

# CONSTRUCTING THE RIGHT TO VOTE

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*The right to vote is foundational to our democracy, but it lacks a strong foundation. Voting rights litigants are constantly on their heels, forever responding to state-imposed impediments. In this regard, the right to vote is decidedly reactive: directed and defined by those seeking to limit the right, rather than by those who advocate for it. As a consequence, the right to vote is both deeply fragile and largely impersonal. It is fragile because voters must reckon with flimsy electoral bureaucracies that are susceptible to meltdown from both intentional efforts to limit the franchise and systemic strain. The right to vote is impersonal because, with few exceptions, it is shaped through litigation, rather than comprehensive consideration of voters' circumstances and needs.*

*To address these weaknesses, this Article champions the idea that a robust right to vote must be constructed. Unlike most other rights, the right to vote relies on governments to build, fund, and administer elections systems. This obligation is not ancillary to the right to vote; it is foundational to it. Drawing from state constitutional law, electoral management theory, federalism scholarship, and rarely examined consent decrees, we argue that a constructed right to vote incorporates three essential features: electoral adequacy (including the right to adequate funding of elections, the right to competent management, and the right to democratic structures), voting rights legislation tailored to individuals' experiences, and voting rights doctrines that require states to build their elections systems in rights-promoting ways.*

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## INTRODUCTION

*“Quarreling must lead to disorder, and disorder exhaustion.”*

—Xunzi, c. 250 BC<sup>1</sup>

*“Your vote is precious, almost sacred.”*

—Rep. John Lewis, 2012<sup>2</sup>

The right to vote is foundational to our democracy, but it lacks a strong foundation. It is the core of democratic governance,<sup>3</sup> the fulcrum on which other rights rest,<sup>4</sup> and the paradigmatic form of civic participation.<sup>5</sup> But it is also a definitionally slippery right,<sup>6</sup> an often-unexercised entitlement,<sup>7</sup> and the target of an unrelenting barrage of

<sup>1</sup> XUNZI, XUNZI: BASIC WRITINGS 38 (Colum. Univ. Press 2003).

<sup>2</sup> *Rep. John Lewis: ‘Your Vote Is Precious, Almost Sacred,’* PBS (Sept. 6, 2012 6:02 AM), <https://www.pbs.org/newshour/show/rep-john-lewis-your-vote-is-precious-almost-sacred>.

<sup>3</sup> See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”); HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* 235 (1967) (“We would be reluctant to consider any system a representative government unless it held regular elections, which were ‘genuine’ or ‘free.’”).

<sup>4</sup> See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (identifying the right to vote “as a fundamental political right, because preservative of all rights”).

<sup>5</sup> See SIDNEY VERBA, KAY LEHMAN SCHLOZMAN, HENRY E. BRADY, *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 23 (1995) (“Because casting a ballot is, by far, the most common act of citizenship in any democracy and because electoral returns are decisive in determining who shall govern, political scientists appropriately devote a great deal of attention to the vote.”); see also Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 *IND. L.J.* 1289, 1333–36 (2011) (summarizing defenses of the right to vote premised on human dignity and political equality).

<sup>6</sup> See Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 *TEX. L. REV.* 1705, 1720 (1993) (“The Supreme Court’s failure to acknowledge that its cases reflect more than one ‘right to vote’ creates both a danger of doctrinal chaos at the Supreme Court level and a risk of doctrinal manipulation by the lower courts.”).

<sup>7</sup> See Zoltan Hajnal & Jessica Trounstein, *Where Turnout Matters: The Consequences of Uneven Turnout in City Politics*, 67 *J. POL.* 515, 515 (2005) (“At best roughly half of eligible voters vote in national contests. At worst, fewer than 10% of adults vote in local elections.”).

attacks.<sup>8</sup> Consequently, the bounds of the right are ever-changing, expanding and contracting as circumstance dictates.

This instability is unfortunate. One might think, given its importance, the right to vote would be universally protected, both rhetorically championed and immunized from partisan squabbles. In fact, history reveals the opposite: The right to vote is and always has been contested, delimited, and subject to retrenchment.<sup>9</sup>

What is underappreciated, though, is how opponents of the right to vote have been the ones to dictate the terms of contestation. Election law doctrines and voting rights laws are commonly shaped by those seeking to deny the vote. Efforts to hamper the right to vote far exceed efforts to outline its essential components. Voting rights litigants are constantly on their heels, forever responding to state-imposed impediments. In this regard, the right to vote is decidedly *reactive*.

This Article considers the implications of our reactive right to vote and champions the idea that a robust right to vote must be *constructed*. The reactive nature of the right obscures the governmental obligation to build an electoral apparatus. This obligation distinguishes the right to vote from most other constitutional rights.<sup>10</sup> The First Amendment, for example, prevents the government from restricting our speech in some circumstances. But it does not require the government to create spaces within which speech may be exercised. Likewise, the Fourteenth Amendment prevents the government from prohibiting same-sex couples from marrying,<sup>11</sup> but it does not

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<sup>8</sup> See, e.g., Gabby Birenbaum, *State GOPs Have Already Introduced Dozens of Bills Restricting Voting Access in 2021*, Vox (Jan. 29, 2021), <https://www.vox.com/22254482/republicans-voter-suppression-state-legislatures>; Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 232 (2018) (“From voter ID bills to registration restrictions, from cutbacks in early voting to purging of registration lists, measures making it harder to vote were adopted by approximately two dozen states in less than eight years.”).

<sup>9</sup> The most comprehensive exploration of this point is ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES*, at xxiii (Perseus rev. ed. 2009) (“The history of suffrage in the United States is a history of both expansion and contraction, of inclusion and exclusion, of shifts in direction and momentum at different places and at different times.”).

<sup>10</sup> Stephen Holmes and Cass Sunstein, by contrast, observe governmental obligation in *all* rights. STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 48 (1999) (“The financing of basic rights through tax revenues helps us see clearly that rights are public goods: taxpayer-funded and government-managed social services designed to improve collective and individual well-being. All rights are positive rights.”).

<sup>11</sup> See *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that the fundamental right to marry includes same-sex couples under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment).

require the government to create a system of marriage in the first place. The right to vote is different. It simply does not exist unless governments affirmatively administer elections.<sup>12</sup> This obligation is not ancillary to the right to vote; it is foundational to it.

It is curious that this unique feature of the right to vote is largely ignored in scholarship.<sup>13</sup> Instead, two overarching questions predominate within the field, neither of which squarely pertains to these topics. First, scholars have long debated whether courts, in resolving election law disputes, should adhere to an individual-rights framework or, alternatively, privilege structural values that take account of the democratic system writ large.<sup>14</sup> Second, scholars disagree over what form remedial efforts should take. While some believe a universalist approach (i.e., an approach that is not expressly designed to protect minority voters) is prudent, others believe the specific challenges of minority disenfranchisement demand targeted responses.<sup>15</sup> This debate, which is centered around Congress and the

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<sup>12</sup> Moreover, unlike other government functions, voting has no private-market substitute. The government is the *only* potential provider of the right to vote if we are to have a republican form of government. Thanks to Justin Levitt for this point.

<sup>13</sup> There are three exceptions to this: Pamela S. Karlan, *The Reconstruction of Voting Rights*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS 34, 37–42 (Guy-Uriel E. Charles, Heather K. Gerkin & Michael S. Kang eds., 2011), Joseph Fishkin, *Voting as a Positive Right: A Reply to Flanders*, 28 ALASKA L. REV. 29, 33 (2011) (“The entire enterprise of voting requires positive action by the state. This is because voting is, inescapably, a positive right.”), and HOLMES & SUNSTEIN, *supra* note 10, at 53 (“Practically speaking, the government ‘enfranchises’ citizens by providing the legal facilities, such as polling stations, without which they could not exercise their rights. The right to vote is meaningless if polling place officials fail to show up for work.”). The latter two sources make the point without expanding on it. Professor Karlan’s essay argues for an affirmative conception of the right to vote rooted in “the structure and relationship of constitutional provisions.” Karlan, *supra*, at 42. Our emphasis is quite different.

<sup>14</sup> See Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 295–98 (2014) (summarizing the debate). Well-known defenses of the continued use of an individual-rights framework include RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *Baker v. Carr* to *Bush v. Gore* 138–56 (2003) and Nathaniel Persily, *The Search for Comprehensive Descriptions and Prescriptions in Election Law*, 35 CONN. L. REV. 1509, 1515–17 (2003). Prominent structuralist arguments include Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 645 (1998), Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1218 (1999), and Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 644 (2008).

<sup>15</sup> Compare Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741, 762 (2006) (“The most effective way of providing legal protection for voting rights, including minority voting rights, might increasingly be less through an anti-discrimination vision than through a vision focused directly on the substantive right to vote itself.”), and Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Slouching Toward Universality: A Brief History of Race, Voting, and Political Participation*, 62 HOW. L.J. 809, 853 (2019) (“On instrumental grounds, as we

need for legislative action,<sup>16</sup> occurs at a high level of abstraction that often fails to engage with practical election administration issues confronting states and localities.<sup>17</sup> In sum, even sophisticated academic exchanges fail to consider the reactive nature and baseline components of the right to vote. We aim to transcend this inertial thinking.

This Article, therefore, develops the idea that our reactive right to vote is not simply a byproduct of a constitutional order in which negative, as opposed to positive, rights prevail.<sup>18</sup> It is instead an understanding that stifles our ability to conceptualize and develop a robust voting regime. And this understanding renders the right to vote both deeply fragile and largely impersonal.

The right to vote is fragile because its foundation is unsteady. Because most election-related litigation and federal legislation arises in reaction to state and local attempts to restrict the franchise, the core regulatory and financial attributes of our elections systems are rarely assessed. As a consequence, election administration is often haphazard, lacking in standards, and underfunded. The COVID-19 global pandemic has revealed that the systems designed to deliver our essential goods and services are more delicate than we thought.<sup>19</sup> Our

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search for a path forward from the voting rights, racialized model, we might find the only available path is one in which we view voting and political participation as a positive and universal right.”), with Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 *YALE L.J.* 2838, 2873 (2014) (“I believe the tactical arguments for the universalist position are likely overblown.”).

<sup>16</sup> See, e.g., Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 *HARV. L. REV.* 95, 121–23 (2013); Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 *IOWA L. REV.* 1389, 1434 (2015) (“With voting rights policy at a crossroads, this is precisely where Congressional leadership is crucial. Congress is the more competent decision maker because of its ability to engage in systematic empirical or policy analysis.”); Bagenstos, *supra* note 15, at 2875 (“The proposed Voting Rights Act Amendments, introduced in response to *Shelby County*, combine universalistic rules (such as requiring disclosure of voting changes) with a continued use of a race-targeted preclearance regime.”); Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 *B.U. L. REV.* 317 (2019).

<sup>17</sup> See *infra* Part III (discussing such practical election administration issues).

<sup>18</sup> See, e.g., *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (“The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state governments, not to secure them basic governmental services.”).

<sup>19</sup> See, e.g., *Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty*, *N.Y. TIMES* (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html> (“[F]ive of 180 polling sites remained open . . .”); Michael Pollan, *The Sickness in Our Food Supply*, *N.Y. REV. BOOKS* (June 11, 2020), <https://www.nybooks.com/articles/2020/06/11/covid-19-sickness-food-supply> (“For our society, the Covid-19 pandemic represents an ebb tide of historic proportions, one that is laying bare vulnerabilities and inequities that in normal times have gone undiscovered.”); Siddhartha Mukherjee, *What the Coronavirus Reveals About American Medicine*, *NEW YORKER* (Apr. 27, 2020), <https://www.newyorker.com/magazine/2020/05/04/what-the->

elections systems are no exception. In addition, intentional resistance to the franchise continually takes new forms, causing confusion and undermining voters' reliance interests. These novel efforts at vote denial, in turn, place constant pressure on election law doctrines.<sup>20</sup>

The right to vote is impersonal in that, with a few exceptions,<sup>21</sup> it is agnostic about individual voters' circumstances. That is, voters are treated similarly regardless of the relative ease or difficulty they might experience in registering to vote and casting a ballot. Because the right is reactive, it develops around attempts to disenfranchise while ignoring the particular needs of various populations. While no system of voting with a significant number of participants will be able to accommodate the idiosyncrasies of each individual voter, our system too often treats voters as monolithic, failing to appreciate meaningful group-based differences that affect the voting experience.<sup>22</sup>

Given the fragility and impersonal nature of our current systems, what would it take to construct a robust right to vote? This Article makes three principal suggestions. The first is ensuring electoral adequacy. The notion of electoral adequacy is that states must provide a minimal or baseline level of voting services. It requires, as put by Joseph Fishkin, "a judge, legislature, or administrative agency [to] make a determination that *this* much, and no more, is required of the state, even though more might help some particular voter cast a ballot."<sup>23</sup> We understand electoral adequacy to consist of three subsidiary components: (1) adequate *funding*, (2) competent *management*, and (3) inclusive *democratic structures*. These components invite more energetic focus on both "institutional political theory"<sup>24</sup> and empirical assessments of the performance of elections systems.<sup>25</sup> The question of adequate election funding has, in particular, received far too little attention. In an effort to gain purchase on the issue, we draw an

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coronavirus-crisis-reveals-about-american-medicine (describing how the COVID-19 pandemic has revealed some hidden fractures in the health care system).

<sup>20</sup> For instance, despite decades of litigation, first-order questions, such as what standard of review applies, remain unsettled in certain contexts. See, e.g., Joshua S. Sellers, *Political Participation, Expressive Association, and Judicial Review*, 69 AM. U. L. REV. 1617, 1623–28 (2020) (highlighting the conflict between First Amendment protections and states' need to regulate the electoral process).

<sup>21</sup> See *infra* notes 178–80 and accompanying text.

<sup>22</sup> See Fishkin, *supra* note 5, at 1351–54 (discussing the various movements designed to protect the right to vote for marginalized citizens).

<sup>23</sup> *Id.* at 1337.

<sup>24</sup> See DENNIS F. THOMPSON, *JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES* viii (2002) (applying institutional political theory to electoral justice).

<sup>25</sup> For work in this vein, see generally *THE MEASURE OF AMERICAN ELECTIONS* (Barry C. Burden & Charles Stewart III eds., 2014); Stephen Ansolabehere & Nathaniel Persily, *Measuring Election System Performance*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 445 (2010).

analogy between adequacy as determined in the educational litigation context and adequacy as it might be defined in the election administration context.

Second, the Article describes how election law legislation can be better tailored to voters' experiences. This tailoring involves understanding the diverse needs and challenges faced by voters when creating election legislation. It also involves understanding the nature of our highly decentralized elections systems and incorporating into legislation mechanisms that account for the many different forms of election administration under which people exercise the vote.

Third, the Article describes how election law doctrines—and particularly remedies—can aid in constructing the right to vote. Consider, for instance, a federal district court judge in South Carolina who recently, in granting plaintiffs' request for an injunction to relieve absentee voters from the obligation of signing their ballots in the presence of a witness, additionally ordered local officials to “immediately and publicly inform South Carolina voters about the elimination of the Witness Requirement for absentee voting,”<sup>26</sup> including “on all relevant websites and social media outlets (i.e., Facebook, Instagram, Twitter, etc.) as appropriate.”<sup>27</sup> Courts have taken other more proactive steps when resolving election litigation, but these steps largely emerge not in the doctrine itself but through the use of consent decrees. We survey these rarely examined consent decrees, categorize the ways in which they take affirmative steps to guarantee the right to vote, and argue that these affirmative actions should be incorporated into the doctrine, not relegated to essentially voluntary remedies.

The Article is organized as follows. Part I details how contemporary voting rights doctrines and federal legislation are reactive. Part II examines the consequences of our reactive right to vote. Part III describes how to construct the right to vote.

## I

### OUR REACTIVE RIGHT TO VOTE

Our focus is on contemporary voting rights doctrines and legislation, and the challenge of refashioning the right to vote as a positive right. Yet, historically, the right to vote has always been driven and defined by underlying resistance to the franchise. One can provide a comprehensive history of American voting simply through anecdotes

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<sup>26</sup> Findings of Fact, Conclusions of Law, and Order and Opinion Granting in Part Motion for Preliminary Injunction at 55, *Thomas v. Andino*, 20-cv-01552 (D.S.C. 2020), <https://electionlawblog.org/wp-content/uploads/SC-Order.pdf>.

<sup>27</sup> *Id.*

about concerted efforts to slow expansion of the electorate. Whether at the Founding,<sup>28</sup> in the years preceding the “First Reconstruction,”<sup>29</sup> or during the subsequent seventy-year backlash,<sup>30</sup> the extent of voter suppression is arresting.

However, our focus is on late twentieth and early twenty-first century developments beginning with the passage of the Voting Rights Act of 1965 (VRA)<sup>31</sup> and the Warren Court’s heightened oversight of the political process.<sup>32</sup> Accordingly, this Part demonstrates that four pillars of the contemporary right to vote—sections 2 and 5 of the VRA, the *Anderson-Burdick* test of whether an election regulation is permissible, and the National Voter Registration Act of 1993 (NVRA)—are all ultimately reactive in nature.

These four pillars have shaped the course of the contemporary right to vote. As detailed below, courts interpreted section 2 of the VRA to require the creation of majority-minority electoral districts, an interpretation that radically altered national politics. More recently, litigants have used section 2 to challenge election laws alleged to have a disparate impact on minority voters. Section 5 of the VRA, prior to its undoing in *Shelby County v. Holder*,<sup>33</sup> prohibited select states and counties from diminishing minority voting rights. The *Anderson-Burdick* test is the primary test for assessing the constitutionality of election regulations. And the NVRA is the most significant modern federal law to expand the size of the electorate.

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<sup>28</sup> ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 58 (1997) (“A variety of . . . colonial laws indicated that the ‘proper’ electorate ought not go much beyond free, white, Protestant adult native, English-born, or naturalized male property owners.”).

<sup>29</sup> KEYSAR, *supra* note 9, at 44 (“By the early nineteenth century, the balance of political power had shifted . . . and the Federalists, as well as two competing groups of Republicans, concluded that it was no longer to their advantage to have all ‘inhabitants’—including women, aliens, and African Americans—in the electorate.”). On the First Reconstruction and the ratification of the Fifteenth Amendment, see ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 109 (2019) (“Like its two predecessors, the Fifteenth Amendment marked a radical change in the political system. It moved the nation into ‘uncharted terrain,’ since voting rights—like the existence of slavery and the rights of citizenship—had always been a matter for the states to determine.”).

<sup>30</sup> See FONER, *supra* note 29, at 165 (“There cannot have been many instances in which millions of persons who enjoyed the right to vote suddenly had it taken away.”); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 63 (2004) (“For those living through the Progressive Era, racial attitudes and practices seemed to have reached a post-Civil War nadir. Conditions were worse, not better, than during the *Plessy* period.”).

<sup>31</sup> 52 U.S.C. § 10301.

<sup>32</sup> See Pamela S. Karlan, *Forward: Democracy and Disdain*, 126 HARV. L. REV. 1, 16–27 (2012).

<sup>33</sup> 570 U.S. 529 (2013).



In three of these contexts, Congress did exactly what it often does: It noticed a problem and crafted a solution. We do not fault Congress for acting in this way. The point we are making is that the trajectory of the right to vote ends up being defined by specific problems that arise, rather than by fundamental principles or aspirations. The right therefore appears at the margins of the voting process, where resistance exists, rather than at its core.

### A. Section 2

Section 2 of the Voting Rights Act of 1965 (VRA) forbids any “standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”<sup>34</sup> A cornerstone of the VRA, both the text and judicial interpretations of section 2 have evolved in reaction to recurrent attempts to bar or weaken the value of minority citizens’ votes. Three episodes in section 2’s history illustrate the dynamic.

First, the provision’s inception. As originally enacted, section 2 was a direct response to a litany of racially exclusionary practices used to quash Black political participation. Prior to its enactment, whether through the discriminatory enforcement of poll taxes,<sup>35</sup> literacy tests,<sup>36</sup> or through formally and informally sanctioned violence,<sup>37</sup> state officials severely curtailed Black Americans’ access to the ballot. The VRA was crafted to expressly respond to these exclusionary practices,<sup>38</sup> with section 2 designed, at long last, to effectuate the Fifteenth Amendment.<sup>39</sup> In this regard, section 2 was textually reactive to the preceding century’s most conspicuous impediments to voting equality.

The second episode in section 2’s history involved legislative and judicial reactions to widespread minority vote dilution. The hub of this episode is the Supreme Court’s 1986 decision, *Thornburg v. Gingles*.<sup>40</sup> As background, following the enactment of the VRA and the resulting spike in Black voter registration, many jurisdictions sought

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<sup>34</sup> 52 U.S.C. § 10301(a).

<sup>35</sup> See J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 63–72 (1974) (discussing the historical use of poll taxes).

<sup>36</sup> See KEYSSAR, *supra* note 9, at 89 (discussing the historical use of literacy tests).

<sup>37</sup> See KLARMAN, *supra* note 30, at 426 (explaining how “[s]outhern politicians fomented violence by explicitly encouraging it, by predicting it, and by using extremist rhetoric that inspired it”).

<sup>38</sup> See Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 17–21* (Bernard Grofman & Chandler Davidson eds., 1992) (examining the history of the Voting Rights Act of 1965).

<sup>39</sup> *Id.* at 17.

<sup>40</sup> 478 U.S. 30 (1986).

to “dilute” Blacks’ votes.<sup>41</sup> Specifically, they altered electoral structures such that Black voters, even when voting as a bloc, would be unlikely to elect preferred candidates.<sup>42</sup> Congress prohibited this tactic by amending section 2 in 1982.<sup>43</sup> *Gingles*, which involved a vote dilution challenge to several multimember electoral districts in North Carolina, was the Court’s first opportunity to interpret the amended section 2. Writing for a unanimous Court, Justice Brennan “endeavored to condense earlier vote dilution precedents and the VRA’s legislative history into a workable framework.”<sup>44</sup> The resulting approach involves a three-part test,<sup>45</sup> coupled by an inquiry into the “totality of the circumstances”<sup>46</sup> that identifies when electoral structures must be modified so that minority voters<sup>47</sup> are afforded a meaningful opportunity to participate in politics and “elect representatives of their choice.”<sup>48</sup>

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<sup>41</sup> See Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 184 (1989) (“Starting in 1966, in the wake of the massive influx of black voters brought about by the Act’s registration machinery, jurisdiction after jurisdiction adopted measures designed to minimize the impact of the increased black vote.”). For a concise summary of minority vote dilution, see Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671–73 (2001).

<sup>42</sup> See RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 200 (2004) (noting that several states “shifted to at-large voting for local assemblies, required run-off voting between the two top vote-getters, sought to annex areas with largely white populations, changed the responsibilities . . . of elective offices . . . [,] redrew district lines, and sought to have legislative districts with artificially large white majorities by means of multimember districting”).

<sup>43</sup> The 1982 amendments are a critical juncture in the history of section 2. Congress amended the provision to resolve that section 2 plaintiffs need not prove discriminatory intent. See generally Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983). This clarification was necessary following the Supreme Court’s decision in *City of Mobile v. Bolden*, 446 U.S. 55, 60–62 (1980) (holding that section 2 is indistinguishable from the Fifteenth Amendment and that, accordingly, section 2 plaintiffs must establish discriminatory intent).

<sup>44</sup> Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM L. REV. 1515, 1536 (2019).

<sup>45</sup> The three-part test asks minority plaintiffs whether: (1) they are of sufficient size such that they could constitute a majority in a single-member district, (2) are politically cohesive, and (3) are generally precluded from electing preferred candidates because of white voter solidarity. *Thornburg v. Gingles*, 478 U.S. 30, 49–51 (1986).

<sup>46</sup> The inquiry into the totality of the circumstances derives from factors contained in a Senate Report that accompanied the 1982 amendment process. S. REP. NO. 97-417, at 27–28; *Gingles*, 478 U.S. at 36–37.

<sup>47</sup> The VRA was amended in 1975 to cover “language minority groups,” including American Indians, Asian Americans, Alaskan Natives, and those with Spanish heritage. 52 U.S.C. § 10310(c)(3); Davidson, *supra* note 38, at 34–37 (discussing the VRA’s extension to cover language minorities).

<sup>48</sup> *Gingles*, 478 U.S. at 63.

*Gingles* thus instructed lower courts, when remedying instances of vote dilution, to replace dilutive electoral structures with single-member electoral districts in which minorities will find political success.<sup>49</sup> Termed “safe-districting,” this “approach to ensuring effective representation under the VRA had been developing for years, but *Gingles* consecrated it.”<sup>50</sup> The upshot was a massive increase in minority officeholding.<sup>51</sup>

The third episode demonstrating section 2’s reactive nature is the introduction of a nascent section 2 vote-denial doctrine. Section 2 is principally a tool to combat vote dilution; historically, it was rarely invoked in cases alleging outright vote denial.<sup>52</sup> But times have changed. The combination of the Supreme Court’s 2013 decision in *Shelby County v. Holder*<sup>53</sup>—which relieved select states from ex-ante federal oversight of any voting-related changes (“preclearance”)<sup>54</sup>—and a wave of new state laws limiting the franchise, has produced “the most systematic retrenchment of the right to vote since the Civil Rights Era.”<sup>55</sup> These laws include limitations on early voting, limitations on voter registration, and burdensome voter identification

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<sup>49</sup> See Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1326–27 (2016) (“Groups that are geographically compact (that is, segregated) and different from the white majority in their voting preferences (that is, polarized) must be able to elect the candidates of their choice. But groups that are spatially integrated or electorally indistinct have no such entitlement.”).

<sup>50</sup> Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1364 (1995) (book review).

<sup>51</sup> See Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations* (“Action by the Justice Department, as well as by private litigants (particularly in the 1980s, when civil rights and minority groups made use of the newly amended provisions of section 2 of the Voting Rights Act), accounts for most of the growth in black legislative representation in the South.”), in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, at 335, 339–40 (Chandler Davidson & Bernard Grofman eds., 1994).

<sup>52</sup> See SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 871 (5th ed. 2016) (“Section 2 had rarely been applied to access-to-the-ballot box issues. By the time the results test was created, there was little litigation over such issues.”).

<sup>53</sup> 570 U.S. 529 (2013).

<sup>54</sup> See *infra* Section I.B.

<sup>55</sup> Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1578 (2019); see also Joshua S. Sellers, *Shelby County as a Sanction for States’ Rights in Elections*, 34 ST. LOUIS UNIV. PUB. L. REV. 367, 367 (2015) (stating that *Shelby County* “dismantled the nation’s long-established voting rights enforcement regime and, in turn, engendered a plethora of controversial state and local voting laws regarding voter identification, voter registration, and voter access that have resulted in racial and ethnic voter discrimination”).

requirements.<sup>56</sup> Consequently, litigants have increasingly relied on section 2 in vote-denial disputes.<sup>57</sup>

This reliance is a reactive strategy. Writing in the early years of section 2 vote-denial litigation, a prominent voting rights litigator forewarned of the practical challenges associated with heavy reliance on section 2, including “the burden of proof, the cost of litigation, and the pace of litigation.”<sup>58</sup> These factors not only make section 2 an inadequate substitute for the now defunct preclearance regime, they all but assure that many voting restrictions will go unchallenged.<sup>59</sup>

With no affirmative conception of the right to vote at hand, voting rights litigants hope to establish that whatever voting restriction they are challenging fails under the terms of section 2’s vote denial doctrine.<sup>60</sup> The provision is therefore employed in opposition to a diverse array of state laws, with little to unite them aside from the arguable disadvantage they impose on minority voters.<sup>61</sup>

Section 2 is thus a reactive provision, primarily shaped by those seeking to bar or circumscribe voting rights. That was true at its inception, it was true as vote-dilution doctrine developed, and it is true

<sup>56</sup> See *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder>.

<sup>57</sup> See Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 766 (2016) (citing *Shelby County* and “increased partisan polarization” as causes for the increase in section 2 vote-denial cases); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 448 (2015) (“Section 2 vote denial claims have become more prominent since the *Shelby County* decision, which effectively ended section 5 preclearance. That decision caused voting rights plaintiffs, including the U.S. Department of Justice, to turn to section 2 to stop practices believed to have a disparate impact on minority voters.”).

In July, 2021, just prior to this Article’s publication, the Supreme Court decided *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), a decision interpreting section 2 of the Voting Rights Act in the vote denial context. The majority opinion in *Brnovich* will likely make it harder for plaintiffs to bring successful section 2 vote-denial claims, though the contours of the change will become clearer in the coming years.

<sup>58</sup> Dale E. Ho, *Voting Rights Litigation After Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 675, 681 (2014).

<sup>59</sup> Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 57–58 (2014) (detailing why section 2 is an inadequate substitute for the preclearance regime).

<sup>60</sup> Again, these terms are now much less plaintiff-friendly following *Brnovich*. 141 S. Ct. 2321.

<sup>61</sup> See, e.g., *Feldman v. Ariz. Sec’y of State’s Off.*, 843 F.3d 366 (9th Cir. 2016) (en banc); *Veasey v. Abbott*, 830 F.3d 216, 225–27 (5th Cir. 2016) (en banc); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); see also Michael J. Pitts, *Rethinking Section 2 Vote Denial*, 46 FLA. ST. UNIV. L. REV. 1, 2 (2019). For consideration of what further unites these laws, see generally Joshua S. Sellers, *Politics as Pretext*, 62 How. L.J. 687 (2019).

now, as advocates seek to stretch the doctrine to account for new forms of resistance.

### B. Section 5

Section 5 of the VRA is no longer with us. But from 1965, when it was enacted,<sup>62</sup> to 2013, when it was struck down by the Court,<sup>63</sup> section 5 was transformative.<sup>64</sup>

It was also reactive. In fact, it was designed that way. Section 5 required certain states and local governments—“covered jurisdictions,” defined in section 4(b) of the VRA<sup>65</sup>—to seek approval from either the United States Attorney General or the United States District Court for the District of Columbia before enacting a change to its voting procedures.<sup>66</sup> Those institutions could provide approval so long as the proposed change had neither the “purpose nor . . . the effect of denying or abridging the right to vote on account of race or color.”<sup>67</sup> The covered jurisdictions were largely Southern states and localities, which had been targeted by Congress because of their use of literacy and other tests as prerequisites to voting as well as their low voter registration and turnout numbers.<sup>68</sup>

Resistance to the right to vote during the 1960s was as protean as it was relentless, and it was that protean quality that Congress sought to address through section 5. Here is an example considered by Congress when it passed the VRA. In 1961, Dallas County, Alabama, had approximately equal numbers of White and Black voting-age persons (14,500 and 15,000, respectively), but while 9,195 Whites were registered to vote, only 156 Blacks were registered.<sup>69</sup> The U.S. Department of Justice brought suit and proved race discrimination on the part of the registrars; however, those registrars had resigned by the time of the lawsuit, and the court, finding the new registrars unbiased, did not issue a remedy.<sup>70</sup> Two and a half years later, the

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<sup>62</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

<sup>63</sup> See *Shelby Cnty. v. Holder*, 570 U.S. 529, 530 (2013) (disabling section 5 by holding that section 4(b)—the provision that defined which jurisdictions were subject to section 5’s requirements—was unconstitutional).

<sup>64</sup> See Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1710–12 (2004) (chronicling the major initial successes of the VRA).

<sup>65</sup> See 52 U.S.C. § 10303(b) (setting out the tests used to define the set of jurisdictions covered under section 5).

<sup>66</sup> 52 U.S.C. § 10304(a).

<sup>67</sup> *Id.*

<sup>68</sup> See 52 U.S.C. § 10303(b)–(c).

<sup>69</sup> H.R. REP. NO. 89-439 (1965), as reprinted in 1965 U.S.C.C.A.N. 2437, 2441.

<sup>70</sup> *Id.* at 2442.

Department of Justice found evidence that those new registrars were in fact discriminating on the basis of race.<sup>71</sup>

In 1964, the county instituted a difficult literacy test that required registration applicants to spell and define words like “emolument,” “impeachment,” “apportionment,” and “despotism.” Because the majority of Whites were already registered, and because almost no Blacks were registered, that test served to perpetuate the discriminatory registration scheme.<sup>72</sup> The Department of Justice sued again, and in 1965, four years after the initial suit, the court enjoined the literacy test.<sup>73</sup> In considering this story, the House Judiciary Committee concluded:

The problem on a national scale is that the difficulties experienced in suits in Dallas County have been encountered over and over again under existing voting laws. Four years is too long. The burden is too heavy—the wrong to our citizens is too serious—the damage to our national conscience is too great not to adopt more effective measures than exist today. Such is the essential justification for the pending bill.<sup>74</sup>

These kinds of disenfranchisements were common in the South and frustrated existing voting rights legislation. The report of the Senate Judiciary Committee, prepared for Congress as it considered the need for the VRA, determined that existing voting laws were inadequate because of “both the intransigence of local officials and dilatory tactics, two factors which have largely neutralized years of litigating effort by the Department of Justice.”<sup>75</sup> The report cited the former Assistant Attorney General in charge of the Civil Rights Division as stating that when the desire to keep Black voter registration “to a minimum is strong, and the routine of determining whose applications are acceptable is within the discretion of local officials, the latitude for discrimination is almost endless. The practices that can be used are virtually infinite.”<sup>76</sup> As Justice Ginsburg stated in dissent

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<sup>71</sup> *Id.*

<sup>72</sup> *See id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> S. REP. NO. 89-162 (1965), as reprinted in 1965 U.S.C.C.A.N. 2508, 2544–45.

<sup>76</sup> *Id.* at 2545. The 1965 congressional record is full of similar sentiments. *See, e.g.*, 111 CONG. REC. 8,366 (1965) (statement of Sen. Tydings) (emphasizing the importance of “an approach which will provide an expeditious administrative remedy in place of the delays and frustrations of civil litigation”); 111 CONG. REC. 8,364 (1965) (statement of Sen. Javits) (“Under the existing Federal law, litigation must be conducted again and again and in county after county. Long and tedious preparation, court delays, and the possibility of recurrent evasions of even the court orders beset the Department of Justice in every case.”); H.R. REP. NO. 89-439 (1965), as reprinted in 1965 U.S.C.C.A.N. 2437, 2441 (“Progress has been painfully slow, in part because of the intransigence of State and local

in *Shelby County v. Holder*, early efforts to manage vote discrimination on the basis of race “resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place. This Court repeatedly encountered the remarkable ‘variety and persistence’ of laws disenfranchising minority citizens.”<sup>77</sup>

By requiring jurisdictions to get approval from the federal government before making changes to their voting systems, section 5 effectuated Congress’s desire for a law that efficiently reacted to and addressed resistance to the right to vote on the basis of race. Its enactment was, unquestionably, monumental. But its structure, particularly its application to only some uniquely problematic jurisdictions, reflects its reactivity.

### C. Anderson-Burdick

Our electoral system is highly decentralized. This feature is in large part by design and reflects the decision by the Framers to afford states principal authority over elections.<sup>78</sup> As a result, laws and regulations governing the political process differ markedly from place to place.<sup>79</sup> In addition, election administration has become more complex as fights over issues as diverse as ballot design, the number of available early voting days, and the technological security of voting machines have increased in salience.<sup>80</sup>

The simple volume of election regulations presents a problem for reviewing courts. On the one hand, the Supreme Court held decades ago that the right to vote is fundamental.<sup>81</sup> Under conventional constitutional analysis, fundamental rights are evaluated under strict scru-

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officials and repeated delays in the judicial process . . . [which] affords those who are determined to resist plentiful opportunity to resist. Indeed, even after apparent defeat resisters seek new ways and means of discriminating.”)

<sup>77</sup> *Shelby Cnty. v. Holder*, 570 U.S. 529, 560 (2013) (Ginsburg, J., dissenting) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 311 (1966)).

<sup>78</sup> See U.S. CONST. art. I, § 2; *id.* § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

<sup>79</sup> Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 752–53 (2016) [hereinafter Weinstein-Tull, *Election Law Federalism*] (“[E]ach state’s election laws are different; states apportion election administration responsibility between . . . officials and local governments in different ways. Elections are . . . hyperfederalized not only because states push election decisions down to the local level, but because the quality of decentralization, including legal relationships between counties and states, varies by state.”).

<sup>80</sup> See *infra* Section II.A.

<sup>81</sup> *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666–67 (1966).

tiny.<sup>82</sup> Yet the quantity and necessity of electoral regulations militate against evaluating every regulation so scrupulously. As explained by the Court, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”<sup>83</sup>

For this reason, the Court, over time, has developed an election-law-specific form of judicial review now commonly referred to as “*Anderson-Burdick*,” a shorthand for the two cases from which it derives: *Anderson v. Celebrezze*<sup>84</sup> and *Burdick v. Takushi*.<sup>85</sup> *Anderson-Burdick* review subjects “severe” restrictions on First and Fourteenth Amendment rights to strict scrutiny.<sup>86</sup> By contrast, “even-handed”<sup>87</sup> restrictions that “protect the integrity and reliability of the electoral process”<sup>88</sup> are subject to a lesser form of review.<sup>89</sup> That review requires courts to balance the “character and magnitude of the asserted injury”<sup>90</sup> against “the precise interests put forward by the State as justifications for the burden imposed by its rule.”<sup>91</sup> Conventional wisdom holds that *Anderson-Burdick* balancing is highly favorable to the government.<sup>92</sup>

Like the two preceding examples, *Anderson-Burdick* is reactive by design. It was born out of the Court’s realization that probing judicial review over every electoral regulation is impractical. It is unsurprising, then, that the Court has characterized judicial review over electoral regulations as involving a “flexible standard.”<sup>93</sup> As with sec-

<sup>82</sup> See *Korematsu v. United States*, 323 U.S. 214, 216 (1944). *But see* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 227 (2006) (claiming that laws abridging access to fundamental rights do not always receive strict judicial scrutiny).

<sup>83</sup> *Storer v. Brown*, 415 U.S. 724, 730 (1974).

<sup>84</sup> 460 U.S. 780 (1983).

<sup>85</sup> 504 U.S. 428 (1992).

<sup>86</sup> *Id.* at 434.

<sup>87</sup> *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189–90 (2008) (quoting *Anderson*, 460 U.S. at 788 n.9).

<sup>88</sup> *Id.*

<sup>89</sup> See Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 318 (2007) (providing a working heuristic for the Court’s review of different voting regulations).

<sup>90</sup> *Anderson*, 460 U.S. at 789.

<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 Nw. U. L. REV. 655, 661 (2017) (“On the voting side, the Court has downplayed the burdens that regulations impose, cast the government’s regulatory interests in broad terms, and placed the onus squarely on plaintiffs to establish that a regulation’s burdens outweigh its benefits.”).

<sup>93</sup> *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); see also Nicholas O. Stephanopoulos, *Election Litigation in the Time of the Pandemic*, U. CHI. L. REV. ONLINE (June 26, 2020), <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-stephanopoulos> (characterizing



tion 2 of the VRA, however, this flexibility affirms nothing concrete for voters, whose “right to participate takes for granted the general contours of existing electoral arrangements.”<sup>94</sup>

A revealing example concerns voter registration deadlines. These deadlines vary greatly from state to state,<sup>95</sup> with most states requiring voters to register “three to four weeks before a general election.”<sup>96</sup> Although the variance between states’ registration deadlines is wide—Vermont permits voters to register on voting day, Pennsylvania requires voters to register no later than fifteen days before an election, whereas Florida’s deadline is twenty-nine days before an election<sup>97</sup>—these mandates typically survive when challenged under *Anderson-Burdick*.<sup>98</sup> While states are not entirely unbounded,<sup>99</sup> the latitude and significant discretion they are afforded over voter registration demonstrates the way in which the right to vote is unmoored from a settled baseline.

#### D. *The National Voter Registration Act*

In the 1980s and early 1990s, voting rights advocates and prominent members of Congress became concerned about low voter turnout<sup>100</sup> and sought to eliminate barriers to voter registration, especially those faced by racial minorities and low-income voters. To that end, Congress enacted the NVRA.<sup>101</sup> The NVRA expanded voter registration by requiring states to offer registration opportunities at public assistance, motor vehicle, disability services, and military

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*Anderson-Burdick* as “impressively flexible,” as revealed through election-related litigation arising from COVID-19).

<sup>94</sup> Karlan, *supra* note 6, at 1712.

<sup>95</sup> Eugene D. Mazo, *Residency and Democracy: Durational Residency Requirements from the Framers to the Present*, 43 FLA. ST. U. L. REV. 611, 645–48 (2016) (chronicling a portion of the varying state regulations).

<sup>96</sup> *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 122 (D. Conn. 2005).

<sup>97</sup> *Voter Registration Deadlines*, NAT’L CONF. OF STATE LEGISLATURES (Oct. 20, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx>.

<sup>98</sup> See, e.g., *Ariz. Democratic Party v. Reagan*, No. CV-16-03618-PHX-SPL, 2016 WL 6523427, at \*10 (D. Ariz. Nov. 3, 2016) (holding that would-be voters who missed the registration deadline are without relief); *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1340 (S.D. Fla. 2008).

<sup>99</sup> See *Dunn v. Blumstein*, 405 U.S. 330 (1972) (finding Tennessee’s one-year residency requirement for voting in state elections unconstitutional).

<sup>100</sup> See, e.g., *Leagues Cites Best, Worst States For Voter Registration*, ASSOCIATED PRESS, Sept. 14, 1992 (“More than a dozen states have voter registration systems that keep people out of the election process, the League of Women Voters said . . . [t]he league supports the National Voter Registration Act, which would streamline voting procedures.”).

<sup>101</sup> 52 U.S.C. §§ 20501–20511. The first effort to enact the NVRA—the National Voter Registration Act of 1992—was vetoed by President George H.W. Bush. S. Doc. No. 102–23, at 1–2 (1992), <https://www.senate.gov/legislative/vetoes/messages/BushGHW/S250-Sdoc-102-23.pdf>.

recruitment offices.<sup>102</sup> Since its enactment, the NVRA has become an important part of the right to vote.

The NVRA differs from the previous examples in that it requires states to take action, rather than preventing them from adopting certain measures.<sup>103</sup> But like the previous examples, the NVRA is fundamentally reactive: It responds to a narrow set of problems in limited ways.

In the years preceding the NVRA, media reports highlighted the barriers faced by those trying to register to vote. These barriers included insufficient registration locations that required potential voters to travel long distances<sup>104</sup> and limited hours at voter registration sites that were inaccessible to people who worked full-time jobs.<sup>105</sup> These problems were common throughout the country.<sup>106</sup>

Concerns about voter registration barriers dovetailed with falling voter turnout numbers. In the late 1970s and 1980s, turnout numbers in presidential elections had been particularly low. Turnout from the 1976, 1980, 1984, and 1988 elections had dropped below fifty-five per-

<sup>102</sup> 52 U.S.C. § 20504(a)–(c) (requiring states to provide voter registration opportunities in motor vehicle offices); *id.* § 20506(a)(2)(A) (public assistance agencies); *id.* § 20506(a)(2)(B) (state disability offices); *id.* § 20506(c) (military recruitment offices).

<sup>103</sup> The NVRA is framed in the affirmative. It states that “each state shall” take the required actions to increase voter registration opportunities. *Id.* § 20504.

<sup>104</sup> *See, e.g.*, Judith R. Arnold, *You Can't Vote If You Don't Register*, ST. LOUIS POST-DISPATCH, May 19, 1992, at 3B (noting that most of St. Louis's voter registration sites were in public schools that are closed during the summer months); *1 Million Not Registered to Vote in Indiana*, EVANSVILLE COURIER & PRESS, Nov. 1, 1992, at A3 (linking low voter registration numbers to barriers to register, like insufficient registration locations and early cutoff deadlines for registration); Steven L. Lapidus, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 FORDHAM L. REV. 93, 93 (1983) (noting that “citizens living in the northern part of Sunflower County, Mississippi, must travel 100 miles roundtrip to register to vote in county, state and federal elections”).

<sup>105</sup> *See, e.g.*, Peter S. Canellos, *Mass. Nonvoters Supply a Range of Reasons, Complaints*, BOS. GLOBE, Oct. 29, 1992 (noting that the limited hours and limited locations for voter registration made it difficult for some eligible voters to register); Lapidus, *supra* note 104, at 93–94 (“In a rural area near Tuscaloosa, Alabama, the only registration office in the county is closed weekends, evenings and lunch hours.”).

<sup>106</sup> *See* Lapidus, *supra* note 102, at 94 (“These restrictive practices are not isolated; they are typical of voter registration procedures throughout the nation.”). Members of Congress understood these concerns as well. *See, e.g.*, 137 CONG. REC. S10429-04, S10430 (1991) (statement of Sen. Wellstone) (“In all too many States when you try to register to vote, you cannot register during the weekend, you cannot register sometimes at noonday during workdays. . . . All too often you have to travel 70 or 80 miles in order to find that place.”); 138 CONG. REC. S6306-02, S6315 (1992) (statement of Sen. Ford) (“[P]eople just do not have time to get off from work. The office opens at 8 in the morning and closes at 4:30 in the afternoon.”).

cent of the voting age population for the first time since 1948.<sup>107</sup> In 1988, turnout fell to fifty percent.<sup>108</sup>

Both the text of the NVRA and floor speeches by members of Congress demonstrate how the NVRA is responsive to these concerns. The NVRA's preamble states that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities."<sup>109</sup> A purpose of the law was to "establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office."<sup>110</sup>

Congress understood registration difficulties and low turnout to be related problems. Senator Bradley, for example, noted that "[s]imply stated, those who register[,] vote. In the 1988 elections, 86 percent of those who registered voted. . . . In a 1990 study, the [Government Accountability Office] recognized that difficulties involved in registration have affected voter turnout, suggesting that Congress consider making registration more convenient and accessible."<sup>111</sup> Senator Kennedy stated that "[a]lthough the ideal of broad-based voter participation has been firmly incorporated into the Constitution, registration procedures adopted in many States have had the effect—and often the intent—of denying the right to vote to large numbers of citizens."<sup>112</sup> Others noted the effectiveness of the "motor-voter" model in increasing turnout.<sup>113</sup> This link—between voter registration and the right to vote—was a recurring theme during the congressional debates over the NVRA.<sup>114</sup>

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<sup>107</sup> U.S. CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 244 tbl.397 (131st ed. 2011), <https://www2.census.gov/library/publications/2011/compendia/statab/131ed/tables/election.pdf>.

<sup>108</sup> *Id.*

<sup>109</sup> 52 U.S.C. § 20501(a)(3).

<sup>110</sup> *Id.* § 20501(b)(1).

<sup>111</sup> 138 CONG. REC. 26,589 (1992) (statement of Sen. Bradley); *see also* 136 CONG. REC. 1245 (1990) (statement of Rep. Annunzio) ("Major studies have been designed to discover why so many Americans do not vote. The No. 1 reason was not being registered."); *Id.* (statement of Rep. Mfume) ("In a poll conducted after the 1988 election, more than one-third of the nonvoters surveyed said that registration prevented them from voting in the election.").

<sup>112</sup> 138 CONG. REC. 11,684 (1992) (statement of Sen. Kennedy).

<sup>113</sup> *See, e.g.*, 138 CONG. REC. 14,979 (1992) (statement of Rep. Clement) ("In Tennessee, my home State where we do not have a motor-voter program, voter turnout decreased 35 percent from 1986 to 1990. However, States with motor-voter programs saw significant increases in voter turnout.").

<sup>114</sup> *See, e.g.*, 136 CONG. REC. 1242 (1990) (statement of Rep. Swift) ("Testimony before our committee revealed that in many jurisdictions around the country, eligible voters

Congress was also particularly concerned about the disenfranchisement of minority voters. Although the registration disparity between eligible White voters and eligible Black voters had decreased since the passage of the VRA, by the 1980s, a significant disparity persisted.<sup>115</sup> In one Georgia county in 1980, for example, “over 80 percent of whites and less than 25 percent of blacks were registered.”<sup>116</sup> Congress was responsive, first, to the idea that these barriers could be used to intentionally disenfranchise minority voters. As Representative Clay stated, “[s]o often in our history, voter registration requirements have been used to systematically prevent minority groups from exercising their fundamental right to vote. [The NVRA], without a complicated, costly set of procedures, ensures that all Americans will be able to exercise this basic, valuable right.”<sup>117</sup>

But Congress was also responsive to the idea that registration barriers could be unintentionally burdensome on minority voters. The impact of registration restrictions “often falls most heavily upon minority, low-income, and disabled citizens,”<sup>118</sup> Senator Cranston stated. “[The NVRA] will remove registration barriers by requiring States to provide motor voter, mail, and agency registration.”<sup>119</sup>

In sum, through the NVRA, Congress sought to expand the right to vote by increasing the number of people registered to vote. It did so in a way that directly responded to a set of problems created by both intentional resistance to the exercise of the franchise and unaccommodating administration.

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continue to be deprived of their right to vote as a result of restrictive registration practices.”).

<sup>115</sup> See Kim Cobb, *Racial Gap Still Exists in Voter Registration*, HOUS. CHRON., Mar. 18, 1990 (noting that during the 1988 election, whereas 73.44% of eligible white voters were registered to vote in southern states, only 61.63% of eligible Black voters were registered).

<sup>116</sup> Lapidus, *supra* note 104, at 94 (describing DeKalb County, Georgia).

<sup>117</sup> 139 CONG. REC. H505-02, H519 (1993) (statement of Rep. Clay); see also 139 CONG. REC. H1823-01, H1827 (1993) (statement of Rep. McKinney) (“In the communities I represent American citizens still face real barriers and harassment when they go to register to vote. . . . In Georgia’s 11th Congressional District people still fight today for the right to register to vote.”).

<sup>118</sup> 136 CONG. REC. 25,902 (1990) (statement of Sen. Cranston).

<sup>119</sup> *Id.*; see also 138 CONG. REC. 10,726 (1992) (statement of Sen. Sanford) (“Many of these registration practices discourage participation by minorities, people with disabilities, and first time voters.”).

## II CONSEQUENCES

Because the right to vote is largely reactive, it relies on various “shields”<sup>120</sup>: prohibitions on the election-related actions that private parties and state actors may take. This reactivity has consequences for our elections systems. In fact, identifying the right as reactive helps to diagnose some of the systems’ deepest problems. This Part identifies two such problems: deeply fragile and largely impersonal elections systems that do not account for the particular voting difficulties of various populations.

### A. *A Fragile Right*

Voting-related problems are so frequent, it is a wonder our elections maintain any legitimacy at all.<sup>121</sup> Our elections systems are subject to challenge after challenge: inadequate resources, incompetent administration, intentional attempts to restrict the vote, relentless but baseless allegations of fraud, life-threatening pandemics, and more. Because the right to vote has largely been shaped by previous resistance, each of these challenges tests our elections systems in a new way. In short, the right to vote is disconcertingly fragile.

Conceptually, the challenges can be divided into two general categories: (1) election administration problems caused by systemic strain, including inadequate resources or mismanagement, and (2) intentional efforts to impede or undermine the right to vote. In practice, though, properly categorizing certain actions can be difficult. For instance, polling place closures might be a consequence of inadequate resources or voter discrimination. Conversely, dubious voter purges might be a function of election administration mismanagement rather than intentional voter suppression. In addition, unexpected events—e.g., hurricanes, earthquakes, pandemics—also generate challenges that seem to fall within both categories. With that caveat, consider the following summaries.

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<sup>120</sup> See Richard H. Pildes, *The Constitutional Emergency Powers of Federal Courts* 3 (N.Y.U. Sch. of L., Pub. L. Rsch. Paper, Paper No. 20-59, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3629356](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3629356).

<sup>121</sup> See James A. Gardner, *Democratic Legitimacy Under Conditions of Severely Depressed Voter Turnout*, UNIV. CHI. L. REV. ONLINE (June 26, 2020), <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-gardner> (concluding that “American political thought appears to have developed conceptions of both substantive and procedural electoral legitimacy that are emphatically minimal!”); Pam Fessler, *American Distrust of the Voting Process Is Widespread, NPR Poll Finds*, NPR (Jan. 21, 2020, 5:06 AM), <https://www.npr.org/2020/01/21/798088827/american-distrust-of-the-voting-process-is-widespread-npr-poll-finds> (discussing the results of a poll on trust in the 2020 election).

Election administration problems caused by inadequate resources or mismanagement are commonplace and are rarely legally redressable. For example, voters everywhere report inefficient voting experiences. “Long Lines Frustrate R.I. Voters,” reads a 2016 headline from Rhode Island’s *Providence Journal*.<sup>122</sup> The *New York Times* reported in 2020 that “Long Waits Frustrate Los Angeles Voters.”<sup>123</sup> The *Dallas Morning News*, also in 2020: “Long Lines, Broken Machines, Causing Frustration for Some Voters in Dallas, Tarrant Counties.”<sup>124</sup> A 2014 *Washington Post* column states: “The wait times to vote in Florida are horrendous.”<sup>125</sup> Long lines, therefore, are both predictable and routine,<sup>126</sup> but because they do not fit into the preexisting set of problems protected by “the right to vote,” no legal recourse is available.<sup>127</sup>

Long lines are in part caused by polling place closures, another common election administration problem. In a comprehensive study of states formerly covered by section 5 of the Voting Rights Act, the Leadership Conference Education Fund identified “1,688 polling place closures between 2012 and 2018.”<sup>128</sup> As the study notes, “[d]ecisions to shutter or reduce voting locations are often made quietly and at the last minute, making pre-election intervention or litigation virtually impossible.”<sup>129</sup> These sudden changes upset voters’ reliance interests in accessing proximate, and often longstanding, polling place locations.<sup>130</sup> While some polling place closures may be due

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<sup>122</sup> Paul Edward Parker, *Long Lines Frustrate R.I. Voters*, PROVIDENCE J. (Nov. 8, 2016, 1:04 PM), <https://www.providencejournal.com/news/20161108/long-lines-frustrate-ri-voters>.

<sup>123</sup> Jill Cowan & Louis Keene, *Long Waits Frustrate Los Angeles Voters*, N.Y. TIMES (Mar. 3, 2020), <https://www.nytimes.com/2020/03/03/us/california-los-angeles-voting.html>.

<sup>124</sup> LaVendrick Smith & Nic Garcia, *Long Lines, Broken Machines, Causing Frustration for Some Voters in Dallas, Tarrant Counties*, DALL. MORNING NEWS (Mar. 3, 2020, 2:45 PM), <https://www.dallasnews.com/news/elections/2020/03/03/long-lines-broken-machines-causing-frustration-for-some-voters-in-dallas-tarrant-counties>.

<sup>125</sup> Aaron Blake, *The Wait Times to Vote in Florida Are Horrendous*, WASH. POST (Sept. 15, 2014, 11:18 AM), <https://www.washingtonpost.com/news/the-fix/wp/2014/09/15/study-states-with-long-lines-are-failing-to-meet-their-own-election-day-requirements>.

<sup>126</sup> See, e.g., Elora Mukherjee, *Abolishing the Time Tax on Voting*, 85 NOTRE DAME L. REV. 177, 180 (“In the 2008 election, more than ten million voters had to wait longer than an hour to vote and hundreds of thousands had to wait longer than five hours. Hundreds of thousands more left the polls without casting a ballot because lines were too long.”).

<sup>127</sup> *But see id.* at 201–22 (exploring possible legal claims).

<sup>128</sup> LEADERSHIP CONF. EDUC. FUND, DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE 10 (2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>.

<sup>129</sup> *Id.* at 8.

<sup>130</sup> See, e.g., Michael Wines, *The Student Vote Is Surging. So Are Efforts to Suppress It*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/us/voting-college-suppression.html> [hereinafter Wines, *Student Vote*] (“[Austin Community College] has tapped its own funds to set up temporary early-voting sites on nine of its 11 campuses. No

to inadequate resources, as noted above, there is compelling evidence that many closures are designed to reduce minority election turnout.<sup>131</sup>

Secure, reliable voting machines are also a major election administration concern. Our intelligence community has concluded that “Russia’s effort to influence the 2016 US presidential election represented a significant escalation in directness, level of activity, and scope of effort compared to previous operations aimed at US elections.”<sup>132</sup> This effort included attempted attacks on electronic voting machines.<sup>133</sup> Yet, despite these considerations and others, funding for election security measures remains inadequate.<sup>134</sup> And again, because this kind of intrusion into our elections systems is novel, voting rights doctrines provide no protection.

Problems also arise from intentional efforts to impede or undermine the right to vote. For example, states contribute to the fragility of the right by fomenting voter uncertainty. They attempt to evade compliance with the few federal election statutes that exist and then disclaim legal responsibility for the administration of those statutes.<sup>135</sup> These “liability mismatch arguments”<sup>136</sup> commit time and resources to litigation while delaying the expansion of voting rights.<sup>137</sup> Conversely, some states, rather than disclaiming responsibility for certain aspects

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more, however. This spring, the Texas Legislature outlawed polling places that did not stay open for the entire 12-day early-voting period.”)

<sup>131</sup> An analysis of polling place wait times concludes that “the more voters in a precinct who are non-white, the longer the wait times.” Matthew Weil, Tim Harper, Charles Stewart III & Christopher Thomas, *The 2018 Voting Experience: Polling Place Lines*, BIPARTISAN POL’Y CTR. (2019), <https://bipartisanpolicy.org/wp-content/uploads/2019/11/The-2018-Votin-Experience.pdf>. In addition, significant numbers of language minorities are deprived of assistance at their polling sites. See Alexa Ura, *Translators Help Korean American Voters in Harris County Find Their Electoral Voice*, TEX. TRIB. (Nov. 26, 2019, 12:00 AM), <https://www.texastribune.org/2019/11/26/how-korean-americans-lobbied-harris-county-bilingual-pollworkers>.

<sup>132</sup> NAT’L INTEL. COUNCIL, INTELLIGENCE COMMUNITY ASSESSMENT: ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS 5 (2017).

<sup>133</sup> See RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION, VOLUME 1: RUSSIAN EFFORTS AGAINST ELECTION INFRASTRUCTURE WITH ADDITIONAL VIEWS, S. REP. NO. 116-290 (2020); David E. Sanger & Catie Edmondson, *Russia Targeted Election Systems in All 50 States, Report Finds*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/us/politics/russian-hacking-elections.html> (describing a Russian “search for vulnerabilities in the security of the election systems”).

<sup>134</sup> See generally CHRISTOPHER R. DELUZIO, LIZ HOWARD, PAUL ROSENZWEIG, DAVID SALVO & RACHAEL DEAN WILSON, BRENNAN CTR. FOR JUST., DEFENDING ELECTIONS: FEDERAL FUNDING NEEDS FOR STATE ELECTION SECURITY (2019).

<sup>135</sup> See Weinstein-Tull, *Election Law Federalism*, *supra* note 79, at 764–71.

<sup>136</sup> *Id.* at 765.

<sup>137</sup> See *id.* at 764–71; Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 859–61 (2017) [hereinafter Weinstein-Tull, *Abdication and Federalism*] (describing Alabama’s attempt to evade the mandates of federal election law).

of election administration, have preempted local governments' control of voting-related matters.<sup>138</sup> In both instances, states hamper election administration by complicating accountability.

Voter purges reflect similar fragility. For example, under Ohio law, the state may remove, or “purge,” voters from the statewide registration list for failing to vote for six years and failing to respond to a postcard.<sup>139</sup> In 2018, the Supreme Court upheld this practice, finding no conflict with the NVRA.<sup>140</sup> The decision “sanctions the needless and routine purging from voting rolls of a potentially very large number of eligible and registered voters.”<sup>141</sup> In the fall of 2019, it was reported that approximately 40,000 of the 235,000 voters Ohio planned to purge were improperly at risk of removal, an error that was only caught thanks to the work of concerned citizens.<sup>142</sup> Viewed in context, Ohio's recent voter purges appear nefarious, and the same is true in other states.<sup>143</sup>

Voter identification requirements are the most infamous example of voter suppression. At present, thirty-six states require voters to show some form of identification.<sup>144</sup> Supporters claim that such laws guard against fraud,<sup>145</sup> though evidence of in-person fraud is virtually non-existent.<sup>146</sup> Opponents, by contrast, argue that such laws are

<sup>138</sup> See Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1383–92 (2020) (discussing various state efforts to enact bills preempting the authority of localities over elections).

<sup>139</sup> See generally *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

<sup>140</sup> See *id.* at 1848.

<sup>141</sup> Manheim & Porter, *supra* note 8, at 213–14; see also Michael Wines, *As November Looms, So Does the Most Litigious Election Ever*, N.Y. TIMES (July 7, 2020), <https://www.nytimes.com/2020/07/07/us/2020-election-laws.html> (“Three Republican-allied advocacy groups have sent warning letters to scores of local election officials demanding that they purge their rolls of ineligible voters; in some cases, they have filed suits. One group, the Public Interest Legal Foundation, has sent warnings to 33 of 83 counties in one 2020 battleground, Michigan.”).

<sup>142</sup> Nicholas Casey, *Ohio Was Set to Purge 235,000 Voters. It Was Wrong About 20%*, N.Y. TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/14/us/politics/ohio-voter-purge.html>.

<sup>143</sup> See, e.g., Eileen Sullivan, *A Lawsuit in Georgia Claims That Nearly 200,000 Registered Voters Were Improperly Purged*, N.Y. TIMES (Dec. 2, 2020), <https://www.nytimes.com/2020/12/02/us/a-lawsuit-in-georgia-claims-that-nearly-200000-registered-voters-were-improperly-purged.html> (detailing a purge of nearly 200,000 eligible and registered voters from the rolls in Georgia).

<sup>144</sup> *Voter Identification Requirements*, NAT'L CONF. STATE LEGISLATURES (Aug. 25, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

<sup>145</sup> See, e.g., JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY (2004).

<sup>146</sup> German Lopez, *Trump's Claims About Voter Fraud Are Based on a Lie*, VOX (Oct. 17, 2016, 12:40 PM), <https://www.vox.com/policy-and-politics/2016/10/17/13305448/trump-voter-fraud>.



wholly unnecessary,<sup>147</sup> have a disparate impact on minority voters,<sup>148</sup> and, as such, are intended to benefit the Republican Party.<sup>149</sup>

Another example of intentional voter suppression demonstrating the fragility of the right to vote, and how opposition to voting rights is a shell game, involves organizations that engage voters in the political process. Several states, again invoking the threat of voter fraud, have passed laws targeting third-party individuals or organizations that facilitate others' right to vote. For instance, in Tennessee, a 2018 surge in Black voter registration prompted the state legislature to pass a law imposing civil penalties on voter registration groups that submitted voter registration forms with inaccurate or incomplete information.<sup>150</sup> A Michigan law makes it a crime to help voters submit absentee ballots.<sup>151</sup> Similar "ballot harvesting" laws exist in over twenty states.<sup>152</sup> Multiple states recently moved to criminalize organizations' distribution of food and water to those waiting in line to vote.<sup>153</sup>

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<sup>147</sup> Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 681 (2007) ("Existing data suggests that a photo-identification requirement would disenfranchise twenty million Americans while deterring minimal voter fraud.").

<sup>148</sup> Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363, 368 (2017) ("The effects are perhaps most consistent for Latinos, but across the different types of contests, there are strong signs that strict identification laws decrease turnout for Latinos, blacks, and Asian Americans, and some indications that they also do so for multiracial Americans."). See generally Sahar F. Aziz, *The Blinding Color of Race: Elections and Democracy in the Post-Shelby County Era*, 16 BERKELEY J. AFR.-AM. L. & POL'Y 182, 185 (2014) ("Notwithstanding significant progress made in decreasing overt discrimination, discriminatory tactics aimed at disempowering minority voters continue to plague the American electoral process.").

<sup>149</sup> See Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL. 1088, 1089 (2013); LORRAINE C. MINNITE, PROJECT VOTE, THE POLITICS OF VOTER FRAUD 16 (2007); Edward B. Foley, *The Separation of Electoral Powers*, 74 MONT. L. REV. 139, 142–43 (2013) (referring to circumstances where "the evidence overwhelmingly indicates that the desire to secure a partisan advantage actually motivated the enactment of these laws").

<sup>150</sup> Amy Gardner, *How a Large-Scale Effort to Register Black Voters Led to a Crackdown in Tennessee*, WASH. POST (May 24, 2019, 7:50 AM), [https://www.washingtonpost.com/politics/how-a-large-scale-effort-to-register-black-voters-led-to-a-crackdown-in-tennessee/2019/05/24/9f6cee1e-7284-11e9-8be0-ca575670e91c\\_story.html](https://www.washingtonpost.com/politics/how-a-large-scale-effort-to-register-black-voters-led-to-a-crackdown-in-tennessee/2019/05/24/9f6cee1e-7284-11e9-8be0-ca575670e91c_story.html). The law was initially enjoined in federal court, then ultimately repealed by the Tennessee legislature. *Tennessee Lawmakers Repeal Discriminatory Restrictions on Voter Registration Drives Following Federal Lawsuit*, ANDREW GOODMAN FOUND. (Apr. 3, 2020), <https://andrewgoodman.org/news-list/tennessee-lawmakers-repeal-discriminatory-restrictions-on-voter-registration-drives-following-federal-lawsuit>; Sellers, *supra* note 20, at 1632–35 (summarizing the litigation).

<sup>151</sup> MICH. COMP. LAWS § 168.759 (4), (5), (8) (2021).

<sup>152</sup> *The Canvass: March 2020*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/the-canvass-march-2020.aspx>; see also *infra* Section II.B. (discussing ballot harvesting litigation arising from Arizona).

<sup>153</sup> See, e.g., Nick Corasaniti & Reid J. Epstein, *What Georgia's Voting Law Really Does*, N.Y. TIMES (May 13, 2021), <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html> (detailing Georgia's criminal law to that effect).

Justin Levitt critiqued these laws years ago, finding their indirect restriction on the right to vote gratuitous.<sup>154</sup> In some states, strict laws targeting third-party organizations have led certain groups to shut down their operations, a setback not only for the organizations, but for the voters, or would-be voters, who rely on them.<sup>155</sup> They nonetheless continue to be proposed, passed, and maintained, further demonstrating the contingent nature of the right to vote.<sup>156</sup>

States also target college-student voters with laws that are transparently intended to keep them from the polls.<sup>157</sup> For instance, in New Hampshire, non-resident students looking to vote last fall were confused by the state's new residency law.<sup>158</sup> In several places, such laws have caused significant tension between students and elected officials.<sup>159</sup>

Finally, the arrival of COVID-19 and the novel challenges it imposed laid bare the fragility of elections systems. Americans watched in disbelief as voters in Milwaukee, during the 2020 primary election, put their health at risk by standing in long lines that resulted from the closure of 175 polling sites due to the virus.<sup>160</sup> The city's voting wards saw racially disparate turnout rates.<sup>161</sup> Georgia's 2020 primary election was marred by "a systematic breakdown that both

<sup>154</sup> Justin Levitt, *The New Wave of Election Regulation: Burden Without Benefit*, 6 *ADVANCE* 39, 42–43 (2012) ("These new restrictions on civic participation . . . [lack any] compelling policy need for such burdens on informal voter registration on campuses, in houses of worship, at casual gatherings of friends, and in the . . . other circumstances [that] people help their fellow citizens without first creating a bureaucratic reporting and tracking apparatus.").

<sup>155</sup> See, e.g., Ari Berman, *Texas's Voter-Registration Laws Are Straight Out of the Jim Crow Playbook*, *NATION* (Oct. 6, 2016), <https://www.thenation.com/article/archive/texas-voter-registration-laws-are-straight-out-of-the-jim-crow-playbook> (describing the effect of Texas's strict registration laws on volunteer organizations).

<sup>156</sup> See Sellers, *supra* note 20, at 1628–35 (recounting recent litigation in Arizona and Tennessee).

<sup>157</sup> Wines, *Student Vote*, *supra* note 130.

<sup>158</sup> Laura Weiss, *New Hampshire Voting Law Bewilders College Students*, *ROLL CALL* (Feb. 10, 2020, 3:24 PM), <https://www.rollcall.com/2020/02/10/new-hampshire-voting-law-bewilders-college-students>.

<sup>159</sup> See Amy Gardner, *To Unlock the Youth Vote in 2020, Democrats Wage Legal Fights Against GOP-Backed Voting Restrictions*, *WASH. POST* (July 11, 2019, 7:00 AM), [https://www.washingtonpost.com/politics/to-unlock-the-youth-vote-in-2020-democrats-wage-legal-fights-against-gop-backed-voting-restrictions/2019/07/10/f3c51dd4-8e17-11e9-b08e-cfd89bd36d4e\\_story.html](https://www.washingtonpost.com/politics/to-unlock-the-youth-vote-in-2020-democrats-wage-legal-fights-against-gop-backed-voting-restrictions/2019/07/10/f3c51dd4-8e17-11e9-b08e-cfd89bd36d4e_story.html); Greta Anderson, *Tug-of-War Over Students' Votes*, *INSIDE HIGHER ED* (Nov. 12, 2019), <https://www.insidehighered.com/news/2019/11/12/students-across-country-faced-voting-barriers-election-day>.

<sup>160</sup> *Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty*, *supra* note 19 ("[F]ive of 180 polling sites remained open.").

<sup>161</sup> Shruti Banerjee & Megan Gall, *COVID-19 Silenced Voters of Color in Wisconsin*, *LEADERSHIP CONF. ON CIV. & HUM. RTS.* (May 14, 2020), <https://civilrights.org/blog/covid-19-silenced-voters-of-color-in-wisconsin>.

revealed general incompetence and highlighted some of the thorny and specific challenges that the coronavirus pandemic may pose to elections officials nationwide.”<sup>162</sup> Faulty voting machines were among the challenges.<sup>163</sup> Nationally, litigation over voter purges increased,<sup>164</sup> as did litigation over voter access to absentee ballots.<sup>165</sup>

These issues remain salient as multiple states, including Florida, Georgia, and Texas, have recently enacted a multitude of regressive laws that will increase burdens on voters.<sup>166</sup> In fact, nationwide, hundreds of bills have been introduced by state legislatures that, if enacted and enforced, will hinder voting.<sup>167</sup> Thus, the central problem remains: Because the foundation of the right to vote is unsteady and reactive, we are continually at the mercy of unexpected changes, incompetent administration, and the ingenuity of continual resistance.

### B. *An Impersonal Right*

We all experience the act of voting differently. Those experiences depend upon our lives and circumstances. Because the right to vote is reactive, it does not take those experiences into account. Instead, as Part I demonstrates, we are protected only from very specific attempts at disenfranchisement. The right has been driven and defined by different forms of resistance; it is backward-looking. It does not seek to protect people from the challenges that they face if those challenges have not previously been exposed and addressed by courts.

Consider the range of hurdles that different voters face. As mentioned above, voters in urban areas often experience long lines and

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<sup>162</sup> Richard Fausset & Reid J. Epstein, *Georgia's Election Mess: Many Problems, Plenty of Blame, Few Solutions for November*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/us/politics/georgia-primary-election-voting.html>.

<sup>163</sup> *Id.* (“Much of the trouble that plunged Georgia’s voting system into chaos Tuesday was specific to the state, stemming from the rollout of new voting machines and an electronic voter check-in system, which some elections experts had been sounding alarm bells about for months.”).

<sup>164</sup> Akela Lacy, *Right-Wing Group Seeks to Purge up to 800,000 Voters in Pennsylvania, a Key Battleground State*, INTERCEPT (May 28, 2020, 5:14 PM), <https://theintercept.com/2020/05/28/pennsylvania-voter-rolls-purge-judicial-watch>.

<sup>165</sup> Pam Fessler, *Need a Witness for Your Mail-in Ballot? New Pandemic Lawsuits Challenge Old Rules*, NPR (June 1, 2020, 5:00 AM), <https://www.npr.org/2020/06/01/865043618/need-a-witness-for-your-mail-in-ballot-new-pandemic-lawsuits-challenge-old-rules>.

<sup>166</sup> Reid J. Epstein & Nick Corasaniti, *Inside Democrats' Scramble to Repel the G.O.P. Voting Push*, N.Y. TIMES (May 13, 2021), <https://www.nytimes.com/2021/05/07/us/politics/democrats-republican-voting-rights.html>.

<sup>167</sup> *Voting Laws Roundup: March 2021*, BRENNAN CTR. FOR JUST. (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021>.

wait times.<sup>168</sup> Rural voters may have to drive long distances to reach their polling sites.<sup>169</sup> People with disabilities cannot always find accessible voting machines.<sup>170</sup> People of color may face racial discrimination in voting.<sup>171</sup> People with limited English-language proficiency may not be able to understand their ballots.<sup>172</sup> Low-income voters may not be able to take time off from work to visit a polling place.<sup>173</sup> Senior voters may have a difficult time getting to their polling places and may be fearful of voting during the COVID-19 pandemic.<sup>174</sup> Military and overseas voters, because of delays in international mail, may not receive their ballots in time to vote.<sup>175</sup> Homeless voters are not

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<sup>168</sup> See, e.g., Emily Badger, *Why Long Voting Lines Could Have Long-Term Consequences*, N.Y. TIMES (Nov. 8, 2016), <https://www.nytimes.com/2016/11/09/upshot/why-long-voting-lines-today-could-have-long-term-consequences.html> (“Early voters, urban voters and minority voters are all more likely to wait and wait and wait.”).

<sup>169</sup> See, e.g., Tom McCarthy, *More than 1,000 US Polling Sites Closed Since Supreme Court Ruling, Report Finds*, GUARDIAN (Sept. 11, 2019, 12:15 PM), <https://www.theguardian.com/us-news/2019/sep/11/us-polling-sites-closed-report-supreme-court-ruling> (“For many people, and particularly for voters of color, older voters, rural voters and voters with disabilities, these burdens make it harder—and sometimes impossible—to vote.”).

<sup>170</sup> See BARBARA BOVBJERG, GOV’T ACCOUNTABILITY OFF., STATEMENT BEFORE THE NATIONAL COUNCIL ON DISABILITY, VOTERS WITH DISABILITIES: CHALLENGES TO VOTING ACCESSIBILITY 11 (2013), <https://www.gao.gov/assets/660/654099.pdf> (“[N]early one-half (46 percent) [of polling places] had systems that could pose challenges for people with disabilities to cast a private or independent vote.”).

<sup>171</sup> See, e.g., Kareem Haggag & Devin Pope, *There Are Stark Racial Disparities in Voting Times. Here’s How to Fix Them.*, WASH. POST (Dec. 27, 2019, 12:44 PM), [https://www.washingtonpost.com/opinions/there-are-stark-racial-disparities-in-voting-times-heres-how-to-fix-them/2019/12/16/5fb4948a-1c5b-11ea-b4c1-fd0d91b60d9e\\_story.html](https://www.washingtonpost.com/opinions/there-are-stark-racial-disparities-in-voting-times-heres-how-to-fix-them/2019/12/16/5fb4948a-1c5b-11ea-b4c1-fd0d91b60d9e_story.html) (“[V]oters in majority-black neighborhoods are likelier to wait longer than those in majority-white neighborhoods, often considerably longer.”).

<sup>172</sup> See, e.g., Richard Salame, *Vote Aqui? Limited-English-Proficiency Voters Could Help Determine Congress*, NATION (Nov. 5, 2018), <https://www.thenation.com/article/archive/limited-english-voters-investigation-election> (“‘At the end of the day, without meaningful language assistance, many voters simply would not be able to cast a meaningful and effective ballot,’ said Kristen Clarke, president of the Lawyers’ Committee for Civil Rights Under Law.”).

<sup>173</sup> See Gionna Kinchen & Catherine O’Connell, *The Barriers to Voting in Low-Income Communities*, TEMPLE NEWS (Jan. 14, 2020), <https://temple-news.com/the-barriers-to-voting-in-low-income-communities> (“[P]eople in low-income areas may fail to show up at the polls because of an inability to take off of work due to financial circumstances.”).

<sup>174</sup> See Connor Perrett, *Senior Citizens Have the Highest Rates of Voter Turnout but Coronavirus Could Change the Game and Keep Older Voters Home*, BUS. INSIDER (Mar. 11, 2020, 4:51 PM), <https://www.businessinsider.com/senior-voter-turnout-at-risk-over-coronavirus-worries-2020-3> (“At-risk groups have been advised to avoid crowded places, like polling places.”).

<sup>175</sup> See PEW CTR. ON THE STATES, NO TIME TO VOTE: CHALLENGES FACING AMERICA’S OVERSEAS MILITARY VOTERS 1 (2009), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/election\\_reform/NTTVReportWebpdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/election_reform/NTTVReportWebpdf.pdf) (noting that overseas military voters vote “in the face of procedural hurdles and tight deadlines in half the states and Washington, D.C.”).

always able to register to vote because they do not have a stable place of residence.<sup>176</sup> Voters in jail are often disenfranchised.<sup>177</sup> Many voters will experience multiple hurdles at once, which creates still more challenges.

Despite the variety of these experiences and challenges, the federal right to vote rarely seeks to improve and strengthen the experience of voting in personal ways. While a few exceptions do exist, their scarcity proves the general rule. The Help America Vote Act (HAVA), for example, contains some accessibility requirements.<sup>178</sup> The Uniformed and Overseas Citizens Absentee Voter Act (UOCAVA) requires states to transmit ballots to military and overseas voters forty-five days before an election.<sup>179</sup> Section 203 of the Voting Rights Act requires some jurisdictions to provide balloting materials in languages other than English,<sup>180</sup> but only in jurisdictions with high numbers of limited English proficiency (LEP) voters,<sup>181</sup> which means that many LEP voters go without language-appropriate balloting materials.<sup>182</sup> And, as noted above, section 2 of the Voting Rights Act protects voters of color by prohibiting states and other political subdivisions from “den[ying] or abridg[ing] . . . the right of

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<sup>176</sup> See Nathalie Baptiste & Will Peischel, *Voting Can Be Hard. If You're Homeless, It's Nearly Impossible.*, MOTHER JONES (Nov. 7, 2019), <https://www.motherjones.com/politics/2019/11/voting-can-be-hard-if-youre-homeless-its-nearly-impossible> (“For a homeless person, maintaining the necessary documents to either acquire a valid ID or use as one is not always easy . . . [T]he challenges homeless people regularly encounter—hunger, lack of shelter, inadequate clothing—can make civic participation less of a priority.”).

<sup>177</sup> See Nicole Lewis & Aviva Shen, *Unlocking the Vote in Jails: The Majority of the 745,000 People Held in Local Jails Can Vote, but Few Do. Advocates Say It's Voter Suppression on a National Scale.*, MARSHALL PROJECT (Oct. 26, 2020, 5:45 AM), <https://www.themarshallproject.org/2020/10/26/unlocking-the-vote-in-jails>.

<sup>178</sup> See 52 U.S.C. § 21081(a)(3)(A) (requiring that voting systems “be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters”).

<sup>179</sup> See *id.* § 20302(a)(8) (requiring states to “transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter . . . not later than 45 days before the election”).

<sup>180</sup> See *id.* § 10503(c) (requiring covered jurisdictions to provide “any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process . . . in the language of the applicable minority group as well as in the English language”).

<sup>181</sup> See *id.* § 10503(b)(2) (setting out the coverage formula).

<sup>182</sup> For work on how LEP voters continue to face barriers to voting despite section 203, see Matthew Higgins, *Language Accommodations and Section 203 of the Voting Rights Act: Reporting Requirements as a Potential Solution to the Compliance Gap*, 67 STAN. L. REV. 917 (2015); James Thomas Tucker & Rodolfo Espino, *Government Effectiveness and Efficiency? The Minority Language Assistance Provisions of the VRA*, 12 TEX. J. C.L. & C.R. 163 (2007).

any citizen of the United States to vote on account of race or color.”<sup>183</sup>

Aside from these few examples, voting is protected only by a set of doctrines directed and defined by specific forms of resistance. For an example of how this plays out, consider the state laws that prohibit early voting ballot collection (so-called “ballot harvesting” laws), mentioned above. No federal law or doctrine specifically protects voters who have difficulty returning early voting or absentee ballots. Nevertheless, some political parties and third-party voting rights advocates help collect sealed early voting ballots and return them to be counted.<sup>184</sup> These collections allow people to vote even when they do not have access to reliable outgoing mail services or transportation.<sup>185</sup> On Native American reservations, for example, “most people live in remote communities, many communities have little to no vehicle access, and there is no home incoming or outgoing mail, only post office boxes, sometimes shared by multiple families.”<sup>186</sup> “[R]esidents of sovereign nations often must travel 45 minutes to 2 hours just to get a mailbox.”<sup>187</sup>

In 2016, Arizona enacted H.B. 2023, which criminalizes collecting early ballots,<sup>188</sup> making it more difficult for those voters who rely on third-party assistance to vote. The Ninth Circuit struck down the law as violating section 2 of the Voting Rights Act,<sup>189</sup> but, in *Brnovich v. Democratic National Committee*, the Supreme Court reversed, holding that “[h]aving to identify one’s own polling place and then travel there to vote does not exceed the ‘usual burdens of voting.’”<sup>190</sup> H.B. 2023

<sup>183</sup> 52 U.S.C. § 10301(a).

<sup>184</sup> See *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1005 (9th Cir. 2020) (en banc) (noting that in Arizona, before it was criminalized by the state legislature, ballot collection was common practice).

<sup>185</sup> People who benefit from ballot collection include “communities that lack easy access to outgoing mail services; the elderly, homebound, and disabled voters; socioeconomically disadvantaged voters . . . ; voters who have trouble finding time to return mail because they work multiple jobs or lack childcare services; and voters who are unfamiliar with the voting process . . . .” *Id.* at 1006 (quoting *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 848 (D. Ariz.), *aff’d* 904 F.3d 686 (9th Cir. 2018)).

<sup>186</sup> *Id.* (quoting *Reagan*, 329 F. Supp. 3d at 869).

<sup>187</sup> *Id.* (quoting *Democratic Nat’l Comm. v. Reagan*, 904 F.3d 686, 751–52 (9th Cir. 2018) (Thomas, C.J., dissenting)).

<sup>188</sup> *Ariz. Rev. Stat. Ann.* § 16-1005 (“A person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony.”).

<sup>189</sup> *Hobbs*, 948 F.3d at 999, 1037, 1041 (holding that H.B. 2023 violated section 2 of the Voting Rights Act both because it “imposes a disparate burden on American Indian, Hispanic, and African-American citizens” and because the evidence showed that “racial discrimination was a motivating factor in enacting H.B. 2023”).

<sup>190</sup> 141 S. Ct. 2321, 2344 (2021) (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008)).

ultimately survived by capitalizing on the fact that the right to vote, as construed by the courts, is impersonal, and does not address most individual circumstances in voting, outside the few specific contexts described above. And because the Court found that H.B. 2023 did not fit into any of those contexts, it survived judicial review.

### III

#### CONSTRUCTING THE RIGHT TO VOTE

Now imagine that instead of the reactive right to vote that we currently possess, we understood the right to require governments to build sturdy elections systems from the ground up. States would be required to provide adequate amounts of funding for elections, rather than shoestring them; states would be required to administer elections competently, rather than abdicate those responsibilities to local governments that lack sufficient administrative capabilities; and states would be required to administer elections in ways that are responsive to democratic concerns, without excluding politically disempowered populations. In addition, governments would enact voting laws that respond to and address the hurdles that their constituents face in voting. And courts would enforce these voting laws to ensure states and local governments vindicate them, even when that means substantial intrusion into and oversight of state bureaucracy.<sup>191</sup>

We argue that any meaningful right to vote must be *constructed* in these ways, rather than be solely *reactive*. A constructed right avoids the problems described above. A state with adequate funding and a sufficient number of polling places, for example, could absorb the new demands of a particularly contentious election. A state with abundant, well-trained poll workers, or a refined method of distributing and counting absentee ballots, could respond to the needs associated with COVID-19 without lines out the door.

Constructing the right to vote requires governmental action of multiple kinds. Adequate funding and well-tailored election laws come from legislatures, whether federal, state, or local. Competent administration requires competent state and local bureaucrats. Responsive electoral structures arise from well-written election laws

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<sup>191</sup> This positive conception of the right to vote, which requires extensive state action, differs from most other federal rights, which can be vindicated by prohibiting, rather than guaranteeing, state action. In one sense, the fact that the right to vote must be constructed is obvious: States could not fulfill their obligation to administer elections without creating an elections bureaucracy of some kind. But in another sense, it is incredibly complex. How can we require states to build functional elections systems while also maintaining the benefits of diversity that result from state freedom to design their own systems?

and state constitutional provisions. Proactive voting rights doctrines originate in the courts.

That a constructed right to vote requires action from many government officials is not a bug in our approach, it is a feature. The idea of a right that stretches beyond the purview of the courts may be counterintuitive to some lawyers and legal scholars, but our decentralized system of elections ensures that no single governmental actor—not the Supreme Court, not Congress, not an innovative governor or state legislator—has the power to vindicate the right to vote. Understanding the right to vote as constructed by multiple actors simply acknowledges that reality.

In addition, recognizing the many actors who must construct the right allows for multiple forms of advocacy. When the composition of the Supreme Court makes it hostile to expanding, say, the reach of the Voting Rights Act, our framing of the right to vote allows us to see that advocates have many other government actors to productively lobby. Where state governments are unresponsive, advocates can go to the federal government, and vice versa. Where state and federal governments are unresponsive, advocates can look to local governments. Framing the right to vote as constructed by multiple actors in fact opens “multiple ports of entry” for advocates.<sup>192</sup>

As for how to actually construct the right, remarkably little scholarship addresses the question of what, holistically, well-functioning elections systems require. This is undoubtedly in part because of a lack of data. As summarized by Stephen Ansolabehere and Nate Persily, “[a]lthough we have made great strides as a nation in addressing the technological problems endemic to the 2000 election, we have made very little effort to evaluate the administration of elections in a systematic way.”<sup>193</sup> The data we do have must inform our thinking about the nature of the right to vote. On the theoretical side,

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<sup>192</sup> See Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1626–27 (2006) (describing the way that our system of federalism allows advocates to press for legal change at multiple levels of government).

<sup>193</sup> Ansolabehere & Persily, *supra* note 25, at 446; Barry C. Burden & Charles Stewart III, *Introduction to the Measure of American Elections* (“[W]hile there are scientific professions devoted to the study of corrections, education, public health, transportation, and many other critical functions of state and local government, there is no scientific profession devoted to the study of election administration.”), in *THE MEASURE OF AMERICAN ELECTIONS*, *supra* note 25, at 3. Some data do exist: The MIT Election Data and Science Lab oversees a rich repository of data on election system performance, measured by, among other indicators, the number of mail ballots rejected, the number of provisional ballots cast, and voter turnout and registration rates. *Elections Performance Index*, MIT ELECTION DATA & SCI. LAB, <https://elections.mit.edu/#/data/indicators> (last visited Sept. 23, 2021) (click “Indicators”).



Dennis Thompson has made a compelling case for concentrating on “principles informed enough by actual practice to connect to political agents, but detached enough to provide critical perspective on their actions.”<sup>194</sup> We lack rigorous analysis that joins these two approaches. Legal scholars, who understandably think in terms of rights, often fail to engage with the empirical findings of social scientists. They also fail to pursue the deep theorizing necessary to justify normative claims about electoral fairness.

Uniting data, theory, and law is a substantial undertaking. But in this Part, we take a step in that direction by defining a constructed right to vote as incorporating three essential features. The first is electoral adequacy, which in turn has three components: the right to adequate funding of elections, the right to competent management, and the right to democratic structures. The second is voting rights legislation tailored to individuals’ experiences. The third is voting rights doctrines that require states to construct their elections systems in rights-promoting ways.

### A. *Ensuring Electoral Adequacy*

A constructed right to vote requires baseline electoral adequacy, but voting rights reformers lack a conception of what this should mean. What minimal set of voting services should states offer? Which voting experiences are condemnable? While complete *ex ante* agreement on the answers to these questions may be impossible, there is theoretical and practical value in building an analytical framework. If state legislators and election administrators pre-committed to certain outcomes, or were compelled to do so by courts, many voting rights disputes would be greatly simplified, or might never arise.

#### 1. *The Right to Adequate Funding*

To state the obvious, elections are not cost-free.<sup>195</sup> Virtually every aspect of election administration comes with a price. The extreme decentralization of our elections systems makes it very difficult, methodologically, to get a complete picture of how much money is spent on elections.<sup>196</sup> While some jurisdictions—California, for instance—pro-

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<sup>194</sup> THOMPSON, *supra* note 24, at vii–ix.

<sup>195</sup> Joshua S. Sellers & Roger Michalski, *Democracy on a Shoestring*, 74 VAND. L. REV. 1079, 1081 (2021) (“Voters must be registered, voting rolls updated, election dates advertised, voting technology purchased and tested, poll workers trained, ballots designed, votes counted and verified, and on and on.”).

<sup>196</sup> See Zachary Mohr, Martha Kropf, JoEllen Pope, Mary Jo Shepherd & Madison Esterle, *Election Administration Spending in Local Election Jurisdictions: Results from a Nationwide Data Collection Project 2* (2018) (unpublished article) (on file with the *New*

vide this information on easily accessible websites, others are far less transparent.<sup>197</sup> Unfortunately, “[n]o one knows how much it costs to run elections in the United States.”<sup>198</sup>

We do know that costs are primarily borne by state and local governments, and that state and local officials routinely complain about a lack of funds.<sup>199</sup> Technology costs, specifically—for election machine maintenance, information technology support, and, increasingly, cybersecurity protections—are rising.<sup>200</sup> Federal support is minimal.<sup>201</sup> However, data on election expenditures, while essential, provides only part of the picture. Election-related problems may be entirely unrelated to how much money a given jurisdiction spends on elections.<sup>202</sup> Methodological difficulties aside, the basic claim is straightforward: Elections cost money and, below a certain level of funding, election services will be so inadequate that the right to vote is no longer meaningful.

The argument that adequate funding is an essential component of a constructed right to vote—one that should be privileged in legal and policy discussions about election system performance—benefits from a comparison with educational rights litigation. Successful educational

*York University Law Review*). See generally Sellers & Michalski, *supra* note 193 (using predictive machine learning to supplement hand-coded data).

<sup>197</sup> See Sellers & Michalski, *supra* note 195, at 1094 (“[W]hile some budgets listed expenditures in great detail, down to the last stamp put on a letter, others were vaguer, providing only a broad overview of election administration expenditures.”).

<sup>198</sup> Katy Owens Hubler & Wendy Underhill, *Election Costs: Who Pays and with Which Funds?*, NAT’L CONF. STATE LEGISLATURES (Mar. 2018), <https://www.ncsl.org/research/elections-and-campaigns/election-costs-who-pays-and-with-which-funds.aspx>; Mohr et al., *supra* note 196, at 2 (“While U.S. policymakers have provided for more centralized data concerning voter turnout, provisional votes and registered voters, no scholars that we know of have unearthed cost data in a systematic way nationwide.”).

<sup>199</sup> PRESIDENTIAL COMM’N ON ELECTION ADMIN., *THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 10* (2014), <https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/466754/doc/slspublic/Amer%20Voting%20Exper-final%20draft%2001-04-14-1.pdf> [<https://perma.cc/JP6V-SMM2>] (“The most universal complaint of election administrators in testimony before the Commission concerned a lack of resources.”).

<sup>200</sup> *The Price of Democracy: Splitting the Bill for Elections*, NAT’L CONF. OF STATE LEGISLATURES, (Feb. 2018), [https://www.ncsl.org/Portals/1/Documents/Elections/Final\\_Costs\\_Report-Splitting\\_the\\_Bill\\_for\\_Elections\\_32084.pdf](https://www.ncsl.org/Portals/1/Documents/Elections/Final_Costs_Report-Splitting_the_Bill_for_Elections_32084.pdf) (“While elections technology costs are just one part of the overall costs of elections, they are the driving cost in policy conversations, at least at the legislative level. That’s because most states are looking to replace their equipment before the 2020 presidential election.”).

<sup>201</sup> Sellers & Michalski, *supra* note 195, at 1088 (noting that the federal government is the least consistent source of funding).

<sup>202</sup> See *id.* at 126 (“High election expenditure jurisdictions are distributed throughout the state, many in places that might be hard to predict. Conversely, numerous well-known and wealthy municipalities fall on the lower end of the expenditure spectrum.”).

rights litigation often results in courts ordering state legislatures to expend more money on public education. Similar forms of relief should be available in election litigation.<sup>203</sup>

Educational rights litigation is conventionally divided into three “waves.”<sup>204</sup> The first wave involved challenges to school finance inequities brought in federal courts under the federal Equal Protection Clause. This wave ended with the Supreme Court’s determination in *San Antonio Independent School District v. Rodriguez* that education is not a fundamental interest.<sup>205</sup> Education reformers then looked to state courts for relief, principally relying on state constitutional equal protection provisions.<sup>206</sup> These second wave lawsuits found only minimal success.<sup>207</sup>

Reformers then altered their litigation strategy, arguing not for equality but for adequacy, which they assert is guaranteed under state constitutional education clauses. These third-wave lawsuits “ask[] the state to provide all schools with some absolute, base level of resources sufficient to provide a constitutionally adequate education, however the court may define that level.”<sup>208</sup> While hardly a panacea,<sup>209</sup> third-

<sup>203</sup> To our knowledge, Chris Elmendorf was the first to draw an analogy between educational adequacy and adequacy in the realm of election law. Christopher S. Elmendorf, *From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on Partisan Gerrymanders*, 59 WM. & MARY L. REV. 1601, 1680 (2018) (“I leave for future work a related question: Might the education analogy prove equally valuable in cases about barriers to voting, such as identification requirements, rollbacks in early voting, and the like?”).

<sup>204</sup> Richard Briffault, *Adding Adequacy to Equity* (“The law of school finance reform is conventionally described as consisting of three ‘waves,’ each associated with a distinctive legal theory.”), in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 25, 25 (Martin R. West & Paul E. Peterson eds., 2007); William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1901–07 (2017).

<sup>205</sup> 411 U.S. 1, 40 (1973).

<sup>206</sup> Koski, *supra* note 204, at 1903–04 (“Specifically, plaintiffs primarily sought to achieve either horizontal equity among school districts, such that per-pupil revenues were roughly equalized by the state, or fiscal neutrality, such that the revenues available to a school district would not depend solely on the property wealth of a particular school district.”).

<sup>207</sup> Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1202 (2011) (“Of the thirty-one state supreme courts to consider state equal protection challenges, only fourteen invalidated school finance systems.”).

<sup>208</sup> *Id.* at 1207.

<sup>209</sup> *See id.* at 1217 (“Put succinctly, school funding levels, both in states where plaintiffs have prevailed and in states where they have not, continue to fall beneath the amount that experts conclude is needed to offer children the education that the states’ own standards require.”); Elmendorf, *supra* note 203, at 1634 (“My point is simply that when courts deem an education-quality claim justiciable, they embark on an uncertain, highly scrutinized journey, the ultimate success of which depends on the cooperation of the legislative and

wave lawsuits have been more successful than their precursors,<sup>210</sup> resulting in “judicial attention to the structure of the state-local educational system and the content of the education provided, in addition to how that education is financed.”<sup>211</sup>

We don’t overstate the resulting success. Litigation can drag on for years, with reformers forced to return to state court, over and over, to ensure financing.<sup>212</sup> And, naturally, questions about what constitutes adequacy abound,<sup>213</sup> as do questions about whether increased funding actually improves educational quality.<sup>214</sup> Nevertheless, courts in many states have successfully directed state legislatures to establish and fund minimal educational requirements.<sup>215</sup>

The granularity of the requirements is most instructive. As an initial matter, it is notable that, as James Ryan has observed, “courts have focused on disparities in funding, curricular and extracurricular offerings, qualified teachers, school facilities, and instructional materials. That is, they have focused primarily on disparities in *inputs*, and they have spent less time focusing on disparities in *outputs*.”<sup>216</sup> Con-

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executive branches of government—cooperation which may be difficult for the courts to secure.”).

<sup>210</sup> Briffault, *supra* note 204, at 26 (“The shift from equity to adequacy has been credited with the greater success school finance reform plaintiffs have enjoyed in the last fifteen years.”).

<sup>211</sup> *Id.* at 31.

<sup>212</sup> Tang, *supra* note 207, at 1209 (“[E]ven though most state courts have shown a general willingness to consider adequacy challenges, history also demonstrates that once a court jumps into the adequacy thicket, its involvement may be protracted, difficult, and highly politicized.”); Briffault, *supra* note 204, at 46 (“In states like Arizona, Kansas, New Jersey, and Ohio, school financing and administrative reforms have ping-ponged between the legislatures and the courts, as the legislatures have adopted measures to respond to court declarations of unconstitutional inadequacy and the courts have found the state enactments wanting.”).

<sup>213</sup> Koski, *supra* note 204, at 1908 (“[S]tate constitutions provide legislatures, and ultimately courts, little guidance as to what constitutes an adequate education. There is no agreed-upon list of public education goals . . . [or] standard for the skills, competencies, and knowledge necessary to serve those goals of an adequate education, as the unraveling of the Common Core suggests.”); James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1223 (2008) (“One obvious difficulty [confronting courts in such cases] is how to define an adequate education. This task is not only conceptually difficult; it could also strain the institutional capacity and perhaps integrity of courts.”).

<sup>214</sup> See Valerie Strauss, *Report: Does Money Matter in Education?*, WASH. POST (Jan. 6, 2021), [https://www.washingtonpost.com/blogs/answer-sheet/post/report-does-money-matter-in-education/2012/01/05/gIQAM8AweP\\_blog.html](https://www.washingtonpost.com/blogs/answer-sheet/post/report-does-money-matter-in-education/2012/01/05/gIQAM8AweP_blog.html).

<sup>215</sup> Elmendorf, *supra* note 203, at 1643 n.171 (“Yet research showing that state court rulings in the adequacy cases have led states to increase spending on the schools, and to allocate that spending in ways that substantially benefit disadvantaged students, demonstrates that legislatures generally do respond—productively—to judicial findings of liability.”).

<sup>216</sup> Ryan, *supra* note 211, at 1233. Elmendorf, *supra* note 203, at 1637 (listing common inputs as “funding, teacher salaries, curricula, facilities, and class sizes”).

sider the Texas Supreme Court which, in invalidating the state's school financing system, noted that wealthy school districts are advantaged in their ability to provide "more extensive curricula, more up-to-date technological equipment, better libraries and library personnel, teacher aides, counseling services, lower student-teacher ratios, better facilities, parental involvement programs, and drop-out prevention programs."<sup>217</sup> The court went on to reference one poorly resourced school that "offers virtually no extra-curricular activities such as band, debate, or football."<sup>218</sup>

Or consider the analysis of the Arkansas Supreme Court in concluding that the state's public school system was unconstitutional.<sup>219</sup> Among other deficiencies, "one uncertified mathematics teacher"<sup>220</sup> was deemed to have "an insufficient number of calculators for his trigonometry class, too few electrical outlets, no compasses and one chalkboard, a computer lacking software and a printer that does not work, an inadequate supply of paper, and a duplicating machine that is overworked."<sup>221</sup> A second school district was plagued by "leaking roofs and restrooms in need of repair."<sup>222</sup> An elementary school had "two bathrooms with four stalls for over one hundred students."<sup>223</sup> These cases are not outliers. Several state supreme courts engaged in similar analyses,<sup>224</sup> and crucially, their findings informed meaningful legislative reforms.<sup>225</sup>

These same kinds of analyses can be applied to state elections systems. Although state legislators are primarily responsible for funding elections systems, courts—in interpreting state statutory and constitutional provisions<sup>226</sup>—can order state legislatures to clarify the maximum amount of time that voters should wait in line to vote, how

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<sup>217</sup> Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989).

<sup>218</sup> *Id.* Future developments in Texas have been less promising. Koski, *supra* note 204, at 1908 n.43.

<sup>219</sup> Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee, 91 S.W.3d 472 (Ark. 2002).

<sup>220</sup> *Id.* at 490.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 491.

<sup>223</sup> *Id.*

<sup>224</sup> Ryan, *supra* note 211, at 1235.

<sup>225</sup> See Elmendorf, *supra* note 203, at 1634 ("The best available evidence suggests that judicially induced spending increases have on average yielded both test-score and lifetime-outcome gains for students in the benefitted districts.").

<sup>226</sup> In the educational context, reformers have relied on federal and state standards when crafting remedies, but such standards do not exist in the election administration context. Education reformers also have the benefit of better information about education spending than do election reformers. Finally, there is the question of whether state courts would interpret state constitutional provisions promising "free and open" or "free and equal" elections as broadly as they have state constitutional provisions promising

many voting machines per capita each jurisdiction is required to maintain, how poll workers are to be trained, or how much money each jurisdiction is to receive from the state for election technology. Again, reliance on courts to mandate precise reforms has not always been a smooth process in the education context,<sup>227</sup> but it does provide both a potential strategy for vindicating a constructed right to vote that, to date, has gone unexamined, and an alternative path for advocates in states with hostile state legislatures.

## 2. *The Right to Competent Management*

Competent management is also a central component of any adequate electoral system. Legal scholars are unaccustomed to thinking about management, which evokes organizational theory or public administration scholarship.<sup>228</sup> But the intricacies of management, or what one scholar has called “the logistical delivery of the electoral process,”<sup>229</sup> are at the core of electoral adequacy. Broadly defined as “the organizations, networks, resources, micro anthropological working practices and instruments involved in implementing elections,”<sup>230</sup> competent management demands systematic attention that, to date, has not been given.

As a threshold matter, competent management involves both public and private actors.<sup>231</sup> State and local election officials are of course public actors. Political parties, though, are quasi-public, quasi-private entities, whose status at any given point in time depends on

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“thorough and efficient” or “general and uniform” educational systems. See Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 144–49 (2014).

<sup>227</sup> See Briffault, *supra* note 204, at 45–46 (“State supreme court orders requiring additional school funding to meet adequacy requirements have frequently encountered legislative resistance, necessitating multiple trips to the court house and numerous follow-up court decisions and orders.”).

<sup>228</sup> Consider the observation of Kathleen Hale and Christa Slaton that “[f]or many years, election administrators have been actively engaged in building a network connecting elected officials and senior administrators, research organizations, nonprofit groups, and other private interests to share information and generate solutions to election issues.” Kathleen Hale & Christa D. Slaton, *Building Capacity in Election Administration: Local Responses to Complexity and Interdependence*, 68 PUB. ADMIN. REV. 839, 842 (2008). These informal networks are, we argue, a crucial aspect of competent management.

<sup>229</sup> TOBY S. JAMES, *COMPARATIVE ELECTORAL MANAGEMENT: PERFORMANCE, NETWORKS AND INSTRUMENTS* 3 (2020).

<sup>230</sup> *Id.* at 5.

<sup>231</sup> Mitchell Brown, Lindsey Forson, Kathleen Hale, Robert Smith & Ryan D. Williamson, *Capacity to Address Natural and Man-Made Vulnerabilities: The Administrative Structure of U.S. Election System Security*, 19 ELECTION L.J. 180, 182 (2020) (“The decentralized nature of the environment is compounded by myriad non-profit and for-profit organizations intertwined with the government in a network of relationships that is essential to government functioning.”).

the activity they are performing.<sup>232</sup> A comprehensive theory of competent management of elections must account for the interplay between these actors which, particularly in the lead up to an election, impacts not only how nominees are chosen, but the shape of the electorate as well.<sup>233</sup>

A constructed right to vote requires training and empowering election managers to perform essential functions and respond to unforeseen circumstances. As of 2002, strict training requirements were not common throughout the nation. Only seven states had a poll worker certification process, fewer than half of the states provided mandatory poll worker training, and the remaining states either provided optional training to local poll workers or no training at all.<sup>234</sup> Training is necessary to ensure that election workers can perform essential management functions, including organizing the electoral process, monitoring election outcomes, and certifying election results.<sup>235</sup> Each of these functions can be assessed in myriad ways, and researchers will disagree over which assessments are preferable. Here, we note only that these functions are at the core of competent management.

Election managers must also be capable of responding to unforeseen circumstances. Take, for example, Maricopa County, Arizona, the fastest growing county in the country. Like counties nationwide, Maricopa was forced to rapidly adjust to the challenges associated with administering elections during the COVID-19 pandemic. In response to voters' health concerns, the County adopted a "revised election model"<sup>236</sup> for its August 2020 primary election, which, rather than forcing voters to vote at "one assigned polling location,"<sup>237</sup> allowed them to pick from between "90–100"<sup>238</sup> locations. "[M]alls and retail facilities"<sup>239</sup> within the County were also "open for at least

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<sup>232</sup> See Daniel H. Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1747–54 (1993).

<sup>233</sup> See Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*, 114 NW. U. L. REV. 633 (2019).

<sup>234</sup> See THE CONST. PROJECT, ELECTION REFORM BRIEFING: WORKING TOGETHER? STATE AND LOCAL ELECTION COORDINATION 6 (2002).

<sup>235</sup> JAMES, *supra* note 229, at 8; see also Richard H. Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. CHI. L. REV. ONLINE (June 26, 2020), <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-pildes> (describing the election process as consisting of "three interconnected stages").

<sup>236</sup> *Maricopa County Approves August Primary Election Plans*, MARICOPA CNTY. (Jun. 22, 2020), <https://www.maricopa.gov/CivicAlerts.aspx?AID=1460&ARC=3262>.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

two weeks”<sup>240</sup> prior to election day. These options were offered in addition to existing vote-by-mail options.<sup>241</sup> Absent this response, thousands of voters would have been effectively disenfranchised. And it is not apparent that any existing legal theory required County officials to make these adjustments.

In sum, competent management of elections should be considered holistically, and should be privileged when conceptualizing the parameters of the right to vote.<sup>242</sup>

### 3. *The Right to Democratic Structures*

Creating robust elections systems requires states to do more than impose new requirements onto elections officials—it also requires state legislatures and administrators to create structurally sound election administration systems. Elections are elaborate things; they involve hundreds if not thousands of employees and volunteers, scores of governance decisions, and regulations that must be complied with at all levels—federal, state, and local. It is only possible to ensure and maintain adequate funding and competent management if elections systems are administered in a way that both ensures coordination and role clarity among different state and local actors and is responsive to democratic concerns. Structural soundness is thus a prerequisite to other requirements.

Election administration spills vertically across state and local governments and horizontally across state branches and officials. State secretaries of state, for example, are often the chief election officials of their states,<sup>243</sup> but local election officials are the ones who actually administer elections.<sup>244</sup> In addition, power within state government is fractured horizontally, between branches and among executive agen-

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> It appears that non-legal scholars are beginning to do so. See JAMES, *supra* note 227, at 19 (proposing “a realist sociological approach to the study of electoral management, which can be contrasted with the rationalist scientific approach which dominates election sciences and has been used in initial approaches”); KATHLEEN HALE & MITCHELL BROWN, *HOW WE VOTE: INNOVATIONS AND AMERICAN ELECTIONS* (2020).

<sup>243</sup> See *Election Administration at State and Local Levels*, NAT’L CONF. STATE LEGISLATURES (Feb. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx> (listing twenty-four states in which an elected secretary of state is the chief election official).

<sup>244</sup> See Justin Weinstein-Tull, *A Localist Critique of Shelby County v. Holder*, 11 STAN. J. C.R. & C.L. 291, 296 (“States have delegated most of their own election responsibilities to local governments.”). This state/local division of responsibilities is often so pronounced that state officials do not always have a good sense of how their own local governments administer elections. See PEW CHARITABLE TRS., *MEASURING MOTOR VOTER 2* (2014), <http://www.pewtrusts.org/~media/Assets/2014/05/06/MeasuringMotorVoter.pdf> (finding that “almost none of the states covered by the law [could] document the degree to which



cies.<sup>245</sup> So whereas secretaries of state may be in charge of elections, they often will not have control of the state budget (generally possessed by the governor and legislature) or have enforcement authority over local governments (generally possessed by attorneys general).<sup>246</sup>

Imposing any kind of budgetary or management requirements onto state elections systems thus requires tight coordination between state officials. But a requirement for coordination will sometimes be at odds with existing state governance structures, like independent state executive branch officials,<sup>247</sup> or home rule laws, which can provide local independence from states.<sup>248</sup> For these reasons, in order to effectuate budgetary and management regulations, states must also adopt internal governance structures that clarify the roles of state and local officials in administering elections, rather than permitting a governance structure that allows overlapping responsibilities to undermine election responsibilities.<sup>249</sup>

In addition to intra-state cooperation and role clarity, sound election administration structures also must include adequate representation of politically disempowered communities. The cost to potential voters of state noncompliance with voting requirements is extremely high: no less than the loss of the ability to participate in the democratic process. For that reason, in the voting rights realm, violation of the right removes affected individuals from the political process altogether, preventing those individuals from engaging in the normal form of political feedback: voting the responsible parties out of office. Representation of disempowered communities within the election administration sphere can fill this gap: it gives the disenfranchised a voice in the election administration system even as others with similar interests are excluded.<sup>250</sup>

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their motor vehicle agencies are offering citizens the opportunity to register to vote or update their registrations”).

<sup>245</sup> See Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 512–15 (2017) (describing the variety of independent agencies within state bureaucracies).

<sup>246</sup> See generally Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1101 (2018) [hereinafter Weinstein-Tull, *State Bureaucratic Undermining*] (“Unlike the federal government, states largely have not adopted the unitary executive model.”).

<sup>247</sup> See *id.* at 1110–11.

<sup>248</sup> See Weinstein-Tull, *Abdication and Federalism*, *supra* note 135, at 877–83.

<sup>249</sup> See Weinstein-Tull, *State Bureaucratic Undermining*, *supra* note 244, at 1115–17 (describing how role confusion within state bureaucracy can undermine state or federal policy priorities).

<sup>250</sup> See *id.* at 1133–34 (arguing for “proxy representation” within state government to provide a voice for those who are politically disempowered by dysfunctional state government); cf. Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L. L. REV. 289, 294–300 (2015) (describing how the national security agencies have institutionalized internal stakeholder representatives).

A constructed right to vote therefore requires more than just adequate funding and new standards for administering elections. It also requires states to organize their election administration operations in a way that fosters functional government and democratic responsiveness.

### B. Tailoring to Experience

The second feature of a constructed right to vote is legislation tailored to the challenges faced by different groups of voters. It is not enough to react with patchwork litigation challenging limitations to the franchise; that approach ensures that the right to vote will develop solely in reaction to either intentional or unintentional resistance to the right, as described above. Instead, both federal and state legislators should affirmatively strengthen people's ability to cast their vote. This tailoring has two parts. First, legislators should seek to better understand the barriers that people face in casting their votes and craft legislation that helps voters overcome these specific barriers.<sup>251</sup> Second, legislators should incorporate into those laws mechanisms that account for the many different types of elections systems employed by states and local governments.

People who are differently situated in life have different paths to the polling place.<sup>252</sup> Uncovering this set of voter experiences requires investing in investigative resources around the country. The Presidential Commission on Election Administration was a good example of this.<sup>253</sup> To diagnose the state of the electoral system, it sought information about how different kinds of voters experience their elections systems. The Commission "sought out and received extensive testimony, data, and information from election administrators, experts, academics, and the public. . . . In addition to four public hearings the Commission held around the country, subgroups of commissioners were invited to and attended meetings of election officials, interest groups, and academics."<sup>254</sup> Although the Commission learned about and described specific voting experiences, its findings and recommendations were more general.

In addition to uncovering more information about voter experience, realizing a meaningful right to vote requires enacting legislation

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<sup>251</sup> In a sense, well-tailored voting legislation is reactive in that it responds to the conditions of voters. But we see it as different from the way in which the current regime is problematically reactive because it does not respond solely to efforts aimed at limiting the franchise.

<sup>252</sup> See *supra* Section II.B.

<sup>253</sup> PRESIDENTIAL COMM'N ON ELECTION ADMIN., *supra* note 199.

<sup>254</sup> *Id.* at 7.

that addresses these experiences. Although some legislation is circumstance-specific,<sup>255</sup> most federal legislation has broader aims. The most recent major voting rights proposal, H.R. 1, is an example of both. It seeks to modernize voter registration and increase early voting—both examples of more generalized reforms—but it also buttresses protections for disabled voters and protects those who have been disenfranchised by state laws that target people previously convicted of a felony.<sup>256</sup>

There is room for more legislation that targets specific challenges. Consider, for example, the proposed (but not enacted) Native American Voting Rights Act, which would “increas[e] Native access to voter registration sites and polling locations, and authoriz[e] tribal ID cards for voting purposes.”<sup>257</sup> We envision other, similarly tailored laws: a rural voter rights law that ensures polling places in rural areas are not too far from any individual voter; a college student voting rights act that ensures college students can register and vote in the jurisdiction where they attend college; a homeless voter rights act that ensures homeless voters will not be disenfranchised because they lack a stable address.

Simply enacting legislation with national standards, however, will not ensure that those standards effectively make change. As described above, election administration is “*hyperfederalized*.”<sup>258</sup> Although the Constitution, through its Elections Clause, makes states initially responsible for administering elections,<sup>259</sup> states largely delegate their election administration responsibilities down to local governments.<sup>260</sup> States differ in the specifics, but they tend to delegate registration

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<sup>255</sup> See *supra* Section II.B.

<sup>256</sup> See For the People Act of 2019, H.R. 1, 116th Cong. §§ 1101–03, 1402 (2019) (as placed on Senate calendar) (proposing a requirement for states to establish and operate automatic registration systems).

<sup>257</sup> See Press Release, U.S. Senate Comm. on Indian Affs., Udall, Luján Introduce Bicameral Native American Voting Rights Act (Mar. 12, 2019), <https://www.indian.senate.gov/news/press-release/udall-lujan-introduce-bicameral-native-american-voting-rights-act>.

<sup>258</sup> ALEC C. EWALD, *THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE* 3 (2009).

<sup>259</sup> The Elections Clause requires that states choose the “Times, Places and Manner of holding Elections . . . .” U.S. CONST. art. I, § 4. Alexander Hamilton believed the Elections Clause authorized the federal government to regulate elections “in the last resort,” leaving primary responsibility to the states. *THE FEDERALIST* NO. 59 (Alexander Hamilton).

<sup>260</sup> See generally Weinstein-Tull, *Election Law Federalism*, *supra* note 79, at 778–80 (describing the general state prerogative to delegate election administration responsibilities down to local governments); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990) (“State legislatures, often criticized for excessive interference in local matters, have frequently conferred significant political, economic and regulatory authority on many localities.”).

responsibilities,<sup>261</sup> absentee balloting responsibilities,<sup>262</sup> funding responsibilities,<sup>263</sup> and poll worker training responsibilities.<sup>264</sup> And once delegated, states often fail to monitor those requirements and in essence abdicate them fully to local governments.<sup>265</sup>

As a consequence, any new requirement on election administration is not merely a requirement imposed onto a government actor whose compliance may be monitored. Election requirements—whether they be federal, state, or local in nature—are instead imposed onto an entire institutional structure (or “ecosystem”<sup>266</sup>) that includes state governments and local governments, each of which has specific pathologies, hierarchies, and internal power dynamics.

As an example, take compliance with the National Voter Registration Act (NVRA), the federal statute discussed above that requires states to provide voter registration opportunities in a variety of government offices, like motor vehicles offices and public assistance offices.<sup>267</sup> These mandates require actions not only by state and local election officials, who handle voter registration, but also state and local motor vehicle officials and state and local public assistance officials, who administer motor vehicles and public assistance offices.<sup>268</sup> NVRA compliance suffers without both directed coordination among branches, agencies, and local governments and clear roles for each.<sup>269</sup>

<sup>261</sup> See Weinstein-Tull, *State Bureaucratic Undermining*, *supra* note 246, at 778–79.

<sup>262</sup> See *id.* at 779.

<sup>263</sup> See THE CONST. PROJECT & THE ELECTION INFO. REFORM PROJECT, ELECTION REFORM BRIEFING: WORKING TOGETHER? STATE AND LOCAL ELECTION COORDINATION 6 (2002), <https://perma.cc/G7BR-5RQB>.

<sup>264</sup> See *id.*

<sup>265</sup> See Richard Briffault, “What About the ‘Ism?’” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1318 (1994) (noting that state-local delegations of authority are “often quite broad and . . . rarely revoked. In most states, local governments operate in major policy areas without significant external legislative, administrative, or judicial supervision”); Weinstein-Tull, *Abdication and Federalism*, *supra* note 137, at 841 (arguing that once states delegate responsibilities to local government, they “do not monitor local compliance with those laws, they disclaim responsibility for the actions of their local governments, and they relinquish the legal capacity to bring their local governments into compliance”).

<sup>266</sup> See Daniel P. Tokaji, *Teaching Election Administration*, 56 ST. LOUIS U. L.J. 675, 680–81 (2012) (describing a state elections ecosystem as consisting of nine parts: “(1) institutional arrangements, (2) voter registration, (3) challenges to voter eligibility, (4) voting technology, (5) early and absentee voting, (6) polling place operations, (7) voter identification and other ballot security measures, (8) provisional voting, and (9) recounts, contests, and other post-election disputes”).

<sup>267</sup> See 52 U.S.C. §§ 20504(a)–(c) (requiring states to provide voter registration opportunities in motor vehicle offices); *id.* § 20506(a)(2)(A) (public assistance agencies); *id.* § 20506(a)(2)(B) (state disability offices); *id.* § 20506(c) (military recruitment offices).

<sup>268</sup> See Weinstein-Tull, *State Bureaucratic Undermining*, *supra* note 246, at 1102.

<sup>269</sup> See *id.* at 1130.

So legislation that takes voter experience into account must also take election structure into account. There are two ways Congress can do this. The first is to impose strict reporting requirements onto states and local governments that administer federal laws or are subject to federal standards. We actually know very little about how local governments administer elections. The federal body charged with collecting some election statistics—the Election Assistance Commission—asks states to voluntarily provide statistics, but cooperation is imperfect and those statistics are incomplete.<sup>270</sup>

The second way to account for state-local delegation is to require states that delegate to local governments to create a plan for monitoring that delegation. Medicaid regulations provide a model for this kind of required oversight. These regulations permit the state agency responsible for administering Medicaid to delegate eligibility determinations to local government agencies,<sup>271</sup> but also require that if a state chooses to delegate its responsibilities to local agencies, it must create “methods to keep itself . . . informed of the adherence of local agencies to the State plan provisions” and “[t]ake corrective action to ensure their adherence.”<sup>272</sup> Any new piece of federal legislation should incorporate one of these forms of required state-local compliance monitoring.

### C. *Developing Voting Rights Doctrines*

Even tailoring the right to vote to the specific circumstances of voters is not sufficient, however. The third component of a constructed right to vote is that courts must interpret the right in a proactive way. They must take a more active hand in how they require states and local governments to comply with various statutes. Specifically, they should incorporate the electoral adequacy factors described above.

However, courts are traditionally backwards-looking: They can only act when cases come before them and once that happens, and even with reason to act, they generally act in a way that remedies the immediate problem but not potential future problems.<sup>273</sup> This tradi-

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<sup>270</sup> See HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* 44–49 (2009); Weinstein-Tull, *Election Law Federalism*, *supra* note 79, at 794–95.

<sup>271</sup> See 42 C.F.R. §§ 431.10(c)–(d) (2015).

<sup>272</sup> *Id.* § 435.903.

<sup>273</sup> See William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 *YALE L.J.* 635, 649–50 (1982) (“The preferred form of injunction is to instruct the defendant not to do what it has been planning or to stop what it has been doing. The affirmative or mandatory injunction, instructing the defendant to do a particular thing or set of things, is the disfavored remedy.”).

tional role has long been in tension with the goals of effective civil rights litigation. The more affirmative state action that a right requires for vindication, the more necessary it becomes to reach inside state bureaucracy in order to fully remedy rights violations.<sup>274</sup> The extent of judicial power to enter civil rights remedies like these has proven contentious.<sup>275</sup> These remedies pose constitutional problems because they require courts to take unusually invasive action in order to foster change and compliance within state and local governments. The potential problems with this invasiveness are structural: They implicate federalism because they require federal courts to intrude into state bureaucracy and sovereignty;<sup>276</sup> they implicate separation of powers because civil rights injunctions can require courts to make policy judgments, which some believe they are not competent to make.<sup>277</sup>

These tensions have led courts to limit the availability of civil rights remedies. In a line of cases that includes *Milliken v. Bradley*<sup>278</sup> and *Missouri v. Jenkins*,<sup>279</sup> the Supreme Court has limited the scope of available judicial remedies to civil rights violations. Over time, because of this doctrinal trend, civil rights injunctions have transformed from the “traditional injunctions of the civil rights era that were often hundreds of pages long and ‘took the form of highly detailed regulatory codes embracing vast provinces of administration,’”<sup>280</sup> to more process-based injunctions that “treat functional gov-

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<sup>274</sup> See Weinstein-Tull, *State Bureaucratic Undermining*, *supra* note 246, at 1125–34 (describing the ways that remedies must invade and direct state bureaucracy in order to vindicate some kinds of civil rights).

<sup>275</sup> Owen Fiss and Abram Chayes, in particular, initiated academic discussion about what they called “civil rights injunctions” and “structural injunctions.” See generally OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

<sup>276</sup> See Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 647 n.166 (1983) (“Local autonomy and other federalism values have often played a role in shaping remedies in constitutional cases . . .”).

<sup>277</sup> See Fletcher, *supra* note 273, at 663 (“The dilemma for the judicial process is deep and unavoidable. Discretion in resolving non-legal polycentric problems is inevitable in institutional decrees. And a court can never succeed in domesticating such discretion sufficiently to make it legal in nature while still permitting it to serve the function of discretion.”).

<sup>278</sup> 418 U.S. 717 (1974).

<sup>279</sup> 515 U.S. 70 (1995).

<sup>280</sup> Weinstein-Tull, *State Bureaucratic Undermining*, *supra* note 246, at 1126 (quoting Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1024 (2004)).

ernment as the goal and create pathways between state actors by specifying how they must work together to achieve compliance.”<sup>281</sup>

This trend—away from interfering with state bureaucracy—is at odds with constructing the right to vote. As described above, administering elections fairly requires extensive state action: adequate funding, competent administration, and a set of state structures that foster accountability and inclusion. Compliance with voting rights laws requires similar things. Take as an example one of the centerpieces of H.R. 1: automatic voter registration. H.R. 1 requires that “[t]he chief State election official of each State shall establish and operate a system of automatic registration for the registration of eligible individuals to vote for elections for Federal office in the State . . . .”<sup>282</sup> This is to be achieved in a manner that the state election official decides, but a wide variety of state agencies must also participate: public assistance agencies, firearm regulation agencies, secondary schooling agencies, and others.<sup>283</sup>

Enacting this priority will require states to dedicate funding, train administrators at both the state and local levels, and coordinate cooperation between tens if not hundreds of state and local actors. And when a state fails to enact it—as inevitably some will<sup>284</sup>—courts have a choice: They can simply mandate compliance and leave the methods of compliance up to the defendant governments, or they can take an approach that better positions the defendant governments to ensure compliance in the future. This second approach—incorporating funding, administrative competence, and democratic structures—is what we advocate, and it will inevitably run up against the doctrinal trend away from highly involved remedies.<sup>285</sup>

Nevertheless, courts have approved consent decrees that take a constructive approach. These decrees should serve as models for how the doctrine can develop in productive ways. The decrees are agreed to by both parties, which allows the court to enter a remedy that

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<sup>281</sup> *Id.*; see also Sabel & Simon, *supra* note 280, at 1032 (noting that more recent public law remedies differ from the more hands-on Civil Rights era remedies because they “emphasize broad goals and leave the defendants substantial latitude to determine how to achieve them”).

<sup>282</sup> For the People Act of 2019, H.R. 1, 116th Cong. § 1012(a)(1) (2019).

<sup>283</sup> See *id.* § 1013(e)(1) (listing these agencies).

<sup>284</sup> See Weinstein-Tull, *Election Law Federalism*, *supra* note 79, at 759–61 (describing widespread noncompliance with a number of important federal election laws).

<sup>285</sup> Although that trend started in the school desegregation context, it has spread to public law contexts more broadly, including voting. See, e.g., *Voting Rts. Coal. v. Wilson*, 60 F.3d 1411, 1416 (9th Cir. 1995) (upholding the constitutionality of the National Voter Registration Act of 1993, but cautioning the district court “to approach its task of implementation with an ‘adequate sensitivity to the principle of federalism’” (quoting *Ass’n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 798 (7th Cir. 1995))).

exceeds what it otherwise might enter in a contested remedial phase.<sup>286</sup> The most involved of these decrees vindicate, or attempt to vindicate, a full understanding of the statutory rights involved: that is, a rearrangement of the state bureaucracy such that the institutional defendants are less likely to fall out of compliance with the statute in the future. As described below, they require the institutional defendants to devote additional resources to compliance, they require action to improve administrative performance, and they put accountability and inter-state coordination mechanisms into place.<sup>287</sup> Courts should take these innovations from the remedial stages and incorporate them into the doctrine itself. That is, they should *require* these forms of remediation once they find a rights violation, rather than relying on the parties to come to them on their own.

First, adequate funding. The consent decrees do not tend to explicitly require the institutional defendants to dedicate additional funding to achieving compliance, but they do impose obligations that implicitly do so, like requiring institutional defendants to hire additional personnel to staff and coordinate compliance. These provisions tend to appear in consent decrees that resolve violations of sections 4(e) and 203 of the Voting Rights Act, which require jurisdictions to provide language assistance for Limited English Proficient voters. For example, in a case against officials in Salem County, New Jersey, the settlement agreement required the county board of elections to “recruit, hire, and assign poll officials able to understand, speak, write, and read Spanish fluently to provide effective assistance . . . to Spanish-speaking voters in Penns Grove, Salem County at the polls on election days.”<sup>288</sup> In the education context, these requirements can be more explicit. In one settlement that resolved an education finance dispute, for example, the state agreed to “monitor[] and ensur[e] the

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<sup>286</sup> Public law remedies must closely track the scope of the violation. See *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) (“[T]he scope of the remedy is determined by the nature and extent of the constitutional violation.”). But consent decrees need only be fair, adequate, reasonable, consistent with the public interest, and consistent with the statute. See *United States v. Lexington-Fayette Urb. Cnty. Gov’t*, 591 F.3d 484, 489 (6th Cir. 2010).

<sup>287</sup> Although we focus on consent decrees that have arisen from voting rights statutes, *Anderson-Burdick* litigation during COVID-19 led some courts to require election law changes. See Pildes, *supra* note 120, at 9–10.

<sup>288</sup> Settlement Agreement and Proposed Order at ¶ 8, *United States v. Salem Cnty.*, No. 08-cv-03276 (D.N.J. 2008), <https://www.justice.gov/crt/united-states-district-court-district-new-jersey-1>; see also Consent Order at ¶ 12, *United States v. Colfax Cnty.*, 12-CV-84 (D. Neb. Mar. 2, 2012), ECF No. 12 (“Defendants shall recruit, hire, and assign poll officials able to understand, speak, write, and read Spanish and English fluently to provide effective assistance to Spanish-speaking voters at the polls on election day.”).



provision of educational resources, as well as funding for facilities construction and maintenance.”<sup>289</sup>

Second, competent administration. Some consent decrees require institutional defendants to take steps to remedy noncompliance by focusing on training. States leave most training responsibilities to their local governments,<sup>290</sup> so forcing states to engage in training is an affirmative obligation that they would not otherwise employ. As an example, take a memorandum of understanding that resolved a dispute arising out of the National Voter Registration Act. The memorandum has an entire section devoted to the “Training and Monitoring” responsibilities of the state, which required the New York motor vehicles department to “develop, implement, and offer NVRA training” which would be “mandatory for every DMV employee, county employee, or other licensing agent responsible for providing driver license services” on an annual basis.<sup>291</sup>

Third, democratic structures. Some model consent decrees take structure seriously by creating lines of communication and coordination between institutional actors. States are complex, plural institutions, and vindicating voting rights requires cooperation between multiple state actors who might not otherwise be inclined to cooperate.<sup>292</sup> To solve that problem, consent decrees meticulously set out the roles and required actions of specific state and local actors. One settlement agreement between the Metropolitan Tulsa Urban League and various Oklahoma state actors to enforce the NVRA, for example, requires the state to designate specific and discrete employees as NVRA coordinators for the State Elections Board, the state-level Department of Human Services, local-level Department of Human Services agencies, the state-level Department of Health, and local-level Department of Health agencies.<sup>293</sup> These coordinators are responsible not just for NVRA compliance in their domains but for

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<sup>289</sup> Koski, *supra* note 204, at 1917.

<sup>290</sup> See THE CONST. PROJECT & THE ELECTION INFO. REFORM PROJECT, *supra* note 263, at 6.

<sup>291</sup> Memorandum of Understanding between the United States and the State of New York, through the New York State Board of Elections and the New York State Department of Motor Vehicles 13 (U.S. Dep’t of Justice, June 20, 2017), <https://www.justice.gov/crt/case-document/file/975901/download>.

<sup>292</sup> See William P. Marshall, *Break Up the Presidency? Governor, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2453 (2006) (describing how electing statewide officials independently, like governors and attorneys general, can generate competition between those officers).

<sup>293</sup> Settlement Agreement between the Metropolitan Tulsa Urban League et al. and the Oklahoma State Election Board et al. 4–10 (July 28, 2015), [https://www.projectvote.org/wp-content/uploads/2015/09/ok\\_settlement\\_agreement\\_jul\\_28\\_2015.pdf](https://www.projectvote.org/wp-content/uploads/2015/09/ok_settlement_agreement_jul_28_2015.pdf).

coordinating with the other state actors to ensure statewide compliance.<sup>294</sup>

Consent decrees also promote democratic structures by creating accountability mechanisms in the form of reporting requirements and requirements to provide outreach to affected community members. In one decree that resolved a dispute between the United States and Vermont over Vermont's compliance with the Uniformed and Overseas Citizen Absentee Voter Act, for example, Vermont was required to report to counsel for the United States its compliance with the statute for an upcoming election.<sup>295</sup> In another example that arose in the context of a dispute over NVRA compliance, Nevada state officials agreed to report to plaintiffs' counsel the total number of transactions covered by the statute and their compliance with the statute on a monthly basis for three years.<sup>296</sup>

These settlements also require defendants to engage in outreach to community members—despite voting rights statutes saying nothing at all about communications outreach. In one section 2 settlement that resulted in redrawn district lines, for example, the agreement required the school board defendant to “ensure that information, materials, and announcements regarding the district boundaries . . . are provided to the voters through mail, newspapers, radio, the Internet, and other appropriate media.”<sup>297</sup> In another case that settled a section 203 dispute, the consent decree required the institutional defendant to establish an “Advisory Group” to “assist and inform the Spanish language election program.”<sup>298</sup> This advisory group was “open to any interested community members and organizations.”<sup>299</sup> By opening up election administration to community comment, the consent decree institutionalized community feedback and democratic accountability.<sup>300</sup>

These expansive consent decrees are not the default remedy for voting rights violations, and certainly not the result when either the violation or remedy is contested by the parties. Take, as an example, the memorandum of understanding that resolved a longstanding dis-

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<sup>294</sup> *Id.*

<sup>295</sup> See Settlement Agreement and Stipulated Motion for Entry of Order at 4–5, *United States v. Vermont*, No. 5-12-cv-00236-cr (D. Vt. Oct. 22, 2012), ECF No. 10, [https://www.justice.gov/sites/default/files/crt/legacy/2012/10/23/vt\\_ucocava\\_settlement12.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/10/23/vt_ucocava_settlement12.pdf).

<sup>296</sup> See Settlement Agreement at 10–12, 16, *Nat'l Council of La Raza v. Cegavske*, No. 12-cv-00316 (D. Nev. Mar. 11, 2016), ECF No. 116.

<sup>297</sup> Consent Judgment and Decree ¶ 4, *United States v. Sch. Bd. of Osceola Cnty.*, No. 08-cv-582-ORL-31DAB (M.D. Fla. Apr. 23, 2008), ECF No. 6.

<sup>298</sup> Consent Order ¶ 24, *United States v. Colfax County*, 12-CV-84 (D. Neb. Mar. 2, 2012), ECF No. 12.

<sup>299</sup> *Id.*

<sup>300</sup> See *supra* Section III.A.3 (discussing adequate representation of communities within the election administration ecosystem).

pute between the United States and Louisiana over NVRA compliance.<sup>301</sup> Unlike the remedies described above, this settlement contains no requirements for new training (in fact, it explicitly states that certain state actors will *not* take responsibility for remote voter registration training<sup>302</sup>), no reporting requirements, no community outreach, and no new funding.

Courts thus currently rely on parties to construct appropriate remedies. But if these remedies were required by the doctrine, they would become an important component of constructing the right to vote.

### CONCLUSION

After the flawed 2020 primary election in Georgia, Kristen Clarke, then president and executive director of the Lawyers' Committee for Civil Rights Under Law, said that our elections systems were "broken."<sup>303</sup> If they are broken, it is only because they were never whole. We have never defined an affirmative right to vote. Instead, our conception of the right is reactive: defined and guided by those who seek to restrict the vote. As a consequence, our elections systems are always just one unexpected circumstance from disaster. They are continually at the mercy of new forms of intentional resistance and administrative incompetence.

Creating a robust right to vote requires thinking about our elections systems in more experiential ways. The right to vote must impose affirmative obligations on election administrators consistent with what is necessary to administer a complex system: It should require adequate funding, competent management, and democratic structures. Congress and the courts should also play a role by creating more personalized voting rights laws and interpreting those laws in ways that force states and local governments to proactively foster compliance, rather than retroactively respond to noncompliance. In short, the right to vote must embrace and encompass the foundations of election administration.

Embracing this vision of a constructed right to vote will require stretching our understanding of what a right is, potentially in uncom-

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<sup>301</sup> See Memorandum of Understanding and Settlement Agreement, *United States v. Louisiana*, No. 11-CV-470 (M.D. La. Aug. 21, 2017), ECF No. 523-1.

<sup>302</sup> *Id.* at 4 (noting that the Louisiana Secretary of State will not "direct, instruct, or train any agency or office to provide voter registration services by remote means").

<sup>303</sup> Steve Peoples & Christina A. Cassidy, *'It's Broken': Fears Grow About Patchwork US Election System*, ASSOCIATED PRESS (June 12, 2020), <https://apnews.com/550d11a97af645b1d6e64ad2047cd72a>.

fortable ways.<sup>304</sup> The alternative, though, is elections systems forever on the verge of collapse. We must secure the foundation of our most precious right.

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<sup>304</sup> See Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703, 707 (2019) (“[I]n order to complete the unfinished work of the Civil Rights Movement, lawyers and activists must stretch their limbs toward the unorthodox, the unthinkable.”).