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The Other Voting Right: Protecting Every Citizen's Vote by Safeguarding the Integrity of the Ballot Box

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Introduction

There is a saying that "people get the government they vote for." The implication of the maxim is that if undesirable or unwise legislation is enacted, if executive branch officials are inept or ineffective, or if the government is beset with widespread corruption, then such unfortunate results are the consequence of the electorate's decision regarding whom to trust with the powers and prestige of public office. The Constitution does not forbid people from enacting wrongheaded policies. If voters elect leaders that fail them, then the citizenry is saddled with the consequences of its choice until the next election. Such is the reality in a democratic republic.

But this argument begs the question of whether voters did in fact elect the individuals who take their oaths of office. How do citizens know which candidate actually won in any given election? Election results are legitimate only to the extent that the returns include every legal vote—and only those legal votes—undiluted by fraudulent or otherwise unacceptable votes. The task of counting every legal ballot and excluding every unlawful one is the challenge faced by practitioners of election law, whether as lawyers or as election officials. Primary authority for elections in America rests with the states, and in each jurisdiction the secretary of state is the senior executive officer responsible for ensuring a free and fair election. Thus the secretary of state is involved in the unique act of balancing the duty to ensure access to the ballot box with protecting the integrity of the voting process.

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Over the past four decades, most developments in voting rights legislation and case law have focused specifically on the franchise: the right to cast a ballot and have that ballot tabulated as a vote. These advances, albeit important, have left underdeveloped the concomitant right to an undiluted count. And if we seek to ensure the legitimacy and fairness of our electoral system then we must now turn to protecting this "other voting right" vigorously. Further, we must do so in a manner that recognizes voting as a duty and that expects the voter to exert some effort toward fulfilling that duty.

This Essay explores several aspects of protecting the second, equally important, right to a protected ballot box. Part I approaches the electoral process from the vantage point of a secretary of state, responsible for turning theory into practice and administering the law to make the electoral system work sufficiently well on Election Day. Part II explains how the right to vote actually encompasses two distinct rights—the right to cast a vote and the right to have one's ballot untarnished by illegal votes—and that these two rights are often in tension. Part III discusses how voting is, and always was intended to be, not only a right but also a civic duty for American citizens, legitimizing certain tasks and burdens that the voter is obligated to accept to participate in self-government. Part IV explores some examples from case law regarding challenges to election measures designed to ensure successful elections. These cases show efforts to strike a balance between the two rights, and the legal hurdles a secretary of state often faces when trying to protect the ballot box. Finally, Part V surveys additional topics relevant to executive decisions taken to protect voting rights.

I. The Perspective of a Secretary of State

Popular commentary might lead to the perception that the democratic process somehow self-organizes on Election Day. The reality, however, is that fulfilling democracy's promise is extremely difficult. There are countless challenges inherent in a system for choosing representatives in our republic. Some of these challenges are the natural result of the grand undertaking that is a general election, namely accounting for millions of votes cast by geographically dispersed and imperfect human beings in a system administered by other imperfect human beings. Other difficulties arise from the immense power at stake in an election. Consequently, there are incentives for some to press every advantage, fair or not, to achieve their desired electoral results. All of these challenges must be faced squarely and overcome to ensure legitimate elections.

Every state in the Union has a secretary of state who serves in the executive branch of government as the chief elections officer.[1] Chief elections officers are

1. Secretaries of state typically are elected. *E.g.*, Ind. Const. art. VI, § 1; Ohio Const. art. III, § 1. Such secretaries of state are charged with overseeing state elections. *See, e.g.*, Official Web Site of the Indiana Secretary of State, About the Divisions, http://www.in.gov/sos/2362.htm (last visited Dec. 22, 2009); Ohio Secretary of State, Duties and Responsibilities, http://www.sos.state.oh.us/SOS/about/

charged with administering the law, both through promulgating rules, regulations, and directives, and also through making countless decisions on how to proceed when reality confounds theory. These principles of due process and equal protection must be administered on a daily basis to fulfill the Constitution's promise. The secretary of state is the official in charge of fulfilling these duties at both the state and federal levels[2] and is charged, in a sense, with balancing the dual voting rights we identify,[3] thereby ensuring adequate access to a secure ballot box.

II. Two Voting Rights, Often in Tension

People often speak of the right to vote. But in actuality there are two voting rights. The first is the electoral franchise: the right to cast a ballot that is tabulated to determine the outcome of elections, a definitive aspect of democratic regimes.[4] The second is a concomitant right for each voter not to have his legitimate vote diluted or cancelled by an illegal vote. In other words, voters have the right to measures that protect and safeguard the integrity of the electoral process and that assure only legitimate votes are counted. The Supreme Court recognized this interest when it declared that "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system."[5] Both rights must be preserved for each voter to enjoy the optimal impact of his or her voting decision, but preserving both rights simultaneously often is a challenge.[6]

Some level of tension remains unavoidable between the two voting rights of the franchise and ballot integrity. Measures to increase the franchise focus on removing individual-level barriers to make voting easier or more convenient. On the other hand, measures to protect legal votes from illegal dilution tend to

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dutiesResponsibilities.aspx (last visited Dec. 22, 2009) [hereinafter Ohio Secretary of State].

2. *See, e.g.*, Ohio Secretary of State, *supra* note 1. This still remains true at the federal level even after the most recent major federal law affecting elections. *See* Help America Vote Act of 2002, Pub. L. No. 107-252, § 254, 116 Stat. 1666, 1694-96 (codified as amended at 42 U.S.C. § 15404 (2006)).

3. *See infra* Part II.

4. *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.").

5. Burdick v. Takushi, 504 U.S. 428, 441 (1992).

6. It also is possible to characterize these concomitant rights as aspects of one right as follows: A voter has the right to maximum participation in the electoral system by casting a ballot that is counted properly and not diminished by the illegal influence of ineligible votes. The benefit of conceptualizing these two aspects separately, however, is that it aids identifying the specific interest served by any given voting law.

impose burdens on the individual, such as requiring the voter to obtain photo identification, to remember to bring such identification to the polls, or to appear at a certain place at certain times to cast a vote.

The voting system, by necessity, requires a balancing of these somewhat countervailing interests. The only infallible, yet politically controversial, way to confirm voter eligibility at any location would be a biometric identification card that contains not only a current picture and physical address but also a fingerprint or other such unique datum. Each polling location would need a device that could verify the encoded material, authenticate identities, and cross-reference them in real time to a database that integrates local, state, and national voter data. This procedure would establish that the person present at the polling location: (1) is the person whose name appears on the precinct voting roll; (2) is eligible to vote; (3) is entitled to vote in the specific precinct; (4) is not registered to vote at another location or in another state; and (5) has not cast a vote in another jurisdiction. Short of such a comprehensive measure, some degree of doubt in the electoral process will persist. But such a technology would be extremely costly and entail serious privacy implications. At the other end of the convenience continuum, a person would have three choices for casting her vote. First, the voter could show up at any polling location to cast a ballot and simply provide her name to the official distributing the ballots or controlling access to a booth. Second, the voter could send her ballot by mail, perhaps even weeks before an election, much like current absentee balloting procedures. Finally, the voter could also register her preferences online, again simply providing her name and other identifying information to the system. Such a tripartite system would be the easiest, most convenient voting mechanism guaranteeing every qualified voter the opportunity to participate in an election. But such a system also could be subject to enormous abuse and fraud, and making voting *effortless* is not a secretary of state's goal when formulating a plan for a secure, effective, and efficient election.

Thus, the challenge within any voting system—and the challenge faced by a secretary of state—reduces to balancing both sides of the voting rights coin. Burdens on the voting process likely will have a disparate impact on some voters and may discourage participation. Voting accommodations increase the ease with which the franchise can be exercised but also may increase the probability of fraud, which undermines confidence in the integrity of the electoral process. Normatively speaking, failure to respect either voting right diminishes the legitimacy of an election, in derogation of the political ideal in a democratic republic.

III. Voting Is a Civic Duty, Not Just a Civil Right

With these two rights in mind, whatever voting system a state adopts, it should reflect the principle that voting is a civic duty and that the state can expect patriotic citizens to invest a certain amount of effort toward that duty. Regarding the second right we have identified, there is an important public inter-

est in tabulating only the votes of eligible voters.[7] The right to have one's vote untarnished by fraud is shorn of any inherent worth if it is divorced from the voter's role as part of the entire electorate. After all, when casting a ballot, a voter is acting as part of the government.[8] The citizen is not acting as a servant or agent of government but rather as the sovereign authority dictating government policy.[9]

Framing voting as a civic duty is particularly evident in the citizenship qualifications mandated by law. Indeed, one of the distinctive attributes of the right to vote in the United States is that it is reserved only to citizens. This restriction is significant when analyzing a constitutionally protected right such as voting, which is "of the most fundamental significance under our constitutional structure."[10] Safeguarding fundamental rights usually applies to the states through the Fourteenth Amendment's Due Process Clause.[11] Strict scrutiny is the general rule for government actions burdening fundamental rights,[12] and severe bur-

7. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1619 (2008) (plurality opinion).

8. Petition of Kutay, 121 F. Supp. 537, 538 (S.D. Cal. 1954) ("The individual is the smallest individual unit of government . . . .").

9. *See* Dysart v. City of St. Louis, 11 S.W.2d 1045, 1050 (Mo. 1928) ("The citizen is sovereign, and the right to vote is the distinguishing badge of his sovereignty.").

10. *Burdick*, 504 U.S. at 433 (quoting Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979)). It is beyond the scope of this Essay to discuss in depth which rights are fundamental. There currently is some confusion as to what the test for defining fundamentality is for constitutional rights. Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. Rev. 195, 211-12 (2009). Originally the test was whether the right was "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 324-25 (1973). In later years, the Court appeared to consider whether the right is "fundamental to the American scheme of justice" and "necessary to an Anglo-American regime of ordered liberty." Duncan v. Louisiana, 391 U.S. 145, 149-50 & n.14 (1968). But, in a more recent case presenting the question of fundamentality, the Court applied a two-prong test of whether the right is both deeply rooted in the history and traditions of the American people and also "implicit in the concept of ordered liberty," Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal citations omitted), suggesting a revival of the earlier test with an additional criterion attached to make the test more demanding. Although it is unclear as to what the proper test is or whether these are varying articulations of a single test, Klukowski, *supra*, at 212, this issue may be clarified in a case currently pending before the Supreme Court. *See* Brief for American Civil Rights Union et al. as Amici Curiae Supporting Petitioners at 9-10, McDonald v. City of Chi., *cert. granted* 130 S. Ct. 48 (2009) (No. 08-1521).

11. *See* Klukowski, *supra* note 10, at 197.

12. *See* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988). It also should be noted that strict scrutiny is not the test employed for all burdens on fundamental rights. Free speech is one example of a fundamental right for which strict scrutiny applies only to certain types of burdens, with laws regulating speech subject to va-

dens on participation in the political process often are subjected to that test.[13] Nonetheless, the Court has suggested that citizenship is not a suspect classification when considering the right to vote.[14] The Court has elaborated on this concept, holding that certain public functions are properly performed by citizens and that discrimination based on citizenship in the realm of those public functions are merely subject to rational-basis review.[15] For example, the Court applied this logic to uphold a New York law that allowed only U.S. citizens to be police officers.[16] Such reasoning applies at least equally well to voting laws, since the citizen is participating in a self-governmental act that determines public policy when voting, which is perhaps the most significant public function a citizen can perform.

The difference in Supreme Court review standards suggests that the right to vote is somehow distinguished from other civil rights. When applied to laws that burden fundamental civil rights, the strict scrutiny test is intended to protect persons as individuals. But perhaps the right to vote, although fundamental, is of a different genus because it is not only the right of the citizen *qua* individual but also that of the citizen *qua* constituent element of "We the People."

When the Supreme Court upholds the constitutionality of a citizenship qualification, it does so based on the rationale that the subject matter at issue involves a person acting "so close to the core of the political process as to make him a formulator of government policy."[17] The contrapositive of this notion is that citizens are formulators of government policy. If the ultimate determinant of public policy is the selection of those who wield policymaking power, then, when exercising their franchise, voters collectively forming the electorate em-

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rying levels of scrutiny. Klukowski, *supra* note 10, at 206 n.117; Kenneth A. Klukowski, *Armed by Right: The Emerging Jurisprudence of the Second Amendment*, 18 GEO. MASON U. CIV. RTS. L.J. 167, 186-87 (2008). State action involving some fundamental rights triggers a test that looks nothing at all like strict scrutiny, with the Establishment Clause being a perfect example. *See* Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 228-30 (2008) (describing the multifaceted framework for laws that allegedly violate the Establishment Clause).

13. Clingman v. Beaver, 544 U.S. 581, 586-87 (2005).

14. *See* Hill v. Stone, 421 U.S. 289, 297 (1975). This result is significant for two reasons. First, laws discriminating on the basis of alienage generally are subject to strict scrutiny because alienage is a suspect class. Graham v. Richardson, 403 U.S. 365, 371-72 (1971). Second, equal protection challenges involving fundamental rights trigger strict scrutiny in their own right. *Kadrmas*, 487 U.S. at 458. Voting laws involving citizenship entail both of these triggers but are still not subject to this demanding test.

15. *See* Foley v. Connelie, 435 U.S. 291, 294-96 (1978).

16. *Id.* at 292-93, 297.

17. *In re* Griffiths, 413 U.S. 717, 729 (1973) (invalidating a Connecticut statute restricting eligibility for the state bar to citizens).

body government itself. As participants in the system voting becomes not only a *right* of U.S. citizens; it is a *duty* of citizenship.[18]

Since voting is a right as well as a public duty, a citizen may forfeit the right to vote if he becomes unfit in the eyes of society to perform his civic function. For example, the Fourteenth Amendment allows states to disenfranchise convicted felons,[19] expressly allowing that voting rights can be denied to those convicted of serious crimes.[20] Justice Rehnquist's opinion for the Court in *Richardson v. Ramirez* rejects the argument that such disenfranchisement violates the Equal Protection Clause.[21] Felon disenfranchisement is a matter of state policy; thus, one may expect variance in how states decide the issue. Only two states, Maine and Vermont, allow incarcerated felons to vote,[22] and approximately

18. Petition of Kutay, 121 F. Supp. 537, 538 (S.D. Cal. 1954) (holding that a citizen has a "duty to collaborate in suffrage and other governmental duties" but also stating that there is "not yet a duty to vote"); Dysart v. City of St. Louis, 11 S.W.2d 1045, 1050 (Mo. 1928) (declaring that the citizen-voter as a sovereign must discharge his sovereign function and abide by regulations enacted for that purpose).

19. Richardson v. Ramirez, 418 U.S. 24, 41-55 (1974).

20. *See* U.S. Const. amend. XIV, § 2. It should be noted that other countries have differing views on this question. Canada, for example, recently has held that denying voting rights to felons violates the fundamental principles of democracy. Sauvé v. Canada, [2002] 3 S.C.R. 519, 2002 SCC 68 (Can.).

21. 418 U.S. at 54-55. Section One of the Fourteenth Amendment includes the Equal Protection Clause, and Section Two includes language allowing for the number of people represented in congressional districts to be reduced on the basis of excluding certain criminals, but not other criminals. U.S. Const. amend. XIV, § 1, cl. 4, § 2. In *Ramirez*, petitioners argued that if this latter group of criminals is exempted from the lesser sanction of reduced congressional representation, then surely the Equal Protection Clause should be interpreted to forbid them from suffering the greater sanction of losing the franchise. 418 U.S. at 43. While examining the drafting history of the Fourteenth Amendment—a discussion beginning with the caveat that such legislative history should not be afforded unlimited weight in constitutional interpretation—the Court found one historical item to be dispositive of this case. *Id.* at 43-52. Each of the former Confederate states only could be readmitted after it had submitted its proposed new state constitution for congressional approval. *Id.* at 48-49. At the time the Fourteenth Amendment was adopted, twenty-nine states disallowed voting by felons. *Id.* at 48. As those states were readmitted separately to the Union by state-specific enabling legislation, that federal statute expressly permitted those states to disenfranchise felons. *See id.* at 51-52. Therefore, the Court found that whatever rights were secured by the Equal Protection Clause, a right against disenfranchisement for felons was not among them, since Congress contemporaneously and expressly authorized such disenfranchisement in specific states. *Id.* at 53-54.

22. Daniel Hays Lowenstein & Richard L. Hasen, Election Law: Cases and Materials 49 & n.0 (3d ed. 2004) (citing Rosanna M. Taormina, Comment, *Defying One-Person, One-Vote: Prisoners and the "Usual Residence" Principle*, 152 U. Pa. L. Rev. 431, 460-61 (2003)).

one-third of the states disallow voting by felons who have completed their sentences.[23]

Recently enacted statutes designed to advance voting rights seem to have focused on expanding the franchise—a worthwhile and laudable objective—but have not focused enough on protecting the integrity of legal votes. What are perhaps the two most significant changes in federal voting law in the past twenty years, the National Voter Registration Act of 1993,[24] and the Help America Vote Act of 2002 (HAVA),[25] both have facilitated voter registration and the ability to cast ballots. One looks in vain for recent federal laws that focus on eliminating waste and fraud from the voting process or that stress the constitutional permissibility of imposing reasonable burdens on voters in fulfilling their civic duty to participate in democracy. Laws strengthening the integrity of the ballot box must be pursued with equal vigor. There is a strong government interest in the stability of electoral systems.[26] The electorate's "confidence in the integrity of the electoral process [is vital] because it encourages citizen participation in the electoral process."[27] The Supreme Court thus has held that "government

23. *Id.* at 49-50. For a specific example, see IND. CONST. art. II, § 8.

24. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 42 U.S.C. § 1973gg (2006)). The Act had four official purposes:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office; (3) to protect the integrity of the electoral process; and (4) to ensure that accurate and current voter registration rolls are maintained.

42 U.S.C. § 1973gg(b)(1)-(4) (2006). Although these purposes may have been the official ones enumerated, a sizeable minority in Congress considered it a partisan measure that would deteriorate ballot box integrity. *See* H.R. REP. NO. 103-9 at 34-35 (1993). If true, then this statute may have advanced its first two stated objectives of expanding the franchise but possibly at the expense of the latter two objectives concerning the right against vote dilution. Most courts seem to have identified the former interests of increasing the franchise as being the primary objective of the Act. *See, e.g.*, Harkless v. Blackwell, 467 F. Supp. 2d 754, 763 (N.D. Ohio 2006) ("The purpose of the NVRA is to establish procedures that will increase the number of eligible citizens who register to vote in elections for federal office.").

25. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 42 U.S.C. §§ 15301-15545 (2006)). HAVA was intended to update and improve the standards used in voting systems nationwide. *See* H.R. REP. NO. 107-730, at 1 (2002) (Conf. Rep.). HAVA's providing for the casting of provisional ballots in situations where formerly a person might not be able to vote at all, however, has the effect of expanding the franchise in a manner that creates the possibility of illegal votes being cast.

26. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 366 (1997).

must play an active role in structuring elections . . . 'if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.'"[28]

IV. Legal Challenges to Safeguarding the Voting Process

When evaluating election laws, courts must be cognizant of the dual guarantees of the right to vote and additionally that voting is not solely a right but also a duty. The right to vote does not entail the right to do so in whatever manner the voter chooses.[29] States retain the power to regulate elections,[30] and every election law invariably imposes some burden on individual voters.[31] Although invidiously discriminatory laws are offensive to the right to vote, even-handed measures "that protect the integrity and reliability of the electoral process" are not invidious and therefore pass constitutional muster.[32] Moreover, the fact that this right is also a duty allows election officials to presume that public-spirited citizens with due concern for the course of state and national policy should be willing to satisfy reasonable regulations and shoulder incidental burdens in the fulfillment of their civic duty.

The federal judiciary has examined numerous voting issues over the past half-century, working both to promote the enfranchisement right and also to protect against vote dilution via illegitimate ballots. Many early cases dealt with racial issues, arising from the reality that many election law violations stemmed from racial discrimination. In those disputes, the courts often were called upon to vindicate the constitutional rights of American citizens belonging to minority racial groups.[33] So much has been written on the role of law in securing the franchise generally that little more need be added here. Instead, additional discussion is needed on which legal measures will help safeguard the democratic process by only tabulating ballots that are legal votes and which measures are appropriate in modern America, where past injustices have been to a large extent remedied.

This Part examines three case studies of how secretaries of state and other high-ranking election officials grapple with the modern challenges of convert-

27. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1620 (2008) (plurality opinion).

28. Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

29. *Id.* (citing Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986)).

30. *Id.* (citing Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986); Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

31. Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983).

32. *Id.* at 788 n.9 (1983).

33. For example, poll taxes were found to be unconstitutional because of their racial impact. Harper v. Va. Bd. of Elections, 383 U.S. 663, 685 (1966).

ing legal theory into democratic reality for election law and voting rights issues. Section IV.A discusses the recent example of voter-identification laws as one of the few attempts to safeguard the ballot box and the constitutionality presumption issues that arose in ensuing litigation. Section IV.B considers the issues arising from timely administration of new federal mandates in state elections. Finally, Section IV.C deals with the federalism issues posed by the preceding discussions and argues that a clearer demarcation between federal and state authority may alleviate the burdens posed by federal involvement in state elections.

A. Constitutional Burden-Shifting

The modern approach in election law litigation seems to be that when someone brings suit challenging a voting law, there is a de facto presumption that the law is unconstitutional unless the government can establish a compelling need for even the slightest measure. This quasi-strict scrutiny approach to voting regulations (even when the court does not actually apply strict scrutiny) drives much of the conflict in election law, as courts become more skeptical of, rather than deferential to, the efforts of election officials—especially secretaries of state—to ensure an orderly and fair election.

The reality is that states have significant authority under the Constitution to protect legal votes from illegitimate dilution. In 2008, a plurality opinion of the Supreme Court asserted that if a state's burdens on voting are merely inconvenient and if its restrictions are nonsevere and nondiscriminatory, those burdens are evaluated under a much less demanding "important regulatory interests" standard that is deferential to policymakers' judgments.[34] The Supreme Court's precedents show that, when assessing the magnitude of the burden that laws impose on voting rights, it determines how the law applies to the entire electorate, not just the impact on individual voters with "peculiar circumstances."[35] Absent discriminatory intent, this proposition holds even where protected classes are concerned.[36] As a result, it should follow that states need not provide elaborate empirical verification regarding the significant interests they purport to uphold through election laws.[37]

Voter identification laws are excellent examples of statutes designed to protect the public integrity of the electoral process, and challenges to such laws appear frequently on the federal docket. A recent bipartisan, blue ribbon commis-

34. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1624 (2008) (Scalia, J., concurring) (citing Burdick v. Takushi, 504 U.S. 428, 433-34 (1992)). The plurality opinion in *Crawford* expressly rejected at least some aspects of this proposition. *See id.* at 1616 n.8 (plurality opinion).

35. *Id.* at 1625 (Scalia, J., concurring).

36. *Id.* at 1626.

37. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997) (citation omitted).

sion concluded that allowing polling officials to confirm the identity of a person requesting a ballot is imperative for democratic electoral systems.[38] As a step in the right direction towards respecting state primacy, and in the only photo-identification case it has decided so far, the Supreme Court found that an Indiana statute did not impose "excessively burdensome requirements" on any type of voter.[39] Courts are increasingly willing to uphold these measures as seen in several recent federal cases.[40]

The deference to state authorities present in *Crawford* is essential for election officials, as it allows them to formulate policies that cannot be invalidated pursuant to the lawsuits that some special interest groups consistently bring against voting regulations. It shifts the burden of producing empirical evidence of unconstitutionality to the interest group. If nonsevere measures are presumptively valid, then the burden should rest with challengers to demonstrate the measures' flaws rather than on election officials to build an extensive factual record as a condition precedent to enacting new policies. If courts were to adopt the same approach as was taken in *Crawford*, an approach that respects state primacy, election officials would able to focus on protecting voters' rights rather than engaging in frivolous lawsuits.

B. The Timeliness and Interpretation of Federal Mandates

Another example of voting rights controversies worth consideration are those arising from states' attempts to grapple with new federal mandates for election reform. For example, after the contentious 2000 general election, Congress enacted the Help America Vote Act of 2002 (HAVA). Laws such as HAVA often generate substantial litigation, as parties disagree over what is permissible under the new law. Such major federal interventions regarding a government

38. Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform § 2.5, at 18 (2005), *available at* http://www1.american.edu/ia/cfer/report/full_report.pdf ("The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.").

39. *Crawford*, 128 S. Ct. at 1623 (plurality opinion) (quoting Storer v. Brown, 415 U.S. 724, 738 (1974)). The statute at issue required voters to present proof of identification when arriving at the polls to cast a ballot, Ind. Code Ann. §§ 3-10-1-7.2, 3-11-8-25.1 (LexisNexis 2009), with exemptions for some voters or special circumstances, such as elderly voters at seniors' homes casting a ballot at that location, *id.* §§ 3-10-1-7.2(e), 3-11-8-25.1(e), 3-11-10-1.2 (LexisNexis 2009).

40. *E.g.*, Common Cause/Ga. v. Billups, 554 F.3d 1340 (11th Cir. 2009) (upholding Georgia's voter identification statute); ACLU of N.M. v. Santillanes, 546 F.3d 1313, 1319 (10th Cir. 2008) (upholding a municipal law requiring valid photo-identification); League of Women Voters v. Blackwell, 340 F. Supp. 2d 823 (S.D. Ohio 2004).

function traditionally within the states' purview generate numerous legal questions. Many of those disputes unfortunately arise right when elections are approaching. This imposes an especially onerous burden on secretaries of state, who must prepare and coordinate with election officials at the county and precinct level (most of whom are volunteers with limited time to receive amended instructions) whose duty it is to ensure a successful election system in a timely fashion.

Courts therefore must be careful when engaging in voting rights controversies so soon before citizens turn out to the polls. Suits brought just before an election limit the possibility of judicial review, as there are only so many days before Election Day, and conducting an orderly election takes a great deal of planning, effort, and coordination. Some courts argue that timing issues should not impede judicial intervention, even when the regulations challenged were enacted recently.[41] This is unfortunate, as complex and intrusive federal statutory schemes often take significant time to implement correctly at the state level. The Supreme Court recently has restated in the context of elections that judicial review of federal laws should be regarded as "the gravest and most delicate duty that this Court is called on to perform."[42] That sentiment is not controlling here because the Court premises it on Congress's status as a "coequal branch,"[43] but it is not inapposite either. "When evaluating a neutral, nondiscriminatory regulation of voting procedure, [the Court] must keep in mind that [a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people."[44] The Constitution's specific recognition of states' primacy in the election process[45] implicates federalism concerns that counsel for judicial restraint.

When election officials such as secretaries of state issue final voting regulations quickly after major legislation like HAVA becomes law, those officials risk the specter of federal litigation. Such challenges usually are directed against state

41. *See, e.g.*, Sandusky County Democratic Party v. Blackwell, 339 F. Supp. 2d 975 (N.D. Ohio 2004), *rev'd in part*, 387 F.3d 565 (6th Cir. 2004) (finding that the plaintiffs' filing suit just six weeks before the 2004 election was justified because the challenged directive was issued two months before Election Day).

42. Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2506 (2009) [hereinafter *NAMUDNO*] (quoting Blodgett v. Holen, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring)).

43. *Id.* (quoting Rostker v. Goldberg, 453 U.S. 57, 64 (1981)).

44. *Crawford*, 128 S. Ct. at 1623 (plurality opinion) (quoting Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006) (internal quotation marks and other citations omitted)); *see also id.* at 1626-27 (Scalia, J., concurring) ("It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class.").

45. *See* Sugarman v. Dougall, 413 U.S. 634, 647 (1973) (citing various cases).

statutes and regulations, which means that they should be filed in state courts.[46] Building on the aforementioned federalism concerns, courts should consider whether they can effectively adjudicate some matters in the remaining days before an election. Occasionally, "practical considerations . . . require courts to allow elections to proceed despite pending legal challenges."[47] This is especially true in light of the franchise's corollary right of a secure and undiluted ballot box, juxtaposed with the civic duty dimension voting, which expects citizens to participate even in the face of adverse circumstances.

Take, for example, a district court ruling from Ohio concerning whether under HAVA provisional ballots must be cast in the same manner as ordinary ballots, i.e., in the voter's home precinct. HAVA does not define the term "jurisdiction" in which a provisional ballot must be cast. The district court rejected a directive from the Ohio Secretary of State that required a person found not to be an eligible voter could only cast a provisional ballot in his regular precinct and decided that "jurisdiction" meant county rather than precinct.[48] The Sixth Circuit reversed, noting that while the district court cited Senator Dodd's comments from legislative history defining "jurisdiction" to mean county, Senator Bond's comments explicitly required the ballot to be cast only in the correct polling place.[49] The purpose of HAVA is to compensate for local election officials' lack of "perfect knowledge" regarding individual voters;[50] it is not to effectuate widespread removal of state voting requirements. Had the Sixth Circuit not intervened, such district court decisions, handed down shortly before Election Day, could result in major disruptions for the election at hand.[51] Bal-

46. Indeed, the Supreme Court has recognized that state courts are "the ultimate expositors of state law." Mullaney v. Wilbur, 421 U.S. 684, 691 (1975).

47. Riley v. Kennedy, 128 S. Ct. 1970, 1985 (2008) (citation omitted). The current version of the Voting Rights Act (VRA) was adopted in 2006. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended at 42 U.S.C. § 1973 (2006)).

48. Sandusky County Democratic Party v. Blackwell, 339 F. Supp. 2d 975, 989-90 (N.D. Ohio 2004).

49. Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 574-75 (quoting 148 Cong. Rec. 30 (2002) (statements of Sen. Bond)).

50. *Id.* at 570 (citation omitted).

51. It is possible that these holdings may not be good law. Standing is a threshold issue, which a court must address before turning to the merits. Lance v. Coffman, 549 U.S. 437, 439 (2007) (citing Steel Co. v. Citizens United for a Better Env't, 523 U.S. 83, 102 (1998)). Although the constitutional case-or-controversy elements of Article III were not at issue in *Blackwell*, *see* Davis v. FEC, 128 S. Ct. 2759, 2768 (2008); Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992), it is a separate standing issue to recognize that HAVA § 302 did not expressly authorize a cause of action. Courts are reluctant to find an implied right of action in statutes. *See* Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001); *cf.* Blessing v. Freestone, 520 U.S. 329, 340-41 (1997) (describing the factors for finding implied rights of action).

ancing the right to cast a ballot with the right to an orderly and secure voting process can naturally lead to the conclusion that requiring a voter to cast his provisional ballot in his local precinct is an appropriate policy. Courts should consider the appropriateness and timeliness of their interventions before venturing into the litigation that often accompanies states' interpretations of complex federal election mandates.

C. Federalism and Conflicts of Authority

As American society continually aspires to its constitutional ideals, the balance between protecting voting rights through federal law and respecting state authority to regulate elections has shifted. The Voting Rights Act of 1965 (VRA) is an example of federal involvement regarding the right to vote that was enacted in response to an environment far removed from the United States of the present day. The Act was passed with an intense focus on expanding the franchise, specifically to give effect to the plain language of the Fifteenth Amendment. The law permitted previously unprecedented federal interference and oversight into state election practices and was passed to address the most egregious violations of voting rights taking place in America at the time, largely driven by racial prejudice.[52] While seeking to address racial injustice, the VRA is a textbook illustration of the federal focus on expanding voting rights without sufficient regard for the "other" right at the heart of this Essay.

Thus, when federal law attempts to preempt state election law, the judiciary should examine such laws carefully to avoid unduly privileging the first right (franchise) while ignoring the second (protecting ballot integrity). Federal authority with respect to election law in particular should be approached cautiously, and recent cases suggest a new respect for state authority in elections is returning to the judiciary. For example, the Court has signaled that VRA § 5

The district court rejected the argument that HAVA § 302—concerning provisional ballots—creates no private right of action to bring a § 1983 civil rights suit, holding instead that the plaintiffs had standing. *Blackwell*, 339 F. Supp. 2d at 986-87. This part of the district court's holding was affirmed by the Sixth Circuit. *Blackwell*, 387 F.3d at 572-73. In another lawsuit four years later, however, the Supreme Court reviewed a controversy in Ohio concerning HAVA § 303, vacating the Sixth Circuit on a preliminary matter. The Court justified its decision on the ground that it was unlikely that the plaintiffs could establish a right of action if the Court were to call for briefing and argument in the case (which it did not, as the case became moot shortly thereafter). Brunner v. Ohio Republican Party, 129 S. Ct. 5, 6 (2008) (granting stay and vacating temporary restraining order, citing probable lack of standing). Had the Supreme Court considered the *Blackwell* case, perhaps the Court would have dismissed it for lack of standing. Even so, the Court's later holding in the subsequent *Brunner* case at least casts doubt on whether a suit could be brought under § 302, a doubt that cannot be resolved until an appellant properly requests relief under that HAVA provision.

52. *See* South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).

may not survive future constitutional challenges. Specifically, § 5, which requires that states submit their election and districting proposals for federal approval, may be overly intrusive in light of contemporary political realities. In short, the racial hostilities prevalent when the VRA was enacted no longer justify such intrusion.[53] Additionally, an Ohio district court rejected the argument that a statute such as HAVA cannot preempt state law in regulating matters incidental to federal elections[54] based on the Supremacy Clause and upon general rules regarding preemption.[55]

While the Ohio case and the Supreme Court's leanings with respect to the VRA represent a partially restored respect for states' roles in election, they still fail to meet the actual constitutional standard. Unlike cases giving rise to general pronouncements of federal preeminence, the Constitution specifically addresses federal-state interaction vis-à-vis elections. Article I, § 4 specifically 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 . . . ."[56] It is true that the same clause then continues, "but the Congress may at any time by Law make or alter such Regulations . . . ."[57] That a specific constitutional provision exists should require further judicial explication on this issue, given that this clause appears to balance some degree of sovereign autonomy concerning the conduct of elections.[58]

The fact that Congress has constitutional authority to override state policy judgments does not automatically lead to the conclusion that general principles of preemption apply. A clearer rule demarcating the appropriate interaction of the two aforementioned constitutional provisions in the current statutory regime would be helpful. In some contexts, such preemption has only occurred where congressional intent to override state law is clear and unambiguous.[59] Courts must establish a clear rule that upholds the constitutionally established role of states in the administration of elections, attempting to reconcile a state's

53. *NAMUDNO*, 129 S. Ct. 25104, 2510-14 (2009).

54. 339 F. Supp. 2d 975, 989 (N.D. Ohio 2004).

55. *Id.* (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373-74 (2000)).

56. U.S. Const. art. I, § 4, cl. 1.

57. *Id.*

58. *See, e.g.*, Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 568 (6th Cir. 2004) (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)) ("The States long have been primarily responsible for regulating federal, state, and local elections. These regulations have covered a range of issues, from registration requirements to eligibility requirements to ballot requirements to vote-counting requirements.").

59. *Cf.* United States v. Bass, 404 U.S. 336, 349 (1971) (discussing preemption in a criminal law context); Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 275 (1943) (highlighting preemption concerns in refusing to strike down a state regulation affecting the award of government contracts).

goal in conducting free and fair elections with meeting the demands of federal regulation, especially when those federal demands give too little weight to the right to ballot box integrity.

V. Additional Measures Necessary To Avoid Dilution of Legal Votes

Although it is beyond the scope of this Essay, applications of these voting rights principles should affect how the decennial census is conducted. The central role that the census plays in determining political representation inextricably links it to voting rights. The Constitution requires a national census to be conducted once per decade,[60] and this mandate serves as the basis for apportioning seats in the U.S. House of Representatives.[61] For each state, the number of people in each constituent congressional district must be precisely equal.[62] This directive holds true for state legislative seats as well, except that some degree of variation in district population is constitutionally acceptable.[63] Given that the census in part apportions political representation and that the State may exclude aliens from the formal political community,[64] it seems relevant for census forms to ask whether a person being counted is an alien, especially an illegal alien.[65]

At this point, it is essential to distinguish census counts for purposes of political representation from population counts for federal funding or other nonrepresentational functions. Note, for example, that Native Americans not sub-

60. U.S. Const. art. I, § 2, cl. 3.

61. *Id.*

62. Karcher v. Daggett, 462 U.S. 725, 733-34 (1983); Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969).

63. *See* Mahan v. Howell, 410 U.S. 315, 320-25 (1973); *see also* Reynolds v. Sims, 377 U.S. 533, 579 (1964) (noting that the overriding objective of the state in creating districts "must be substantial equality of population"). This state-level requirement exists despite the fact that requiring state senate districts be drawn in the same manner as state house districts seems inconsistent with a number of principles regarding the different purposes that senates serve.

64. *See* Sugarman v. Dougall, 413 U.S. 634, 642 (1973).

65. The relevance of whether an alien is present legally in the country stems from considering the policy judgments of Congress. The Constitution vests Congress with plenary authority over immigration and naturalization. *See* U.S. Const. art. I, § 8, cl. 4. If an alien is a legal resident, then, at a minimum, Congress has officially welcomed that person into this country. Insofar as federal aid and entitlements are impacted by population, then counting a legal alien gives effect to recognizing Congress's right to bring noncitizens into the country. But an illegal alien may be excluded from the national community and should, as a normative matter, have no claim to political representation or government largesse. *But see* Plyer v. Doe, 457 U.S. 202, 224-26 (1982) (5-4 decision) (holding that denying the children of illegal aliens a public school education violates the Equal Protection Clause).

ject to taxation are expressly excluded from the U.S. census for purposes of congressional representation.[66] And the Court has noticed that the Framers of the Fourteenth Amendment intended that congressional redistricting should not take account of convicted felons who could not vote.[67] This limitation emphasizes a focus on counting members of the electorate, not imposing additional penalties for past crimes. A logical extension of that rationale would exclude aliens or, at least illegal aliens, in counts used for redistricting and reapportionment of state and federal legislative districts.

Conclusion

The issue of voting rights has reached a new turning point in United States history. After decades of efforts to expand the franchise and ensure that voters have an opportunity to cast ballots, legislatures and the courts are poised to refocus on the concomitant right not to have a legal vote diluted or cancelled by illegitimate ballots. This second right, advanced by measures to protect the integrity of the ballot box and build public confidence in the electoral system, works with the franchise to realize the best principles underlying the American experiment in popular government that gives life to our democratic republic.

Executive officials hold their offices to serve the American people and faithfully perform their duties. In the arena of elections those duties are performed at the state level, by a secretary of state and others accountable for implementing the Secretary's plan for conducting elections. Secretaries of state aim to ensure that the voting process is accessible to voters and also work to secure the ballot box by combating fraud and waste. Elections must be conducted in an orderly fashion; systems that recognize reasonable burdens on the franchise are perfectly acceptable. For voting is a duty, and the citizen wishing to participate should also be willing to satisfy reasonable criteria to guarantee a free and fair election that validly reflects the choice of the electorate.

66. *See* U.S. Const. amend. XIV, § 2.

67. Richardson v. Ramirez, 418 U.S. 24, 45-46 (1974).