VOTING RIGHTS AND THE CLOAK OF ADMINISTRATIVE INCOMPETENCE

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I. INTRODUCTION

Despite the existence of strong constitutional and statutory protections of the right to vote, participating in elections remains difficult for many Americans. Turnout in major American elections is consistently low in comparison to other democracies and varies widely across states and localities.[1] This Article draws upon a large body of social scientific research to describe what practices make voting difficult and how these practices withstand legal scrutiny. It argues that practices of election administration, rather than formal provisions of law, are currently the source of the most significant practical barriers to participation in American democracy. State and local election officials often successfully defend such administrative barriers, or deflect scrutiny of them, by "playing dumb"—claiming that official conduct that has deleterious effects on some group's ability to vote arises from mistakes, incompetence, or organizational incapacity rather than an intention to make voting difficult.[2] These professions are often effective ways of disclaiming responsibility. Inadequate material support for election administration, the organizational complexity of election

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[1] MELANIE JEAN SPRINGER, HOW THE STATES SHAPED THE NATION: AMERICAN ELECTORAL INSTITUTIONS AND VOTER TURNOUT, 1920-2000 16–17 (2014).

[2] *See infra* Part IV, Section A "Playing Dumb" (discussing feigning lack of knowledge in response to social confrontation).

administration, and major differences between social scientific and legal approaches to creating knowledge have the combined effect of making federal legal remedies a relatively ineffective response to some common administratively imposed burdens on the right to vote.[3] Further, the ramified legal effects of *Crawford* and *Shelby County* have created a voting rights regime defined by judicial credulity: officials readily disclaim bad motives because courts subject their accounts to remarkably little scrutiny.[4]

Judicial credulity directs legal attention away from the practical complexity of elections. Many of the reasons why Americans find it difficult or impossible to vote flow from combinations of state and local administrative practices.[5] Registering to vote and casting a ballot are relatively cumbersome forms of routine public interaction with government, and in contrast to technological changes that have simplified individuals' interactions with many other parts of American government, most Americans who participate in elections still register to vote and cast a ballot in person.[6] The time cost of voting is hardly insuperable for the typical American voter, as the extraordinary turnout in the 2020 general election showed.[7] However, it is non-trivial. What appear to be modest average burdens on voting entail substantial burdens for a subset of voters. There are significant geographic and racial disparities in how these practical burdens are distributed: they fall disproportionately upon groups that have historically suffered from discrimination and remain concentrated in states and localities with histories of discriminatory voting policies.[8]

It is certainly possible, and probably very common, for voters to encounter barriers to participation despite the good faith efforts of administrators. Election administration is, at all levels of

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[3] *See* SPRINGER, *supra* note 1, at 167–68.

[4] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008); Shelby Cnty. v. Holder, 570 U.S. 529 (2013). *See generally* 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, 676 (2014) (discussing the ramifications of the *Shelby County* decision).

[5] *See* SPRINGER, *supra* note 1, at 20–21.

[6] *See id.* at 21–22.

[7] Jacob Fabina, *Despite Pandemic Challenges, 2020 Election Had Largest Increase in Voting Between Presidential Elections on Record*, U.S. CENSUS BUREAU (Apr. 29, 2021), https://www.census.gov/library/stories/2021/04/record-high-turnout-in-2020-general-election.html.

[8] SPRINGER, *supra* note 1, at 24–25, 145.

government, a low budgetary priority.[9] At the state and local levels, the officials charged with administering elections ordinarily hold an exceedingly broad portfolio of official responsibilities, which they must discharge with the aid of very modest staffs.[10] The costs of administering elections are devolved to local governments with limited resources and capacity.[11] These resource shortages are a serious policy problem that courts cannot be expected to resolve.

However, federal law provides few good bases for distinguishing honest shortcomings from bad action. This Article shows that the contours of federal voting rights law allow election officials to avoid legal ascriptions of impermissible motives by presenting themselves as incompetent and that such self-presentations could not succeed without a formally credulous audience. Such officials, who are often directly elected, also face few political sanctions for such self-presentations. If the alternative is a conclusion—whether in public or in court—that a policy or policy implementation was, for instance, designed to "target African Americans with almost surgical precision," it is politically and legally preferable to claim to be an inept surgeon.[12] This vocabulary of incompetence may include professions of ignorance of facts, ignorance of the (potentially dubious) motives of other government actors, ignorance of how information was produced, or organizational incapacity.[13] Such professions work, in part, because they align with particular features of legal doctrine, but they also work because they are in many cases plausibly true.

Official performances of incompetence and inattention have a long history, some far more malevolent than the matters examined here. Perhaps the most dramatic of these come in the cases of lynching and other instances of mob violence when officers of the law "lost" individuals in their custody.[14] Mob efforts to take the

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[9] PRESIDENTIAL COMM'N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS 10 (Jan. 2014).

[10] THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 150 (2019 ed.).

[11] PRESIDENTIAL COMM'N ON ELECTION ADMIN., *supra* note 9, at 10.

[12] N.C. State Conf. NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

[13] *See generally infra* Part IV, Section A "Playing Dumb" *and* Barbara Kellman, *When Should a Leader Apologize—and When Not?*, HARV. BUS. REV. (Apr. 2006), https://hbr.org/2006/04/when-should-a-leader-apologize-and-when-not (discussing failure of political actors to take responsibility for their actions).

[14] *See* Christopher Waldrep, *National Policing, Lynching, and Constitutional Change*, 74 J. S. HIST. 589, 616, 618 (2008).

law into their own hands did not always succeed: officials could, and in many cases did, successfully intervene.[15] At other times, they actively "colluded with mobs"[16] or passively turned a blind eye.[17] To consider an example more closely connected to voting rights, racially exclusionary white primaries were sustained by the official pretext that political parties were private clubs not properly subject to state scrutiny.[18]

Our examples, drawn from administrative practices challenged in federal courts, are by definition relatively extreme—the idea that burdens on voting so plausibly flow from public organizational failings certainly precludes any legal challenge of most burdens as the potential result of willful maladministration.[19] So defined, this problem does not admit of obvious legal solutions. The framework of voter registration and voter roll maintenance defined in the National Voter Registration Act ("NVRA") and Help America Vote Act ("HAVA"), though a source of serious problems, is by now largely settled.[20] The protections afforded by surviving sections of the Voting Rights Act ("VRA") are beset by important conceptual difficulties.[21] Disparities in the ease of voting arise from causally complex processes, which often operate across public organizations and levels of government.[22] Statistics are often the most apt means of describing these patterns, but the federal judiciary has been highly resistant to the use of complex social statistics in voting-related cases and, in many instances, lacks well-defined standards or concepts for using statistics thoughtfully.[23] The Supreme Court's

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[15] *See, e.g.*, Ryan Hagen et al., *The Influence of Political Dynamics on Southern Lynch Mob Formation and Lethality*, 92 SOC. FORCES 757, 757–58 (2013); E. M. Beck et al., *Contested Terrain: The State versus Threatened Lynch Mob Violence*, 121 AM. J. SOCIO. 1856, 1860 (2016).

[16] Kinga Makovi et al., *The Course of Law: State Intervention in Southern Lynch Mob Violence 1882-1930*, 3 SOCIO. SCI. 860, 869 (2016).

[17] James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 BRIT. J. POL. SCI. 269, 270 (1998).

[18] SPRINGER, *supra* note 1, at 155–56.

[19] *See* PRESIDENTIAL COMM'N ON ELECTION ADMIN., *supra* note 9, at 9.

[20] *See* SPRINGER, *supra* note 1, at 167.

[21] Voting Rights Act of 1965, Pub. L. No. 107-252, 79 Stat. 437 (1965); Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002); U.S. ELECTION ASSISTANCE COMM'N, ELECTION ADMINISTRATION AND VOTING SURVEY: 2018 COMPREHENSIVE REPORT 42–43 (2019).

[22] *See* Robert S. Montjoy, *The Public Administration of Elections*, 68 PUB. ADMIN. REV. 788, 793–94 (2008).

[23] *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

rulings in recent partisan gerrymandering cases offer the powerful suggestion that further development of statistical evidence is unlikely to alter legal analysis.[24] In earlier cases, most notably *Crawford v. Marion County Election Board* (discussed *infra*), the Court effectively foreclosed potential consideration of what has since become a well-developed and compelling body of evidence about contemporary practices that make electoral participation harder.[25]

The limits on the legal use of social statistics do not simply arise from fine points of doctrine. Judicial understandings of cause often differ markedly from the logic of causal inference that undergirds social statistical research; in commending statistical evidence to judges' attention, the social sciences have perhaps not put their best foot forward.[26] One of the guiding principles of sociological research to come from the last century is the Thomas Theorem, which states parsimoniously that "if men define situations as real, they are real in their consequences."[27] A legal analog of this might be "if judges do not define situations as real, they cannot be real in their consequences." No matter how sophisticated the statistical techniques become, if judges are hesitant to grant them epistemological priority, then they will never be as useful as we might like at effecting actual change. Even supposing the judiciary looked more favorably upon the forms of social scientific evidence it has resisted up to this point, scarcity of government- or researcher-produced data would still make it difficult to describe many kinds of disparities well enough to make them amenable to legal remedy.

We conclude that other forms of social scientific evidence, and other aspects of existing law, might provide promising ways of promoting unburdened exercise of the right to vote. Forms of qualitative social science grounded in interviewing, direct observation, and interpretation often rely on underlying views of cases, causes, and evidence that approximate judicial reasoning much more closely than standard forms of statistical analysis. Administrative burdens on the right to vote might also be constructively reconceived in other legal terms. Given that administratively imposed

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[24] *See* Gill v. Whitford, 138 S. Ct. 1916 (2018).

[25] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

[26] *See* discussion *infra* Part III, Section A, Subsection ii, "The Supreme Court has Broadly Avoided Statistics or Statistically-Supported Explanations."

[27] WILLIAM ISAAC THOMAS & DOROTHY SWAINE THOMAS, THE CHILD IN AMERICA (1928).

burdens on the right to vote flow from state and local practices and are closely associated with materially inadequate government support for the task, state legal guarantees of fair and adequate support for the administration of democracy could be quite effective. The majority of state constitutions contain language that could be invoked to this end, and similar legal guarantees have long played an important role in addressing disparities in public education.[28] In addition, American administrative law has well-developed conceptions of reasonable conduct, and administrative scholarship and practice is increasingly oriented toward greater public transparency and participation in administrative decision-making.[29] A confrontation with the overall inefficiency and opacity of election administration might also be a powerful means of addressing disparities.

II. ADMINISTRATIVE PRACTICES BURDEN THE RIGHT TO VOTE

Rights do not enforce themselves. The practical experience of government protections, including rights or entitlements defined by statute or judicial interpretation, is mediated by the work of administrators. Sympathetic administrators have played a major role in making rights real.[30] Conversely, frontline administrative behavior and designed features of public programs can impose a range of burdens on individual members of the public, which may markedly limit the practical benefit of government for the individual and diminish trust in government.[31] A growing social scientific literature, reviewed in detail below, catalogues the extraordinary effect of administrative burdens in the everyday experience of government in the United States.

The administration of elections and the democratic process exemplifies this pattern. Compared to many other forms of routine public interaction with government, participating in elections is

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[28] EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 67–68 (2013).

[29] *See generally* Glen Stazewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 886 (2011) ("Such transparency is needed to provide citizens and other public officials with an opportunity to discuss, evaluate, and criticize those decisions, 'as well as potentially to seek legal or political reform.'").

[30] CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 218 (2010).

[31] Megan Doughty & Karen J. Baehler, *"Hostages to Compliance": Towards a Reasonableness Test for Administrative Burden*, 3 PERSP. ON PUB. MGMT. & GOVERNANCE 273, 286 (2020).

relatively complex and time consuming.[32] The degree of burden placed on voters, and voters' capacity to surmount these burdens, varies widely across places and populations.[33] A great deal of recent social scientific and legal work on voting rights examines practical limitations on the right to vote and the value of a vote. Much of this work has focused on major judicial rulings or controversial statutory provisions such as voter identification requirements.[34] Such work focuses "less on understanding and improving the relationship between the administrative process and citizen participation in elections and more on the statutory and constitutional language designed to structure this dynamic."[35] This section argues that the most significant contemporary obstacles to voting are closely associated with the relatively neglected work of administrators: ineffective administration, shortages of public organizational capacity, and poor communication and responsiveness make voting more difficult for many Americans, especially in communities and polities where confidence in government is already low.[36]

Although academic interest in voting and elections issues has grown markedly over the past decade, there are several important features of contemporary election administration that are still imperfectly understood. For example, neither scholars nor government officials possess very detailed information about the experience of voting in most local places in the United States. It is not always clear how individual and communal perceptions of government and its motives shape the subjective understanding and experience of how elections are administered.

A. The Importance and Ambiguity of Administrative Burden

Administrative burdens are the learning, compliance, or psychological costs that are imposed on individuals in their

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[32] *See generally* Robert S. Montjoy, *The Public Administration of Elections*, 68 PUB. ADMIN. REV. 788, 793–94 (2008).

[33] *See* John Kuk et al., *A Disproportionate Burden: Strict Voter Identification Laws and Minority Turnout*, 8 POLS. GRPS. & IDENTITIES 1, 7 (2020).

[34] *Id.* at 2.

[35] Jennifer L. Selin, *The Best Laid Plans: How Administrative Burden Complicates Voting Rights Restoration Law and Policy*, 84 MO. L. REV. 999, 1004 (2019).

[36] Shannon Portillo et al., *The Disenfranchisement of Voters of Color: Redux*, 23 PUB. INTEGRITY 111, 112 (2021).

interactions with government.[37] The direct effect of administratively burdensome implementations of policy is to limit the ability of individuals to make practical claims on government.[38] A broader, indirect effect may be to limit administratively burdened individuals' future efforts to engage with or make claims upon government and to lower confidence in government.[39] Herd and Moynihan examine administrative burdens in several areas of policy in the United States: means-tested social welfare programs, age-based programs like Medicare and Social Security, voting policy, access to reproductive health services, and federal income tax filing.[40] The public's use of such services and benefits may be limited, in the first place, by a lack of knowledge of program availability or eligibility, or by difficulty in obtaining information. For many of the best-studied instances of burden, such as barriers to enrollment in state-administered programs like Medicaid and Supplemental Nutrition Assistance Program ("SNAP"), a great obstacle is bureaucratic complexity, such as that arising from documentation and paperwork requirements.[41] The cognitive cost of navigating these aspects of participation in public programs has the strongest adverse effect on precisely the members of the population most in need of the assistance the programs offer.[42] Establishing or maintaining eligibility may also require submitting to extensive, highly intrusive examination of one's personal affairs, a process that may feel pointedly inquisitorial and calculated to produce reasons to deny the claims of eligible beneficiaries.[43]

Administrative burdens bear upon the core public question of the distribution of resources and protections, but it is often difficult to mount effective political challenges to administratively burdensome practices. The decision-making processes that produce

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[37] PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 22–23 (2018).

[38] *Id.* at 37.

[39] *Id.* at 3.

[40] *Id.* at 6–7.

[41] *Id.* at 24.

[42] Julian Christensen et al., *Human Capital and Administrative Burden: The Role of Cognitive Resources in Citizen-State Interactions*, 80 PUB. ADMIN. REV. 127, 131 (2019).

[43] Spencer Headworth, *Getting to Know You: Welfare Fraud Investigation and the Appropriation of Social Ties*, 84 AM. SOCIO. REV. 171, 172 (2019); Cayce Hughes, *From the Long Arm of the State to Eyes on the Street: How Poor African American Mothers Navigate Surveillance in the Social Safety Net*, 48 J. CONTEMP. ETHNOGRAPHY 339, 340, 353 (2019).

burdens are frequently obscure, and it is often not possible to show that a burdensome outcome was intended.[44] Administrative decision-making processes are also difficult to influence by conventionally political tactics: administrative design and implementation processes strongly favor organized interests over individuals and technical expertise over expressly political claims-making.[45]

Some administrative burdens appear calculated to make it more difficult for members of the public to make claims on government,[46] leading to the characterization of administratively burdensome design as "policymaking by other means."[47] However, it is not always reasonable to tie a burdensome policy implementation to a deliberate motive. Burdens may arise from poor or incorrect decisions that were made with good intentions. Contemporary policymakers are often embedded within organizational structures that are ineffective at digesting policy information that could support effective administrative design and implementation.[48] At the state level, policymakers may also face acute shortages of policy information or resources. Although the U.S. Congress has thousands of expert staff members, many state legislatures lack institutional policy staffing and have little or no dedicated staffing for individual legislators.[49] State agencies have relatively greater policy capacity, but this is often very modest when viewing the scope of the task before them.[50] This lack of policy capacity is a significant reason why delegation of authority to the states frequently does not have the salutary, democratic effects that theories of American federalism

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[44] Jacob S. Hacker, *Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 245 (2004).

[45] RACHEL AUGUSTINE POTTER, BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY 47 (2019); Susan Webb Yackee, *Participant Voice in the Bureaucratic Policymaking Process*, 25 J. PUB. ADMIN. RSCH. & THEORY 427, 431 (2014).

[46] Carolyn J. Heinrich, *Presidential Address: "A Thousand Petty Fortresses": Administrative Burden in U.S. Immigration Policies and its Consequences*, 37 J. POL'Y ANALYSIS & MGMT. 211, 216 (2018).

[47] HERD & MOYNIHAN, *supra* note 37, at 8.

[48] FRANK F. BAUMGARTNER & BRYAN D. JONES, THE POLITICS OF INFORMATION: PROBLEM DEFINITION AND THE COURSE OF PUBLIC POLICY IN AMERICA 39 (2015).

[49] MATT GROSSMAN, RED STATE BLUES: HOW THE CONSERVATIVE REVOLUTION STALLED IN THE STATES 55 (2019); THE COUNCIL OF STATE GOV'TS, *supra* note 10, at 81.

[50] *See generally* Neal D. Woods & Michael Baranowski, *Legislative Professionalism and Influence on State Agencies: The Effects of Resources and Careerism*, 31 LEGIS. STUD. Q. 585, 586 (2006) (arguing that greater legislative resources increase influence on administrative agencies, but scarce use of resources decreases legislative influence).

anticipate.[51] Many contemporary policy issues, particularly matters like election administration where a great deal of authority reposes at the state or local level, involve a high degree of technical uncertainty and jurisdictional fragmentation.[52] Problems of this class have been a prominent focus of policy research for decades, but technical complexity and dispersed or overlapping patterns of authority remain enormous obstacles to effective policy design.[53]

In addition, governments characteristically shift administrative work onto other actors, including individual members of the public, when their own capacity is limited.[54] Administrative choices that shift work onto individuals may be an unavoidable organizational response to resource constraints externally imposed by political actors—a very common problem for public organizations given that the imposition of fiscal constraints is a defining tactic of modern American politics and that both major political parties tend to characterize government as wasteful and inefficient.[55] Burdens may also reflect structural shortages of public resources that neither political nor administrative actors can readily correct. Genuine scarcity of public resources is very common at the state and local level, where governments must finance their operations under a variety of legal constraints that do not occur at the national level.[56] Finally, programs that are reasonably functional under ordinary circumstances may also become severely burdensome under unusual ones. For instance, job losses associated with the novel coronavirus pandemic overwhelmed state-administered unemployment insurance programs, and many newly unemployed people either found it impossible to register a claim or could do so only by extraordinary time

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[51] Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 111 (2018).

[52] KATHLEEN HALE & MITCHELL BROWN, HOW WE VOTE: INNOVATION IN AMERICAN ELECTIONS 168 (2020).

[53] ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 25–26 (2015); MATTHEW WOOD, HYPER-ACTIVE GOVERNANCE: HOW GOVERNMENTS MANAGE THE POLITICS OF EXPERTISE 14 (2019).

[54] Cass Sunstein, *Sludge and Ordeals*, 68 DUKE L.J. 1843, 1860–62 (2019) (arguing that adequate bureaucratic capacity is associated with low programmatic burden).

[55] MONICA PRASAD, STARVING THE BEAST: RONALD REAGAN AND THE TAX CUT REVOLUTION 15 (2018); AMY E. LERMAN, GOOD ENOUGH FOR GOVERNMENT WORK: THE PUBLIC REPUTATION CRISIS IN AMERICA (AND WHAT WE CAN DO TO FIX IT) 20 (2019).

[56] Daniel R. Alvord, *The Triumph of Deficits: Supply-Side Economics, Institutional Constraints and the Political Articulation of Fiscal Crisis*, 61 SOCIO. Q. 206, 212 (2020).

investments.[57] Administrative burdens, in short, are always political in the sense that they have distributive consequences that follow from government decisions, but they are not always baldly political or calculatedly partisan. Burdens may arise from financial, personnel, informational, and legal constraints that public organizations cannot reasonably control or counteract. This ambiguity about the causes and motives of burdens is a defining feature of the role of administrative burdens in elections and voting.

B. Administrative Burdens on the Right to Vote Remain Common

In the case of election administration, administrative burdens may be understood as politics by other means—burdens constrain the opportunity to participate in the democratic process. Since the emergence of mass parties in the nineteenth century, tension has existed between the broadened legal recognition of the right to vote and the patterns of administration that practically limit the exercise of that right.[58] Until the latter part of the twentieth century, these burdens could be very heavy and were widespread.[59] Formal voter registration requirements were first adopted in northeastern and midwestern states with large, urbanized immigrant populations; when introduced, these registration requirements frequently applied only to voters in cities and disfavored urban voters in intention and effect.[60] Voter registration spread widely and was also used to a highly restrictive effect in the South.[61] Between 1950 and 1972, there were twenty-five states where poll taxes or literacy tests were in formal use.[62] Sixteen were non-southern states,

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[57] *See* Robert Clifford & Marybeth J. Mattingly, *Unemployment Insurance Is Failing Workers During COVID-19. Here's How to Strengthen It*, BROOKINGS (Apr. 9, 2020), https://www.brookings.edu/research/unemployment-insurance-is-failing-workers-during-covid-19-heres-how-to-strengthen-it.

[58] *See* Theodore J. Lowi et al., *American Government: An Introduction*, W.W. NORTON & COMPANY, INC., https://wwnorton.com/college/polisci/american-government12/core/ch/12/outline.aspx.

[59] *Id.*

[60] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES, 65 (2009).

[61] SPRINGER, *supra* note 1, at 67–68, 79.

[62] *Id.* at 57.

typically states with large immigrant populations: as in the South, these restrictive laws were largely directed at minority groups.[63]

This is to speak only of official actions of government; studied government inaction was another feature of disenfranchisement. Many governments ignored or suborned extralegal violence and intimidation.[64] As noted above, states also hindered electoral participation by the pretense that political parties were private organizations whose conduct was not properly subject to government regulation.[65] This view of political parties was very common through the early twentieth century.[66] In states with historically strong party organizations, this legacy demonstrably affects basic features of elections up to the present day.[67] States' treatment of parties as private, autonomous organizations was also the legal foundation of the racially exclusionary white primary system in the South.[68]

By present standards, routine features of elections administration through the mid-twentieth century could be extraordinarily burdensome. Springer reproduces the voter registration form in use in Mississippi in the 1960s, which neatly demonstrates how policy design choices may impose a range of burdens on individuals.[69] The form included twenty-one items, which registrants were required to complete in their own handwriting, in the presence of the registrar, "without assistance or suggestion of any person or memorandum."[70] The form requested a range of factual details that a registrant might not know or readily remember—including how long they had resided in their current precinct, addresses and dates of prior residence, and whether some other person of the same name was registered in the jurisdiction.[71] In addition, registrants were obliged to copy a section of the Mississippi State Constitution of the registrar's choosing, then provide a written "reasonable

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[63] *Id.* at 56.

[64] Jay Goodliffe et al., *The Enduring Effects of State Party Tradition on the Voting Experience*, 19 ELECTION L. J. 45, 46–47 (2020).

[65] *Id.*

[66] FRANK GOODNOW, POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT 92 (Routledge, 1st ed. 2017).

[67] Goodliffe et al., *supra* note 64, at 47.

[68] *See* SPRINGER *supra* note 1, at 156.

[69] *Id.* at 173–75.

[70] *Id.*

[71] *Id.* at 173.

interpretation" of the section's meaning.[72] This constitutional gloss was to be followed by a written "statement setting forth your understanding of the duties and obligations of citizenship under a constitutional form of government."[73] A law professor or political theorist might well struggle to answer such questions, and it is no great marvel that voter turnout in the state at mid-century hovered around 10% in non-Presidential elections.[74]

By comparison, the registration form defined by the National Voter Registration Act of 1993 is simplicity itself.[75] However, although participating in elections today is undoubtedly simpler than it was in many previous places and times, registering, remaining registered, and casting a ballot remains difficult for many. The burden imposed on some voters is, in part, an effect of the relatively archaic character of elections administration generally. Voting, though not onerous for the typical voter, is nonetheless a relatively cumbersome form of routine interaction with government.[76] In the 2018 general election cycle, around 54% of voters registered at a motor vehicles office or in-person at a local election office.[77] More than 55% of all voters cast their ballot in person at a polling place on Election Day, which involves at least some time cost to travel and navigate the procedures of the polling place, in addition to time waiting in line in many cases.[78] Voting absentee frequently involves meeting additional requirements, and even in states where elections are conducted wholly by mail voting, participation commonly involves a time cost.[79] Although voters may return a mail-in ballot through the postal service, the great majority travel to an official site to return their ballot in person.

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[72] *Id.* at 174.

[73] *Id.*

[74] *Id.* at 37.

[75] *See* National Voter Registration Act, 52 U.S.C. §§ 20501–20511; *see also* U.S. ELECTION ASSISTANCE COMM'N, REGISTER TO VOTE IN YOUR STATE BY USING THIS POSTCARD FORM AND GUIDE 1 (2021).

[76] *See Why Are Millions of Citizens Not Registered to Vote?*, PEW (June 21, 2017), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/06/why-are-millions-of-citizens-not-registered-to-vote.

[77] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 18 tbl.2.

[78] *Id.* at 7.

[79] *See Absentee and Early Voting*, USAGOV, https://www.usa.gov/absentee-voting (last visited Oct. 6, 2021).

There may also be substantial and unevenly allocated costs to acquiring needed information about voting. One reason for this is limited online availability of official information about voting.[80] A great deal of the public's regular interaction with government, and acquisition of governmental information, happens electronically.[81] But the majority of state elections websites do not provide information about rules for primary elections or information about official activity, security concerns, or observation of elections—key integrity concerns that figure prominently in online information offered in other democratic polities.[82] As of 2018, six state elections agencies had no Twitter account, and nine had no Facebook page; only thirteen total states maintained social media presences specific to the particular elections cycle.[83] In Garnett's study of online provision of voting information, five state election offices never responded to emails posing common, simple questions about voting, and nine other emails waited more than a week for a response.[84] This experiment did not seek to gauge differences in the speed or quality of responses depending upon the identity of the person requesting information. Other experimental studies, however, have found that partisan officials were differentially responsive to questions depending upon the party affiliation of voters.[85] Nationwide, election officials were less likely on average to respond to queries from Latino aliases than queries from non-Latino white aliases and on average provided less complete and less accurate information when they did respond.[86] Even the most basic fact—whether one has a current, valid registration—is not always easily obtained.[87]

There is a range of important modern federal protections of the right to vote. The Twenty-fourth Amendment prohibits directly

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[80] Holly Ann Garnett, *Behind the Screens: E-Government in American State Election Administration*, 19 ELECTION L. J. 402, 410 (2020).

[81] *Id.* at 403.

[82] *Id.* at 410–11.

[83] *Id.* at 411.

[84] *Id.* at 412.

[85] Ethan Porter & Jon C. Rogowski, *Partisanship, Bureaucratic Responsiveness, and Election Administration: Evidence from a Field Experiment*, 28 J. PUB. ADMIN. RSCH. & THEORY 602, 611 (2018).

[86] Ariel R. White et al., *What Do I Need to Vote? Bureaucratic Discretion and Discrimination by Local Election Officials*, 109 AM. POL. SCI. REV. 129, 140 (2015).

[87] *See id.* at 131 n.11.

imposed financial costs on voting.[88] Large portions of the VRA remain in effect after *Shelby County v. Holder*, and the NVRA and HAVA establish a wide range of requirements, all of which serve to define basic safeguards and guarantees of access.[89] Nonetheless, there may be significant time and cognitive costs to register to vote, remain registered, and actually cast a ballot.[90] State governments may make a range of policy and administrative choices that may affect the ease and fairness of each of these phases of the process.

Federal law establishes clear minimum standards about the availability of voter registration.[91] The implementation of positively burdensome registration policies, such as the much-contested documentary proof of citizenship requirement at issue in *Arizona v. Inter Tribal Council of Arizona* and implemented in Kansas, has therefore been rare.[92] However, states may make a range of choices that make registering relatively easier or more convenient than the federal baseline, and the variety and convenience of means of registering varies significantly across states.[93] It may be added that much could be done to make it easier for voters to obtain information about their current registration status: in 2018, some 7.5 million registrations—about 10% of total registrations—were duplicate submissions by voters whose registration status was already up-to-date.[94]

Between the 2016 and 2018 federal election cycles, thirteen states developed some model of automatic voter registration, most commonly an "opt in" model that modestly streamlined registration in settings like DMVs; Alaska deployed an "opt out" model by which government records were used to register voters unless they expressly stated their desire not to be registered.[95] In 2018, thirty-eight states permitted online voter registration, typically employing

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[88] U.S. CONST. amend. XXIV, § 1.

[89] Vincent Marinaccio, *Protecting Voters' Rights: The Aftermath of* Shelby v. Holder, 35 WHITTIER L. REV. 531, 548–49 (2014); U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 42–43.

[90] *See generally* VOTE.ORG, https://www.vote.org (last visited Sep. 29, 2021) (illustrating the various voting deadlines, dates, and rules for each state).

[91] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 41–42.

[92] Arizona v. Inter Tribal Council of Arizona, 570 U.S. 1, 6–7 (2013); Fish v. Kobach, 840 F.3d 710, 715 (10th Cir. 2016).

[93] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 45–47.

[94] *Id.* at 74–75 tbl.2c.

[95] *Id.* at 47.

systems that require possession of a driver's license.[96] Just under half of the states permit some form of same-day registration; fifteen permit registration and voting on Election Day.[97] States have widely varying rules about voter registration drives, in which party or advocacy organizations provide assistance in registering.[98] Where state policy is relatively permissive, drives may be a major source of new registrants: in 2018, there were four states where more than 10% of new registrations came from drives, as well as many states with stringent rules where there were none at all.[99] The administrative methods for restoring voting rights to former offenders may significantly affect ease of registration among this population. Such rights restorations are most commonly carried out automatically, but one-third of states require former offenders to initiate restoration of voting rights, either by furnishing documentation or navigating a formal administrative process.[100] Such processes may pose especially significant obstacles to former offenders.[101]

The ease of remaining registered may also vary significantly across states and localities. The enactment of HAVA obliged states to develop centrally maintained, electronic voter rolls and modified provisions of the NVRA by permitting maintenance to remove duplicate or incorrect registrations.[102] States have widely varying procedures about how and when they engage in routine voter roll maintenance.[103] The quantity and variety of information obtained to maintain voter rolls, and the manner in which this information is used, may in some cases prompt erroneous scrutiny or

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[96] *Id.* at 122 fig.3.

[97] *Id.* at 123 fig.4.

[98] DIANA KASDAN, BRENNAN CTR. FOR JUST., STATE RESTRICTIONS ON VOTER REGISTRATION DRIVES 2 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/State%20Restrictions%20on%20Voter%20Registration%20Drives.pdf.

[99] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 69–70 tbl.2b.

[100] *Id.* at 125.

[101] AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 125, 216 (Univ. Chi. Press 2014).

[102] *See* National Voter Registration Act, 52 U.S.C. §§ 20501–20511; *see also* Help America Vote Act, 52 U.S.C. §§ 20901–21145; *see also* U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 43 (explaining implications of the two laws).

[103] *See* NAT'L ASSN. OF SECRETARIES OF STATE, MAINTENANCE OF STATE VOTER REGISTRATION LISTS: A REVIEW OF RELEVANT POLICIES AND PROCEDURES (2017).

cancellation of valid registrations.[104] An existing registration is properly removed if the voter has moved outside of the relevant jurisdiction, has died, no longer wishes to be registered, has been convicted of a disqualifying criminal offense, or has been found to be mentally incompetent.[105] A registration should also be removed if the registration was improper in the first place—for instance, if a person who did not satisfy eligibility requirements was erroneously registered.[106]

The most significant feature of voter roll maintenance is the registration confirmation postcard framework defined by the NVRA; voters may respond to these cards to indicate that they have moved or no longer wish to be registered, and non-response, coupled with non-voting in the two prior federal elections, may be grounds for removing a registration.[107] The registration confirmation method leaves much to be desired. Nearly two decades after the enactment of HAVA, bloated voter rolls remain common: in Washington, D.C., Alaska, and Kentucky, registered voters were more numerous than the citizen voting age population, and many other states had rolls nearly as large as the total eligible population.[108] Registration confirmation mailings offer only modest help. Nationally, 61.9% of registration confirmation notices sent in the United States were of unknown status—in effect, more than 13 million mailings were not returned to elections officials for reasons not known.[109] An additional 16.4% of such notices were returned as undeliverable, and in nine states, more than a quarter of such notices were undeliverable.[110] The briefs, oral arguments, and opinions in *Husted v. A Philip Randolph Institute*, a recent Supreme Court case on the use of confirmation mailings in voter roll maintenance, abundantly demonstrated the ambiguity of the NVRA's statutory language, as well as the dearth of factual information about what happens to the great mass of unreturned mailings.[111] It is plain that non-

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[104] Christopher Coble, *How Do You Know If Your Voter Registration Has Been Cancelled?*, FINDLAW (Aug. 7, 2019, 3:00 PM), https://www.findlaw.com/legalblogs/law-and-life/how-do-you-know-if-your-voter-registration-has-been-cancelled.

[105] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 52.

[106] *See* JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD 4 (2007).

[107] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 52.

[108] *Id.* at 48 fig.4.

[109] *Id.* at 51–52.

[110] *Id.* at 51, 78–79 tbl.3a.

[111] Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1838–39 (2018).

response is a weakly informative piece of information. Yet non-response to registration confirmations is by far the most common trigger for a registered voter's removal from the rolls.[112] Removal of registrations on this basis will often result in the deletion of a large number of valid registrations, which are, for a variety of reasons, likely to be concentrated in communities with lower average incomes and higher concentrations of registered voters belonging to racial and ethnic minority groups.[113]

States may also make use of a wide range of other records to maintain current voter rolls. All states have electronic linkages between voter rolls and other sources of information; the most common links are to motor vehicles departments, sources of death information, and sources of information about disqualifying criminal convictions.[114] States, to more widely varying degrees, also maintain linkages to other sources of information. Most states have also participated in either the now-suspended Interstate Voter Registration Crosscheck Program ("Crosscheck") or the Electronic Registration Information Center ("ERIC"), two interstate record-sharing programs.[115] Aside from differences in how much information state governments acquire for purposes of maintaining voter rolls, there are differences in how they use this information. For instance, Virginia and North Carolina, two states with similar electoral administrative structures and histories, made strikingly different use of lists of potentially obsolete registrations produced by Crosscheck: owing to data quality concerns, Virginia largely discarded these matches, while North Carolina treated them as strong evidence that registrations were obsolete or even that tens of thousands of North Carolinians had engaged in illegal double voting.[116] Voter roll maintenance practices, depending upon their timing, the administrative classification of potentially obsolescent records, and voter registration rules, may ultimately make it difficult for erroneously removed voters to cast a ballot.

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[112] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 53.

[113] MYRNA PEREZ, BRENNAN CTR. FOR JUST., VOTER PURGES 10–12 (2008).

[114] *See* U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 120–21, 137–38 tbl.2.

[115] *See e.g.*, Off. Sec. of State, *Interstate Crosscheck Program Grows*, CANVASSING KAN. 1 (Dec. 2013), https://www.kssos.org/forms/communication/canvassing_kansas/dec13.pdf; *Who We Are*, ELECTRONIC REG. INFO. CTR., https://ericstates.org/who-we-are (last visited Oct. 4, 2021).

[116] BEN MERRIMAN, CONSERVATIVE INNOVATORS 113–14 (2019).

Federal protections are arguably weakest regarding the ease of casting a ballot. Meaningful federal policy, of course, exists. The minority language provisions of the Voting Rights Act provide significant access to ballots in a voter's preferred language.[117] Over 350,000 uniformed military personnel and overseas civilian voters participated in the 2018 election through absentee and mail voting methods defined by the Uniformed and Overseas Citizens Absentee Voting Act.[118] And provisional balloting safeguards developed after the enactment of HAVA enable participation for voters of challenged or uncertain registration status. In 2018, nearly 870,000 provisional ballots were eventually verified and counted in full.[119] However, the ease of voting, and the time ultimately spent casting a ballot, is, to a great degree, a matter of state and local policy and administration. States define rules for voting absentee or early in-person.[120] The number and location of polling places are defined by some combination of state and local decisions.[121] The recruitment of poll workers is a task left mainly to local officials and, in many states, so is the financing and acquisition of voting equipment. Long travel or wait times have been a persistent problem against which federal law offers few direct protections. One potential legal approach—looking upon heavy time burdens as analogous to poll taxes—was effectively ruled out by *Crawford v. Marion County Election Board*, where the Supreme Court declined to assess the potential effects of Indiana's voting identification law according to the legal standard applicable to poll taxes.[122] The line of reasoning in that case would certainly tend to make it harder to mount compelling legal objections to election administrative practices that impose functional time costs on voters where there is no directly imposed monetary cost.

Wait times above six hours were reported in some localities in the 2004 general election, which prompted the new technique of preemptive litigation to anticipate and avert similar wait times in 2008; the success of such litigation has been hindered by unclear

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[117] *See* U.S. COMM'N ON C.R., A CITIZEN'S GUIDE TO UNDERSTANDING THE VOTING RIGHTS ACT 15 (Clearinghouse 1984).

[118] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 15.

[119] *Id.* at 16, 34 tbl.3.

[120] *See id.* at 1–3.

[121] *See id.* at 1, 2, 7.

[122] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 188–89 (2008).

legal standards, and imperfect alignment of legal arguments with what is administratively feasible.[123] Long wait times have persisted as a problem. In the 2012 general election, some five million voters waited more than an hour to cast their ballot, and another five million voters waited between half an hour and an hour.[124] In the 2020 federal election cycle, there were prominent reports of lines of many hours in length to vote in primary elections in cities such as Atlanta, Georgia, and Louisville, Kentucky, and in October, there were reports of similar lines to vote early in-person in localities in Ohio, Georgia, and Texas.[125]

The time cost of voting is allocated very unevenly. In the majority of states, the average wait time to vote in the 2012 general election was less than ten minutes, but average wait times approached forty minutes in Florida.[126] Wait times are also distributed unevenly across localities. Long wait times are far more common in majority-minority areas: "zip codes with greater than 75 percent nonwhite populations waited more than twice as long as zip codes with less than 25 percent nonwhite populations."[127] Minority voters are six times more likely than white voters to wait at least an hour to vote.[128] Although data that could persuasively demonstrate it are unavailable, the end of pre-clearance after *Shelby County v. Holder* has conceivably compounded racial disparities in wait times.[129] The most thorough available analysis found that 1688 polling places have been closed in jurisdictions formerly covered by Section 5 of the VRA, a figure that does not include closures in Virginia or some localities in Texas.[130]

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[123] *See* Justin Levitt, *Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens*, 9 ELECTION L. J. 19–20, 36, 39 (2010).

[124] PRESIDENTIAL COMM'N ON ELECTION ADMIN., *supra* note 9, at 13.

[125] *See* BRENNAN CTR. FOR JUST., VOTER SUPPRESSION IN 2020 10–11 (2021); Dan Sewell & Julie Carr Smyth, *Lines Long as Early Voting Begins Amid Pandemic Precautions*, AP NEWS (Oct. 6, 2020), https://apnews.com/article/virus-outbreak-election-2020-joe-biden-donald-trump-cincinnati-c66ee83816849c72f144df10ea890f19.

[126] Charles Stewart III, *Waiting to Vote in 2012*, 28 J. L. & POL. 439, 452 (2013).

[127] Robert M. Stein et al., *Waiting to Vote in the 2016 Presidential Election: Evidence from a Multi-County Study*, 73 POL. RSCH. Q. 439, 441 (2019).

[128] Stephen Pettigrew, *The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 POL. SCI. Q. 527, 527 (2017).

[129] Donald L. Davison & Michael Krassa, *Times Taxes and Voting Queues: The Voting Rights Act after* Shelby County, Alabama v. Holder *(2013)*, 20 NAT. POL. SCI. REV. 20, 20 (2019).

[130] THE LEADERSHIP CONF. EDUC. FUND, DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE 12, 53 (2019).

Long wait times to vote in person may arise, in part, from statutory provisions: states that provide limited opportunities for absentee or early in-person voting will, of necessity, see more voting occurring in person on Election Day. Voter identification laws have a modest but demonstrated effect on wait times.[131] And the number and proximity of polling places will follow partly from legal provisions. However, long wait times are perhaps the largest functional burden on voting that arises from administrative decisions and practices: wait times to vote in person are very much a result of election administrative capacity. Adequate staffing of polling places is the most significant organizational determinant of shorter wait times.[132] Staffing is also one of the most obvious deficiencies in American elections administration: in 2018, staffing levels were unchanged from 2014 while voter turnout increased nearly 45%.[133] Simple staffing considerations were one of most prominent concerns in the run-up to the 2020 general election. Turnout was expected to be extremely high, but the novel coronavirus pandemic promised to increase the complexity of routine work at the polls while also deterring the participation of many experienced workers—in 2018, 58% of poll workers were over the age of sixty.[134]

Long waits also arise from the relative scarcity of polling places and the capacity of polling places to handle voters, both matters shaped largely by the decisions of local election officials. Around half of the observable racial difference in wait times to vote in the United States arises from "differences within an election administrator's jurisdiction"—that is, from local choices about allocation of resources and opportunities.[135] Long wait times may also be a sign of technical and organizational breakdowns or insufficiencies.[136] Robust local organizational and technical capacity can be a serious protection against delays and problems, even where financial resources are not especially abundant.[137] Unusually thorough observation finds that experienced poll workers facilitate more

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[131] Stein et al., *supra* note 127, at 439, 442.

[132] *Id.* at 446.

[133] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 5, 9.

[134] *Id.* at 10.

[135] Pettigrew, *supra* note 128, at 535.

[136] Stewart, *supra* note 126, at 444.

[137] Martha Kropf et al., *Making Every Vote Count: The Important Role of Managerial Capacity in Achieving Better Election Administration Outcomes*, 80 PUB. ADMIN. REV. 733, 737–38 (2020).

efficient and accurate polling place operation.[138] However, achieving such staffing conditions has been a major challenge: in 2018, only about 15% of local jurisdictions reported finding it somewhat or very easy to recruit poll workers.[139]

C. Perceptions of Government Magnify the Effects of Electoral Administrative Burdens

Objectively speaking, the cognitive and time costs of voting vary widely across places and voter populations. The subjective experience of those costs, and how this experience affects behavior, also varies. Election administrative practices unavoidably send potent messages about whose democratic participation is welcomed. Individual and communal perceptions of how elections are administered are also shaped by existing beliefs about and experience of government.

Voter identification laws, which require voters to present one of a specified set of identifying documents to cast a ballot in person, are the most visible and best studied of the class of current policies and practices that may limit electoral participation in the United States. It is by no means clear that they are most widely or intensely burdensome of such policies, but because the body of social research on the policy is very well developed, voter identification requirements are a useful case for describing the social dynamics of such policies.[140] Studies of the direct effects of voter identification laws suggest that there are relatively few people who try and fail to vote because they genuinely lack the requisite documentation.[141] Although these effects are modest, they are plainly disparate across groups—the robust literature on the subject invariably finds a more pronounced effect on minority voters and older voters, and policies with an exact name match provision are

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[138] Barry C. Burden et al., *What Happens at the Polling Place: Using Administrative Data to Look Inside Elections*, 77 PUB. ADMIN. REV. 354, 362 (2017).

[139] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 9.

[140] *See generally Research on Voter ID,* BRENNAN CTR. FOR JUST. (Apr. 11, 2017), https://www.brennancenter.org/our-work/research-reports/research-voter-id (providing a list of research on voter ID laws).

[141] *See* Nate Dobbs, *The Pitfalls of the Kansas SAFE Act Voter Identification Provision and the Resulting Negative Impact on Provisional Voters*, 83 UMKC L. REV. 427, 440–41 (2015); M.V. Hood III & Charles S. Bullock III, *Much Ado about Nothing? An Empirical Assessment of the Georgia Voter Identification Statute*, 12 ST. POL. & POL'Y. Q. 394, 396 (2012); Charles Stewart III, *Voter ID: Who Has Them? Who Shows Them?*, 66 OKLA. L. REV. 21, 22 (2013).

disproportionately likely to affect women.[142] Such policies also have measurable but modest effects on wait times to vote at polling places with large concentrations of minority voters and may create scope for discriminatory patterns of discretionary application at the street level.[143] This risk is heightened by the extremely modest training requirements for most poll workers.[144]

However, the participatory effects of voter identification laws are entangled with individual and communal perceptions of the intentions of such policies. Thus, such measures may prompt increases in turnout when effective communication makes the heightened requirements salient to voters who might be adversely affected.[145] Conversely, the number of people who possess appropriate identification but who do not vote because they are confused about the requirements of voter identification laws can be quite large.[146] In one study, the number of qualified nonvoters who stayed away from the polls on the mistaken belief that they lacked required documentation was markedly larger than the number of people who genuinely lacked the required documents.[147]

Studies of this kind suggest that administrative choices about policy communication can have a larger effect on voter behavior than formal provisions of a policy and that effective outreach can attenuate the potentially adverse effects of changes. Experimental studies of vote-by-mail also suggest that government responsiveness to the public is by far the most effective means of securing productive changes in voters' behavior.[148] This is consistent with a much

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[142] Kelly S. McConville et al., *Accumulating Evidence of the Impact of Voter ID Laws: Student Engagement in the Political Process*, 5 STAT. & PUB. POL'Y. 1, 6 (2017).

[143] Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362, 426, 428–29 (2014); Stein et al., *supra* note 127, at 441.

[144] *See* U.S. ELECTION ASSISTANCE COMM'N, COMPENDIUM OF STATE POLL WORKER REQUIREMENTS (4th ed. 2020).

[145] Chelsea L.M. Bright & Michael S. Lynch, *Kansas Voter ID Laws: Advertising and its Effects on Turnout*, 70 POL. RSCH. Q. 340, 344–45 (2017); Jack Citrin et al., *The Effects of Voter ID Notification on Voter Turnout: Results from a Large-Scale Field Experiment*, 13 ELECTION L. J. 228, 235 (2014); Daniel J. Hopkins et al., *Voting But for the Law: Evidence from Virginia on Photo Identification Requirements*, 14 J. EMPIRICAL LEGAL STUD. 79, 82 (2017).

[146] Michael G. DeCrescenzo & Kenneth R. Mayer, *Voter Identification and Nonvoting in Wisconsin—Evidence from the 2016 Election*, 18 ELECTION L. J. 342, 345, 348, 352–53 (2019).

[147] BILL HOBBY ET AL., THE TEXAS VOTER ID LAW AND THE 2014 ELECTION: A STUDY OF TEXAS'S 23RD CONG. DIST. (2015).

[148] Andrew Menger & Robert M. Stein, *Enlisting the Public in Facilitating Election Administration: A Field Experiment*, 78 PUB. ADMIN. REV. 892, 896 (2018).

larger administrative literature on government responsiveness. Voting, because it is a voluntary practice tightly connected to a sense of membership in the political community, might be much more sensitive to communication and information provisions than many other matters of policy.

Many voters' anticipation that such policies will make it difficult or impossible to vote is likely, to some degree, a reflection of the circumstances of the adoption and stated purposes of these policies. In *Crawford v. Marion County Election Board*, the Supreme Court recognized that electoral integrity and fraud prevention were compelling, lawful rationales for Indiana's enactment of a voter identification law, even absent any demonstrated problem with fraudulent voting.[149] In that case, the Court also declined to consider the legislature's party-line vote to enact the policy as suggestive evidence that suppressing voter participation was an unstated purpose for the policy.[150] The pattern in Indiana has recurred in other states that have adopted similar measures: such policies are characteristically adopted along party-line votes in states under Republican control where elections are competitive and the population of minority voters is large.[151] There are striking partisan and racial differences in how the purpose and function of such policies are perceived.[152] In view of the circumstances of their enactment, many voters understand such policies to possess unstated exclusionary motives and anticipate the effects of those policies accordingly.

In addition, voting behavior is connected to individual and community experience of government more broadly. Adverse experiences of government readily create distrust and aversion. Experimental work broadly shows that existing distrust in government actively shapes how individuals interpret subsequent government

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[149] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008).

[150] *Id.* at 203–204.

[151] *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); Daniel R. Biggers & Michael J. Hanmer, *Who Makes Voting Convenient? Explaining the Adoption of Early and No-Excuse Absentee Voting in the American States*, 15 ST. POL. & POL'Y. Q. 192, 198 (2015); Michael C. Herron & Daniel A. Smith, *Race, Party, and the Consequences of Restricting Early Voting in Florida in the 2012 General Election*, 67 POL. RSCH. Q. 646, 660 (2014).

[152] *See e.g.*, Shaun Bowler & Todd Donovan, *A Partisan Model of Electoral Reform: Voter Identification Laws and Confidence in State Elections*, 16 ST. POL. & POL'Y. Q. 340, 343–45 (2016); David C. Wilson & Paul R. Brewer, *The Foundations of Public Opinion on Voter ID Laws: Political Predispositions, Racial Resentment, and Information Effects*, 77 PUB. OP. Q. 962, 967 (2013).

behavior.[153] This effect is intensified by the public's necessarily limited understanding of the inner workings of government. Public administrative research finds that "external audience members view public agencies as being more unified than they actually are," which is to say that an unfavorable experience with one official will tend to shape views of an agency, and an unfavorable experience of one part of government may readily shape broader attitudes.[154]

Adverse experiences, such as unwelcome encounters with government, enduringly and negatively affect individuals' views of government's legitimacy and goodwill, an effect that may extend from the individual to the community level.[155] Such experiences also have specific, persistent effects on political participation, a pattern driven by directly diminished trust in government,[156] as well as a more complex pattern of "negative interpretive policy feedback" that spurs disengagement.[157] These effects are particularly apparent, for instance, in the infrequency with which former offenders seek restoration of their voting rights in states where this process does not occur automatically.[158] Delays and adverse incidents at the polling place, which are markedly more prevalent in localities with large minority populations, may have substantial and lasting effects on confidence in the democratic process.[159]

It is difficult to say more about the subjective response to policy because factual knowledge of election administration remains remarkably underdeveloped. Major proposals for reform regularly begin by urging improved measurement.[160] As one recent

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[153] LERMAN, *supra* note 55, at 132–33.

[154] Daniel P. Carpenter & George A. Krause, *Reputation and Public Administration*, 72 PUB. ADMIN. REV. 26, 29 (2012).

[155] *See* CHARLES R. EPP ET AL., PULLED OVER 1, 140–42 (2014); *see also* Daniel S. Nagin & Cody W. Telep, *Procedural Justice and Legal Compliance*, 13 ANN. REV. L. & SOC. SCI. 5 (2017).

[156] Brandon R. Davis, *Testing Mechanisms: Carceral Contact and Political Participation*, 101 SOC. SCI. Q. 909, 921 (2020).

[157] Brandon R. Davis, *Feeling Politics: Carceral Contact, Well-Being, and Participation*, 49 POL'Y. STUD. J. 591, 595 (2021).

[158] Selin, *supra* note 35, at 1002, 1017.

[159] Bridgett A. King, *Waiting to Vote: The Effect of Administrative Irregularities at Polling Locations and Voter Confidence*, 41 POL'Y. STUD. 1000, 1003, 1017 (2020).

[160] *See* HEATHER GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT 68 (2009); HALE & BROWN, *supra* note 52.

study put it, "what isn't counted can't be managed."[161] Yet there remain large gaps in factual knowledge about the working of elections, especially regarding local administration or the practical experience of the individual voter. Ongoing projects like the Survey of Performance of American Elections ("SPAE") and the Cooperative Congressional Election Studies ("CCES") provide excellent, valuable descriptions of national and state patterns, but these aggregate views may obscure remarkable variations across populations and jurisdictions.[162] More detailed observational or experimental studies, such as those discussed in this section, likewise offer valuable insight but furnish direct accounts of voting in only a small set of jurisdictions. There exists only one major study of the backgrounds, attitudes, and work of state secretaries of state—generally states' chief election officials.[163] The enactment of HAVA has prompted the development of a modest literature about local election officials.[164] However, developing systematic knowledge in this area is difficult, owing to both the great number of local officials, as well as wide (and as-yet incompletely cataloged) interstate variation in how local election authority is defined and exercised.[165]

Social scientific research often relies on governmentally produced information, and there is simply a remarkable number of important election administrative matters about which governments do not ordinarily collect data. The Election Administration and Voting Survey ("EAVS"), the results of which have been discussed extensively in this section, offers a detailed view of part of the process but thereby also illustrates things not known.[166] To mention matters relevant to this discussion, EAVS reports on localities' relative ease in finding poll workers but not how this is done or what barriers make recruiting a difficult task in most local jurisdictions.[167] EAVS

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[161] JOHN C. FORTIER ET AL., BIPARTISAN POL'Y CTR., IMPROVING THE VOTER EXPERIENCE: REDUCING POLLING PLACE WAIT TIMES BY MEASURING LINES AND MANAGING POLLING PLACE RESOURCES 29 (2018).

[162] Stewart, *supra* note 126, at 451.

[163] JOCELYN BENSON, STATE SECRETARIES OF STATE: GUARDIANS OF THE DEMOCRATIC PROCESS (2010).

[164] Donald P. Moynihan & Carol L. Silva, *The Administrators of Democracy: A Research Note on Local Election Officials*, 68 PUB. ADMIN. REV. 816 (2008).

[165] KATHLEEN HALE ET AL., ADMINISTERING ELECTIONS 24 (2015).

[166] *See generally* U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at i–iii (stating generally the results of voter turnout, registration, and poll location statistics).

[167] *Id.* at ii.

reports nearly a third of rejected mail ballots are rejected for "other" reasons but not what these might be.[168] The survey documents a wave of polling place closures in the South but not the reasons—sound or unsound—for these closures. Adequate financial capacity is a necessary condition for effective election administration. Yet, every state has its own model for allocating the costs of elections and only four states systematically collect data on costs.[169] Until the 2020 general election, the great majority of American voters had cast a ballot in-person on Election Day, but only five states collect detailed information about the operation of polling places.[170] Although the Bipartisan Policy Center has developed effective, simple ways to collect data on wait times to vote, it does not appear that any jurisdiction has made the collection of such data a permanent requirement.[171] Under present circumstances, many jurisdictions could not reasonably be expected to undertake more thorough data collection: election administration is chronically underfunded and is almost invariably near the bottom of state and local budgetary priorities.[172]

In reviewing existing social scientific work, this section has shown that voting is a relatively time-consuming and confusing process for many Americans, that the burdens of voting are distributed unevenly, and that it is the administration of elections, rather than the content of statutory law, that is often the proximate cause of these burdens.[173] Although the evidence for these general propositions is strong, academic and governmental knowledge of the administration of elections in any particular local case tends to be scant. In consequence, it is often difficult to say, in any specific instance, whether disparities in voting exist or whether these disparities are substantial. Similarly, it is hard to discern whether local disparities flow from state or national decisions, and whether they arise in the course of good faith efforts to run elections or from maladministration. The complexity of the task, coupled with specific legal

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[168] *Id.* at 14 tbl.1.

[169] NAT'L CONF. OF STATE LEGISLATURES, THE PRICE OF DEMOCRACY: SPLITTING THE BILL FOR ELECTIONS 5 (2018).

[170] *See* Burden et al., *supra* note 138, at 362–63.

[171] FORTIER ET AL., *supra* note 161, at 16–17.

[172] *See* PRESIDENTIAL COMM'N ON ELECTION ADMIN., *supra* note 9, at 42–44; Jacob Rush, *Hacking the Right to Vote*, 105 VA. L. REV. ONLINE 67, 69, 71 (2019).

[173] *See* Wendy Weiser et al., *Congress Must Pass the 'For the People Act'*, BRENNAN CTR. FOR JUST., at 1, 7–8 (2021).

doctrines and a broad judicial aversion to statistical information, creates broad scope for bad (or simply inept) action to avoid or withstand legal scrutiny.

III. The Federal Judiciary Does Not Offer Strong Protections Against Administrative Burdens on the Right to Vote

The preceding section showed that administrative burdens limit the exercise of the right to vote. In contrast to historical restrictions that purposefully made voting impossible or dangerous, contemporary practices make voting inconvenient, confusing, and uncertain. This section describes broad patterns of judicial reasoning that make it difficult to use the courts to seek effective protection against such burdens. The probabilistic, causally complex operation of administrative burden is not readily intelligible to federal courts that have been highly resistant to statistics and that have a narrow—and at times credulous—view about the legal pertinence of political officials' intentions.[174] The discussion offered here is not the sort of detailed account of judicial reasoning common in legal scholarship. Its aim is not to say whether judges reached correct conclusions about any particular controversy or point of law but to describe the federal judiciary's general pattern of reasoning.

A. The Judiciary is Unreceptive to the Forms of Social Scientific Evidence that Substantiate the Existence of Serious Disparities

The factual account offered up to this point has relied heavily on social research, much of which is statistical in character. That account, though compelling in its own terms, has had modest influence on judicial reasoning; the federal judiciary has been reticent in its use of statistics in voting and elections cases. From a strictly legal point of view, modern cases about districting and apportionment—which arose from the Supreme Court's own recognition of the justiciability of these matters—are somewhat distinct from individual voting rights matters more firmly founded upon the statutory

[174] *See e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2334–36, 2338 (2021) (holding that increasingly restrictive voter requirements were lawful in light of the considerable factors involved in protecting voting within a state).

schemes of the VRA, NVRA, and HAVA.[175] However, judicial attitudes about statistical evidence are similar in these two neighboring areas of law. Cases of both sorts will be discussed here to illustrate the aversion to social research and statistical evidence. We hasten to note that this aversion, to a considerable degree, arises from basic features of the judicial worldview, rather than the policy preferences or ideological leanings of judges.

i. Common Forms of Social Statistical Reasoning Give Strong Accounts of General Patterns, but Weak Accounts in any Specific Instance

It is perhaps useful, at the outset of this discussion, to describe the reasoning that undergirds common quantitative forms of social science, noting how these differ from judicial thinking about cause. One important approach employs an experimental logic to isolate a causal process. For instance, researchers White, Nathan, and Faller, discussed above, sent thousands of emails to local election administrators.[176] These emails posed common, simple questions about voting; some emails were sent from aliases with Latino-sounding surnames, and identical emails were sent from aliases with other surnames.[177] The name of the person ostensibly sending the query was one of two variables in the study, making it logically simple to gauge whether names patterned official responses.[178] They found, on average, that officials were less likely to respond to emails from Latino aliases and on average provided less thorough information when they did respond; these disparities disappeared in localities covered by preclearance or minority language provisions of the VRA.[179] This research approach persuasively establishes that ethnic bias shapes officials' responsiveness to voters. However, its design does not give any indications about which local officials are more or less likely to respond to such emails—and, of course, a legal case or controversy would concern the conduct of specific officials. Nor does a study of this sort elucidate what officials thought when

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[175] Rucho v. Common Cause, 139 S. Ct. 2484, 2499–500 (2019) (holding that partisan gerrymandering is a political question outside the scope of review by the Supreme Court).

[176] White et al., *supra* note 86, at 132–33.

[177] *Id.* at 133.

[178] *Id.*

[179] *Id.* at 142, 144–46.

deciding not to respond; it is a form of causal explanation that need not delve into motivational or cognitive accounts of cause. Experiments of this sort are not the most common means of studying matters like elections, but for many social scientists, experiments are the simplest and most convincing means of demonstrating the existence of a causal pattern, and many studies employing other designs seek to approximate the sort of clean measurement offered in a study like this one.

The more common research approach makes inferences by describing statistical relationships between variable measures that would be unlikely to arise by chance, supposing the two measurements were genuinely unrelated. Improbability may be relatively compelling in itself. The suggestion that there is a genuine, meaningful relationship between two measurements becomes more compelling when the pattern persists after introducing other measures that might shape the outcome of interest and when the pattern is consistent with existing social scientific accounts.

For instance, Springer describes how measures like property requirements and poll taxes affected turnout in Southern elections.[180] She shows that voter turnout in the early and mid-twentieth century was lower in elections held in states that employed these requirements, and that the statistical association was much larger than would be likely to arise randomly—that is, if such policies did not genuinely affect turnout.[181] This statistical pattern of lower turnout in states with property requirements and poll taxes persists after incorporating into the analysis other factors likely to shape turnout: the demography of the state, rules about polling place hours, which officials appeared on the ballot in a given election, and so on.[182] Her conclusion that such measures genuinely limited electoral participation is also consistent with existing social scientific accounts: one may readily understand how requirements of this kind would make it harder for an otherwise eligible voter to participate, and a large body of historical research suggests that these kinds of policies were intended to limit turnout. Combined, such evidence powerfully suggests that property requirements and poll taxes limited electoral participation, though Springer's analysis of course offers no specific

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[180] SPRINGER, *supra* note 1, at 58, 63.

[181] *Id.* at 31–37 tbls.3.1–3.4, 3.9–3.10.

[182] *Id.*

evidence that any individual potential voter was deterred for this reason.

ii. The Supreme Court has Broadly Avoided Statistics or Statistically-Supported Explanations

The avoidance of statistics is latent in one of the boldest legal doctrines in modern voting and elections law—one person, one vote. In his dissent in *Baker v. Carr*, Justice Frankfurter warned that holding legislative districting cases to be justiciable would draw the judiciary into the "mathematical quagmire."[183] There immediately followed considerable speculation about how the courts might find predictable criteria for settling such questions of fairness in districting schemes.[184] That justiciability could be established by straightforward reference to principles of equal protection did not in itself imply a neat means of ruling upon the fairness of any particular districting scheme. The doctrine of one person, one vote emerging from *Wesberry v. Sanders* and related cases was, politically speaking, boldly progressive.[185] It was also a stark simplification of the practical problems. It leapt past a range of intermediate approaches to the question of fair apportionment—approaches that also would have obliged courts to consider a wide range of criteria, many of which would, as Justice Frankfurter warned, certainly have been statistical in character. The elaboration of one person, one vote transformed what was understood at the time as an exceedingly complex question into a simple one resolved by applying the basic criterion of population equality. This seemingly intuitive criterion in fact creates ambiguities about what is being protected—equal value of a vote or equal access to representation, which would seem to require different approaches to districting. Social scientific evidence shows that the practical differences between these two notions of equality can be very sizable.[186] Justice Thomas's concurrence in *Evenwel v. Abbott* offers a lucid statement of the conceptual tension, though we

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[183] Baker v. Carr, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting).

[184] Jerold Israel, *On Charting a Course through the Mathematical Quagmire: The Future of* Baker v. Carr, 61 MICH. L. REV. 107, 107–108 (1962).

[185] Wesberry v. Sanders, 376 U.S. 1, 18 (1964).

[186] Sarah Cowan, *Periodic Discordance between Vote Equality and Representational Equality in the United States*, 2 SOCIO. SCI. 442, 442–43 (2015).

hardly agree that this ambiguity is an argument against the basic principle.[187]

Recent Supreme Court cases about voter registration and partisan gerrymandering have also demonstrated a relatively plain judicial aversion to extensive engagement with social science. First, the Court has pursued lines of thinking that have precluded the consideration of potentially useful social science. As noted above, in *Crawford v. Marion County Election Board*, the Court broadly rejected the claim that partisan patterns in enactment of Indiana's voter identification law offered judicially compelling indications about the motives or likely effects of the law.[188] This finding has prompted the Court not to consider what has become, in the following dozen years, a voluminous social scientific literature on how contemporary voter registration practices may make it harder to vote, or the factors that reliably predict when and where restrictive policies are enacted, and who supports them. That *Crawford* involved a facial challenge to Indiana's law has probably been consequential for the arc of cases on voter registration policies. Because the case was heard before there were well-developed accounts of the effects of policies like voter identification laws, the Justices gave remarkably little consideration to the role of race as a factor predicting the enactment of such policies, or as a predictor of who will be adversely affected by them.[189]

In oral arguments in *Husted v. A Philip Randolph Institute*, Justice Breyer pursued a line of factual questioning concerning what happens to NVRA registration confirmation mailings that are not returned, seeking for "any place in this record that I can look for some numbers or surveys."[190] Given that the vast majority of such mailings are not returned, and the state of Ohio treated non-response coupled with non-voting as grounds for removing a registration, this would seem to be an exceedingly pertinent factual question. However, the rest of the Justices turned away from such questions, instead exploring Aristotelean questions of cause by reference to a baseball metaphor.

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[187] Evenwel v. Abbott, 136 S. Ct. 1120, 1136 (2016) (Thomas, J., concurring).

[188] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008).

[189] MERRIMAN, *supra* note 116, at 93–95.

[190] Transcript of Oral Arguments at 66, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980).

The Court has also evinced a broad unwillingness to rely upon statistics as a key means of resolving questions. In *Cooper v. Harris*, social scientist Stephen Ansolabehere submitted an analysis suggesting that the alterations to a Congressional district boundary in North Carolina were informed primarily by race rather than voters' partisan leanings.[191] In this case, the Justices' views of the statistics did not directly shape the legal outcome, but their views demonstrate important intellectual differences between social scientific and legal thinking. Ansolabehere's analysis relied on two important factual patterns: first, black North Carolinians were extremely likely to vote for Barack Obama, and this support was patterned by race as well as underlying partisan preferences.[192] Second, Ansolabehere showed that the alterations to the district map were vastly more likely to affect black Democratic supporters than white Democratic supporters.[193] From a probabilistic point of view, it was extraordinarily unlikely that this pattern would arise by chance if a mapmaker redrew district lines merely to disfavor Democratic supporters, with no attention to race. Consistent with existing doctrine in the area, the majority opinion characterized this analysis as a credible but "circumstantial" form of evidence.[194] Justice Alito's dissent included pointed criticism of Ansolabehere's analysis.[195] Alito effectively rejected the notion that such analysis could be persuasive if there were any circumstances under which a pattern of this sort could arise without an underlying racial motive—and pointed to local racial residential segregation as evidence that the mapmaker could have acted without a racial motive.[196]

The Court long held the justiciability of partisan gerrymandering claims as an open question, partly in anticipation of a larger corpus of social scientific research that might simplify the analysis of the problem. Ultimately, researchers developed a social scientifically compelling account that the Court was unwilling to embrace. In *Gill v. Whitford*, the Court rejected a probabilistically-derived claim of standing, though it also acknowledged that it would be difficult for any particular voter to demonstrate an injury in fact arising

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[191] Cooper v. Harris, 137 S. Ct. 1455, 1477 (2017).

[192] *Id.* at 1493.

[193] *Id.* at 1495.

[194] *Id.* at 1462.

[195] *Id.* at 1503 (Alito, J., dissenting).

[196] *Id.*

from a legislative map that was unfair in its overall design.[197] That is, although it is recognized that the harmful consequences of partisan gerrymandering flow from the overall apportionment scheme, the Court could not see a way to allow a challenge to the overall scheme, focusing instead on a more traditional analysis of the districts in which particular petitioners resided.

The case was remanded; the opinion of the Court suggested that the petitioners develop a more or less novel associational argument, in effect preferring a complex, untested legal argument to a straightforward statistical argument.[198] In turning aside *Gill* on standing considerations, the Court also rejected a readily applicable numerical standard for an unfair partisan gerrymander.[199] The standard was derived from a study of all U.S. state legislative elections since 1970.[200] That analysis sought to predict persistent representational gaps using data from the first election employing a new map.[201] It found that a map yielding a disparity of more than 8% between a party's popular vote share and the proportion of legislative seats won would, more than 95% of the time, disfavor that same party in every subsequent election employing the map.[202] That standard could have addressed two important concerns arising in partisan gerrymandering cases: it would subject only a small proportion of legislative maps to scrutiny and suggest that a map could be judged acceptable without requiring proportional representation. That the statistical bright line offered in this case would admit of ready application hardly makes it ideal. Such a standard would effectively authorize modest but substantial partisan disadvantages and would raise some difficult subsidiary analytical questions. For instance, the respondents correctly observed that many of the maps with the most severe partisan efficiency gaps were drawn by courts, indicating that the linkage between partisan intent and partisan advantage is not always straightforward.[203] Likewise, respondents observed that some efficiency gaps arise from geographic patterns of

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[197] Gill v. Whitford, 138 S. Ct. 1916, 1933 (2018).

[198] *Id.* at 1938.

[199] *Id.* at 1933.

[200] *Id.* at 1932.

[201] *Id.*

[202] *Id.*

[203] *Id.*

party support; it could be difficult to draw a map that mitigated this effect while also satisfying traditional districting criteria.

In *Rucho v. Common Cause*, a case whose facts conformed more closely than *Gill* to the standard legal analyses of intent, burden, and causation, the Court finally found partisan gerrymandering to be non-justiciable.[204] Tellingly, the *Rucho* Court shied away from answering questions that are "matters of degree," even when the degree is quite extreme.[205] As Justice Kagan's dissent noted, the mapmakers in North Carolina showed extraordinary sophistication: one expert simulating maps that met basic districting criteria produced thousands of maps, none of which were as skewed as the one actually developed by the state.[206] It may be added that in the present era, where categorical exclusions from the right to vote are impermissible, circumscriptions of the right to vote and the value of a vote are by definition matters of degree. The unwillingness to embrace quantitative evidence that can finely describe such degrees has yielded legal protections that are ill-suited to address current problems. Partisan gerrymandering illustrates this particularly strikingly because the intentions of mapmakers are professed openly, the representational consequences are clear, and the Justices broadly agree that the phenomenon is harmful to democracy.[207]

B. Judicial Reasoning Aligns Poorly with the Nature of Election Administration

Regarding partisan gerrymandering, a reticence to act upon statistical bases has culminated in a flat rejection of well-developed social scientific evidence that was created with the clear aim of supplying the Court with a ready means of settling a persistent problem. The judiciary analyzes causal processes with a strong emphasis on demonstrable intent.[208] In some cases, it can offer remedy without a showing of specific official intent (or use of a prohibited device) by noting the existence of a disparity affecting a protected group and linking that disparity to a historical or ongoing process.[209] These forms of reasoning, however, do not offer very incisive

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[204] Rucho v. Common Cause, 139 S. Ct. 2484, 2508–09 (2019).

[205] *Id.* at 2505.

[206] *Id.* at 2520.

[207] *Id.* at 2507, 2509.

[208] *Id.* at 2489.

[209] League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 402 (2006).

analyses of electoral administrative conduct and suffer from conceptual under-definition.

Federal voting rights law distinguishes permissible and impermissible motives, in large part, by reference to the group disfavored by an electoral practice. It is licit to draw district boundaries to disfavor one's rival political party but not to draw district boundaries that erode the voting power of a racial minority group. Criticism of this reasoning often focuses on the extreme difficulty of the analytical task that results from it: disentangling race and party support is nearly impossible in many states.

But this is not the oddest consequence of such reasoning. This thinking produces sharply divergent views, in different cases, about the competence and foresight of roughly the same constellation of government officials. In partisan gerrymandering cases, where the intention to aid one's party is licit, officials acknowledge the motive and pursue it with extraordinary aptitude.[210] In cases about, for example, racial gerrymanders or voter identification laws, legislators disclaim any invidious discriminatory intention, even though the likely effects of such laws are, by now, very well established.[211] Yet, the people are the same: a legislative majority that enacts voter identification laws with professed ignorance of the racial disparities produced by such laws is the same legislative majority that collaborates with mapmakers to produce sophisticated partisan gerrymanders. The state secretaries of state, who are typically charged to fairly administer America's democracy, are, nearly without exception, partisans; in most states, they belong to the political party that firmly controls a state's government.[212] The great majority of state secretaries of state who serve as chief election officers have also previously held state political offices, most often in state legislatures.[213] Virtually all secretaries of state remain closely connected to the routine political life of the state by virtue of official duties involving routine interaction with the legislature and key elected executive officials.[214] Whatever one believes about the objective skill of such officials, it is hard to credit that it varies depending upon

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[210] *Rucho*, 139 S. Ct. at 2488.

[211] *League of United Latin Am. Citizens*, 548 U.S. at 477.

[212] *Secretary of State Office Comparison*, BALLOTPEDIA, (Oct. 2021), https://ballotpedia.org/Secretary_of_State_office_comparison.

[213] *Id.*

[214] THE COUNCIL OF STATE GOV'TS, *supra* note 10, at 152.

one's framing of an issue as a partisan matter or a racial or ethnic matter.

It is, in any event, difficult to pursue vigorous legal scrutiny of the intentions of elections administrators. *Crawford v. Marion County Election Board* acknowledged the prevention of fraud and the protection of both the objective and perceived credibility of the electoral process as generally valid motives.[215] This has since become a ubiquitous rationale for policies likely to make it more difficult for some Americans to vote. Additionally, there is little deliberative record underlying many consequential administrative decisions. State and local elections administration does not ordinarily yield detailed records produced by the work of legislatures nor do decisions such as the allocation of voting equipment to polling places—or the decision to close polling places—rely upon practices like informal rulemaking that produce a robust deliberative record.[216] In short, the judiciary is relatively credulous of official explanations for policies and practices that make voting harder, readily accepts a stock explanation for such conduct, and must frequently conduct its analysis without the benefit of a well-developed official record that it could meaningfully scrutinize.

The solution to this problem is not necessarily to embrace forms of social scientific reasoning that describe causal processes without strong reference to intentions—in fact, the appellate judiciary has long done this with unsatisfactory results. Section 2 of the Voting Rights Act provides protections against policies that have disparate impacts on voting.[217] Demonstrating the existence of a racial disparity in the effects of a policy is not adequate to establish a violation of the law—as Ho says, it must be demonstrated that the result is more than a "statistical accident."[218] Stephanopoulos notes that the prevailing judicial approach to vote denial is a two-part test that links a demonstrated disparity to an account of the historical or ongoing social process that produces the disparity.[219] This analytic approach differs from other prominent disparate impact

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[215] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

[216] *See* CHRISTOPHER FAMIGHETTI ET AL., BRENNAN CTR. FOR JUST., ELECTION DAY LONG LINES: RESOURCE ALLOCATION (2014), https://www.brennancenter.org/sites/default/files/publications/ElectionDayLongLines-ResourceAllocation.pdf.

[217] Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

[218] Ho, *supra* note 4, at 680.

[219] Nicholas Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L. J. 1566, 1570 (2019).

provisions in federal law, and Stephanopoulos proposes aligning thinking in voting rights with other approaches to disparate impact: "courts should scrutinize the interests that allegedly *justify* these electoral disparities; how compelling they are, the degree to which they are advanced by challenged practices, and whether they could be furthered by other means."[220] Facially, this appears to be a proposal to impose a more difficult standard on claims about voting disparity; the existing approach considers that a situation lacks a remedy if its effects arise from a general social process, rather than the work and thinking of government officials. However, the two-part test reflects the more general posture of judicial credulity about officials' accounts of their intentions, and its underlying logic is in fact very similar to forms of social scientific thinking that the courts have generally avoided. In view of the drift of judicial thinking about matters like partisan gerrymandering, more litigation and better data on elections practice would perhaps lead to the conclusion that the test is legally unworkable.

In a recent ruling, the Supreme Court at once adopted this familiar test, and applied it so narrowly that its value in challenging unfair practices now stands as an open question. In *Brnovich v. Democratic National Committee*, a case that dealt with vote denial claims under Section 2, the Court embraced the familiar test, rejecting alternative approaches, including that suggested by Stephanopoulos.[221] Yet, the opinion used all the forms of reasoning discussed above to narrow what would constitute vote denial. The majority opinion gives little weight to the easily predictable disparities produced by Arizona's categorical prohibition on the counting of ballots cast out of precinct, and it reaffirms fraud prevention as a broadly permissible legislative motive absent any actual occurrence of fraud.[222] Both large disparities in ballot rejection rates and the high overall rates of ballot rejection are dismissed by characterizing odds ratios as a misleading form of cross-group comparison.[223] The plain failure of a public organization to carry out its legal mandate is characterized as a peripheral consideration.[224]

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[220] *Id.* at 1570–71.

[221] Brnovich v. Democratic Nat'l Committee, 141 S. Ct. 2321, 2341 (2021).

[222] *Id.* at 2340.

[223] *Id.* at 2345.

[224] *Id.* at 2348.

In sum, the judiciary has been broadly unwilling to embrace social statistical forms of reasoning in handling cases about voting rights and electoral practices. Although we find such statistical reasoning persuasive, we do not regard judges' reticence to be crudely ideological or anti-intellectual—basic features of law and the judicial task involve forms of thinking quite different from that of quantitative social science. Yet, the relevant judicial categories also overlook matters we consider important. Below, we describe how elections administrators use presentations of incompetence to avoid legal scrutiny.

IV. Performances of Administrative Incompetence Shield Officials' Conduct from Effective Legal Scrutiny

The preceding section described important differences between common social scientific and legal accounts of causes, how this difference figures in the judiciary's relatively limited use of well-developed research findings about difficulties in voting, and the official conduct that contributes to such difficulties. Doctrine has evolved in ways that limit effective judicial scrutiny of the motivation and rationality of official action. Legal distinctions about suspect categories lead courts to deploy widely varying assumptions about the competence of a stable set of political actors: they are competent in favoring their party's interests but harm the interests of minority groups only incidentally and unwittingly. The statistical improbability that certain of these patterns arise incidentally is, in itself, not legally compelling. Where policies affecting the individual right to vote are concerned, a broadly proclaimed goal of promoting electoral integrity is readily accepted as a permissible motive, and judicial analysis of disparate impacts of electoral practices, in contrast to both other analyses of disparate impact and other issues related to elections and voting, is relatively inattentive to officials' motives and justifications.

We have suggested that administrative practices about voter registration, voter roll maintenance, and voting opportunities impose the largest practical burdens on the right to vote. These matters do not figure as prominently in legal scholarship or litigation as they could, but here we consider what happens when claims about administrative practice or policy implementation in these areas are contested in court. That is, in view of the kinds of evidence

and accounts that courts consider persuasive, how do officials seek to defend actions that may hinder the right to vote? We argue that officials' defenses of their conduct frequently rely on a vocabulary of incompetence. They present themselves as being, in various ways, ignorant of or incapable of meaningfully acting upon important facts and thereby seek to disavow impermissible motives for their conduct—a result could not be intended by one who did not know about the conditions that created it. For elected officials such as state secretaries of state or county clerks, these public professions of ignorance and error are remarkable—it is extremely rare for elected officials to take personal responsibility for mistakes, in part because the political costs of such acknowledgments may be very high.[225] Yet, the potential political costs are, evidently, lower than the potential hazard of being found legally responsible for restricting voting rights. This approach is often successful, in part because there is a wide penumbra of credulity at the margin of the relevant legal standards, particularly after *Shelby*—the suspension of preclearance under Section 5 of the VRA is, in essence, the end of a regime of official skepticism about election administration in covered jurisdictions.[226] These self-representations may also succeed because they are at least plausibly grounded in objective reality. In view of pervasive, persistent shortages of information, materiel, and staffing in elections administration, good faith errors are undoubtedly possible.

A. Playing Dumb

Characterizing the self as a social creation is a sociological commonplace dating back at least to the beginning of the twentieth century.[227] The idea that a functioning society, and all its attendant institutions, requires a functional order of social interaction is propounded most clearly in Erving Goffman's work on interaction

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[225] Allan McConnell, *What is Policy Failure? A Primer to Help Navigate the Maze*, 30 PUB. POL'Y. & ADMIN. 221, 238 (2015).

[226] Ho, *supra* note 4, at 687.

[227] *See generally* CHARLES HORTON COOLEY, HUMAN NATURE AND THE SOCIAL ORDER (1902); GEORGE HERBERT MEAD, MIND, SELF, AND SOCIETY FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST (1967) (illustrating that discussion of sociological commonplace is found in twentieth century literature).

ritual and social presentation of self.[228] Goffman emphasizes interaction rituals as a sort of lubricant that allows social life to keep moving rather than coming to a standstill at every moment of awkwardness or disconnect.[229] Goffman's theory is dramaturgical: he is interested in how our staged behaviors manifest themselves in everyday interaction—his explanation of "tactful blindness," for example, is useful for explaining how a family gets through a Thanksgiving dinner with each person's feelings unscathed by means of everyone pretending they did not hear an uncle's racist remark or notice a mother's drinking problem.[230] "Social life is an uncluttered, orderly thing because the person voluntarily stays away from the places and topics and times where he is not wanted and where he might be disparaged for going," Goffman concludes.[231] In discussing social life as performance, he notes that

> in their capacity as performers, individuals will be concerned with maintaining the impression that they are living up to the many standards by which they and their products are judged . . . . But, *qua* performers, individuals are concerned not with the moral issue of realizing these standards, but with the amoral issue of engineering a convincing impression that these standards are being realized.[232]

The fundamental question is not whether one is what one claims to be, but whether one can convince other people of it. We are helped along in this regard by other people, as "the audience contributes in a significant way to the maintenance of a show by exercising tact or protective practices on behalf of the performers."[233] For Goffman, social life moves along because of both *obligations* and *expectations*, with obligations "establishing how [an individual] is morally constrained to conduct himself" and expectations

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[228] *See generally* ERVING GOFFMAN, INTERACTION RITUAL (1967); ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 251 (1959) (highlighting the powerful role of self-presentation in communicating in social interactions).

[229] *See generally* INTERACTION RITUAL, *supra* note 228 (explaining that people develop social skills and learn to react appropriately to certain social cues through interaction rituals).

[230] Erving Goffman, *On Face-to Face*, *in* INTERACTION RITUAL 5, 12, 18 (1967).

[231] *Id.* at 43.

[232] THE PRESENTATION OF SELF IN EVERYDAY LIFE, *supra* note 228, at 251.

[233] *Id.* at 234.

"establishing how others are morally bound to act in regard to him."[234]

Goffman's account is therefore concerned with how we portray competence in the performance of our roles. Yet, situations may also call for a self-presentation of incompetence.[235] McLuhan describes how individuals may don "the cloak of incompetence" in order to "deliberately disregard, disguise, downplay, or diminish their personal abilities in social interaction for strategic and moral purposes."[236] One technique is particularly important here: "playing dumb," which McLuhan describes as "pretending not to understand the other, feigning ignorance of some subject, or downplaying personal abilities."[237]

This particular strategic performance of incompetence or ignorance is recognizable enough in everyday life that "playing dumb" is a common term: we play dumb when revealing knowledge of certain information might result in social sanctions or discomfort and are told not to play dumb when denials of knowledge strain credulity. As with any other social performance, the audience must do its part to sustain this self-presentation by shows of credulity. As Goffman, says,

> When a person treats face-work not as something he need be prepared to perform, but rather as something that others can be counted on to perform or to accept, then an encounter or an undertaking becomes less a scene of mutual considerateness than an arena in which a contest or match is held.[238]

This need for a credulous audience speaks to the notion that there is something fundamentally *social* about this process. Wakeham, in an article about the phenomenon of "bullshit"—his term, not ours—argues that it is a problem of social epistemology, contending that "bullshit is the product of social action, and bullshitting is a decidedly social activity. Explaining bullshit requires

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[234] INTERACTION RITUAL, *supra* note 228, at 49 (emphasis in original).

[235] Arthur McLuhan et al., *The Cloak of Incompetence: A Neglected Concept in the Sociology of Everyday Life*, 45 AM. SOCIO. 361, 364 (2014).

[236] Arthur McLuhan, *Adopting a Cloak of Incompetence: Impression Management Techniques for Feigning Lesser Selves*, 38 SOCIO. THEORY 122, 122 (2020).

[237] *Id.* at 127.

[238] INTERACTION RITUAL, *supra* note 228, at 24.

framing the problem not just in reference to the epistemic conditions faced at the individual level but also in reference to the social production of knowledge."[239] A significant part of what makes bullshit likely to be accepted is vagueness of standards of evidence. As Wakeham says,

> Whether the would-be bullshitter intends to be deceptive (like a liar) or sincerely believes and promotes some form of nonsense is less important than the fact that he or she is able to get away with it (to varying degrees) largely because of the lack of clarity and agreement over the relevant epistemic standards.[240]

A lack of epistemic clarity can be intensified when "bullshit" is appositely framed. Goffman, for instance, discusses rituals of deference, "that component of activity which functions as a symbolic means by which appreciation is regularly conveyed *to* a recipient *of* this recipient, or of something of which this recipient is taken as a symbol, extension, or agent."[241] Within the confines of these rituals, actors are actually given substantial leeway: "in scrupulously observing the proper forms [an actor] may find that he is free to insinuate all kinds of disregard by carefully modifying intonation, pronunciation, pacing and so forth."[242] This situation is a useful working description of the courtroom.

B. A Vocabulary of Non-Competence

Goffman's account of social life conceives of reality in the terms of what is intersubjectively treated as true, rather than what is objectively the case. This view is well-suited to describe the operation of courts. His thinking arises from the pragmatist tradition that also gave rise to legal realism, the view of law resting on the maxim that "the law" is nothing but "what the courts will do in fact."[243] A banal realism pervades American legal thought and practice, and

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[239] Joshua Wakeham, *Bullshit as a Problem of Social Epistemology*, 35 SOCIO. THEORY 15, 18 (2017).

[240] *Id.* at 26.

[241] Erving Goffman, *The Nature of Deference and Demeanor*, *in* INTERACTION RITUAL 47, 56 (1967).

[242] *Id.* at 58.

[243] Oliver Wendell Holmes, Jr., *The Path of Law*, 110 HARV. L. REV. 991, 994 (1997).

courts are meant to produce a reality much like that Goffman describes.[244] The purpose of adversarial proceedings is to establish legal rather than objective truth, and the production of legal truth is achieved by the application of a range of concepts and standards that seek to gauge what is approximately true, with the understanding that different questions call for different standards—non-arbitrary, reasonable, clear and compelling, and so forth. Claims and self-representations in legal contexts, at least from actors with an understanding of how law works, should therefore be understood in those terms: legal success arises from producing legally effective accounts of one's actions. Representing oneself as ignorant of facts, the motives of others, or lacking the organizational ability to do one's work may be an effective accounting.

i. Disavowing Responsibility for or Knowledge of Others' Actions

Election officials may try to disclaim responsibility for administrative problems by professing ignorance about the conduct or motives of other actors. In legal settings, this may involve a claim to be applying, rather than making, law. For example, Ohio Secretary of State Jon Husted claimed to be immune from a lawsuit challenging his enforcement of "an illegal state law saying initiative petition circulators must be Ohio residents."[245] Husted was found not to have qualified immunity.[246] When the ruling came down, "Husted's office questioned [the] ruling denying him qualified immunity, saying his role in the executive branch is to carry out a law, not interpret it," with a spokesman saying, "When the General Assembly issues a new law, we go on the assumption that the law is constitutional. I don't believe the voters elected Secretary Husted to decide which laws he's going to uphold and which laws to ignore."[247] The executive director of the 1851 Center for Constitutional Law, the plaintiff in the lawsuit, said, "We would like to end

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[244] Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1813 (1990).

[245] Darrel Rowland, *Judge Finds Husted Liable for Enforcing Unconstitutional Law*, COLUMBUS DISPATCH (Mar. 16, 2015), https://www.dispatch.com/article/20150316/NEWS/303169731.

[246] *Id.*

[247] *Id.*

the 'I don't make the law; I just enforce it' mentality that many public officials use to escape liability for the harm they cause."[248]

Such claims, in a legal venue, are analogous to the common rhetorical practice of ascribing responsibility to some other government actor. We will confine ourselves to two examples. In 2018, Ford County Clerk Debbie Cox moved Dodge City, Kansas's sole voting location beyond the city limits to a site only accessible by car.[249] Dodge is a majority-minority community anchored by the meatpacking industry, whose relatively poor and busy workers might lack the time or transportation to visit an extra-municipal polling place.[250] When a complaint was first sent to Cox, she forwarded the complaint by email to another state official, along with her own commentary: "LOL."[251] As concerns about Dodge City became more prominent, "Secretary of State Kris Kobach's office said in an emailed statement it has no control over the decisions of most Kansas counties"—a factually correct claim largely beside the point.[252] Similarly, after long lines to vote in Georgia's 2020 primary elections received national recognition, Georgia Secretary of State Brad Raffensperger "accused the liberal-leaning Fulton County, which includes most of Atlanta, of botching the election" and specifically placed "the blame on the workers from individual counties for not knowing how to work the machines."[253] Such a claim may have some basis in fact but is hardly a compelling response from an official responsible for administering elections in a state with a very long history of similar problems.

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[248] *Id.*

[249] Roxana Hegeman, *New Voters Get Notices Listing Wrong Dodge City Polling Site*, AP NEWS (Oct. 25, 2018), https://apnews.com/e1b4e441d4a448b98f129fcde0556a98.

[250] *Id.*

[251] Aris Folley, *Kansas Election Official Wrote 'LOL' in Response to ACLU Request for Second Polling Site*, HILL (Nov. 2, 2018) https://thehill.com/blogs/blog-briefing-room/news/414534-election-official-said-lol-in-response-to-aclu-request-to-open.

[252] Hegeman, *supra* note 249.

[253] *Black Areas Plagued by Voting Problems in Georgia, Activist Says*, WTOP (July 2020), https://wtop.com/national/2020/07/black-areas-plagued-by-voting-problems-in-georgia-activist-says. Secretary Raffensperger, of course, faced strong criticism from co-partisans for his later defense of the conduct of Georgia's general and runoff elections, and was wholly unwilling to take any steps to question, alter, or discard the results—a significant illustration that the administrative conduct described here is generally legally permissible, and carried out within traditional understandings of the rule of law. Amy Gardner, *Ga. Secretary of State Says Fellow Republicans are Pressuring Him to Find Ways to Exclude Ballots*, WASH. POST (Nov. 16, 2020), https://www.washingtonpost.com/politics/brad-raffensperger-georgia-vote/2020/11/16/6b6cb2f4-283e-11eb-8fa2-06e7cbb145c0_story.html.

ii. Ignorance of Facts or Their Production

Election officials may claim to have been ignorant of facts that, if known, would have strongly suggested that some action was likely to produce a serious problem or disparity. The discussion above has pointed to voter roll maintenance as a matter badly hindered by incomplete and inadequate information; the NVRA's maintenance framework has effectively institutionalized action grounded in non-knowledge. When voter roll maintenance shades into voter purging, officials commonly profess not to have known about the conditions that produce this result.

For example, in 2004, Glenda Hood, who succeeded Katherine Harris as Secretary of State of Florida, was forced to abandon a plan to use a "felon purge" list "after it became known that the flawed list would target [B]lacks but not Hispanics, who are more likely in Florida to vote Republican."[254] The list also contained the names of thousands of people, most of them Black, who should not have been on the list at all.[255] Hood claimed this was unintentional, and even ordered an audit of the database.[256]

In West Virginia, Secretary of State Andrew "Mac" Warner reported in 2018 in a communication titled "Voter List Maintenance is the Foundation for Election Security" that approximately 100,000 names were removed from voting rolls over the course of nineteen months.[257] This constituted "about one in 12 registered voters," as the Brennan Center for Justice points out.[258] The Brennan Center also reports a disparity between the point of view of election administrators on this purge and the experience of voters:

> In contrast, the county officials we spoke with reported that for the most part, the list maintenance process went smoothly. Most officials said they were unaware of any

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[254] Bob Herbert, *A Chill in Florida*, N.Y. TIMES (Aug. 23, 2004), https://www.nytimes.com/2004/08/23/opinion/a-chill-in-florida.html.

[255] *Id.*

[256] Lucy Morgan, *Hood Wants Investigation of Felon Database*, TAMPA BAY TIMES (July 16, 2004), https://www.tampabay.com/archive/2004/07/16/hood-wants-investigation-of-felon-database.

[257] Press Release, Mac Warner, W. Va. Sec'y of St., Voter List Maintenance is the Foundation of Election Security (Sept. 14, 2018), https://sos.wv.gov/news/Pages/09-14-2018-B.aspx.

[258] Jonathan Brater, *West Virginia's Large-Scale Purge Raises Concerns among Voters*, BRENNAN CTR. FOR JUST. (Oct. 30, 2018), https://www.brennancenter.org/our-work/analysis-opinion/west-virginias-large-scale-purge-raises-concerns-among-voters.

> individuals who had been removed wrongly. However, some of these officials were from counties in which we also spoke to voters who were purged. County officials did acknowledge that mistakes do happen.[259]

Voter roll maintenance does not simply rely on weak information such as non-response to a confirmation mailing—it relies upon information supplied by federal, state, and local entities, as well as records furnished by other states. Above, we noted that North Carolina made aggressive, uncritical use of ostensible record matches created by the Crosscheck program. Here, we consider recent voter roll maintenance issues in Texas. In 2019, Texas Secretary of State David Whitley directed county administrators to investigate the registration status of some 95,000 registered voters whose names appeared on a list of non-citizens produced by the Texas Department of Public Safety—in effect contending that the state had failed to detect well over 100,000 instances of felonious registration and voting by non-citizens.[260] In fact, the list was outdated and inaccurate: it cataloged a range of erroneous name matches, or information of individuals who registered to vote after naturalizing.[261] Steve McCraw, head of the Department of Public Safety, said "his department had included that citizenship flag in the data it sent to the secretary of state, chalking up the error to 'confusion in how the data was interpreted' by 'lower-level people acting in good faith.'"[262] Such was also the position of Secretary Whitley, who professed not to have been aware of the means or timing of the production of this list.

This issue is not specific to Texas. Other states have used "lawful presence lists" based on driver's license and other state ID applications, as well as juror questionnaires, to determine

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[259] *Id.*

[260] Liam Stack, *Texas Secretary of State Questions Citizenship Status of 95,000 Voters*, N.Y. TIMES, Jan. 26, 2019, at A16.

[261] Liam Stack, *Texas Ends Review That Questioned Citizenship of Almost 100,000 Voters*, N.Y. TIMES (Apr. 26, 2019), https://www.nytimes.com/2019/04/26/us/texas-voting.html.

[262] Alexa Ura, *Gov. Greg Abbott Blames DPS for Voter Roll Snafu. But the Story Behind the Citizenship Review is Complicated*, TEXAS TRIB. (Mar. 5, 2019, 8:00 PM), https://www.texastribune.org/2019/03/04/voting-rights-fight-texas-gov-greg-abbott-picks-side-david-whitley.

citizenship status.[263] Such records are a weak basis for subjecting registrations to scrutiny. In Texas, "driver's licenses don't have to be renewed for several years. In between renewals, Texans aren't required to notify DPS about changes in citizenship status. That means many of the people on the list could have become citizens and registered to vote without DPS knowing."[264] The same investigation noted that this has had consequences in other states, including "in 2012, [where] Florida officials drew up a list of about 180,000 possible noncitizens . . . . It was later culled to about 2,600 names, but even then that data was found to include errors . . . [and] ultimately, only about 85 voters were nixed from the rolls."[265] Careful handling of such records will greatly limit the number of questioned registrations:

> Around the same time, officials in Colorado started with a list of 11,805 individuals on the voter rolls who they said were noncitizens when they got their driver's licenses . . . [but] in the end, state officials said they had found about 141 noncitizens on the rolls — 35 of whom had a voting history — but that those still needed to be verified by local election officials.266

iii. Organizational Incapacity

Finally, officials may claim disparities flowing from administrative actions are not willful, but the result of organizational incapacity. Perhaps the most important instance, poll closures, can be discussed briefly. Budgetary constraints are routinely cited as a reason for elimination of polling places, an argument often conjoined to claims about high costs of making polling places compliant with the Americans with Disabilities Act.[267] For example, in Maricopa County, Arizona, participants in the 2016 primary "faced voting

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[263] Alexa Ura, *"Someone Did Not Do Their Due Diligence": How an Attempt to Review Texas' Voter Rolls Turned into a Debacle*, TEX. TRIB. (Feb. 1, 2019, 10:00 AM), https://www.texastribune.org/2019 /02/01/texas-citizenship-voter-roll-review-how-it-turned-boondoggle.

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] Andy Sullivan, *Southern U.S. States Have Closed 1,200 Polling Places in Recent Years: Rights Group*, REUTERS (Sept. 10, 2019, 2:12 AM), https://www.reuters.com/article/us-usa-election-locations-idUSKCN1VV09J.

delays of up to five hours. After state officials cut county budgets, Maricopa reduced its number of polling places by 70 percent—from 200 to 60—meaning one polling place was available for every 21,000 voters."[268]

Accounts about incapacity are also found in discussions of voter roll maintenance. In 2012, it was reported that "in a state of four million people and two million registered voters, Louisiana lists a staggering 190,848 registered voters on the state's inactive voter list."[269] Despite this, "some parishes have used budgetary constraints to justify not publishing inactive voter lists."[270] In the recent voter roll maintenance in West Virginia noted above, election officials attributed the high purge rates in some counties to lack of resources.[271] On the subject of:

> seven counties where between 26 percent and 33 percent of Democratic registrations were purged . . . [which] also saw between 21 percent and 26 percent of Republican registrations purged, [. . .] [general counsel in the Secretary of State's Office Donald] Kersey and Brittany Westfall, director of the Secretary of State's Elections Division, said those percentages likely represent challenges faced by county clerk's offices with small staffs to quickly address backlogs of inactive registrations.[272]

In *Fish v. Kobach*, this account also extended to voter registration practices.[273] At issue in the case was Kansas's implementation of a documentary proof of citizenship requirement to register to

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[268] Adam Harris, *The Voting Disaster Ahead*, ATLANTIC (June 30, 2020, 7:50 PM), https://www.theatlantic.com/politics/archive/2020/06/voter-suppression-novembers-looming-election-crisis/613408.

[269] Erica Woebse, *Geaux Vote (or Don't): Exploring the Excessive Number of Louisiana Voters on State's Inactive Voter List*, WM. & MARY ELECTION L. SOC'Y. (Oct. 10, 2012), http://electls.blogs.wm.edu /2012/10/10/geaux-vote-or-dont-exploring-the-excessive-number-of-louisiana-voters-on-the-states-inactive-voter-list.

[270] *Id.*

[271] Phil Kabler, *More WV Democrats than Republicans Have Been Purged from Voter Rolls. Is that Unexpected?*, CHARLESTON GAZETTE-MAIL (Jan. 18, 2020), https://www.wvgazettemail.com/news/politics/more-wv-democrats-than-republicans-have-been-purged-from-voter-rolls-is-that-unexpected/article_53b54044-1b99-5d3a-a192-926f9950e0cb.html.

[272] *Id.*

[273] Fish v. Kobach, 309 F. Supp. 3d 1048, 1104 (D. Kan. 2018).

vote in state elections.[274] New registrants who could not immediately supply proof of U.S. citizenship were placed on a list of "suspended" voter registrations; this list was maintained (and cleared) by administrators in the Office of the Kansas Secretary of State.[275] This suspended list grew rapidly in size and produced lengthy delays in processing clearances from the suspension list. At trial, Secretary Kobach sought to defend the legality of the documentary proof of citizenship policy, in part, by acknowledging administrative failings in its implementation.[276]

Judge Julie Robinson's opinion in the case enumerated an extraordinarily wide range of reasons for rejecting the documentary proof of citizenship policy in both its conception and implementation. But the case provides occasion to note how modest the organizational capacity of state-level secretaries of state is relative to the scope of their tasks. In Kansas, the Office of the Secretary of State "administers more than 1,000 laws" respecting elections, lobbying, trademarks, corporations, notaries, legislative operations, state administration, and so forth, but the office has the equivalent of thirty-six staff members.[277] It is hard to imagine how an organization of this scope was to find the additional capacity to manually assess and clear tens of thousands of suspended voter registrations.

Practices of the kind described here routinely produce disparate effects across racial and ethnic groups and do so by mechanisms that are readily understood.[278] Elections officials who oversee polling place closures, enforce legally questionable restrictions on registration activity, or engage in voter roll maintenance practices that remove valid registrants frequently profess that both the results and the intervening causal steps were unexpected and unintended.[279] Although this section has focused on (unusual) instances where such claims failed to serve as complete legal defenses of actions, they served in these instances as a successful means of

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[274] *Id.* at 1053.

[275] *Id.* at 1067.

[276] *Id.* at 1113.

[277] LAURA KELLY, OFF. OF THE GOVERNOR, THE GOVERNOR'S BUDGET REPORT, VOLUME 2, AGENCY DETAIL, FISCAL YEAR 2020 162–163 (2020).

[278] *See, e.g.*, Theodore Johnson, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2018), https://www.brennancenter.org/our-work/research-reports/new-voter-suppression.

[279] Antony Page & Michael Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1, 3–4 (2010).

disclaiming malign intent. We believe that these self-representations are broadly effective: they are common among elections administrators who face criticism, but similar professions of personal failure are extraordinarily rare in American public life. The relatively modest administrative record produced to support choices of this kind also affords little basis to rebut the officials' self-representations. We claim no privileged knowledge of the motives or states of mind of elections officials. But we conclude by observing that there are few other governmental domains where sincere, persistent avowals in individual or organizational incompetence would be tolerable.

V. Demanding Competence

We have argued that the inadequacies of election administration have constituted the largest practical barrier to the right to vote in the United States over the past generation. The wave of state legislation in 2021 is unlikely to change this pattern—it is the legislation's administration that will define the practical effect of such laws. As we have defined it, administrative burdens on the right to vote are the result of three interrelated problems: administrative inadequacy, discrimination, and misalignment between the social scientific evidence for these problems and the legal standards for defining and remedying them. The baseline quality of election administration in the United States is relatively low: official information is modest in scope, the conduct of elections relies upon the work of a highly dispersed set of public organizations and an aging infrastructure, and voting is, in comparison to other kinds of common interaction with government, relatively inconvenient. It is instructive that one of the great achievements in the modern history of voting rights was to raise voter registration practices to the administrative standard set by motor vehicles agencies—offices that serve as a popular archetype of inefficient, unpleasant bureaucracy.

Many of these problems are conceivably outside of the control of elections administrators. We are inclined to believe that state and local elections administrators broadly desire to run fair and inclusive elections, and many problems individual voters encounter truly are traceable to scarcity of public resources, rather than any personal failing or animus on administrators' part. Yet, it is clear that general problems in administering elections coexist alongside clear disparities that closely follow persistent social and geographic

patterns of inequality and discrimination. That participating in elections is so often confusing and laborious makes it more difficult, in any particular instance, to show that barriers may be the product of bad intentions rather than structural problems.

A generally improved standard of election administration would be the most expedient means of stripping the protective cloak of incompetence from invidiously discriminatory conduct. Avoidable barriers to voting are also objectionable in a representative democracy, irrespective of any cross-group disparity they might produce. In this section, we suggest three potential ways of addressing these matters. All the suggestions rest outside the conventional parameters of voting rights law: we laud the vigorous and thoughtful efforts of voting rights advocates but note that larger patterns of legal and political change are closing off once-promising avenues of argument.

A. Call Attention to Social Research that Aligns with Judges' Habits of Mind

Social statistics are the basis of a large, distinguished research tradition for good reason. They afford a means of producing approximate (but sound) descriptions of large patterns from modest observations. Ubiquitous computing has also transformed statistics into a labor efficient means of describing social reality. Used thoughtfully, many statistical methods can identify a particular causal link amid the profuse, messy processes that characterize social reality.

However, many of the qualities that make social statistics a strong basis for describing social reality also limit their application in judicial settings. Conventional techniques such as statistical regression produce knowledge by describing the overall pattern or structure that may be observed across a wide range of "cases" (that is, particular observations); a regression, for instance, yields a simplified description of the patterned variation of social reality, rather than a complete account of any particular case included in the statistical analysis.[280] Although there are a wide range of beliefs about the nature of causation that inform statistical research, much of this work endeavors to *isolate* a given cause, rather than to give a

[280] ANDREW ABBOTT, TIME MATTERS 38–40 (2001).

detailed, processual account of the operation of that cause.[281] This is a contrast to judicial production of knowledge, which treats a particular case in fine detail, and often conceives of causes in terms of subjective motivations and states, amid the unfolding of processes. Thus, conventional social statistical findings, however rigorously produced and compelling in their own terms, will almost never be taken by judges as dispositive answers to legal questions.

Not coincidentally, this pattern strongly resembles divisions between research traditions within the social sciences. At the turn of the twentieth century, there were very strong intellectual and institutional connections between law and social science.[282] Divisions within the social sciences arose from historical processes similar to those that drew professionalized social science farther from law.[283] Statistical accounts have developed in parallel with another prominent research approach, characteristically reliant upon direct observation, interviews, or documents as primary sources of information, and which transmute such information into arguments—including causal explanations—by structured practices of interpretation. In disciplines like sociology, such "qualitative" research figures prominently in studies of contemporary forms of inequality, especially inequality arising from the everyday manifestations of racism at the individual and community level.

Qualitative techniques also figure prominently in work on topics where there the number of observable cases is limited, but the cases are of high interest. There have been few successful political revolutions in modern history, but the causes of the French and Russian Revolutions are of undoubted interest.[284] Or, to mention a matter of more direct relevance for the American judiciary: understanding the circumstances of Reconstruction has been critical for making sense of contemporaneous legal provisions such as the Fourteenth Amendment, whose expansive interpretation has altered law and government practice in ways that are almost impossible to overstate.[285] Social historian Eric Foner's account of Reconstruction has therefore been one of the most-cited pieces of non-

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[281] *Id.* at 54–59.

[282] *See* Eric Lybeck, *Ajurisdiction*, 48 THEORY & SOC'Y. 167, 175–76 (2019).

[283] ANDREW ABBOTT, CHAOS OF DISCIPLINES 32 (2001).

[284] THEDA SKOCPOL, STATES AND SOCIAL REVOLUTIONS 37, 39 (1979).

[285] Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585 (2012).

legal research in the modern history of the Supreme Court—though, in Foner's own view, the Court has never yet fully acknowledged the importance of modern accounts of Reconstruction.[286]

These distinct methods, and their underlying modes of reasoning, have been a source of major disciplinary conflict in the social sciences.[287] There exist pointed critiques of the simplifying mathematical assumptions of statistics and the tendency of these assumptions to shape how researchers conceive of social reality; there are similarly pointed critiques of the subjective character of evidence production in qualitative research and the limitations on the ability to make general knowledge claims from such work.[288] Influential works have argued that studies of single cases may be designed in a way that conforms to the common assumptions of statistical inference, though we are persuaded by responses that characterize this as an awkward fit that undermines the truly compelling explanatory features of case-based qualitative studies.[289] In some social sciences, one approach or the other predominates—the great majority of work in political science and public policy, for instance, relies on statistical forms of evidence, while contemporary anthropology is overwhelmingly qualitative. Our own fields of sociology and public administration have sought a pluralist approach that acknowledges the value of different methods in making sense of a given topic—and, in many cases, the value of combining quite distinct techniques in the context of a particular study.[290]

Efforts within the social sciences to constructively combine different forms of data and explanation offer a potential model for presentation of social scientific evidence in support of rights claims. There are profound intellectual similarities between judicial and qualitative social scientific work.[291] The elaboration of more

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[286] *Id.* at 1599.

[287] ABBOTT, *supra* note 283.

[288] ABBOTT, *supra* note 280.

[289] GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 106 (1994); Mario Small, "*How Many Cases Do I Need?*" *On Science and the Logic of Case Selection in Field-Based Research*, 10 ETHNOGRAPHY 1, 18 (2009).

[290] Michèle Lamont & Ann Swidler, *Methodological Pluralism and the Possibilities and Limits of Interviewing*, 37 QUALITATIVE SOCIO. 153, 154–55 (2014); Mario Small, *How to Conduct a Mixed Methods Study: Recent Trends in a Rapidly Growing Literature*, 37 ANN. REV. SOCIO. 57, 58 (2011).

[291] Boyce Robert Owens & Laura Ford, *Judicial Social Theorizing and Its Relation to Sociology*, 42 QUALITATIVE SOCIO. 229, 230 (2019).

sophisticated statistical accounts of voting issues, even if carefully tailored to judicial reasoning, would appear to have modest prospects of future success. At this point, it is useful to consider that a key distinction in social science research between the logic of inquiry associated with statistical research and the logic of inquiry associated with qualitative research is that, while the former focuses on describing empirical cases in ways that are statistically generalizable to a larger population, the virtue of the latter is its ability to identify mechanisms in cases that drive social processes, regardless of whether the cases under examination admit of generalizable claims-making. Emphasizing such a logic is potentially strategically beneficial to actors attempting to convince judges who have been hesitant to rely on statistics in making their decisions, because the qualitative approach to identifying mechanisms within empirical cases roughly aligns with existing legal logics of legal realism.[292] We do not suggest that statistical evidence has no place in legal arguments, but rather that joining such work to social scientific accounts that provide strong narrative, motivational, or processual accounts of experience and behavior could be a promising way forward, particularly regarding subjective aspects of voters' experiences. Judges and lawyers are trained to think in ways consonant with a qualitative case-based social science approach, so emphasizing such evidence within a courtroom could potentially pay dividends.

B. Positive Guarantees Under State Law

The inadequacy of material support for election administration arises in part because there is no level of government that bears a clear responsibility for financing elections. The fiscal federalism of elections is very complex, and as has been noted above, there is much still unknown about the cost of conducting elections. The gap between strong legal protections of the right to vote and the weak and uneven institutional basis for exercising it is in many ways analogous to public education. Since the 1950s, the federal courts have emphatically rejected segregated schools as inherently unequal.[293] Yet, federal courts have recognized no positive right to a public education. Nor does the federal government assume much responsibility for financing public education: nearly all funding for public

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[292] Holmes, *supra* note 243, at 8, 11.

[293] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

K-12 education comes from state and local governments.[294] The legal pursuit of educational equity has thus advanced much farther at the state level, where it has often been possible to enact and enforce positive guarantees of fair and adequate support for public education in state constitutions.[295]

Given that elections are a matter where states have the largest role, both constitutionally and practically, similar legal guarantees for fairly and adequately administered elections might be pursued at the state level. Although the U.S. Constitution does not explicitly grant the right to vote, every state constitution, except Arizona's, expressly recognizes a right to vote; in addition, there are twenty-six states whose constitutions expressly guarantee "free," "free and open," or "free and equal" elections.[296] Such language may be interpreted more broadly than federal law, and the practical meaning of these guarantees may be further explored or revisited in states where doctrine is already well-developed. We note that elections clauses were central to two important recent decisions. In *League of Women Voters v. Commonwealth*, Pennsylvania's elections clause was invoked in a successful challenge to the state's congressional districting plan.[297] In *Common Cause v. Lewis*, North Carolina's elections clause was successfully invoked to challenge a statewide districting scheme.[298] This approach couples law and practical responsibility more closely. It is also a proposition that might be broadly agreeable to voters, who often show a stronger appetite for elections reforms than political leadership. By direct democratic means, voters in many states have opted for the creation of independent redistricting commissions and reform of felon disenfranchisement laws.

C. Elections as Administration

Election officials embody a duality. They are charged to safeguard the fairness and integrity of the democratic process, and in a large democracy like the United States, the greater part of this task

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[294] Daniel Alvord & Emily Rauscher, *Minority Support: School District Demographics and Support for Funding Election Measures*, 57 URB. AFF. REV. 643, 644 (2021).

[295] See ZACKIN, *supra* note 28.

[296] Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 144–49 (2014).

[297] League of Women Voters v. Commonwealth, 178 A.3d 737, 741 (Pa. 2018).

[298] *See* Common Cause v. Lewis, 834 S.E.2d 425 (N.C. 2019).

is neutrally technical in character, the sort of work often entrusted to a senior civil servant who has advanced on the basis of merit. Yet, the most important state and local election officials are political figures—often directly elected and, at the state level, invariably partisan. As sitting secretaries of state themselves conceive the role, a good official must meet both standards: the role demands the skill and impartiality of a senior administrator, but also democratic accountability to the electorate.[299]

In practice, it is often possible to fall short of both standards: the typical voter cannot be expected to be well informed about the record of a state secretary of state or county clerk, and elected officials' decisions are often subject to lower legal standards of scrutiny than administrators who must act in accordance with legislative authorization of their work. Judges, solely through stylistic choices, could play a role in holding officials to the dual standard. In cases arising from two of the examples discussed in the previous section, *LULAC v. Whitley* and *Fish v. Kobach*, the district judges issued scathing rulings.[300] In *LULAC*, Judge Biery frankly declared that the Secretary of State had "created this mess."[301] In *Fish v. Kobach*, Judge Robinson also entered a contempt of court finding that obliged Secretary Kobach to take continuing legal education courses.[302] The tenor of these opinions secured significant media attention in both cases, effectively bringing what judges deemed to be the administrative failings of political officials into public view in a way that a routine application of the NVRA would not. Opinion style matters for law, and rebuke can be a powerful stylistic choice.[303]

Judicial review of administrative conduct commonly takes two forms. To assess the decisions arising from settings like administrative adjudications or rulemakings, the courts have elaborated a robust framework that is particularly attentive to the inputs and

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[299] BENSON, *supra* note 163.

[300] Tex. League of United Latin Am. Citizens v. Whitley, No. SA-19-CA-074-FB 1, 4 (W.D. Tex. Feb. 27, 2019) (order denying defendant motion to dismiss); Fish v. Kobach, 189 F. Supp. 3d 1107, 1118–19 (D. Kan. 2016).

[301] *Tex. League of United Latin Am. Citizens*, No. SA-19-CA-074-FB, at 4.

[302] *Fish*, 189 F. Supp. 3d, at 1119.

[303] Pamela Hobbs, *Judges' Use of Humor as a Social Corrective*, 39 J. PRAGMATICS 50, 52–53 (2007); Robert J. Hume, *The Impact of Judicial Opinion Language on the Transmission of Federal Circuit Court Precedents*, 43 L. & SOC'Y. REV. 127, 146 (2009).

procedures.[304] In assessing less formal administrative decisions, such as the frontline work of officials who interact directly with the public, the standard is lower—in many cases, the question is whether the decision followed reasonably from the trained intuition of the official.[305] More might be done, through both legal and political means, to bring election administration into closer conformity with such basic standards.

A wide range of important administrative choices about elections—what sources of records to employ in voter roll maintenance, where to site polling places, and so forth—are regularly made out of public view, with little supporting rationale. There are two compelling grounds for making the administration of democracy a more transparent process. First, a more transparent (and, perhaps, participatory) process would be consistent with basic democratic values and would also accord with the professional ethical orientation of modern American administration, which strongly favors equity and participation.[306] Second, the soundness of the thinking behind officials' choices cannot readily be tested in court if officials are not obliged to document these reasons or are free to offer them post facto.[307]

A promising model for pursuing administrative procedural regularity is Virginia's House Bill 1890, enacted by the General Assembly in its 2021 Special Session.[308] The bill subjects a wide range of "covered practices" to review before final adoption.[309] The language of covered practices, and the mechanism of review by the state attorney general, both resemble the requirements of Section 5 of the VRA.[310] However, the law also provides for review of a covered practice through ordinary public notice and comment mechanisms, which are in wide use and about which there is a mature

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[304] DAVID ROSENBLOOM, ADMINISTRATIVE LAW FOR PUBLIC MANAGERS (2d ed. 2015); JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 489–90 (6th ed. 2018).

[305] DAVID ROSENBLOOM ET AL., PUBLIC ADMINISTRATION AND LAW (3d ed. 2010).

[306] KENNETH J. MEIER & LAURENCE J. O'TOOLE, JR., BUREAUCRACY IN A DEMOCRATIC STATE 40 (2006); AM. SOC'Y. FOR PUB. ADMIN., CODE OF ETHICS (2020).

[307] Gregg G. Van Ryzin et al., *Latent Transparency and Trust in Government: Unexpected Findings from Two Survey Experiments*, 37 GOV'T INFO. Q., 1, 8 (2020); K. Sabeel Rahmaan, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 167, 168 (2018).

[308] H.B. 1890, 2021 Gen. Assemb., Spec. Sess. (VA 2021).

[309] H.B. 1890.

[310] Voting Rights Act of 1965, Pub. L. No. 97-205, §10304, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

body of law. House Bill 1890 also includes provisions that address common barriers to individuals seeking to make use of administrative legal protections by providing for recovery of court costs and explicitly defining a simple standing requirement.[311]

In other settings, organizations regularly protect themselves against claims about discrimination by the use of mandatory training. Such training, for instance, is a foundation of employers' protection against employment discrimination claims. There exist compelling arguments for the practical limitations of this approach.[312] Yet even this modest baseline is often absent in elections administration. There are fifteen states that have no mandatory training for local elections officials—states without mandatory training include notably populous states like California, New York, and Pennsylvania, as well as states like Alabama, Florida, Louisiana, and Texas that have been at the center of past and present concerns about voter suppression.[313] Many other states permit local officials to waive training requirements when faced with shortages of poll workers.[314] There is both a strong administrative argument for training and professionalism, and potentially wide administrative legal grounds for contesting the choices of untrained administrators.[315]

We are hardly the first to suggest that administration may be an effective starting point for defending voting rights. Zipkin, for instance, provides a thoughtful overview of administrative legal concepts that could be of use in electoral settings.[316] However, our account has suggested that there is a great deal of new work to be done. Legally, confronting administratively produced barriers might require new argumentative approaches and strategies and could require turning efforts away from symbolically potent and historically significant legal provisions. In view of the intergovernmental character of election administration, and the range of important choices made at the county level (or below), confronting electoral

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[311] Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821 (2008); *see* Ben Merriman, *Public Management's Problems are Legal Problems: How Law Contributes to Inequity in Contemporary Governance*, 4 PERSP. ON PUB. MGMT. & GOVERNANCE 213 (2021).

[312] LAUREN EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS (2016).

[313] NAT'L CONF. OF STATE LEGISLATURES, *supra* note 169, at 35.

[314] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21.

[315] HALE ET AL., *supra* note 165, at 46.

[316] Saul Zipkin, *Administering Election Law*, 95 MARQ. L. REV. 641, 669–70 (2012).

administrative burden would also involve a widely distributed effort. Moreover, the empirical basis for such a full legal confrontation with electoral administrative burden is wanting in two respects. First, factual knowledge about the local financing and organization of elections, and voters' experience of elections at the community level, is seriously underdeveloped, in part because social science is so reliant on governmentally produced information, and the systematic underfinancing of elections limits public organizational capacity to collect useful information. Second, the social scientific account of elections in the United States has been built from kinds of evidence and inference that courts have resisted; qualitative research of a kind infrequently commended to the judiciary's attention might be compelling. But employing the findings of emerging, methodologically mixed literatures, such as the rapidly growing literature of administrative burden, would require closer, sustained intellectual relationships between the social sciences and law. This article is our modest effort, as social scientists, to open a conversation with the legal scholars and practitioners who have been at the center of ongoing efforts to protect the right to vote.