NOTES

THE VOTE FROM BEYOND THE GRAVE

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INTRODUCTION

On November 4, 2008, Americans watched the networks declare Barack Obama the next President of the United States. As the historical election came to an end, some may have turned their thoughts to Madelyn Dunham, the President-elect's grandmother, who lost her battle with cancer just the day before at the age of eighty-six. Though she did not live to see her grandson elected to the highest office in the country, Ms. Dunham played a part in putting him there—she voted absentee.[1]

Because her ballot had been legally cast and received, Hawaii Chief Elections Officer Kevin Cronin assured reporters that it would be counted along with the rest of the state's votes in determining which presidential candidate would receive Hawaii's four electoral votes.[2] Notably, if Dunham resided in her grandson's home state of Illinois, her ballot would have been rejected.[3]

Since the 2000 presidential election and the storm of litigation that it produced,[4] the American public has exhibited heightened concern about the integrity of the voting process.[5] The media debated the implications of hanging, dimpled, and pregnant chads on Florida ballots, and the certification of the Florida returns—leading to the election of President George W. Bush—did not silence the controversy.[6] Despite the passage of the Help America Vote Act of 2002 (HAVA),[7] during the 2004 election news stories swirled about the thousands of deceased whose names had yet to be purged

1. Tahman Bradley, Rigel Anderson & Arnab Datta, *Obama's Grandmother's Absentee Ballot Will Be Counted by State of Hawaii*, ABC NEWS, Nov. 3, 2008, http://blogs.abcnews.com/politicalradar/2008/11/obamas-grandm-1.html.

2. *Id.*

3. 10 ILL. COMP. STAT. 5/19-11 (2003).

4. *See* Martin H. Belsky, Bush v. Gore—*A Critique of Critiques*, 37 TULSA L. REV. 45, 48-60 (2001) (cataloging the judicial proceedings challenging the Florida election results).

5. *Id.* at 69-70; Philip J. Peisch, Note, *Procurement at the Polls: How Sharing Responsibility for Acquiring Voting Machines Can Improve and Restore Confidence in American Voting Systems*, 97 GEO. L.J. 877, 886-87 (2009) (discussing low public confidence in American voting systems).

6. *See* Belsky, *supra* note 4, at 68-78.

7. 42 U.S.C. §§ 15301-15545 (2006).

from the voter rolls[8] and, in other districts, votes being cast by deceased voters.[9] Although outright fraud—such as a person assuming the identity of a deceased person in order to vote more than once or in various locations—is clearly illegal, there is another class of votes whose legitimacy is less clearly defined: absentee and advanced voting ballots cast by those who passed away before election day.[10]

Millions of Americans cast their votes prior to election day in the 2008 election in an unprecedented mail-in and in-person early voting turnout.[11] Due to the overwhelming prevalence of absentee voting and the importance of improving an already skeptical electorate's faith in the system, the government should promote certainty in absentee voting. There are volumes of legal scholarship on election law and voting rights. Accordingly, there are a number of topics that are beyond the scope of this Note.[12] This Note seeks to answer three interrelated questions: (1) whether the federal government *could* mandate a uniform approach to nonfraudulent "ghost-voting"; (2) whether the federal government *should* adopt such a standard; and (3) if so, what that standard should be.

Thus, Part I of this Note evaluates the dual grants of control over the election process, divided between the states and the federal government, and concludes that the constitutionality of federal election regulation is well-settled. Part II weighs the arguments in

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8. Geoff Dougherty, *Dead Voters on Rolls, Other Glitches Found in 6 Key States*, CHI. TRIB., Dec. 4, 2004, at C13.

9. Darryl Fears, *DNC To Investigate Ohio Voting Irregularities*, WASH. POST, Dec. 7, 2004, at A10.

10. As used in this Note, absentee voting entails mail-in ballots submitted by voters who will not be present in the district during the election period or satisfy some other criteria permitting them to vote in this way. Advance or early voting describes votes cast at a polling place prior to the designated election day. In more general contexts, however, these terms are occasionally used interchangeably.

11. *See* CNNPolitics.com, Early Voting Suggests 2008 May See Record Turnout, Expert Says (Oct. 22, 2008), http://www.cnn.com/2008/POLITICS/10/21/early.voting/; Michael McDonald, *(Nearly) Final 2008 Early Voting Statistics*, U.S. ELECTION PROJECT, Jan. 11, 2009, http://elections.gmu.edu/Early_Voting_2008_Final.html.

12. For example, this Note will not attempt to address equal protection as it applies to voters at the polls on election day. It does not purport to be an authoritative source on election technology or a state's obligations under HAVA. Furthermore, it will not consider the constitutional issues surrounding the highly controversial voter identification laws enacted by many states.

favor of and against congressional intervention in the area, assessing the chance of success of an equal protection claim brought by the survivor of a deceased person whose vote was rejected. Although the analysis ultimately indicates that an equal protection claim brought on behalf of a disenfranchised voter might not have a strong chance of success, Part III considers whether voters' distrust of the electoral system provides independent reasons warranting federal action establishing guidelines for the states' treatment of these votes. Finally, Part IV provides a recommendation that, though Congress is unlikely to exercise its preemptive authority in this area of election administration, a uniform national standard to deal with these votes would further the governmental interest in burgeoning voters' faith that, when they vote, their voices will be heard.

I. FEDERALISM AND CONGRESSIONAL PREEMPTION OF ELECTION LAWS

> *The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.*[13]

The Constitution delegates the authority to regulate elections to the states.[14] This power, coupled with the Tenth Amendment right of the states to retain "[t]he powers not delegated to the United States by the Constitution," creates a presumption of legitimacy regarding the states' regulation of elections.[15] But this authority is not absolute. The Constitution reserves to Congress the ability to "at any time by law make or alter such Regulations, except as to the Places of chusing Senators."[16] Therefore, Congress has a "general

13. U.S. CONST. art. I, § 4, cl. 1.

14. *Id.*

15. U.S. CONST. amend. X.

16. U.S. CONST. art. I, § 4, cl. 1. Although the Seventeenth Amendment vested the power of selecting senators with the people rather than the states, U.S. CONST. amend. XVII, it did not "explicitly" alter Congress's authority under this clause. KENNETH R. THOMAS, CONGRESSIONAL RESEARCH SERVICE, CONGRESSIONAL AUTHORITY TO STANDARDIZE NATIONAL ELECTION PROCEDURES 3 (2000), *available at* http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-1159.

supervisory power over the whole subject" and may insert itself into the administration of elections when it deems it necessary to do so.[17]

Congress began to regulate certain state election procedures in the 1860s and 70s.[18] The passage of the Thirteenth, Fourteenth, and Fifteenth Amendments guaranteed voting rights to a new class of voters[19] but could not unilaterally erase the prejudices that were at the core of disenfranchisement. To ensure that African Americans were able to exercise their newly guaranteed rights, Congress passed a series of enforcement acts.[20] The Enforcement Act of May 31, 1870[21] prohibited state officials from "discriminat[ing] among voters on the basis of race or color in the application of local election laws" and outlawed interference with the right to vote through force or intimidation.[22] The Force Act of February 28, 1871 further expanded federal control over the election process.[23] Intended to curb voter fraud and false registration, the Act allowed federal election supervisors, at the request of two or more citizens in a town of at least 20,000 residents, to observe the registration and election process.[24]

Nearly ninety years later, Congress again adopted regulations for election procedures in response to state practices that continued to disenfranchise African American voters.[25] After the passage of the Civil Rights Acts of 1957,[26] 1960,[27] and 1964,[28] the courts were forced to intervene when the states crafted discriminatory policies

17. *Ex parte* Siebold, 100 U.S. 371, 387 (1879).

18. *See generally* ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 35-40 (1947).

19. U.S. CONST. amends. XIII-XV.

20. Everette Swinney, *Enforcing the Fifteenth Amendment, 1870-1877*, 28 J. S. LEGAL HIST. 202, 202 (1962).

21. Ch. 114, 16 Stat. 140, 140.

22. Swinney, *supra* note 20, at 202-03.

23. Ch. 99, 16 Stat. 433, 433-40.

24. *Id.* § 2. The final act in the trilogy, the Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13, 13-15, criminalized conspiracy to prevent citizens from voting and "reserved to the federal courts" "exclusive original jurisdiction in all suffrage cases." Swinney, *supra* note 20, at 203.

25. *See* Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 404-05 (2002).

26. Pub. L. No. 85-315, 71 Stat. 634 (codified as amended at 42 U.S.C. § 1971 (2006)).

27. Pub. L. No. 86-449, 74 Stat. 86 (codified as amended at 42 U.S.C. § 1971 (2006)).

28. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 1971 (2006)).

as a rebellion against the perceived federal encroachment.[29] Finding this "case-by-case litigation ... inadequate to combat widespread and persistent discrimination in voting,"[30] Congress instead "cut through the protective barrier of federalism"[31] by enacting the Voting Rights Act of 1965.[32] Sections 4, 5, and 8 of the Act established broad powers for the federal government.[33] Perhaps the greatest expansion of federal authority over voting administration was embodied in section 5, which provides for federal review of any change in "voting qualification or prerequisite to voting, or standard, practice, or procedure" by the states.[34] Section 4 of the Act also prohibits the use of "tests or devices in determining eligibility to vote."[35] Finally, section 8 allows the federal assignment of observers at the polls upon a court order or at the request of the Attorney General.[36]

Congress has not limited its involvement in election supervision solely to legislation implementing the achievements of the 1960s civil rights movement. In 1993, the legislature adopted the National Voter Registration Act (NVR or Motor Voter Act).[37] Among its purported purposes are "establish[ing] procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; ... protect[ing] the integrity of the electoral process; and ... ensur[ing] that accurate and current voter registration rolls are maintained."[38] To accomplish these goals, the statute requires the states to offer voter registration to residents when obtaining a driver's license, as well as at other designated locations.[39]

A number of states have litigated the constitutionality of the Motor Voter Act, contending that contemporary Supreme Court

29. Weinberg & Utrecht, *supra* note 25, at 406.

30. *Id.*

31. *Id.*

32. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973 to 1973 aa-6 (2006)).

33. *See* Weinberg & Utrecht, *supra* note 25, at 406-07.

34. 42 U.S.C. § 1973c (2006).

35. *Id.* § 1973b.

36. *Id.* § 1973f.

37. Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 42 U.S.C. §§ 1973gg to 1973gg-10 (2006)).

38. 42 U.S.C. § 1973gg(b) (2006).

39. *Id.* § 1973gg-2. States that do not require voters to register or that allow voters to register at the polls on election day are exempt from these regulations. *Id.*

decisions advocate federal restraint in preempting state authority.[40] Yet to mount a successful challenge to Congress's intervention in election procedures, a proponent of states' rights would have to prove "consequences of the Act that impose an undue burden on state sovereignty."[41] No such challenge has convinced the courts to discredit the statute's constitutionality.[42] In fact, the Seventh Circuit reasoned that Article I "requires the states to create and operate such a system," while at the same time it "authorizes Congress to alter the state's system."[43] Furthermore, the court determined that the burden the NVR imposes was insufficient to warrant an order of relief on constitutional grounds.[44] Therefore, Congress's authority to involve itself in the election process is broad and well-established.[45]

Many in Congress claim to prefer to avoid interfering in traditional areas of state authority.[46] Nevertheless, some have observed a legislative trend of federal preemption of state law.[47] Although the Supreme Court, under the leadership of Chief Justice William Rehnquist, somewhat curbed the expansion of federal regulation in deference to state authority,[48] federal election regulation clearly is within the purview of the federal government and should not invite the more stringent scrutiny applied to statutes that infringe upon fundamental state functions.[49] Still, Congress might be hesitant to

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40. Jonathan E. Davis, Comment, *The National Voter Registration Act of 1993: Debunking States' Rights Resistance and the Pretense of Voter Fraud*, 6 TEMP. POL. & CIV. RTS. L. REV. 117, 119-20 & n.23 (1997) (citing cases in which the Court has limited congressional authority under the Commerce Clause).

41. *Id.* at 134.

42. *Id.* at 120 (citations omitted).

43. Ass'n of Cmty. Org. for Reform Now v. Edgar, 56 F.3d 791, 795 (7th Cir. 1995).

44. *Id.* at 796.

45. *See* Smiley v. Holm, 285 U.S. 355, 366-68 (1932); Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1413-16 (9th Cir. 1995); United States v. Manning, 215 F. Supp. 272, 277, 283-84 (W.D. La. 1979).

46. *But see, e.g.*, Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(a)(2)(A)-(4) (2006); Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended at 42 U.S.C. § 13925 (2006)).

47. Richard Simon, *Congress Overstepping on State Turf, Some Say*, L.A. TIMES, Nov. 24, 2005, at A36.

48. *See* Denise C. Morgan & Rebecca E. Zeitlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1350-66 (2005).

49. *Compare* Bush v. Gore, 531 U.S. 98, 112-15 (2000) (Rehnquist, C.J., concurring), *with* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47 (1985).

exercise its authority in the administration of qualifying absentee ballots unless there is a compelling reason for such legislation. Those reasons are considered in Part II.

II. THE PROBLEM DEFINED

A. The Fundamental Nature of the Right To Vote

> *No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.*[50]

The Framers of the Constitution—and of its subsequent Amendments—clearly valued the right of citizens to vote, enacting a number of safeguards to protect their right to be heard.[51] An abundance of Supreme Court precedent exists to shield voting rights from abuse and to ensure such rights are extended to "all qualified citizens."[52] Not only are citizens guaranteed the opportunity to cast a ballot on election day, but each is promised that her vote will be counted.[53] Her voice in selecting her representative is considered equal to all others,[54] and, in casting her vote, she is claiming a piece of her government's accomplishments, regardless of who ultimately takes office.

Due to its place at the heart of American democracy, traditional jurisprudence dictates that any restriction on the fundamental right to vote is subject to strict scrutiny review.[55] In certain

50. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

51. *See* U.S. CONST. amends. XIV, XV, XVII, XIX, XXIII, XXIV, XXVI.

52. Reynolds v. Sims, 377 U.S. 533, 554 (1964); *see* Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 WAYNE L. REV. 173, 268 (2002); Jeffrey A. Blomberg, Note, *Protecting the Right Not To Vote from Voter Purge Statutes*, 64 FORDHAM L. REV. 1015, 1015 (1995); *see also* United States v. Saylor, 322 U.S. 385, 387-90 (1944); United States v. Classic, 313 U.S. 299, 314-20 (1941); United States v. Mosley, 238 U.S. 383, 388 (1915); Guinn v. United States, 238 U.S. 347, 361-66 (1915); *Ex parte* Yarbrough, 110 U.S. 651, 666-67 (1884); *Ex parte* Siebold, 100 U.S. 371, 385-88 (1879).

53. *Mosley*, 238 U.S. at 386.

54. Gray v. Sanders, 372 U.S. 368, 381 (1963).

55. Gabrielle B. Ruda, Comment, *Picture Perfect: A Critical Analysis of the Debate on the 2002 Help America Vote Act*, 31 FORDHAM URB. L.J. 235, 238-39 (2003). Because of the fundamental nature of this right, strict scrutiny attaches when disparate treatment of voters

circumstances, however, the Court has adopted a looser standard, "balanc[ing] the 'character and magnitude' of the harm imposed on the right to vote against the state's reason for enacting the regulation and the necessity of the regulation."[56] To convince a court to apply strict scrutiny review as opposed to a more lenient rational basis standard, the party advocating the heightened scrutiny must effectively present the harm as severe.[57]

Absentee voting, however, receives unique consideration. A number of appellate courts have concluded that the Constitution does not confer upon citizens a right to vote absentee.[58] Because the Constitution delegates to the states the authority to regulate election mechanisms, the states are not required to maintain an absentee voting mechanism at all.[59] The basic requirement is the same: if the State chooses to provide for an absentee method of voting, then it must be administered in a nondiscriminatory manner.[60] Yet as opposed to the strict scrutiny applied to provisions regulating traditional voting, absentee voting provisions do not receive such heightened review.[61] Rather, courts apply rational basis review to states' absentee voting mechanisms.[62]

Accordingly, a court will only invalidate an absentee ballot regulation on *federal* constitutional grounds if it finds that the measure bears no "rational relationship to a legitimate state end."[63]

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lacks a "*compelling* state interest," regardless of whether the restriction specifically affects a suspect class. *See* Dunn v. Blumstein, 405 U.S. 330, 336-37 (1972).

56. Kelly T. Brewer, Note, *Disenfranchise This: State Voter ID Laws and Their Discontents, A Blueprint for Bringing Successful Equal Protection and Poll Tax Claims*, 42 VAL. U. L. REV. 191, 196 (2007) (citing the balancing test enumerated in Burdick v. Takushi, 504 U.S. 428, 433 (1992)).

57. *Id.* at 233.

58. Griffin v. Roupas, 385 F.3d 1128, 1130-31 (7th Cir. 2004); *In re* Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami, 707 So. 2d 1170, 1173 (Fla. Dist. Ct. App. 1998) ("[U]nlike the right to vote ... the ability to vote by absentee ballot is a privilege."); Qualkinbush v. Skubisz, 826 N.E.2d 1181, 1192 (Ill. App. Ct. 2005); *see also* Friedman v. Snipes, 345 F. Supp. 2d 1356, 1370 (S.D. Fla. 2004) ("[T]here is no fundamental right to vote by absentee ballot.").

59. *See Griffin*, 385 F.3d at 1130-31.

60. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966).

61. *See* Burdick, 504 U.S. at 432-33.

62. Erlandson v. Kiffmeyer, 659 N.W.2d 724, 733 (Minn. 2003) (citing McDonald v. Bd. of Election Comm'rs of Chicago, 394 U.S. 802, 809 (1969)).

63. *McDonald*, 394 U.S. at 809. Absentee and advanced voting provisions may be subject to heightened scrutiny on *state* constitutional grounds if the state constitution requires that

This level of inquiry is much more deferential to the government than strict scrutiny.[64] As a result, it is more difficult to mount a successful challenge to discriminatory absentee voting requirements than it is to contest disenfranchisement that occurs at the polls. The likelihood of the success of an equal protection claim under this interpretive framework is somewhat low and is discussed in Part II.E.

B. The Variant Standards Employed by the States

> *One major cause of the breakdown of the electoral process in 2000 was the lack of uniform procedural guidelines for various aspects of the voting process.*[65]

Because the authority over the electoral process is concentrated at the state level, the individual states employ various methods in administering absentee voting. Though every state provides some manner of early voting, its structure and the qualifications that a voter must meet in order to vote in advance differ widely among states.[66] For example, in-person early voting in Texas, which begins seventeen days before the election, is offered to all voters who wish to take advantage of it.[67] By contrast, Virginia does not offer in-person early voting for anyone who does not meet specific criteria, such as absence from the district during the hours that the polls will be open on election day.[68]

The states' guidelines for validating absentee ballots are equally diverse. Many states have explicit policies that instruct local boards of elections to disqualify the votes of recently deceased voters who voted absentee.[69] But other states have determined that any vote

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all citizens be afforded the right to vote in advance or absentee. *See, e.g.*, N.H. CONST. art. XI.

64. *See McDonald*, 394 U.S. at 808-09.

65. Ruda, *supra* note 55, at 235.

66. *See* National Conference of State Legislatures, Absentee and Early Voting, http://www.ncsl.org/programs/legismgt/elect/absentearly.htm (last visited Feb. 10, 2010).

67. Hope Andrade, Texas Secretary of State, Early Voting in Texas, http://www.sos.state.tx.us/elections/pamphlets/earlyvote.shtml (last visited Feb. 10, 2010).

68. Virginia State Board of Elections, Absentee Voting, http://www.sbe.virginia.gov/cms/Absentee_Voting/Index.html (last visited Feb. 10, 2010).

69. *See* COLO. REV. STAT. § 31-10-1008(1) (2007); 10 ILL. COMP. STAT. 5/19-11 (2007); IND. CODE ANN. § 3-11-10-23 (2007); IOWA CODE § 53.32 (2006); MD. CODE ANN., ELEC. LAW § 11-

properly completed by an eligible voter should count, even if the voter dies before election day.[70] Still others do not have specific statutory guidelines dictating how boards of elections are to treat a deceased voter's ballot but instead adopt unofficial "opinions" how these votes should be treated.[71] With official and unofficial state policies regarding these ballots ranging from highly regulated to decidedly informal, treatment of these ballots inevitably varies from state to state.[72] This type of inconsistency has the potential to lead to voter confusion regarding why certain votes are less valuable than others. A skeptical electorate, already dubious as to election legitimacy and the import of its vote, may fear that the disqualification of legally cast ballots undermines the integrity of the process and robs some citizens of a privilege of American citizenship. Inconsistent election policies also can foster further distrust among voters as to the accuracy of election results when legislatures adopt directives that are difficult to enforce uniformly. When state practices allow election officials to validate or discredit voters' ballots with wide latitude, the risk of haphazard administration or abuse of discretion is heightened.

C. Equal Protection

> *When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.*[73]

Although a voter's right to vote absentee is far from absolute,[74] once the right is extended to the electorate, it may not be infringed

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302(d)(3)(i) (2008); MINN. STAT. § 203 B.25 (2006); MO. REV. STAT. § 115.293 (2007).

70. *See Early Voting Compounds Problem of "Ghost" Votes Getting Through*, USA TODAY, Oct. 31, 2004, *available at* http://www.usatoday.com/news/politicselections/nation/2004-10-31-dead-voters_x.htm [hereinafter *Early Voting*] (listing California, Ohio, Tennessee, Texas, and West Virginia as states that have specific provisions that allow the absentee votes from those who die before the election to be counted).

71. *Id.*

72. *Id.*

73. Bush v. Gore, 531 U.S. 98, 104 (2000).

74. *See* Griffin v. Roupas, 385 F.3d 1128, 1130-31 (7th Cir. 2004).

upon later in an "arbitrary and disparate" manner.[75] One of the primary problems with discrediting legally cast absentee ballots is that the votes of similarly situated voters—those who engage in some form of early voting—are susceptible to different treatment. In the states where canvassers are required to disqualify votes by the deceased, early votes submitted by mail are fairly easy to identify and set aside, an ease of process that is not paralleled by those tendered in person.[76] This is especially true with the advent of voting technology that separates the identity of the voter from the content of the vote itself.[77] Consider a hypothetical situation in which

> a person in Florida casts an early ballot, then is run over by a truck right outside the polling place, there's no way to rescind the vote. But the vote of a Florida soldier who mails an absentee ballot from Iraq, then is killed in action, won't—or shouldn't—be counted.[78]

North Carolina seeks to remedy this problem by utilizing a system of retrievable ballots that are not counted until election day, allowing for the removal of the ballot cast by an early voter who dies.[79] But North Carolina is highlighted as the exception rather than the rule,[80] resulting in the disparate treatment of early voters within the states that do not have a retrievable ballot mechanism.

Even within the various voting districts, voters are subject to dissimilar treatment though their absentee ballots are similarly cast. In the states that do not have statutory guidelines as to the legitimacy of ballots cast by deceased voters but rather employ unofficial "opinions" about their merits, the ultimate decision inevitably is left to the local election officials to determine whether

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75. *Bush*, 531 U.S. at 104-05; *see also* Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.").

76. *Early Voting*, *supra* note 70.

77. *See* Beth Potier, *Trust, Transparency, Democracy: Radcliffe Fellow Explains Why Electronic Voting is Problematic*, HARV. U. GAZETTE, Oct. 28, 2004, *available at* http://www.news.harvard.edu/gazette/2004/10.28/09-mercuri.html.

78. *Early Voting*, *supra* note 70.

79. *Id.*

80. *Id.*

these votes will count.[81] Consequently, some of the votes within this class get counted whereas others are rejected by the local election board.[82] This leads to vote dilution in the counties or precincts where the absentee votes are counted or, conversely, increased voting power where the votes are discarded.[83] Though a state is not held to a standard of perfection for the election mechanisms it creates or for the success of their enforcement,[84] administrative methods that arbitrarily create this sort of disparate treatment violate the fundamental concept of equal protection.

There is another situation, however, in which these categorizations can disadvantage voters. Specifically, United States citizens are guaranteed the right to equal representation at the federal level.[85] Admittedly, there is "no federal constitutional right to vote ... for the President."[86] States can rescind the privilege to vote for electors at any time, and, therefore, there is no guarantee of an equal voice in this specific process.[87] Similarly, representation in the Senate is fundamentally *un*equal due to the constitutional framework which commands that each state will be represented by two members of the Senate.[88] Yet the Framers of the Constitution determined that there should be one house of Congress in which each citizen's interest is similarly protected, guaranteeing equal representation within the House of Representatives.[89]

The Constitution provides for the representatives to be allocated among the states "according to their respective [n]umbers," provided that no representative stands for fewer than 30,000 citizens, unless a state is composed of fewer than 30,000 people, in which case it

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81. *Id.*

82. *Id.*

83. *See* Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

84. *See* Griffin v. Roupas, 385 F.3d 1128, 1132 (7th Cir. 2004).

85. U.S. CONST. art. I, § 2, cl. 3.

86. Bush v. Gore, 531 U.S. 98, 104 (2000) (citing U.S. CONST. art. II, § 1; McPherson v. Blacker, 146 U.S. 1, 28-35 (1892)).

87. *Id.*

88. U.S. CONST. art. I, § 3. *See generally* Misha Tseytlin, Note, *The United States Senate and the Problem of Equal State Suffrage*, 94 GEO. L.J. 859 (2006).

89. *See* FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION 27-28 (1999).

would have one representative.[90] The Supreme Court concluded that the House of Representatives was intended to "represent people as individuals, and on a basis of complete equality for each voter."[91] The seats are reapportioned every ten years in order to ensure that they are allocated evenly throughout the population.[92] Currently, the target number for each representative's district is 646,952 residents.[93] Though in reality the actual number of people that each representative serves is slightly smaller than the target in some states and somewhat larger than the target in others,[94] the Census Bureau redistributes the seats in the House of Representatives every ten years in an effort to achieve the most equitable distribution feasible.[95]

If a certain class of voters is disenfranchised in one state but is permitted to vote in another, then a citizen's power over the electoral process, in the state with a greater number of eligible voters per elected seat, is "inevitably diluted."[96] It is simply an issue of mathematics: the fewer voters in a district, the greater the voting power of each individual and vice versa. Yet Article I and the Fourteenth Amendment, considered in concert, require that each voter has relatively the same amount of power in choosing his representative,[97] and, furthermore, that a state may not promote an

90. U.S. CONST. art. I, § 2.

91. Wesberry v. Sanders, 376 U.S. 1, 14 (1964).

92. 2 U.S.C. § 2a(a) (2006).

93. U.S. Census Bureau, United States Census 2000: Congressional Apportionment, http://www.census.gov/population/www/censusdata/apportionment/index.html (last visited Feb. 10, 2010).

94. *See* U.S. Census Bureau, Table 1. Apportionment Population and Number of Representatives, by State: Census 2000 (Dec. 28, 2000), http://www.census.gov/population/www/cen2000/maps/files/tab01.pdf.

95. For a detailed explanation about how the Census Bureau calculated these numbers in the 1990 census, see U.S. Census Bureau, Computing Apportionment, http://www.census.gov/population/www/censusdata/apportionment/computing.html (last visited Feb. 10, 2010).

96. Missouri *ex rel.* Bush-Cheney 2000, Inc. v. Baker, 34 S.W.3d 410, 413 (Mo. Ct. App. 2000) ("Courts should not hesitate to vigorously enforce the election laws so that every properly registered voter has the opportunity to vote. But equal vigilance is required to ensure that only those entitled to vote are allowed to cast a ballot. Otherwise, the rights of those lawfully entitled to vote are inevitably diluted.").

97. "[C]onstrued in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964).

imbalance in this representation arbitrarily.[98] Permitting these absentee and advance voting ballots to count in some states but not in others shifts this important balance.

When evaluating the equal protection implications of discrediting legally cast ballots of voters who die before the election, it is essential to identify when the right to vote originated. It is not a question of whether the deceased should be able to vote but whether a person's vote should be treated and weighted equally once the right to vote is exercised. There is nothing in the Constitution or elsewhere in federal law that defines the right to vote solely in terms of a person living through 12:01 a.m. "on the Tuesday next after the first Monday in November."[99] Rather, a more logical conclusion would use the state's actions to define when the right is generated, concluding that the right to vote absentee comes into existence once the state offers it to qualified electors and the prescribed election period begins.[100] Because the voter is given the legal opportunity to take advantage of this enfranchisement and he exercises this right before his death,[101] this Note argues that his vote should be afforded equal import.

D. Can Dead Voters Have Equal Protection Rights?

> *Every cause of action whether legal or equitable ... shall survive either the death of the person against whom the cause of action is or may be asserted, or the death of the person in whose favor the cause of action existed, or the death of both such persons.*[102]

When discussing the equal protection issues surrounding this class of voters, it is natural to question whether voters who die

98. Of course, the state cannot be responsible for disparity as a result of disproportionate voter turnout among the various districts. Rather, it is prohibited from *creating* unequal methods of representation. *See supra* note 84 and accompanying text.

99. 3 U.S.C. § 1 (2006); *see also* 2 U.S.C. §§ 1, 7 (2006).

100. *Cf.* Griffin v. Burns, 570 F.2d 1065, 1069 (1st Cir. 1978) (affirming lower court's finding of disenfranchisement because voters had cast their absentee ballots "in reliance on absentee and shut-in ballot procedures announced by state officials").

101. *See* Bush v. Gore, 531 U.S. 98, 104-05 (2000).

102. VA. CODE ANN. § 8.01-25 (2007).

before the election can even have equal protection rights.[103] This is an important area in the debate surrounding these votes, and one should consider arguments of mootness. Areas of the law other than those dealing with election administration and disputes are instructive when evaluating whether an equal protection claim on behalf of the deceased voter is tenable.

1. Analysis by Analogy: Wrongful Death, Civil Rights, and Privilege

There are a variety of circumstances in which the law recognizes civil liability on behalf of a decedent. The classic example in tort law is wrongful death.[104] This type of tort is the law's recognition that, absent a mechanism for a party—other than the one who was directly injured—to bring suit, there will be some cases in which a tortfeasor will not bear the burden of liability.[105] Accordingly, state laws provide the survivors of the deceased with a mechanism for bringing a claim against the wrongdoer.[106]

These types of survivorship actions also extend to civil rights cases. Congress has expressly provided that civil rights infringements are actionable for civil liability.[107] In determining whether survivors of a deceased may bring suit for these violations, however, the federal government defers to state survivorship statutes to define who, if anyone, can initiate a cause of action.[108] When a state provides for a cause of action on the decedent's behalf[109] and federal

103. The debate over when a person is considered to be a person, such as the debate over when life begins and ends, is beyond the scope of this Note.

104. *See, e.g.*, VA. CODE ANN. § 8.01-50 (2007).

105. Admittedly, when calculating damages in a wrongful death suit, the court does not look to compensate for the value of the decedent's life but rather aims to compensate the survivors, who are deprived of their spouse, children, et cetera, for the loss they incur. Thomas R. Ireland, Walter D. Johnson & James D. Rodgers, *Why Hedonic Measures Are Irrelevant to Wrongful Death Litigation*, 2 J. LEGAL ECON. 49, 50 (1992). The underlying principles in support of a wrongful death framework, however, are applicable to the case at hand.

106. *See, e.g.*, VA. CODE ANN. § 8.01-50 (2007) (vesting the surviving cause of action with the "personal representative" of the deceased).

107. 42 U.S.C. § 1983 (2006).

108. Robertson v. Wegmann, 436 U.S. 584, 589-90 (1978).

109. *Id.* at 591 n.7.

law does not preempt such a provision,[110] these civil actions are upheld in federal court.[111]

Privilege is another area in which the law recognizes the continued rights of the deceased. For each of the three main classifications of privileged communications—attorney-client, doctor-patient, and marital—courts have upheld the privacy protections of privilege even after one, or both, of the parties has died. In the realm of attorney-client privilege, the Supreme Court erected a nearly impenetrable bulwark around these confidential conversations.[112] The Court allows only a limited exception for "litigation between the testator's heirs" as to the decedent's intentions regarding the disbursement of his estate.[113] This strong privilege defense reflects the Court's reasoning that a person may be hindered from full disclosure should the protection be extinguished upon death, thereby undermining the primary purpose of the privilege defense.[114]

This posthumous privilege defense is not exclusive to attorney-client privilege. Courts also have upheld state evidentiary rules protecting the doctor-patient privilege of a deceased patient, reasoning similarly that "[t]he purpose of the laws would be thwarted, and the policy intended to be promoted thereby would be defeated, if death removed the seal of secrecy from the communications and disclosures which a patient should make to his physician."[115] Likewise, marital privilege continues even after the death of a spouse.[116] Marital conversations are presumptively confidential

110. *Id.* at 590.

111. *Id.* at 584.

112. Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998) ("It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of a client in a case such as this."); *see also* Will v. Tornabells, 217 U.S. 47, 68 (1910).

113. *Swidler & Berlin*, 524 U.S. at 405 (quoting United States v. Osborn, 561 F.2d 1334, 1340 (9th Cir. 1977)).

114. *Id.* at 407-08.

115. Westover v. Aetna Life Ins. Co., 1 N.E. 104, 105-06 (N.Y. 1885); *see also* Johnson v. State, 770 S.W.2d 128, 132 (Ark. 1989) (citing ARK. R. EVID. 503); Harrison v. Sutter St. Ry. Co., 47 P. 1019, 1022 (Cal. 1897) (citing *In re* Estate of Flint, 34 P. 863 (Cal. 1893)).

116. *See* Salamon v. Indem. Ins. Co., 10 F.R.D. 232, 233 (S.D.N.Y. 1950); Katherine O. Eldred, Comment, *"Every Spouse's Evidence": Availability of the Adverse Spousal Testimonial Privilege in Federal Civil Trials*, 69 U. CHI. L. REV. 1319, 1333 (2002). *But see* Trammel v. United States, 445 U.S. 40, 53 (1980) (modifying the rule so that the witness-spouse alone has the right to waive the privilege).

unless affirmative evidence demonstrates the parties did not intend for the exchange to be private.[117]

These examples illustrate the law's respect for the rights of a decedent and the importance of legal liability even after the injured party dies to encourage potential tortfeasors to take greater care before a cause of action arises.[118] The reinforcement of privilege also indicates a policy decision by the courts that the functionality and integrity of the legal system is best served by strengthening rather than abating the protection provided to these types of communications.[119] To promote certainty and to further the goals contemplated by the privilege shield, these safeguards are enforced even after a person's death.[120]

A number of the same considerations are at work within the voting context. Were a decedent's survivors unable to bring an action on his behalf when his vote is unfairly rejected, there would never be a legal framework through which discriminatory legislation of this kind could be challenged. No party would ever have standing to sue, and a constitutional challenge would not have the chance to advance to a judgment on the merits.[121]

Furthermore, although the policy concerns at work in the privilege context protect against the undesirable revelation of information after death, the greater implications of the privilege framework are applicable to the enfranchisement of deceased voters. Privilege guarantees a posthumous protection for protected communications to encourage people to obtain legal service, seek medical care, and develop a candid marriage. Likewise, continued defense of the legal exercise of citizens' voting privilege promotes the effective utilization of that privilege. In both circumstances, the legal recognition of these rights, even after the death of the one by whom it was exercised, is meant to advance the employment of these rights before death.

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117. Merlin v. Aetna Life Ins. Co., 180 F. Supp. 90, 92 (S.D.N.Y. 1960).

118. *See* Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559, 575-76 (1985).

119. *See, e.g.*, *Swidler & Berlin*, 524 U.S. at 407-08.

120. *Id.*

121. For a thorough discussion of the standing doctrine, see Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663 (2007).

Finally, the law's treatment of privilege—that a privilege is not subject to a new definition simply because of the death of one of the parties—indicates deference to legal certainty which is similarly applicable to the electoral system. Just as a person who exercises a privilege before death should not have its protections stripped away after death, neither should a voter who exercises the legal right to vote have his ballot robbed of its political significance upon his death. Instead of choosing to count or discard votes based on whether the voter is still alive at a certain time on a certain day, a system that counts all votes cast during a legal election period recognizes that the strength and stability of the American electoral process rests on its esteem for each person's vote and the certitude that each appropriately tendered vote will be counted.

2. Effect on Surviving Voters

Another class of voters whose equal protection rights are affected includes the voters in precincts that count the ballots of deceased voters. The Supreme Court has recognized vote dilution in a variety of contexts, observing that "[a] citizen's right to a vote ... has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box."[122] Accordingly, a member of the electorate whose voting power is weakened because of the arbitrary counting of votes in some districts and discrediting of votes in others is able to state "a plain, direct and adequate interest in maintaining the effectiveness of [his] votes."[123] This dilutive effect qualifies the voter to bring an equal protection claim.[124]

E. The Likelihood of Success (or Failure) on the Merits

Even if a plaintiff overcomes standing, the likelihood of success on the merits of an equal protection claim is still very low. Because rules regarding absentee voting are evaluated under the rational

122. Baker v. Carr, 369 U.S. 186, 208 (1962) (citations omitted).
123. Coleman v. Miller, 307 U.S. 433, 438 (1939).
124. *Baker*, 369 U.S. at 208.

basis test,[125] wide latitude would be given to the states in defending their vote-counting guidelines. There are a number of justifications a state could advance, such as a legislative belief that the administrative convenience derived from a certain policy would make an equitable result more achievable.[126] The mechanisms adopted by the states in managing absentee voting do not have to be perfect but rather reasonably fair.[127] As long as the court finds the states' explanations to be rational, the statute would not be invalidated. Accordingly, though the absentee policies in some states certainly treat some votes differently than others, equal protection arguments, standing alone, are somewhat tenuous. A further motivation is needed to compel federal intervention in the debate over these types of ballots. That interest—the necessity of voter faith in the electoral system—is considered in Part III.

III. NECESSITY OF VOTERS' FAITH IN THE SYSTEM

> *Legitimacy requires that governments conduct elections in a way that is objectively fair and widely perceived as fair. Therefore, a central motivation for nonpartisan and uniform system of election administration is "that every citizen, every voter, be treated equally and have an equal opportunity to participate."*[128]

Regardless of the success or failure of an equal protection remedy at law, another argument supporting the adoption of a uniform national standard regulating the consideration of absentee ballots persists. Namely, the Supreme Court recognized a "sufficiently important interest"[129] in "the preservation of public faith in democratic

125. *See supra* notes 58-64 and accompanying text.

126. *Cf.* Reed v. Reed, 404 U.S. 71, 76 (1971) (holding that administrative convenience is not a sufficiently important objective to legitimize a statute preferring males to females for estate administrator).

127. *See supra* note 84 and accompanying text.

128. Frank Emmert, Christopher Page & Antony Page, *Trouble Counting Votes? Comparing Voting Mechanisms in the United States and Selected Other Countries*, 41 CREIGHTON L. REV. 3, 3 (2007) (quoting Jean-Pierre Kingsley, *The Administration of Canada's Independent, Non-Partisan Approach*, 3 ELECTION L.J. 406, 411 n.3 (2004)).

129. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 136 (2003) (citations omitted).

government."[130] This interest was articulated in the context of individual campaign contribution limitations,[131] an area that receives heightened scrutiny because of its implication of the right to freedom of speech.[132] If this justification could be accepted as a legitimate restriction on First Amendment rights—one of the most sacrosanct areas of constitutional protection—then congressional action regarding the counting of absentee ballots seems certain to survive judicial scrutiny, even if it slightly encroaches on a field in which the states have generally exercised primary control.[133]

The interest in "the prevention of corruption and the appearance of corruption"[134] is significant enough to urge congressional action, though such action may be unpopular. If citizens do not have confidence in the voting system, then discriminatory policies not only undermine its integrity but actually impair the voting process because people are less likely to exercise their voting rights.[135] Some refer to the "Calculus of Voting" model which reasons that a voter takes the time to exercise the franchise if there are positive rewards to be gained from doing so.[136] According to this formula, the rewards are calculated:

> by multiplying the benefits (B) an individual receives when his preferred candidate wins over a less preferred candidate by the probability (P) that his vote will make a difference plus the benefits one receives from voting as an act of fulfilling one's duty

130. Andrew N. DeLaney, Note, *Appearance Matters: Why the State Has an Interest in Preventing the Appearance of Voting Fraud*, 83 N.Y.U. L. REV. 847, 862 (2008); *see also* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1617 (2008).

131. Buckley v. Valeo, 424 U.S. 1, 28-29 (1976).

132. Davis v. Fed. Election Comm'n, 128 S. Ct. 2759, 2770-72 (2008).

133. *See* Hayward D. Reynolds, *Deconstructing State Action: The Politics of State Action*, 20 OHIO N.U. L. REV. 847, 884 (1994). Because absentee voting is neither constitutionally required nor constitutionally proscribed, *see supra* notes 58-62 and accompanying text, congressional intervention in this area of weakly established rights should be upheld if the government can articulate a sufficient interest for its actions.

134. *Buckley*, 424 U.S. at 25.

135. Ruda, *supra* note 55, at 249 (citing 148 CONG. REC. S1226, S1229 (daily ed. Feb. 27, 2002)(statement of Sen. Bond)); *see also* Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 288-90 (2007) (addressing the need for voters to have faith in remedial measures undertaken after a "failed" election).

136. DAVID B. MUHLHAUSEN & KERI WEBER SIKICH, THE HERITAGE FOUNDATION: LEGAL ISSUES, NEW ANALYSIS SHOWS VOTER IDENTIFICATION LAWS DO NOT REDUCE TURNOUT 3 (2007), http://www.heritage.org/research/LegalIssues/cda07-04.cfm.

> or civic obligation (D) minus the costs of voting (C) [R = PB – C + D].[137]

Thus, a voter's perception that his ballot will make a difference—or at least has the possibility of making a difference—positively influences his tendency to vote.[138] A sampling of statistical information supports the assertion that the electorate's belief in the integrity of the voting system increases voter turnout.[139]

Some scholars assert that the incidence of deceased voting is low.[140] But when an election comes down to just hundreds of votes, every vote counts.[141] Therefore, regardless of whether a party lacks standing to bring an equal protection challenge to the constitutionality of certain voting laws, faith in the voting system is a sufficient concern meriting action by the federal government when remaining inactive would undermine the system's integrity. Though evidence that this functional disparity actually causes voters *not* to vote is limited, the inference drawn from available information is clear: people are more likely to exercise the right to vote when they believe their voice will have an impact.[142] The true story of a dying woman deliberately filling out her absentee ballot as her last conscious act

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137. *Id.* (citing William Riker & Peter Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 1, 25-42 (1968)); *see also* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889-99 (1999) (describing the theory of "remedial deterrence," which reasons that "raising the 'price' of a constitutional violation by enhancing the remedy will, all things being equal, result in fewer violations" and vice versa).

138. MULHAUSEN & SIKICH, *supra* note 136, at 3, 6.

139. *See* John R. Lott, Jr., *Evidence of Voter Fraud and the Impact that Regulations To Reduce Fraud Have on Voter Participation Rates* 10-11 (Univ. Md. Found., Working Paper Series, 2006), *available at* http://ssrn.com/Abstract=925611.

140. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 656 & n.121 (2007). For example, an audit report of the 2006 election in Montana indicated that there was "[n]o evidence ... of deceased individuals voting." *E-Vote: Montana Elections Get Clean Bill of Health*, GOV'T TECH., Aug. 21, 2007, http://www.govtech.com/gt/132088.

141. *See Early Voting*, supra note 70 (noting that since "an average of 455 voting-age people die in Florida every day, and the 2000 presidential election was decided by a mere 537 votes, dead votes that slip through the cracks could become a meaningful bloc"); *see also* Chris Welch, *MN Board To Certify Franken's Win in Tight Senate Race*, CNNPOLITICS.COM, Jan. 4, 2009, http://politicalticker.blogs.cnn.com/2009/01/04/mn-board-to-certify-frankens-win-in-tight-senate-race/ (reporting that the Senate candidate was declared elected by a 225-vote margin).

142. *See, e.g.*, Mary Jane Smetanka, *Voters Turned On, and Turn Out*, STAR TRIBUNE (Minn.), Nov. 5, 2008, at 13A (recounting the excitement of Demitu Abdissa, a first-time voter).

can lead to no other conclusion than that she would be less likely to vote if she knew that her vote would be arbitrarily excluded.[143] Coupled with a class of citizens that simply does not see the point in voting when an election is decided by the courts rather than the people,[144] the principles that are employed by many of the states serve to discourage rather than encourage participation in the process. A government statute protecting all legally cast votes would help to dispel the distrust that many voters currently have in electoral administration and potentially aid in the effort to "get out the vote."

IV. RECOMMENDATION

> *Elections are fundamentally imperfect ... no matter how many positive reforms we enact, there will always be a few incredibly close elections that lie "within the margin of litigation."*[145]

To protect the civil liberties of those who exercise their right to vote and to promote certainty in the electoral system, Congress should legislate in this area. Equal protection requires that the law, to the extent it is capable, reject election mechanisms that would value one citizen's vote over another. There are two possible ways that Congress could approach ballots cast by voters who die before election day: (1) disqualifying all such ballots, or (2) counting such ballots as long as each vote was lawfully executed during a legal election period. Either approach should be capable of withstanding a court's rational basis review in light of the federal interest in maintaining the equality and integrity of the election process through reasonable mechanisms. The latter option, however, produces results that are more equitable than the former.

Ballot counting is inherently prone to human error, and technological advances do not automatically solve the problem. Identifying fraudulent ballots, such as those cast in the name of a person who died many years before, is an extremely time-consuming and

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143. *See Early Voting*, *supra* note 70.

144. *See* Abby Goodnough, *Reassurance for the Florida Voters Made Wary by the Electoral Chaos of 2000*, N.Y. TIMES, May 24, 2004, at A18.

145. Emmert, Page & Page, *supra* note 128, at 34 (quoting Michael J. Pitts, *Heads or Tails? A Modest Proposal for Deciding Close Elections*, 39 CONN. L. REV. 739, 739, 741 (2006)).

difficult task. Added to that difficulty are the demands for a quick turnaround in calculating and certifying the results. Ultimately, local election boards, many of which are chronically understaffed and short on resources,[146] could better expend their energies by focusing on detecting election fraud rather than poring over the obituaries[147] in order to disqualify legitimate absentee ballots.

Counting all ballots cast in a legal election period not only would more realistically meet the goal of equal treatment of the electorate but also would promote faith in voter enfranchisement. It would signify the government's recognition that the right to vote is revered, and it would dispel people's fears that their vote might be discredited on bad information or misidentification.[148] Furthermore, it would encourage the electorate to exercise this right to vote. Elderly and terminally ill voters will continue to demand their right to representation if they believe that their vote will be counted along with the others.[149] There will be greater, though still imperfect, trust in the validity of a vote legally cast by a citizen who is entitled to do so and an improved faith in the process that brought their leaders to Washington.

Although state authority and principles of federalism should be given due deference, the most effective means of establishing a fair and straightforward national standard is through congressional intervention. Because HAVA is tied to congressional spending, Congress has broad authority to require the states to adopt certain standards as a condition for receiving federal funds, further insulating such legislation from invalidation as an encroachment upon states' rights.[150] This bill should provide that all absentee or advance ballots cast during an authorized election period shall be

146. *See, e.g.*, Eric Rich & Rosalind S. Helderman, *Pr. George's Voting Glitches Highlight Training Problems*, WASH. POST, Sept. 24, 2006, at A01.

147. Under HAVA, states also are to "have registration systems in place that allow voters' registration information to be matched against driver's license and social security records and that allow the removal of ineligible voters from the rolls." Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 478-79 (2008).

148. *See, e.g.*, Robert E. Pierre, *Botched Name Purge Denied Some the Right To Vote*, WASH. POST, May 31, 2001, at A01.

149. *See Early Voting*, *supra* note 70; Chris Wilson, *Can a Dead Woman Vote?: Will the Late Florence Steen's Absentee Ballot Count in South Dakota's Primary?*, SLATE, May 14, 2008, http://www.slate.com/id/2191402.

150. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 212 (1987) (upholding a federal law that conditioned state receipt of federal highway funding on the minimum drinking age).

counted, provided there is no reason to suspect fraudulent or illegal activity.

Congress is not obligated, however, to attach this regulation to spending. The legislature has the constitutional authority to regulate elections, enabling Congress to adopt a statutory provision requiring the uniform treatment of votes in these situations.[151] A third approach—adopting a congressional resolution—might best navigate the often rocky relationship between the federal and state governments. As a nonbinding action, a congressional resolution would encourage the states to adopt this standard of presumed legitimacy for themselves. Rather than mandating the way that states view ballots cast by voters who die before election day, Congress would simply recommend that the states move in the same direction. Though often utilized when Congress wants to promote a uniform national policy in an area in which it has no lawmaking authority,[152] the practical result of such a resolution is minimal since compliance with congressional urging is unenforceable.

Though Congress could legislate outside of the HAVA spending mechanism or could choose to exercise a nonconfrontational approach through simply drafting a resolution, an amendment to HAVA or some other piece of legislation that attaches federal regulation to federal spending strikes the appropriate balance between deference for states' rights and voters' rights. Further, it will afford three primary benefits to the voting franchise: (1) it will define a uniform approach of presumed legitimacy to absentee and advance ballots, (2) it will eliminate the time-consuming and difficult task of attempting to identify and isolate ballots of those who have passed away, and (3) it will preserve the voice of every citizen who takes the time to participate in her government.

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151. Of course, this mandate could only pertain to votes for federal, as opposed to state, offices. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 186-87 (2003).

152. *See, e.g.*, H.R. Con. Res. 45, 98th Cong. (1986) (enacted) ("Expressing the *sense of the Congress* that a uniform State act *should be developed and adopted* which provides grandparents with adequate rights to petition State courts for privileges to visit their grandchildren following the dissolution ... of the marriage of such grandchildren's parents.") (emphasis added).

CONCLUSION

There are a variety of pressing concerns that Americans have regarding the electoral system. Although remedying one of these problems will not dispel all of the uneasiness surrounding election administration, it will be a positive step signifying the government's commitment to providing fair and accurate elections. The increase in absentee and early voting suggests that congressional action would be useful in defending the value of each vote.

In an effort to weigh state supervisory power over elections against the rights of qualified voters, Congress must determine which issues it will address and which it will leave to individual state legislatures. Because a policy protecting absentee and advance ballots cast by voters who die before the election renovates the law with a paintbrush rather than a bulldozer, it is a prime area for federal legislation as an important yet conservative first step. Yet even if Congress declines to exercise its authority in this area, each state should evaluate its philosophy about absentee voters' rights to ensure that when a citizen uses her voice it will not be silenced.

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