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## A New Old Solution: Why The United States Should Vote By Mail-in Ballot

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# A New Old Solution: Why The United States Should Vote By Mail-in Ballot

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By Annie Barouh

## I. INTRODUCTION

Since its inception, the voting system in the United States has been evolving. Part of that evolution has been an expansion of enfranchisement. In 1870 the 15<sup>th</sup> Amendment extended voting rights to African-American men.<sup>1</sup> In 1920, the 19<sup>th</sup> Amendment extended voting rights to women.<sup>2</sup> Despite the 15<sup>th</sup> and 19<sup>th</sup> Amendments extending voting rights to a greater portion of the population, the system evolved again in 1964 when the 24<sup>th</sup> amendment was enacted to protect the poor from poll taxes.<sup>3</sup> Subsequently, the Voting Rights Act (VRA) was signed into law in 1965 and prohibited racial discrimination in voting.<sup>4</sup> The VRA was designed to protect the rights given in the 15<sup>th</sup> Amendment and protect against racial discrimination. The VRA banned laws such as literacy tests, which had traditionally been used to deny enfranchisement.<sup>5</sup> Although the right to vote is enshrined in the Constitution, these additional legislative protections were necessary to truly provide access to the rights guaranteed by the Constitution.

Once again, our voting system must evolve. The purpose of this article is to discuss the ways in which our current voting setup is insufficient in terms of ballot security and voter ease of access and to propose that we resolve that insufficiency by switching to voting entirely on mail-in paper ballots. First, this article will discuss how our voting system is currently configured and

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<sup>1</sup> U.S. Const. art. XV.

<sup>2</sup> U.S. Const. art. XIX.

<sup>3</sup> U.S. Const. art. XXIV.

<sup>4</sup> 89 P.L. 110, 79 Stat. 437, 89 P.L. 110, 79 Stat. 437.

<sup>5</sup> *History of Federal Voting Rights Laws*, DOJ, <https://www.justice.gov/crt/history-federal-voting-rights-laws> [<https://perma.cc/SQ4A-RVTA>].

contextualize why our system is set up that way. Second, it will discuss why switching from any one voting machine to another will not solve the problem. Third, it will move into why the problems with polling places themselves mean that merely switching over to an in-person paper ballot will not be sufficient. Finally, it will analyze the mechanisms by which such a voting method could be implemented.

## II. CURRENT VOTING SETUP

States currently employ one of four basic voting setups. Thirteen states do not permit early voting and require an excuse to vote by absentee ballot.<sup>6</sup> Seven states permit early voting but do not permit voting by no-excuse absentee ballot.<sup>7</sup> Twenty-six states and the District of Columbia permit both early voting and no-excuse absentee voting but also have polling places for voters.<sup>8</sup> Three states vote entirely by mail and do not maintain traditional polling places.<sup>9</sup> Where traditional polling places are still in use, states use one of three possible basic voting methods.

The first and most common method is a paper ballot.<sup>10</sup> Paper ballots can either be counted by an optical scanner or hand-counted, depending on the county. Counties can also use a combination of the two and check ballots by hand if an optical scan machine becomes inoperable. Optical scan ballots also

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<sup>6</sup> *Absentee and Early Voting*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<https://perma.cc/WC4Z-47X3>] (Alabama, Connecticut, Delaware, Kentucky, Michigan, Missouri, Mississippi, New Hampshire, New York, Pennsylvania, Rhode Island, South Carolina, and Virginia).

<sup>7</sup> *Id.* (Arkansas, Indiana, Louisiana, Massachusetts, Tennessee, Texas, and West Virginia).

<sup>8</sup> *Id.* (Alaska, Arizona, California, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Minnesota, Montana, Nebraska, Nevada, New Mexico, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Vermont, Wisconsin, and Wyoming).

<sup>9</sup> *Id.* (Colorado, Oregon, Washington).

<sup>10</sup> *Polling Place Equipment – November 2018*, VERIFIED VOTING, <https://www.verifiedvoting.org/verifier/#year/2016/> [<https://perma.cc/U7A8-DGK2>].

create an unaltered paper record in case a manual recount needs to be done, most often in the case of a very narrow vote margin.

The second method is a combination of paper ballots and direct-recording electronic (DRE) machines.<sup>11</sup> This DRE method branches into three variations. Depending on the state, all of the DRE machines are equipped with Verified Voter Paper Audit Trail (VVPAT) printers, some of the DRE machines are equipped with VVPAT printers, or none of the DRE machines are equipped with VVPAT printers.<sup>12</sup>

The third method of voting is to vote entirely by DRE machine, meaning that there are no physical ballots at polling places.<sup>13</sup> This third method also branches off into the same three variations as discussed above. Five states use only DRE machines with no paper backup whatsoever.<sup>14</sup>

The three states that vote primarily by mail still maintain a limited number of election centers, typically one per county, to assist those who need help with completing a ballot.<sup>15</sup> The specific mechanics of voting entirely by mail will be discussed in more detail later in this paper as a model for other states to follow.

One of the landmark events in the move to machine voting was the 2000 presidential election and, in particular, the issues with Florida's voting system. Florida's butterfly ballot and "hanging chads" caused a decline in public support for paper voting.<sup>16</sup> The butterfly ballot was designed so that the presidential ticket options ran down both sides of the voting card with a

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (Delaware, Georgia, Louisiana, New Jersey, and South Carolina.)

<sup>15</sup> Elections and Voting, WASHINGTON SECRETARY OF STATE, <https://wei.sos.wa.gov/agency/osos/en/voterswithdisabilities/pages/accessiblevotingfaq.a.spx> [<https://perma.cc/8RMS-RDJV>]; Election Day FAQs, COLORADO SECRETARY OF STATE, <https://www.sos.state.co.us/pubs/elections/FAQs/ElectionDay.html> [<https://perma.cc/EB48-4CSU>].

<sup>16</sup> Jonathan Bannet et al., *Hack-a-Vote: Security Issues with Electronic Voting Systems*, 2 SEC. & PRIVACY MAG. 32, 32 (2004).

row of holes in the center of the ballot.<sup>17</sup> The voter was to select their preferred ticket and then punch out the corresponding hole, but because the ticket options ran down both sides of the ballot, it was not entirely clear which hole corresponded to a particular candidate.<sup>18</sup> There was concern that the butterfly ballot had confused voters because of its design, resulting in voters inadvertently selecting a candidate they never intended to support.<sup>19</sup> The “hanging chads” were the result of the punch-out portion of the ballot not fully detaching, which made it difficult for the vote-counters to discern whether the voter had intended to select the ticket in question or whether the selection had been a mistake.<sup>20</sup> Once it became clear that Florida would decide the election and that Florida’s ballots had caused possible confusion that might affect the outcome of the election, many news organizations ran daily stories about these paper ballots. Nightly news broadcasts showed tapes of election volunteers scrutinizing ballots to determine the voter’s ultimate intent. Late night talk shows mocked the butterfly ballots and hanging chads.<sup>21</sup> Some people speculated that the entire presidential election had turned on whether these paper ballots had been properly marked and properly counted.<sup>22</sup>

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<sup>17</sup> Butterfly Ballot, BBC NEWS (Nov. 23, 2000, 4:48 pm), [http://news.bbc.co.uk/2/hi/in\\_depth/americas/2000/us\\_elections/glossary/a-b/1037172.stm](http://news.bbc.co.uk/2/hi/in_depth/americas/2000/us_elections/glossary/a-b/1037172.stm) [<https://perma.cc/7WWS-NWH9>].

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Janny Scott, *Counting the Vote*, N.Y. TIMES (Nov. 17, 2000), <http://www.nytimes.com/2000/11/17/us/counting-the-vote-humor-television-shows-find-comedy-in-the-errors.html> [<https://perma.cc/PCT5-ZYFL>].

<sup>22</sup> Don van Natta Jr. and Dana Canedy, *The Palm Beach Ballot*, N.Y. TIMES (Nov. 9, 2000), <http://www.nytimes.com/2000/11/09/us/2000-elections-palm-beach-ballot-florida-democrats-say-ballot-s-design-hurt-gore.html> [<https://perma.cc/E3Z3-GNWJ>].

### III. VOTER TURNOUT IN THE U.S. COMPARED TO VOTER TURNOUT AROUND THE WORLD

Within the global context, American voter turnout is significantly lower than most other developed nations. The significance of having fewer people voting in the United States is that there are fewer people selecting the representatives that create policy that affects nearly every facet of American life. If politicians need only cater to the small segment of the population that votes, those politicians have a reason to develop policies that will only benefit those that vote while having very little inclination to develop policies that will benefit non-voters.

Other comparable developed nations, which typically have higher voter turnout than the U.S., lead in a number of metrics. U.S. News and World Report ranked the United States behind Sweden, Denmark, Australia, Norway, Finland, and Germany in quality of life.<sup>23</sup> In determining quality of life, the survey considered factors such as income inequality, political stability, a well-developed public education system, and a well-developed public health system.<sup>24</sup> Another study, by The Bertelsmann Stiftung, released a 2016 report that ranked the U.S. 26<sup>th</sup> out of 41 in terms of overall policy outcomes.<sup>25</sup> Again, the U.S. ranked behind countries with higher voter turnout. The same study also ranked countries by its democratic institutions and processes. In that ranking, the U.S. was 12<sup>th</sup>, but it still ranked behind all of the countries listed above except Australia.<sup>26</sup>

The international ranking data above is important because it implies that increased voter turnout will mean that our governmental representatives are

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<sup>23</sup> *Quality of Life Rankings*, U.S. NEWS AND WORLD REPORT, <https://www.usnews.com/news/best-countries/quality-of-life-full-list> [<https://perma.cc/SH4J-UK43>].

<sup>24</sup> Deidre McPhillips, *Methodology*, U.S. NEWS AND WORLD REPORT (January 23, 2018, 12:01 am), <https://www.usnews.com/news/best-countries/articles/methodology> [<https://perma.cc/MA9G-R7A3>].

<sup>25</sup> BERTELSMANN STIFTUNG, POLICY PERFORMANCE AND GOVERNANCE CAPACITIES IN THE OECD AND EU: SUSTAINABLE GOVERNANCE INDICATORS 16 (2016).

<sup>26</sup> *Id.* at 17.

accountable to an electorate that is a more accurate reflection of the country at large. If those representatives know that they must answer to that electorate, they will be more likely to create policies that serve that whole electorate, rather than just one segment.

#### IV. CURRENT THREATS TO OUR ELECTIONS

Elections provide an accountability mechanism for our representatives. If our elections are not free and fair, those accountability mechanisms do not work properly. Our elected representatives will feel pressure to answer to the interests controlling the mechanisms, not the actual electorate. To that end, our elections face threats both externally and internally.

##### A. *External Threats*

One significant external threat we face is interference from other countries. In late 2016, the FBI, the CIA, the NSA, and the ODNI released a joint report stating that the agencies had determined with “high confidence” that Russia had interfered in the 2016 presidential election.<sup>27</sup> Part of this interference was to hack into the emails of both the Clinton campaign and the Democratic National Committee (DNC).<sup>28</sup> Former FBI Director James Comey testified that the Republican National Committee (RNC) had also been hacked.<sup>29</sup> Although these hacks were not to the voting machines directly, they should not be dismissed because they support the argument that the United States faces an imminent threat of outside interference, and should, therefore,

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<sup>27</sup> Matthew Rosenberg, *Trump Misleads on Russian Meddling: Why 17 Intelligence Agencies Don't Need to Agree*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/us/politics/trump-russia-intelligence-agencies-cia-fbi-nsa.html> [<https://perma.cc/W3JA-9R39>].

<sup>28</sup> Raphael Satter, *Inside story: How Russians Hacked the Democrats' Emails*, AP NEWS (Nov. 4, 2017), <https://www.apnews.com/dea73efc01594839957c3c9a6c962b8a> [<https://perma.cc/H3W4-3CQH>].

<sup>29</sup> Nicole Gaouette, *FBI's Comey: Republicans also hacked by Russia*, CNN (Jan. 10, 2017, 4:16 PM), <http://www.cnn.com/2017/01/10/politics/comey-republicans-hacked-russia/index.html> [<https://perma.cc/S875-P9QJ>].

immediately begin taking steps to protect essential facets of our democracy, such as our elections. The security of the voting process is important because, if our elections are not secure, we rob the electorate of its power to hold politicians accountable. Without the ability to hold elected officials accountable, power becomes more concentrated and more absolute. As Lord Acton said, “power tends to corrupt and absolute power corrupts absolutely.”<sup>30</sup> Allowing the electorate to function as a real and effective check on elected officials is key to preventing the consolidation of power. Failing to address foreign interference in the electoral process hinders the ability of elections to function as a political check and is, therefore, a threat to our democracy.

### *B. Internal Threats*

The internal factors affecting our elections are extensive and systemic. There are two major categories of factors: pre-election management and day-of election management.

#### **1. Pre-election management**

Pre-election management includes the steps taken to prepare for an election, such as selecting polling places, determining how the vote will be administered, and determining who is eligible to vote. Pre-election management can be a threat to the electorate because those hostile to a more representative government may use any of the components of that pre-election management to create a more favorable eligible voting population, rather than advocating for positions that are more popular among a true representation of the electorate. Often this massaging of the electorate comes

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<sup>30</sup> Lord Acton, *Letter to Archbishop Mandell Creighton* (Apr. 5, 1887), <https://history.hanover.edu/courses/excerpts/165acton.html> [<https://perma.cc/7WDK-3UEZ>].



at the expense of traditionally marginalized communities, such as poor voters, Latinx voters, and African-American voters.<sup>31</sup>

Both Constitutional amendments and statutes have been put in place to ostensibly protect against this kind of manipulation, but an unintended consequence is that those who might wish to manipulate the electorate have designed increasingly subtle policies that live within the letter of the law but effectively limit the electorate. Prior to 2013, Section 5 of the VRA required states with “indicators of a history of discrimination” in their voting laws to seek preclearance from the U.S. Attorney General or the D.C. District Court before implementing any changes to voting laws.<sup>32</sup> Whether or not a state was subject to Section 5 of the VRA was determined by a formula contained in Section 4(b) of the VRA.<sup>33</sup> In 2013, Shelby County, Alabama filed suit against the U.S. government, arguing that Sections 4(b) and 5 were facially unconstitutional.<sup>34</sup> In his opinion, Justice Roberts reasoned that the a statute’s “current burdens must be justified by current needs,” and because the Section 4(b) formula was based on outdated data and practices from more than forty years prior, it did not meet that requirement.<sup>35</sup> As a result, the Supreme Court decided in Shelby County’s favor, holding that the coverage formula laid out in Section 4(b) was unconstitutional.<sup>36</sup> Although the Court did not issue a holding with regards to Section 5 of the VRA, the loss of the Section 4(b) formula meant that there was no formula to decide whether a state was subject to Section 5, effectively rendering Section 5 toothless.

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<sup>31</sup> Zoltan L. Hajnal, Nazita Lajevardi and Lindsay Nielson, *Do Voter Identification Laws Suppress Minority Voting? Yes, We Did The Research*, WASH. POST, (Feb. 15, 2017) [https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/do-voter-identification-laws-suppress-minority-voting-yes-we-did-the-research/?utm\\_term=.27cf0256c4df](https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/do-voter-identification-laws-suppress-minority-voting-yes-we-did-the-research/?utm_term=.27cf0256c4df) [<https://perma.cc/MM3G-46GX>].

<sup>32</sup> *Shelby County Decision*, <https://www.justice.gov/crt/voting-section> [<https://perma.cc/4DWM-SSFS>].

<sup>33</sup> *Id.*

<sup>34</sup> *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 540-41, 133 S. Ct. 2612-22, 186 L.Ed.2d 651 (2013).

<sup>35</sup> *Id.* at 550-51.

<sup>36</sup> *Id.*

Post-*Shelby County*, one major change that several states have begun to engage in is to close polling sites.<sup>37</sup> Although this is within the discretion of a given state, the effect is often to make voting less accessible, thereby favoring those with the resources to access those polling sites.<sup>38</sup> Following the *Shelby County* decision, Louisiana closed polling places in 61 percent of its parishes.<sup>39</sup> Of 18 sampled counties in Alabama, 12 counties closed 66 polling places.<sup>40</sup> Texas closed at least 400 polling places.<sup>41</sup> Mississippi reduced its polling places by 44.<sup>42</sup> In total, counties that had previously been monitored under the VRA closed at least 868 polling places prior to the 2016 election.<sup>43</sup> Although most of the polling place closures were in jurisdictions previously covered by the VRA, not all were.<sup>44</sup> Arizona closed 212 polling places post-*Shelby County*.<sup>45</sup> Many of these polling places were closed over the objections of the residents who used them.<sup>46</sup>

Further, many of the polling place closures made it more difficult for residents to get to the polling places.<sup>47</sup> Reduced polling sites alone may not seem like a particularly nefarious tactic, but when combined with other factors, these closures serve to disproportionately affect poor voters and voters of color. The more voters that have to use a single voting center, rather than a neighborhood polling place, the longer the wait time is to get to the voting booth. For example, in Alabama, a state with a history of voter discrimination and no early voting or no-excuse absentee voting, voters

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<sup>37</sup> Hajnal et al., *supra* note 31.

<sup>38</sup> *Id.*

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

<sup>40</sup> *Id.* at 4.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

found a number of unexpected delays when attempting to vote.<sup>48</sup> Polling places listed on a voter registration card were no longer open and issues with voting machines in a predominately black election district were extensive enough to cause major delays.<sup>49</sup> For voters who cannot afford to miss work, this wait time can mean the difference between being able to vote or not.

Another common pre-election management issue that voters face are identification (ID) laws. These laws require voters to carry specific identification above and beyond a voter registration card.<sup>50</sup> The majority of voter ID laws that have been passed have been in Southern states, where voter discrimination was most prevalent, prior to the VRA.<sup>51</sup> Although voter ID laws vary, the most disruptive laws are the strict photo ID laws, which require a voter to carry a government-issued photo ID in order to be able to vote.<sup>52</sup> More than half of the states with these strict photo ID laws are Southern states with a history of voter discrimination.<sup>53</sup> Though many ID laws are passed by individual states, their harm comes from the Real ID Act of 2005. The Real ID Act bars states from issuing a driver's license or identification card after 2007 unless an individual presents documentary proof of his or her full legal name, date of birth, Social Security number, and citizenship.<sup>54</sup>

ID laws might not seem like a particularly big hurdle to some, but these laws often work on a deeper level. For example, about 21 million Americans

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<sup>48</sup> Connor Sheets, *Alabama Election Day Woes: Voters Report Broken Voting Machines, Untrained Staff, Other Problems*, AL NEWS (Nov. 8, 2016, 4:34 PM), [http://www.al.com/news/birmingham/index.ssf/2016/11/alabama\\_election\\_day\\_problems.html](http://www.al.com/news/birmingham/index.ssf/2016/11/alabama_election_day_problems.html) [https://perma.cc/AHA7-HRUD].

<sup>49</sup> *Id.*

<sup>50</sup> See Voter Identification Requirements, *Voter Identification Requirements*, National Conference of State Legislatures (Jan. 5, 2018), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [https://perma.cc/9TC5-ENR4].

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 643 (2007).

lack the photo ID necessary to satisfy strict voter ID laws.<sup>55</sup> And even if states offer the IDs free of charge, there are still underlying costs and challenges to actually obtaining those IDs. For example, these IDs often require a birth certificate.<sup>56</sup> For those who do not already have a copy of their birth certificate on file, this means going to their local county to get a copy. That costs money and requires time. This is how the voter ID laws hurt the economically disadvantaged; for those who cannot easily take time off of work or who cannot afford to miss work, getting the underlying documentation to apply for a valid state ID can be a serious hurdle to voting.

Furthermore, the cost of getting those documents can be prohibitive. The ACLU estimates that the average cost for the documents required to obtain valid government photo ID can range from \$75-175.<sup>57</sup> Again, that figure may not seem like an insurmountable sum for some, but for many Americans that figure represents an untenable cost. Voter ID laws also negatively affect the elderly and rural voters.<sup>58</sup> Elderly voters often need help with mobility and may have a difficult time getting to the agencies that issue both the IDs and the underlying documents required. Rural voters may face similar problems. For example, potential voters in Texas must travel roughly 170 miles to access an office where voter IDs are issued.<sup>59</sup> Even assuming that most of that travel is over freeways with no traffic, that is still nearly a six-hour trip without the time spent at the issuing agency. For poor Americans who are working multiple jobs, that kind of time may not be feasible. For elderly Americans, that kind of travel may not be possible. Minority voters disproportionately lack the necessary ID. While eight percent of white American citizens of voting age do not have sufficient ID to vote under these

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<sup>55</sup> American Civil Liberties Union, *Oppose Voter ID Legislation - Fact Sheet* (May 2017) <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet> [<https://perma.cc/7JVG-L725>].

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

laws, twenty-five percent of African-American citizens of voting age do not have the required ID. This disproportionate effect means that, under these voting ID laws, already vulnerable segments of our population are likely to have less of a say in our democracy. And these voter ID laws are spreading.

Texas tried to pass a voter ID law that would have impacted an estimated 600,000 voters until it was blocked as being discriminatory against African-American and Latinx voters.<sup>60</sup> North Carolina passed a voter ID law that is no longer in effect only because the courts struck it down for targeting African-American voters with “almost surgical precision.”<sup>61</sup> Voter ID laws are another way of allowing elected representatives to choose their constituents instead of the other way around. These laws are often justified on the theory that requiring additional ID will prevent fraud and improper voting.<sup>62</sup> When the mechanisms that decide who will get to vote disfavor one group, the elections cannot be representative of the electorate as a whole.

## 2. Day-of Election Management

Pre-election management choices make a huge difference on voting day. First, laws that make it more difficult to vote can suppress turnout. A 2014 Government Accountability Office (GAO) study found that in Kansas and Tennessee, both strict photo ID states, turnout had dropped about two percent from the last measure taken before those laws had passed.<sup>63</sup> That same GAO

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<sup>60</sup> NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, *DEMOCRACY DIMINISHED: STATE AND LOCAL THREATS TO VOTING POST-SHELBY COUNTY, ALABAMA V. HOLDER 4* (2018).

<sup>61</sup> *N. Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

<sup>62</sup> Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL’Y REV. 185, 185 (2009).

<sup>63</sup> Philip Bump, *Voter ID Laws in Kansas and Tennessee Dropped 2012 Turnout By Over 100,000 Votes*, WASH. POST (Oct. 9, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/10/09/gao-voter-id-laws-in-kansas-and-tennessee-dropped-2012-turnout-by-over-100000-votes/?utm\\_term=.f5433fe591db](https://www.washingtonpost.com/news/the-fix/wp/2014/10/09/gao-voter-id-laws-in-kansas-and-tennessee-dropped-2012-turnout-by-over-100000-votes/?utm_term=.f5433fe591db) [<https://perma.cc/Q4W5-87VL>].

study also found that African-Americans were the most turnout-depressed group.<sup>64</sup>

Second, pre-election management choices cause long lines that make it difficult for people to vote. As discussed above, many people do not have the ability to spend multiple hours voting. That burden is too great for some potential voters, causing them simply to not vote.

Third, polling places are harmed by voting machine malfunctions. Voting machines are unreliable and can cause disruptions to elections. For example, in 2016, voting hours in Durham County, NC had to be extended because of the degree to which voting machines malfunctioned.<sup>65</sup> Things like malfunctioning voting machines or enacting policies that effectively require voters to wait several more hours than usual to cast their votes create more barriers, and therefore creates more disincentives to vote.

Fourth, polling places also face staffing issues. Poll workers are often not regular government employees. Rather, they are temporary workers hired for the purpose of working during the election.<sup>66</sup> This means that they do not go through extensive training in any kind of election management. The temporary nature of the jobs also means that poll workers may not be the same from year to year; therefore, there may naturally be some variation in how elections are managed on voting day.

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<sup>64</sup> *Id.*

<sup>65</sup> Colleen Jenkins and Mica Rosenberg, *Voting Extended in North Carolina but not in Colorado After Court Requests*, REUTERS (Nov. 8, 2016), <https://www.reuters.com/article/us-usa-election-north-carolina/voting-extended-in-north-carolina-but-not-in-colorado-after-court-requests-idUSKBN1332Q8> [<https://perma.cc/46SD-Q9FZ>].

<sup>66</sup> National Conference of State Legislatures, *Poll Workers: Everybody's Concern*, The Canvass (May 2012) [http://www.ncsl.org/documents/legismgt/elect/Canvass\\_May\\_2012\\_No\\_30.pdf](http://www.ncsl.org/documents/legismgt/elect/Canvass_May_2012_No_30.pdf) [<https://perma.cc/TW73-9FCV>].

## V. VOTING ENTIRELY BY MAIL-IN PAPER BALLOT WOULD CURE THE PROBLEMS OUTLINED ABOVE

The United States should transition away from polling places and voting machines and should instead vote by mail-in optical scan paper ballots. Paper mail-in ballots would solve each of the problems discussed above without creating significant or difficult-to-resolve new issues. I propose that states adopt a hybrid Washington/Oregon mail-in voting model. This paper analyzes the voting method of those two states together because their procedures are largely the same.

In Washington and Oregon, registered voters receive a ballot by mail two to three weeks prior to an election.<sup>67</sup> A voter completes his or her ballot and inserts it into the security envelope provided in the voting packet, then places the security envelope into the ballot return envelope.<sup>68</sup> The voter then signs the outside of the ballot return envelope to allow election officials to verify that the ballot is legitimate.<sup>69</sup> The ballot return envelope can be stamped and mailed or dropped off at any official drop box across the state.<sup>70</sup> Each ballot comes with a tear-off stub that allows a voter to track his or her ballot and follow along in the vote counting process to ensure that the vote is being counted.<sup>71</sup> In Washington, the signature on the ballot return envelope is checked against the signature in the voter's registration record to ensure that it is a match.<sup>72</sup> After the signature is verified, the ballot is accepted and the voter is credited with having voted in the election.<sup>73</sup> Once the voter is credited

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<sup>67</sup> *Vote By Mail*, WASH. SECRETARY OF ST., [https://wei.sos.wa.gov/agency/osos/en/voters/Pages/vote\\_by\\_mail.aspx](https://wei.sos.wa.gov/agency/osos/en/voters/Pages/vote_by_mail.aspx) [<https://perma.cc/WDV4-8NPY>]; *Voting in Oregon*, OR. SECRETARY OF ST., <http://sos.oregon.gov/voting/Pages/voteinor.aspx> [<https://perma.cc/495F-VJU8>].

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

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

<sup>71</sup> My Voter Information, King County Elections (Oct. 5, 2017), <https://info.kingcounty.gov/kcelections/vote/myvoterinfo.aspx> [<https://perma.cc/6G4F-9PL5>].

<sup>72</sup> *Vote By Mail*, *supra* note 67.

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

as having voted, no other votes attributed to that voter will be accepted.<sup>74</sup> If a voter attempts to cast multiple ballots, the improper votes are rejected and, if warranted, the voter's information is passed to the proper Prosecuting Attorney.<sup>75</sup> After this process, the ballot and security envelope are separated so that the ballot is no longer traceable to the voter.<sup>76</sup> From there, the ballot is scanned and tabulated until all of the votes are counted.<sup>77</sup> Prior to each election, all tabulation equipment is tested to ensure that it works properly.<sup>78</sup> If it is unclear whether a voter is eligible to vote, the voter is issued a provisional ballot, which is then researched to confirm the voter's eligibility before the ballot is counted.<sup>79</sup> Although Washington does not maintain traditional polling places, it does provide in-person voting centers for those who want or need help with their ballot.<sup>80</sup>

Mail-in elections also have disability voting procedures. For voters who are non-mobile, mail-in ballots mean that those voters do not have to arrange transportation to polling places. In Oregon, sight-impaired voters can download a ballot from the Oregon Secretary of State website, mark it on his or her computer, print it out, and mail it in exactly as one would a ballot sent by the elections board.<sup>81</sup> Because the website is not tabulating votes, it does not need to store any data, which differentiates online ballot marking from voting via DRE machine.

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

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Absentee and Early Voting*, National Conference of State Legislatures, (Aug. 17, 2017), <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<https://perma.cc/FDA5-XUQY>].

<sup>81</sup> *Oregon Alternate Format Ballot*, OR. SECRETARY OF ST., [http://www.fivecedarsgroup.com/99\\_AFB\\_Demonstration\\_Ballot.html](http://www.fivecedarsgroup.com/99_AFB_Demonstration_Ballot.html) [<https://perma.cc/JYC5-4U8F>].



*A. The Advantages of Paper Voting Over Machine Voting*

Voting machines are an insecure way of voting. Although most voting machines do not connect to the internet, they are still vulnerable. I will analyze the problems with several different types of machines, each still in use in voter jurisdictions across the country.

One threat assessment by the Argonne National Laboratory in Illinois found that Diebold Accuvote voting machines could be hacked with “\$10.50 in parts and an eighth grade science education.”<sup>82</sup> For an extra \$15, an attacker could use a radio frequency (RF) remote control to stop and start the attack.<sup>83</sup> Rather than writing a code-based attack that would be similar to a computer virus, the attack that Argonne proposed would rely on “man-in-the-middle” hardware installed on the voting machine.<sup>84</sup> According to the Argonne team, the locks protecting the voting machine from interference are insufficient and “gaining access to the inside of the Diebold touch-screen is as simple as picking the rudimentary lock, or using a standard hotel minibar key, as all of the machines use the same easily copied key, available at most office supply stores.”<sup>85</sup> The machine would appear to operate normally to any voter, but when the ballot is submitted the attacker would be able to intercept and change the votes.<sup>86</sup> The machine would then simply record the changed vote.<sup>87</sup> Further, Argonne’s method would not require any soldering or destruction of the circuit board, meaning that an attacker could later remove the hardware without leaving evidence that tampering had occurred.<sup>88</sup> Diebold Accuvote voting machines are used in nearly half of U.S. states.

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<sup>82</sup> Brad Friedman, *Diebold Voting Machines Can Be Hacked By Remote Control*, SALON (Sept. 27, 2011), <https://www.salon.com/2011/09/27/votinghack/> [<https://perma.cc/Y497-5XPY>].

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

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

<sup>87</sup> *Id.*

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

Notably, Diebold machines are used in Florida, a state that permits DRE machines without VVPAT printers.<sup>89</sup>

A Princeton team found similar results on the Sequoia AVC Advantage voting machine. The Sequoia AVC Advantage machine is used in Pennsylvania, New Jersey, and Louisiana, among other places.<sup>90</sup> Until 2017, Virginia also used the Sequoia AVC Advantage DRE machine. In response to concerns about the 2016 election and DRE machine security, the Virginia Board of Elections decertified all touchscreen voting machines in advance of the 2017 gubernatorial election.<sup>91</sup> The Princeton team found that a physical machine could be broken into in seven seconds and have its chips swapped out in roughly seven minutes without leaving evidence of soldering or replacement.<sup>92</sup> This is because the chips used in the Sequoia AVC Advantage DRE machine are not soldered in place.<sup>93</sup> They can simply be jimmed out with a screwdriver and replaced with an attacker's own hardware.<sup>94</sup>

Another commonly used voting machine, WinVote, has major security weaknesses. The WinVote is used in Pennsylvania and Mississippi.<sup>95</sup> It was used in Virginia prior to the decertification of touchscreen voting machines.<sup>96</sup> At a convention where hackers tested voting machines for security, WinVote

<sup>89</sup> *Polling Place Equipment – November 2018*, *supra*, note 10.

<sup>90</sup> Ben Wofford, *How To Hack An Election In 7 Minutes*, POLITICO, (Aug. 5, 2016), <http://www.politico.com/magazine/story/2016/08/2016-elections-russia-hack-how-to-hack-an-election-in-seven-minutes-214144> [<https://perma.cc/RX5R-BKKK>].

<sup>91</sup> Laura Vozzella, *Virginia Scraps Touch-Screen Voting Machines As Election For Governor Looms*, WASH. POST (Sept. 8, 2017), [https://www.washingtonpost.com/local/virginia-politics/virginia-scraps-touch-screen-voting-machines-as-election-for-governor-looms/2017/09/08/e266ead6-94fe-11e7-89fa-bb822a46da5b\\_story.html?utm\\_term=.9b225483b6d2](https://www.washingtonpost.com/local/virginia-politics/virginia-scraps-touch-screen-voting-machines-as-election-for-governor-looms/2017/09/08/e266ead6-94fe-11e7-89fa-bb822a46da5b_story.html?utm_term=.9b225483b6d2) [<https://perma.cc/ZD9N-D5XY>].

<sup>92</sup> Wofford, *supra*, note 90.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Alfred Ng, *Defcon Hackers Find It's Very Easy To Break Voting Machines*, CNET (July 30, 2017, 5:00 AM), <https://www.cnet.com/news/defcon-hackers-find-its-very-easy-to-break-voting-machines/> [<https://perma.cc/H9BH-DRY6>].

<sup>96</sup> *Id.*

machines were hacked in under two hours.<sup>97</sup> The WinVote machines are Wi-Fi enabled, the default password is “abcde,” and that password cannot be changed.<sup>98</sup> Further, the WinVote machines have two uncovered USB ports on the back of the machine into which a keyboard and mouse can be plugged in. At DefCon, a San Francisco based team called Synack did just that, pressed “control-alt-delete,” and got out of the voting software and into the main operating system.<sup>99</sup> One of Synack’s co-founders explained that once out of the voting software, an attacker would merely have to plug in a USB drive to compromise the machine and allow for remote access.<sup>100</sup>

All of the physical attacks analyzed above may seem a little farfetched, but unfortunately they are not. According to the Argonne team, there are multiple opportunities for attackers to access voting machines prior to Election Day.<sup>101</sup> Polling places are often in elementary schools or churches – insecure locations that an attacker could access relatively easily.<sup>102</sup> Similarly, between elections, the voting machines are typically stored in warehouses and an attacker could access the machines there.<sup>103</sup>

Furthermore, even if there are no physical attacks on the machines themselves, some of the machines show troubling glitches. One that occurred in the last election was called “vote-flipping.” “Vote-flipping” is where a voter selects a candidate on a touchscreen DRE machine but the opponent’s name appears to have been selected instead.<sup>104</sup> In North Carolina during the 2016 election, at least five counties had machines that were showing vote-

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Friedman, *supra* note 82.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Pam Fessler, *Some Machines Are Flipping Votes, But That Doesn’t Mean They’re Rigged*, NPR (Oct.26, 2016), <http://www.npr.org/2016/10/26/499450796/some-machines-are-flipping-votes-but-that-doesnt-mean-theyre-rigged> [<https://perma.cc/7KFE-WVDS>].

flipping.<sup>105</sup> At least three counties in Texas and Clark County, Nevada (the state's most populous county), showed the same thing.<sup>106</sup> Although this is likely not the result of malicious interference, it is likely the result of outdated technology.<sup>107</sup> Many of the voting machines are more than 10 years old and the tools used to calibrate the screens are outdated.<sup>108</sup> The hardware on the machines is deteriorating, resulting in misaligned or inaccurate touchscreens.<sup>109</sup>

Although there is not yet evidence demonstrating that vote totals have been changed, we should still must design our electoral system to be on guard against such an attack because foreign actors have been in a position to alter voter data.<sup>110</sup> A threat to one portion of our system is likely a canary in the coal mine for another portion of the system because we know hostile parties have both the means and interest in interfering with our elections. For example, Dallas County, Texas, found evidence that an unauthorized third party had accessed their voter rolls.<sup>111</sup> Dallas County is one of the most populous counties<sup>112</sup> in a state with the second highest number of electoral votes in the country.<sup>113</sup> A more populous county is more likely to sway the vote total in a given state. If outside parties would exploit one weakness, why

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

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

<sup>109</sup> *Id.*

<sup>110</sup> David E. Sanger and 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> [<https://perma.cc/S77B-YFGH>].

<sup>111</sup> The Rachel Maddow Show: Leaked Docs Show New Depth Of Voting System Hacking By Russia (MSNBC television broadcast June 5, 2017).

<sup>112</sup> As of the 2010 Census, Dallas County had a population of 2,366,672. That population count is surpassed only by Harris County, which has a population of 4,093,242, according to the 2010 Census. 2010 U.S. Census, <https://www.census.gov/quickfacts/fact/table/dallascountytexas,harriscountytexas/AGE135216> [<https://perma.cc/HUC7-87LF>].

<sup>113</sup> *Distribution of Electoral Votes*, U.S. CENSUS BUREAU, (Dec. 10, 2010), <https://www.archives.gov/federal-register/electoral-college/allocation.html> [<https://perma.cc/V346-WNTB>].

would they not exploit another? Our voting machines are insecure apparatuses with known weaknesses – essentially sitting ducks for a hostile party interested in attacking our elections.

All of these issues could be eliminated with mail-in ballots. Paper ballots are not subject to the same chip replacement and security problems as the voting machines. Paper does not have to be calibrated. The tabulating machines are unlikely to suffer the same flaws because each of the machines is tested prior to use and does not rely on a touchscreen for selection. Paper ballots eliminate the insecurity of voting machines and provide a hard copy record that can be used to verify results.

Voting machines can be subject to the same malfunctions as any regular computer. In essence, voting machines are just large computers. They can suffer lost or corrupted data, damaged hardware, and dangerously out-of-date software. For example, the hacked WinVote machine discussed above was running Windows XP.<sup>114</sup> Microsoft stopped providing any technical support or security updates for Windows XP in April 2014.<sup>115</sup> Without security updates, software becomes more vulnerable to attack.

Rather than switching to paper, some might propose that we update our voting machines and design them more securely. In theory, this would help. However, even investing in upgraded security does not completely eliminate the problem of outdated machines. A newer model voting machine typically costs between \$2500-3000 per machine,<sup>116</sup> and the National Conference of State Legislatures (NCSL) suggests that election boards have one voting machine per 250-300 residents.<sup>117</sup> For counties with higher voter populations,

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<sup>114</sup> Ng, *supra* note 95.

<sup>115</sup> *End of XP Support*, Microsoft, <https://www.microsoft.com/en-us/windowsforbusiness/end-of-xp-support> [<https://perma.cc/2FT5-YVUY>].

<sup>116</sup> Sarah Breitenbach, *Aging Voting Machines Cost Local, State Governments*, The Pew Charitable Trusts (Mar. 2, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/03/02/aging-voting-machines-cost-local-state-governments> [<https://perma.cc/L6CQ-9EW7>].

<sup>117</sup> *Id.*

having to upgrade machines to meet the NCSL recommendations represents a heavy financial burden. States like California, Texas, and Florida would have to purchase tens of thousands of machines every few years to keep up with hardware obsolescence and constant software vulnerabilities. Those machines would likely require frequent maintenance to stay ahead of threats. Paper would not have these problems because paper requires no security updates. This looming expense could help develop the political will to move away from machines and to paper ballots.

Another counter-argument that might be raised against paper ballots is that the security concerns can be addressed by eliminating machines without VVPAT printers and moving to machines that only print a paper record. However, this would still be insufficient because it does not address the voting machine's aging computer hardware and software. Moreover, machines that produce a paper record still do not address some of the social justice concerns with regards to the operation of polling places.

### *B. Why Vote-By-Mail Is Better Than A Polling Place*

With states closing down polling places and reducing early voting, certain vulnerable segments of our population are facing challenges to their ability to vote. Elimination of early voting tends to disproportionately harm minority voters.<sup>118</sup> And, as previously discussed, the closure of polling places makes it difficult to vote. Some voters are also discouraged by excessively long lines. For example, the New York Times profiled several voters who cited long lines as a challenge to their ability to vote. One of those profiled voters was an Arizona woman named Cynthia Perez, who initially did not vote because of a long line.<sup>119</sup> These long lines, especially during the hot summers,

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<sup>118</sup> Sarah Smith, *Which Voters Show Up When States Allow Early Voting?*, PROPUBLICA (Sept. 26, 2016), <https://www.propublica.org/article/which-voters-show-up-when-states-allow-early-voting> [<https://perma.cc/VUL4-QJ7M>].

<sup>119</sup> Fernanda Santos, *Angry Arizona Voters Demand: Why Such Long Lines at Polling Sites?*, N.Y. TIMES (Mar. 24, 2016), <https://www.nytimes.com/2016/03/25/us/angry->

can present issues like an inability to wait in line long enough to vote. During the Arizona primaries, those lines reached five hour wait times,<sup>120</sup> which could be an insurmountable obstacle for someone who cannot afford to miss that much work or who has to work around childcare or other family obligations. In fact, during the Arizona primaries there were voters who left the polls due to the long wait times.<sup>121</sup> Polling places also faced administrative concerns such as insufficient ballots. In New York, voters reported that stations ran out of ballots and did not have staff during all of the hours scheduled for voting.<sup>122</sup>

Mail-in ballots would overcome the faults of machine voting. First, because mail-in ballots are sent out in advance of the elections, people are able to vote at their convenience, and polling places will not have to be open for early voting. Second, because mail-in ballots can be filled out anywhere, voters will not have to carve out multiple hours or even a full day to be able to vote. There are no lines with mail-in ballots and people can, again, vote at the convenience of their schedule. Third, there would be no issues with insufficient numbers of ballots because a ballot would be printed for each voter on the rolls and sent out ahead of time. If not enough ballots were printed or if voters lost or did not receive ballots, there would be enough time to rectify the situation.

### C. *Additional Benefits To Voting By Mail-In Ballot*

Vote-by-mail provides benefits over and above what has already been discussed. First, voting by mail allows people to research their votes, rather

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arizona-voters-demand-why-such-long-lines-at-polling-sites.html  
[<https://perma.cc/DA8U-K997>].

<sup>120</sup> Ari Berman, *There Were 5-Hour Lines to Vote in Arizona Because the Supreme Court Guttled the Voting Rights Act*, THE NATION (Mar. 23, 2016), <https://www.thenation.com/article/there-were-five-hour-lines-to-vote-in-arizona-because-the-supreme-court-guttled-the-voting-rights-act/> [<https://perma.cc/4AKE-39X8>].

<sup>121</sup> *Id.*

<sup>122</sup> Vote By Mail Act of 2016, S. 3214, 114th Cong. §2 (2016).

than forcing them to make a decision in the moment.<sup>123</sup> Voters have time to sit down with voter guides, research issues online, and consider the options instead of being forced to make a decision while thousands of other people wait in line to cast their own vote. Further, people do not have to remember who they are planning to vote for. Knowing which candidate you want to select going into the voting booth may be easy at the top of the ticket—in races like a presidential or even a senatorial or gubernatorial election—where there is plenty of election coverage and political ads to help a voter remember the candidates and who they intend to vote for. For down-ballot races and measures, however, it can be harder to keep them all straight. Rather than skipping the races that have not received as much coverage, with a mail-in ballot people can vote for the races they are certain about and come back to their ballot later, after they have researched the other candidates and legislative issues.

A second benefit to voting by mail is that it is less expensive than running an election through the traditional method of local polling places. The NCSL says that voting by mail is more fiscally efficient than voting in person.<sup>124</sup> This is because poll workers are a significant part of an election budget, but mail-in voting eliminates the need for those poll workers, and therefore eliminates the associated cost.<sup>125</sup> Many states have cited budgetary concerns as a driving force behind their closure of polling places. Voting by mail offers a solution that allows states to streamline their budget while still protecting the fundamental rights of their citizens. For example, Montana held a special election to replace Rep. Ryan Zinke after he was appointed to be Secretary of the Interior. One Montana representative sponsored a bill to conduct the

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<sup>123</sup> *Vote By Mail*, *supra* note 67.

<sup>124</sup> *All-Mail Elections*, NATIONAL CONFERENCE OF STATE LEGISLATORS (Jan. 12, 2017), <http://www.ncsl.org/research/elections-and-campaigns/all-mail-elections.aspx> [<https://perma.cc/4SXZ-B5K6>].

<sup>125</sup> Michael D. Hernandez, *All-Mail Elections Quietly Flourish*, THE CANVASS, July 2014, at 2.



election entirely by mail, asserting that a by-mail election would save the state's counties a combined \$500,000 in taxpayer funds.<sup>126</sup>

These cost savings can also be seen in the states that have implemented all vote-by-mail elections. After implementing vote-by-mail elections, Oregon's cost decreased by about 30 percent, from \$3.07 per voter to \$2.21 per voter.<sup>127</sup> Colorado's cost decreased by about 40 percent after it enacted all-mail elections.<sup>128</sup> A large chunk of the cost decrease is due to not having to incur the temporary labor costs of hiring poll workers.<sup>129</sup> Given that all-mail elections can reduce costs rather than closing polling places in such a manner that disenfranchises voters, a better solution would be to move to a cheaper and more secure option.

Finally, voting by mail promotes social justice. At the core of social justice is a system which does not systematically advantage one population at the expense of another. The UN released a report in which it stated the following:

Inequalities and inequities associated with political institutions and processes were key factors contributing to inequalities and inequities in society more generally. The way power is organized and distributed among society's various institutions and the manner in which political processes are carried out have a profound influence on how citizens see and find their place on the social ladder and within in the social fabric.<sup>130</sup>

A system in which the maximum number of citizens are able to have their voice heard by our governing bodies allows for better accountability and representation of traditionally marginalized groups. Furthermore, groups

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<sup>126</sup> Matt Volz, Montana Senate Passes Bill to Allow Mail-in Ballot, U.S. NEWS AND WORLD REPORT (Feb. 24, 2017, 9:14 PM), <https://www.usnews.com/news/montana/articles/2017-02-24/montana-senate-endorses-bill-to-allow-mail-in-ballot> [<https://perma.cc/KJ4H-9YTX>].

<sup>127</sup> S. 3214, *supra* note 122, §2.

<sup>128</sup> *Id.*

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

<sup>130</sup> U.N. Dept. of Econ. & Soc. Affairs, *Social Justice in an Open World: The Role of the United Nations*, 19, U.N. Doc. ST/ESA/305 (2006).

dedicated to the rights and liberties of American citizens are in favor of vote-by-mail. Both the ACLU and the American Association of People with Disabilities support vote-by-mail legislation.<sup>131</sup> Voting by mail allows people who might otherwise have a difficult time voting to participate in the electoral process. Voting by mail makes it easier for citizens to participate in elections and, therefore, have a say in the way power is organized.

## VI. MECHANISMS TO EFFECT VOTE-BY-MAIL

U.S. elections are not controlled by one governing body, which means that there are several ways voting by mail could be implemented.

### *A. All-Mail Elections At The Federal Level*

The federal government could pass a law mandating a change to voting laws by using the 14<sup>th</sup> Amendment. Section 5 of the 14<sup>th</sup> Amendment states that “the Congress shall have power to enforce, by appropriate legislation, the provisions of this article,”<sup>132</sup> therefore granting Congress the power to enforce Section 1 of the 14<sup>th</sup> Amendment, which states “no state shall...deny any person within its jurisdiction the equal protection of the laws.”<sup>133</sup> Congress could argue that if elections are interfered with, and some votes do not count because of that interference, then people are being denied equal protection under the law. Alternatively, Congress could pass a law that only covered federal elections but mandated all-mail voting. The federal government has the right to control federal elections; therefore, the federal government could mandate a change to all-mail voting for federal elections.

Enacting vote-by-mail through a federal law offers several benefits. First, proposed federal laws often receive more news coverage than proposed state

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<sup>131</sup> Talia Richman, *Oregon Legislators Propose National Vote-By-Mail Bill*, OREGONIAN (July 14, 2016), [http://www.oregonlive.com/politics/index.ssf/2016/07/sens\\_wyden\\_merkley\\_propose\\_nat.html](http://www.oregonlive.com/politics/index.ssf/2016/07/sens_wyden_merkley_propose_nat.html) [<https://perma.cc/VU3G-YPYY>].

<sup>132</sup> U.S. Const. amend. XIV, §5.

<sup>133</sup> U.S. Const. amend. XIV, §1.

laws. Most of the network nightly news shows, and almost all of the cable news shows, are national shows and are therefore more likely to cover issues that target a broad base. Similarly, the bigger print and online news organizations want to target the broadest number of readers possible and will therefore be more likely to spend resources covering an issue with widespread national appeal. This increased attention means that building critical mass to change federal laws will likely take less time than it would to change state laws.

Second, changing election law at the federal level would likely cause change at the state level. When state and federal elections overlap, voters almost always cast their votes for the two elections at the same time and in the same manner. If the federal government mandated mail-in voting for federal elections but states did not change over, voters would likely end up having to vote by two different methods. This would be untenable for a period of time, and could help create the political will to move to mail-in elections at all levels. Vote-by-mail is popular where it has been enacted; none of the three states<sup>134</sup> that have moved to all-mail elections have gone back to having in-person elections and none of the states that have implemented no-excuse absentee voting having repealed it.<sup>135</sup> Furthermore, the number of voters voting by mail has increased as it has become a more widely available option. In 2000, 10 percent of voters cast their votes by mail while in 2012, that number increased to 19 percent of ballots being cast by mail.<sup>136</sup> The evidence illustrates that as more voters get used to voting by mail and adapt to the convenience, they will not want to go back, and states will therefore be more likely to follow in federal footsteps by changing over to mail-in voting.

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<sup>134</sup> Washington, Oregon, and Colorado.

<sup>135</sup> S. 3214, *supra* note 122.

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

### B. All-Mail Elections At The State Level

Even if the federal government does not enact national legislation to change over to mail-in voting, mail-in voting could still become the standard through state-by-state political will to pass legislation to enact vote-by-mail. Some states are already making the transition, at least, to paper ballots. For example, Virginia decertified all of its touchscreen voting machines and switched entirely to paper ballots for its 2017 gubernatorial election<sup>137</sup> Given that Virginia has already taken this step, it would not be a particularly large leap for the state to move to mail-in voting because that would be the same as what they have now, only more convenient for the voters. Additionally, all states have at least some degree of absentee voting method in place, which means that switching to vote-by-mail is a process of expanding and adapting the existing system, rather than creating an entirely new system from scratch.

In states with an initiative process, voters can propose laws and put them to a vote of the people. As with any law passed through the initiative process, if passed, the state legislature would implement the new law.

## VII. COUNTER-ARGUMENTS TO VOTE-BY-MAIL

While voting by mail has its many advantages, there are still those who oppose it. Other than the aforementioned discussion, there are four main counter-arguments to the proposal to vote on paper ballot entirely by mail.

The first argument against switching to an entirely vote-by-mail system is that it will allow for greater fraud or intimidation.<sup>138</sup> This argument is not persuasive for two reasons. First, this argument is largely unsupported. A 2011 examination found that, although multiple federal laws exist to protect against voter intimidation, there are still those who attempt to engage in such

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<sup>137</sup> Vozzella, *supra* note 91.

<sup>138</sup> Edward B. Moreton, Jr., *Voting By Mail*, 58 S. CAL. L. REV. 1261, 1261 (1985); John C. Fortier and Norman J. Ornstein, *Election Reform: The Absentee Ballot And The Secret Ballot: Challenges For Election Reform* 36 U. MICH. J.L. REFORM 483, 484 (2003).

practices.<sup>139</sup> There are individuals acting as protestors,<sup>140</sup> poll watchers,<sup>141</sup> or holding themselves out to be “voter rights attorneys.”<sup>142</sup> This evidence shows that live voting does not prevent against voter intimidation, and therefore it should not be a reason to implement voting procedures that end up disenfranchising the most vulnerable among us. Moreover, because a person is more likely to have control over what happens in his or her home, a person is just as capable of voting in secret at home. Therefore, the same safeguard exists in-home as at a polling place – a ballot is secret and nobody is entitled to know the contents of another’s vote. As to the fraud concern, modern absentee ballots contain safeguards against this. Absentee ballots require signature verification,<sup>143</sup> which means that if someone is impersonating a voter, it is possible to discern that by checking the signature against the signature on the voter’s registration card. Additionally, the voter is required to put a phone number on the ballot.<sup>144</sup> To successfully impersonate a voter, a fraudfeator would have to know which phone number was associated with the voter’s registration. If either of those protections, or any other permissible reason, gives reason for the vote tabulators to suspect that a ballot is improperly cast, the ballot is a provisional ballot and is adjudicated to determine its admissibility. The existence of these safeguards and the process for handling potentially fraudulent ballots means that intimidation and fraud are concerns not well-founded in reality.

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<sup>139</sup> James J. Woodruff, *Where The Wild Things Are: The Polling Place, Voter Intimidation, And The First Amendment*, 50 U. LOUISVILLE L. REV. 253, 258 (2011).

<sup>140</sup> *Id.* at 259.

<sup>141</sup> Ben Cady and Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. Rev. L. & Soc. Change 173, 224 (2015).

<sup>142</sup> Erika Birg, *Lawyers on the Road: The Unauthorized Practice of Law and the 2004 Presidential Election*, 9 Tex. Rev. Law & Pol. 305, 307 (2005).

<sup>143</sup> *Frequently Asked Questions about Elections in Washington State*, WASH. SECRETARY OF ST., <https://www.sos.wa.gov/elections/general-election-faqs.aspx> [<https://perma.cc/Y3YC-7SDX>].

<sup>144</sup> *Id.*

The second argument against voting entirely by mail is that voters will have to suffer the cost of mailing their ballots. Absentee ballots can often cost more than regular mail because of the additional pages and therefore the additional weight.<sup>145</sup> This argument is not persuasive for three reasons. First, the mailing cost can be avoided entirely because ballots may be submitted in person at secured ballot drop boxes.<sup>146</sup> Drop boxes are open 24 hours per day and are handicap accessible.<sup>147</sup> This means that all citizens can access these drop boxes, and, therefore, no citizen is restrained from voting based on cost of mailing. Second, even if ballots are put in the mail without proper postage or any postage at all, the U.S. Postal Service (USPS) policy is to deliver the ballots anyway.<sup>148</sup> If the USPS does not require postage to mail a ballot, then there is not any mailing cost for the voter to bear. Third, even if voters must pay for the postage, the cost still may be less than the costs associated with going to the polls. Those costs usually include transportation costs and the lost wages that could result from waiting for extensive periods. Such costs almost certainly outweigh the cost of postage.

The third argument against voting entirely by mail is that voting by machine offers disability accessibility in a way that paper voting does not. Those who are visually impaired may not be able to fill out a paper ballot, but voting machines can provide access to visually impaired voters.<sup>149</sup> Those

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<sup>145</sup> Julia Glum, *How To Vote By Mail 2016: Postage Required For Absentee Ballots Varies By State*, INT'L BUS. TIMES (Oct. 24, 2016), <http://www.ibtimes.com/how-vote-mail-2016-postage-required-absentee-ballots-varies-state-2436022> [<https://perma.cc/G9XY-TXEV>].

<sup>146</sup> *Vote By Mail*, *supra* note 67.

<sup>147</sup> *Accessible Ballot Dropbox Guidelines*, Wash. Sec. of State, <https://www.sos.wa.gov/elections/accessibleballotdropboxguidelines.aspx> [<https://perma.cc/TAH7-UPSW>].

<sup>148</sup> Ryan Teague Beckwith, *Yes, the Post Office Will Still Deliver Your Mail-In Ballot Without a Stamp*, TIME (Oct. 27, 2016), <http://time.com/4547550/absentee-mail-ballot-postage-stamp-postal-service-usps/> [<https://perma.cc/GQ68-7QGW>].

<sup>149</sup> *Protecting the Integrity and Accessibility of Voting in 2004 and Beyond*, PEOPLE FOR THE AMERICAN WAY, <https://web.archive.org/web/20041212172330/http://www.pfaw.org/pfaw/general/default.aspx?oid=14581> [<https://perma.cc/W5WQ-GCH2>].

who are manually impaired can struggle with marking a paper ballot.<sup>150</sup> The Department of Justice opines that braille ballots are not an effective workaround because the braille makes the ballot identifiable.<sup>151</sup> And, while a visually impaired voter can have a representative fill out a ballot on the voter's behalf, effectively requiring this by not having accessible ballots raises concerns about ballot secrecy and the rights of blind voters.<sup>152</sup>

While it is true that machine voting does deal with these issues, modern by-mail voting methods also have workarounds that allow voters with disabilities to vote in secret, without going to a polling place. In Oregon, an accessible version of the voting ballot is available through the Oregon Secretary of State.<sup>153</sup> Screen reader technology allows the voter pamphlet and ballot to be read out loud to a sight-impaired voter.<sup>154</sup> The ballot has a button that allows a voter to check for mistakes.<sup>155</sup> Clicking this button will tell the voter if they have not voted in a particular race or if they have voted for two candidates in a particular race.<sup>156</sup> There is a ballot summary page that allows a voter to use a screen reader to read out their voting choices so that impaired voters are also able to double-check that they have voted for the right

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<sup>150</sup> Erik Van Hagen, *The Not-So-Secret Ballot: How Washington Fails To Provide A Secret Vote For Impaired Voters As Required By The Washington State Constitution*, 80 WASH. L. REV. 787, 789 (2005).

<sup>151</sup> *The Americans With Disabilities Act And Other Federal Laws Protecting The Rights Of Voters With Disabilities*, DEPT. OF JUSTICE, [https://www.ada.gov/ada\\_voting/ada\\_voting\\_ta.htm](https://www.ada.gov/ada_voting/ada_voting_ta.htm) [<https://perma.cc/3AHF-TCVM>].

<sup>152</sup> Laurel Raymond, *Federal Judge: Ohio's Absentee Voting System Violates Rights Of Blind Residents*, THINKPROGRESS (May 12, 2016, 8:38 PM), <https://thinkprogress.org/federal-judge-ohios-absentee-voting-system-violates-rights-of-blind-residents-e2f47855e1c2/> [<https://perma.cc/WAT8-LHXC?type=image>].

<sup>153</sup> *Services for Voters with Disabilities*, OR. SEC. OF ST., <http://sos.oregon.gov/voting/Pages/disabilities.aspx> [<https://perma.cc/K8X9-2V2A>].

<sup>154</sup> *Id.*

<sup>155</sup> *Accessible Format Ballot Demonstration Ballot*, OR. SEC. OF ST., [http://www.fivecedarsgroup.com/99\\_AFB\\_Demonstration\\_Ballot.html](http://www.fivecedarsgroup.com/99_AFB_Demonstration_Ballot.html) [<https://perma.cc/7VBB-HN9X>].

<sup>156</sup> *Id.*

candidate. The voter then prints out the marked ballot and sends it in.<sup>157</sup> Having an accessible version of the ballot on the Secretary of State's website allows for a manually impaired-voter to use technology that he or she already owns and has optimized, thereby making it easier to vote. Accessible ballots are available on regular computers, meaning the voter has the convenience and security of voting from home without sacrificing the accessibility of machine voting. While the printed ballot may differ from the pre-printed mail-in ballot, due to differences in paper and font, this does not make the ballot identifiable because nothing prohibits all voters from using it.<sup>158</sup>

This technology does not tabulate votes because the ballot is still counted via the method for standard ballots.<sup>159</sup> This means that the ballot website does not need to store any data. Further, even if there is some error with the website itself, there is a paper backup, and the website is irrelevant to the tabulated vote. Because of the different way the technology is used, accessible voting options in vote-by-mail states do not suffer the same possible insecurities as machines used at polling places.

The fourth argument against voting by mail is that voters will not have a sense of civic community or participation in voting.<sup>160</sup> This argument largely ignores other methods of community and participation. In recent years, multiple campaigns have pushed to frame voting as an important part of civic duty.<sup>161</sup> While physical presence at the polling place might once have played a part in displaying civic duty, social media allows voters to engage with their community regardless of how they voted. Voters can post on their social

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<sup>157</sup> *Services for Voters with Disabilities*, OR. SEC. OF ST.,

<http://sos.oregon.gov/voting/Pages/disabilities.aspx> [<https://perma.cc/K8X9-2V2A>].

<sup>158</sup> *Voting Instructions for Voters with a Disability*, OR. SEC. OF ST., <https://sos.oregon.gov/voting/Pages/instructions-disabilities.aspx> [<https://perma.cc/5GGP-3E2B>].

<sup>159</sup> OR. SEC. OF ST., *supra* note 67.

<sup>160</sup> Priscilla L. Southwell and Justin Burchett, *Vote-By-Mail In The State Of Oregon*, 34 WILLAMETTE L. REV. 345, 347 (1998).

<sup>161</sup> Donald P. Green and Alan S. Gerber, *Get Out the Vote!: How to Increase Voter Turnout* (Brookings Institute, 2004).



media with images announcing that they voted.<sup>162</sup> Community engagement on this level does not require a voter to vote at a polling place and, therefore, voting by mail would not necessarily affect such engagement. Further, the participation argument should be unpersuasive because if people are not voting, then the location of where people are allowed to vote will not matter and there is no reason to believe that non-voters will feel any sense of participation.

### VIII. CONCLUSION

The right to vote is a fundamental right. It has long been one of the most important rights we have as American citizens and our belief in its importance has driven us to look for ways to increase voter participation. Private organizations have done things like hold get-out-the-vote rallies and public relations campaigns to encourage people to vote. But those private efforts pale in comparison to what we are able to do if we change our laws to make voting more accessible. Mail-in voting addresses many problems with our elections while having few drawbacks. And the drawbacks that do exist are minimal and manageable. Therefore, the United States should implement voting by mail-in ballot, using the Washington/Oregon model.

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<sup>162</sup> *Downloadable I Voted Sticker*, WASH. SEC. OF ST., <https://www.sos.wa.gov/elections/downloadableivotedsticker.aspx> [<https://perma.cc/4M4K-58SW>].