on the voter rolls.¹⁸¹ Accordingly, the EAC should adopt a broad definition that instructs state election officers to count provisional ballots cast anywhere in the county in which the voter resides. As the story of Brandi Stenson and her mother illustrates, a narrow definition of jurisdiction inevitably leads to unconscionable instances of disenfranchisement.¹⁸²

The proposed approach would alleviate several common problems. First, it would create a large enough geographical area that the voter will not be instructed to travel from one location to another as Ruth Moore and her husband did in the Michigan primary in 2004.¹⁸³ Second, it is much easier for a relatively untrained poll worker to determine whether the voter is in the correct *county* as opposed to determining whether the voter is in some arbitrarily drawn, election-specific *ward* or *precinct*. Third, counties are sufficiently small that frauds (to the extent they exist) would be less likely to cast provisional ballots at polls mere blocks or miles away from the address at which the valid voter is registered, as opposed to polls on the far side of the state.

Finally, in an effort to prevent further registration errors, the EAC should consider the efficacy of a rule that treats rejected provi-

¹⁸⁰ See *supra* Part II.F.

¹⁸¹ See generally Feige, *supra* note 141, at 456–58 (providing an analysis of the provisional-ballot problems and possible solutions, which range from no specific precinct definition to counting any ballot cast within the state); Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 289 (2007).

¹⁸² See *supra* Part II.F.

¹⁸³ See *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 419 (E.D. Mich. 2004).

sional ballots as de facto voter-registration applications for the next election.

5. *Create Mandatory Minimum Training Standards for State Election-Administration Officers and Poll Workers*

The EAC should circulate a core curriculum that advises all election officials on how to adhere to federal election laws. States should certainly be free to establish their own framework for educating poll workers, but in the event that the state training is lacking, a minimum set of federal guidelines must be made available to the states.

These five proposals would ensure a smoother election-administration framework at both the national and state level, leading to increases in voter registration, lower voter disenfranchisement, and heightened voter turnout.

IV. *That's All Well and Good, but Will Any of This Work?*

This Part addresses problems and counterarguments that might legitimately be raised against mandating online voter registration and granting limited powers to the EAC to promulgate rules. These include the constitutional concern about the federal government overtaking a traditional state function; how to pay for these reforms; determining the validity of digital signatures; and criticism that any regulation short of universal registration is overly burdensome and insufficient.

A. *Wait, Are These Statutes Even Constitutional?*

Yes. The basis for congressional authority to regulate elections, a function traditionally performed by the states, derives from two separate provisions of the Constitution: Article I, Section 4 states that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators,”¹⁸⁴ and Article II, Section 1 states that “[t]he Congress may determine the Time of chusing the [Presidential] Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”¹⁸⁵ The Supreme Court, in *Smiley v. Holm*, interpreted Article I, Section 2 to grant very broad authority to Congress

¹⁸⁴ U.S. CONST. art. I, § 4, cl. 1.

¹⁸⁵ U.S. CONST. art. II, § 1, cl. 4.

to regulate the intricate details of all election proceedings—albeit in a case resolving a redistricting dispute, not a voter-registration matter.¹⁸⁶

In the face of several state challenges to the law on various federalism-related grounds, lower courts have embraced the *Smiley* rationale, holding the NVRA constitutional based on Congress's inherent powers in Article I of the Constitution.¹⁸⁷ This Note's proposals are an extension of the NVRA and HAVA and do not propose anything more onerous than what is already required.

B. Don't You Just Want to Grow the Government and Spend More Money?

A mandate requiring states to enact comprehensive reforms for federal elections is going to cost a lot of money. And granting rulemaking authority to the EAC is going to require more people—and even more money. Although the true costs of implementing the proposed reforms are beyond the scope of this Note, it is reasonable to assume that it will be in the millions of dollars. Promulgation of rules, review of state actions, increased interaction with state agencies, and the provision of guidance on the new rules will require a significant increase in the number of personnel at the EAC—including lawyers, managers, assistants, and computer programmers. Budget hawks will argue that the costs are too high, and states will undoubtedly argue that the federal government should pay for the reforms that states must enact.

However, it is not at all obvious that the costs incurred by the states and federal government will be debilitating. Washington State spent approximately \$200,000 to develop and implement its online re-

¹⁸⁶ See *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (“It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, *registration*, supervision of voting, *protection of voters*, prevention of fraud and corrupt practices . . . in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. . . . All this is comprised in the subject of ‘times, places and manner of holding elections’ and involves lawmaking in its essential features and most important aspect.” (emphasis added)).

¹⁸⁷ *Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995); *Ass'n of Cmty. Orgs. for Reform Now v. Ridge*, Nos. CIV. A. 94-7671, CIV. A. 95-382, 1995 WL 136913, at *7 (E.D. Pa. March 30, 1995) (holding that the statute survives a Tenth Amendment challenge); *Condon v. Reno*, 913 F. Supp. 946, 967 (D.S.C. 1995) (holding that the NVRA is within the powers delegated to Congress, and not in violation of the Tenth Amendment).

gistration system.¹⁸⁸ The cost to the federal government will likely not be exorbitant either. Payroll and healthcare costs may increase slightly, but the professional staff adjustments at the EAC would still be dwarfed by the larger federal agencies such as the Department of Agriculture or the Environmental Protection Agency.

Although there is merit to the fiscal concern, there is an equally compelling argument that absorbing these front-end costs will actually save more money in the form of litigation costs that are already incurred by both state and federal governments. Election litigation has grown significantly because Congress has not granted the EAC authority to clarify the existing ambiguities in federal election law. If political parties, state election officers, candidates themselves, and voters had an avenue other than the courts to resolve these problems, then litigation costs would decrease, saving the government money.

Regardless, cost should not be the deciding factor. Voting is a constitutionally protected right, and in most states a citizen must be registered in order to vote. It follows that the government is obligated to ensure that citizens are not deprived of this fundamental right. Because increased voter registration leads to increased voting, and decreased voter registration leads to disenfranchisement, the costs would have to be extraordinarily high to be unreasonable.

C. You Can't Sign a Website

Another concern militating against online registration is that there is no ability to collect a signature, which serves as a proxy for averting fraudulent registrations. Indeed, the registration programs implemented in Arizona and Washington State are not as far-reaching as this Note's proposal precisely because of the electronic-signature issue. In both states, only citizens with a valid government-issued driver's license or state identification card may register online because the state already has the applicant's signature on file.¹⁸⁹ Although this limitation is an understandable effort aimed at preventing fraud and abuse in the registration system, it is hardly a compelling reason to prevent citizens who do not have a driver's license from registering to vote.

“The Internet has become a catalyst for signatures to enter into a new phase, away from handwritten signatures and back towards symbolic acts, which makes handwritten signatures only a brief phase in

¹⁸⁸ See *supra* note 170 and accompanying text.

¹⁸⁹ See *supra* notes 167–68 and accompanying text.

the evolution of signature technology.”¹⁹⁰ The argument that handwritten signatures are critical to validate contracts has long been dismissed.¹⁹¹ Electronic signatures can be employed in a safe and secure method with little cost to states.¹⁹² Business transactions in the global economy rely overwhelmingly on electronic records and courts now accept electronically submitted documents. The very essence of voting has evolved from paper ballots, to manual-lever machines, to electronic-voting devices.¹⁹³ Moreover, there is simply no empirical evidence to suggest that registration fraud translates into voter fraud at the voting booth.¹⁹⁴

Holding true to an outdated mode of verification—putting ink onto paper—hardly seems a proper justification for denying citizens an opportunity to more easily and efficiently register to vote. As technology evolves, so too must the law.

D. If You're Serious About Ensuring that Everyone Gets to Vote, Why Don't You Just Implement Universal Registration?

There are compelling reasons to implement a universal voter-registration system in the United States.¹⁹⁵ The fundamental argument is that any form of registration is an extraordinary barrier to voting.¹⁹⁶ Proponents suggest, as does this Note, that the decentralized election-administration system in the United States results in significant errors and disenfranchisement.¹⁹⁷ Further, they argue that voter-initiated registration actually stunts election administration, rather than fosters it.¹⁹⁸ Mistakes and errors are common on applications, voter lists are

¹⁹⁰ Benjamin Channing Palmer, *Disparate Impact of Electronic Signature Legislation on Indigent Californians*, 36 McGEORGE L. REV. 697, 716 (2005).

¹⁹¹ See *id.* at 714–16.

¹⁹² In fact, it may be an efficient and cost-saving move. See RALPH C. HEIKKILA, FED. ELECTION COMM'N, INNOVATIONS IN ELECTION ADMINISTRATION 3: ELECTION SIGNATURE RETRIEVAL SYSTEMS 1 (1992), available at <http://www.eac.gov/election/quick-start-management-guides/fec-publications> (explaining that under manual processes, individuals can only check 400 signatures per day).

¹⁹³ See generally PAUL S. HERRNSON ET. AL., VOTING TECHNOLOGY: THE NOT-SO-SIMPLE ACT OF CASTING A BALLOT (2008).

¹⁹⁴ See Benson, *supra* note 98, at 12; see also Hasen, *supra* note 106 (“[Voter] registration fraud—such as when ‘Mickey Mouse’ registers to vote[—]is an artifact of paying bounty hunters to collect completed registration forms; some of those mercenaries will falsify information on registration forms. But, invariably, Mickey declines to vote on Election Day, so where is the fraud?”).

¹⁹⁵ See WEISER, WALDMAN & PARADIS, *supra* note 1, at 2; Hasen, *supra* note 106.

¹⁹⁶ See WEISER, WALDMAN & PARADIS, *supra* note 1, at 3.

¹⁹⁷ *Id.* at 3–4.

¹⁹⁸ *Id.* at 5.

replete with the names of citizens who have moved or died, and administrators cannot process the influx of registration requests that typically precede a federal election.¹⁹⁹ Finally, proponents of universal registration appropriately argue that the United States is the only major power that places the burden of registration on the voter, and consequently, U.S. turnout rates are “near the bottom of the developed world.”²⁰⁰ Proponents of universal registration also dismiss the notion that voter fraud is a significant problem²⁰¹ and that registration is a necessary cure to that evil.²⁰²

There are political as well as practical reasons that universal voter registration is not appropriate today. First, although universal voter registration is arguably a more voter-friendly alternative, it is doubtful that such a proposal would gain any significant traction in Congress given the current political climate. The VRA, the NVRA, and HAVA demonstrate that election-administration issues take time to resolve. It took almost 150 years to establish universal *suffrage*, so a cautious and methodical march towards universal *voter registration*—a process that will allow states to work out the kinks in the modern administration of elections—is the more preferable option.

In addition, the call for universal *registration*, by definition, means that voters must still be registered to vote. Placing the onus on the government to properly and validly register more than 100 million voters, when it routinely makes errors in registering citizens who actually provide them with the information, hardly seems like a workable solution. The approach offered in this Note—allowing voters the opportunity to regularly update their own registration information—would put the person with superior knowledge and the most up-to-date information in charge of making sure files are accurate.

It has been suggested that the key proposals necessary to make universal registration a reality include a federal universal mandate, federal funding for registration, permanent registration, and election-day registration.²⁰³ However, these proposals all rest on utilizing current voter lists and state registration laws to build the voter rolls and

¹⁹⁹ *Id.* at 5–6.

²⁰⁰ See *id.* at 1; see also KEYSSAR, *supra* note 17, at 320; OVERTON, *supra* note 145, at 46 (noting that the right to vote in the U.S. depends on the “inclinations of your state and local politicians”).

²⁰¹ Local election officials on the ground agree that voter fraud is not a serious problem. See FISCHER & COLEMAN, *supra* note 8, at 40 fig.31.

²⁰² See John Fund, *Jimmy Carter Is Right*, WALL ST. J., May 22, 2006, <http://www.opinionjournal.com/diary/?id=110008411>.

²⁰³ See WEISER, WALDMAN & PARADIS, *supra* note 1, at 8–9.

implement the plan. Yet only seventy percent of qualified citizens are registered to vote, and it is unclear how the government would proceed to populate the rest of these lists. Moreover, there may also be constitutional privacy concerns about placing citizen's names on public registration rolls when they would prefer not to exercise their right to vote. In 2006, almost half of the unregistered voters in the United States reported that they were not interested in the election or involved in politics.²⁰⁴ Perhaps it is not the best investment of time, money, and effort to provide a benefit to citizens who will never take advantage of it.

Universal registration is a very attractive alternative, and perhaps it will eventually become a reality. However, at this time, the political and practical concerns weigh against pursuing such a policy.

Conclusion

The right to vote has evolved into a fundamental constitutional right over the last 150 years, and as such, Congress is compelled to ensure that this right is not infringed. Along with this evolution, however, has been the introduction and expansion of voter-registration requirements. Nearly every state requires qualified citizens to register before they may vote.²⁰⁵ The United States is unique among the major industrialized nations in that the government places the onus on citizens to register to vote, rather than assuming that responsibility itself. Traditionally a state-run activity, the federal government has passed three significant statutes that delineate certain guidelines for states to follow when registering voters. These three laws—the VRA, the NVRA, and HAVA—were all crafted, in part, to make voter registration easier and more accessible to citizens. However, the evidence suggests that many states, whether it is because they are incapable or unwilling to take on such a responsibility, have fallen behind in enforcing these laws. Consequently, it is again time for the federal government to assert its right to regulate voter-registration efforts and address the mounting errors that cost thousands of citizens their votes in every election.

The proposals set forth in this Note, if adopted, will address and cure many of the election-registration problems in the United States. First, the states and federal government must modernize the election-registration process and allow for online voter registration and regis-

²⁰⁴ FILE, *supra* note 46, at 12.

²⁰⁵ See U.S. ELECTION ASSISTANCE COMM'N, *supra* note 40, at 4.

tration updating. This proposal would streamline the outdated process of application by mail. Instead of filling out a paper form, mailing it to an office, and hoping that a clerk will properly decipher the handwriting, citizens could personally register on secure and user-friendly websites. Second, this Note proposes giving real teeth to the EAC by granting it the authority to promulgate rules and issue interpretative guidelines on a delineated set of issues.

The EAC would be further directed to establish minimum parameters for state election-registration websites, including security measures, voter education for the system, and minimum website content. The EAC would also create and administer a central voter-registration website to serve as a one-stop shop for voters who want to register online. Voters could visit the EAC website, search for their state, and be directed to the appropriate state election website.

The EAC must also establish uniform efforts that states must make to determine the validity of registrations, because the current method is outdated and error-prone. Improperly registered citizens may not vote, and the government must ensure that states aggressively ensure that every citizen who wishes to be registered *is* properly registered.

The EAC should promulgate rules clarifying HAVA's provisional-ballot language. The provisional ballot was created with the intent of ensuring that voters would never be turned away from a poll without casting a ballot. Vague statutory language and conflicting legislative history, however, have produced a complicated system and dozens of state interpretations on when to count a provisional ballot. This change would create a uniform standard and ensure that the votes of properly registered citizens are not discarded because of an error, oversight, or omission on the part of voters or election officials. Finally, the EAC should establish minimum training standards for state election-administration officers and poll workers. Undertrained and overworked employees often make improper decisions that result in valid ballots not being counted. Although human error cannot be avoided, states can try to adhere to the maxim "proper preparation prevents poor performance." In other words, training employees cannot hurt. The adoption of these proposals would make voter registration easier, administration more efficient, and voter turnout higher.