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### **Voter Registration and Institutional Reform: Lessons from a Historic Election**

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#### **Introduction**

Posterity will recall 2008 as the year in which the United States of America elected its first African American President. It may also be remembered as heralding a new era in American politics through an influx of newly registered voters that altered the pre-existing electoral landscape. Given the historic significance of this election, it is tempting to sweep aside the election administration issues that have dominated the last two presidential election cycles, including such matters as voting machines, provisional ballots, and voter registration. The margin of victory in the presidential election was sufficiently large to overshadow any difficulties in these areas, eliminating any doubt about the true winner.

A closer look reveals that serious problems with the infrastructure of American democracy remain. Topping the list is voter registration, which turned out to be *the* election administration issue of 2008, just as were voting machines in 2000 and provisional ballots in 2004. The significance of voter registration is nothing new. Both the parties and voting rights groups have long recognized that elections, from the presidential race on down, may be won and lost based on who is registered and how voter lists are maintained. But voter registration rules and practices assumed new significance in 2008. Across the country, battles emerged over the conduct of registration drives and the maintenance of registration lists, with those on the right mostly concerned that lax practices would lead to fraudulent voting and those on the left worried that eligible voters would be left off the lists. Both sides took the battle to court in swing states such as Florida, Michigan, Ohio, Washington, and Wisconsin.<sup>1</sup>

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<sup>1</sup> For a listing of significant election administration cases, past and pending, see Election Law @ Moritz, Major Pending Cases: Sorted by Case Name, <http://moritzlaw.osu.edu/electionlaw/litigation/index.php> (last visited Jan. 5, 2008).

This article attempts to contextualize and disentangle the current debate over voter registration, suggesting a framework for federal reform. Part I provides historical background on voter registration, from its manipulation in the late nineteenth and early twentieth centuries through the Help America Vote Act of 2002 (“HAVA”). Part II assesses the debate in the 2008 election season, which pitted advocates of broader access against those worried about fraud, with the former urging rules designed to ensure that no eligible voter is excluded and the latter urging stricter measures to ensure that no ineligible person can vote. The focal point of this dispute was the process of “matching” voter registration records against other state records, an issue that found its way to the U.S. Supreme Court in *Ohio Republican Party v. Brunner*.<sup>2</sup>

Part III addresses some underlying institutional weaknesses in American election administration that the 2008 election reveals and that Congress must account for when it turns to voter registration reform. The time has come to consider seriously a greater federal role in maintaining voter registration lists, perhaps moving to a universal registration system for federal elections. But for such registration reform to succeed, it is necessary to create a federal institution capable of administering registration in a fair and neutral manner. Institutional reform is thus a necessary prerequisite to systemic improvements in voter registration and, ultimately, to a more inclusive and representative electorate.

## I. Registration in Historical Context

Throughout its history, voter registration has served a dual purpose. The first is the laudable goal of promoting electoral integrity by preventing ineligible people from voting and by ensuring that those who are eligible vote only once. The other, less noble purpose that registration has served is to prevent eligible citizens from voting.<sup>3</sup>

Among the most historically noteworthy examples of disfranchisement-through-registration are the manipulations of voter lists in northern cities in the late nineteenth and early twentieth centuries.<sup>4</sup> During this time, there were good reasons for worrying about voter fraud. As more people moved from rural to urban areas, election officials did not personally know every person who showed up to vote at a given precinct on Election Day.<sup>5</sup> Although some rules served a legitimate purpose, those in power also used registration rules to keep voters viewed as undesirable by those in power—such as recent immigrants from southern and eastern Europe—from voting.<sup>6</sup> The most egregious examples of registration manipulation occurred in the South. White Democrats

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<sup>2</sup> *Ohio Republican Party v. Brunner*, 129 S. Ct. 5 (2008).

<sup>3</sup> I provide a more detailed account of this history in Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL OF RTS. J. 453, 456–61 (2008).

<sup>4</sup> *Id.* at 6–9.

<sup>5</sup> ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 152 (2000).

<sup>6</sup> *Id.* at 157; Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL’Y REV. 370, 383–84 (1991).

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manipulated voter registration rules to exclude African Americans.<sup>7</sup> Among the tactics employed were lengthening registration requirements, demanding detailed information, requiring registrants to have witnesses “vouch” for them, and giving registration boards discretion over who was added to the rolls.<sup>8</sup>

We have, of course, come a long way since the nadir of voter disfranchisement. Although state and local authorities retain discretion over the maintenance of voter registration rolls, federal laws have eliminated some of the most egregious disfranchising practices. Most notable is the Voting Rights Act of 1965,<sup>9</sup> which dismantled the system of voting barriers that had kept African Americans from voting, and which was later amended to eliminate language barriers. The other noteworthy pre-HAVA federal law affecting registration is the National Voter Registration Act of 1993 (“NVRA”). Although commonly known as “Motor Voter,” the law did much more than require registration opportunities to be made available at motor vehicle agencies. It also required state agencies providing public assistance and services for people with disabilities to offer registration, restricted states’ ability to “purge” voters from lists based on a failure to vote, and provided a standardized means by which voters could register by mail.

Still, voter registration remains mostly a matter of state law, and the contemporary debate over voter registration echoes those that occurred in the nineteenth century through most of the twentieth century. It is clear that voter registration practices can block eligible citizens from voting or having their votes counted. In the 2000 election, for example, voter registration problems probably accounted for more lost votes than either voting machines or polling places. The Caltech/MIT Voting Technology Project estimated that 1.5 to 3 million votes were lost due to registration problems in that election.<sup>10</sup>

HAVA was designed to address a number of existing problems in election administration, including voter registration. Congress’ main goals in enacting HAVA were to promote access while reducing the risk of fraud or, as one of its primary co-sponsors put it, to make it “easier to vote” but “harder to cheat”—with Democrats more concerned with the former objective and Republicans with the latter.<sup>11</sup> The version ultimately enacted was a compromise, designed to serve both ends. It provided for new voting technology and required provisional ballots, both reforms designed to reduce the number of lost votes. It also included a documentary voter identification requirement,

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<sup>7</sup> Richard H. Pildes, *Democracy, Anti-Democracy and the Canon*, 17 CONST. COMMENT. 295, 302 (2000); Daniel P. Tokaji, *Representation and Raceblindness: The Story of Shaw v. Reno*, in RACE LAW STORIES 497, 503 (Rachel F. Moran & Devon Wayne Carbado eds., 2008).

<sup>8</sup> J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 34 (1999).

<sup>9</sup> 42 U.S.C. § 1973 (2006).

<sup>10</sup> CALTECH/MIT VOTING TECH. PROJECT, VOTING: WHAT IS, WHAT COULD BE 9 (2001).

<sup>11</sup> Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1213 (2005) (quoting Rep. Hoyer).

applicable to first-time voters who registered by mail, designed to prevent ineligible persons from voting.<sup>12</sup>

Like other parts of the statute, HAVA's registration reforms may be understood as attempting to promote both access and integrity. The most significant registration reform in HAVA was to require each state to have in place a computerized statewide voter registration list,<sup>13</sup> commonly referred to as a "statewide registration database." Prior to HAVA, voter rolls were kept at the local level in most states, making it difficult to keep track of voters when they moved from county to county within a state.<sup>14</sup> HAVA also required that state chief election officials enter into agreements with their state motor vehicle authorities to "match" registration and motor vehicle records against one another.<sup>15</sup> The statute is less than completely clear, however, on precisely how that matching should be conducted and on the appropriate consequences of a failed match. As Part II explains, this vagueness in HAVA led to litigation during the 2008 election season.

## II. The Battle of 2008: Registration Matching

There are two major reasons for the heightened significance of registration rules in 2008. The first is the statewide registration database requirement.<sup>16</sup> This requirement was originally slated to take effect in 2004, but HAVA allowed states to extend their deadline until 2006,<sup>17</sup> and most states availed themselves of this extension.<sup>18</sup> The other reason for the increased significance of voter registration is a change in the on-the-ground reality. The 2008 election saw a broad-based effort to increase voter registration, particularly on the part of progressive groups and supporters of then-Senator Barack Obama's campaign.

The move to increase voter registration triggered something of a backlash, with Republicans and their allies alleging that private voter registration drives—particularly those conducted by ACORN—resulted in widespread registration fraud.<sup>19</sup> In some states, this battle spilled into the courts. Progressives alleged that some election officials had engaged in overly restrictive list maintenance practices, while conservatives alleged that others had been insufficiently aggressive in purging ineligible voters from the rolls. The dispute even seeped into the third and final presidential debate, when Senator John McCain accused ACORN of being "on the verge of maybe perpetrating one of the greatest frauds in voter history in this country, maybe destroying the fabric of

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<sup>12</sup> For a summary of these provisions, see *id.* at 1214–18.

<sup>13</sup> 42 U.S.C. § 15483 (2006).

<sup>14</sup> NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 29 (2001).

<sup>15</sup> 42 U.S.C. § 15483(a)(5)(B)(I) (2006).

<sup>16</sup> *Id.* § 15483(a)(1).

<sup>17</sup> *Id.* § 15483(d).

<sup>18</sup> Tokaji, *supra* note 11, at 1216.

<sup>19</sup> For a summary of the allegations surrounding ACORN, see Deborah Hastings, *ACORN Controversy: Voter Fraud or Mudslinging?*, ASSOCIATED PRESS, Oct. 18, 2008, available at [http://www.usatoday.com/news/politics/2008-10-18-3995453887\\_x.htm](http://www.usatoday.com/news/politics/2008-10-18-3995453887_x.htm).

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democracy.”<sup>20</sup> Hyperbolic though this accusation may be, it crystallizes the centrality of voter registration in the 2008 presidential race.

In truth, the battle over voter registration rules had been brewing for quite a while before the 2008 election. Even before the election season began in earnest, disputes over the maintenance of voter registration lists had emerged as an important issue to watch. In recent years, the U.S. Department of Justice (“DOJ”) has assumed an aggressive role with respect to voting fraud. Criminal prosecutions have grabbed the most attention, particularly as a part of the U.S. Attorneys scandal, in which the failure to prosecute voter fraud allegations with sufficient vigor appears to have partially motivated adverse employment actions.<sup>21</sup> Less highly publicized were the DOJ’s actions with respect to the maintenance of voter registration lists. During the Bush Administration, DOJ’s registration cases focused mainly on compelling states to prune or “purge” their registration rolls.<sup>22</sup> It devoted much less attention to enforcing those provisions of federal law that are designed to prevent the exclusion of eligible voters from the rolls.<sup>23</sup> In particular, the DOJ showed little interest in enforcing the NVRA’s requirement that registration opportunities be made available at public assistance offices. In sum, DOJ was principally focused on preventing fraud by pruning voting lists, and much less on ensuring the inclusion of eligible voters.<sup>24</sup>

With DOJ less active in this area, the burden of ensuring that all eligible voters were included on the rolls fell mainly to private advocacy groups. In the run-up to the 2008 election, the Brennan Center for Justice assumed an especially important role. The Brennan Center released a report in 2006 describing the risks of eligible voters being wrongly omitted from the rolls due to overly stringent “matching” protocols.<sup>25</sup> Among the risks were that voters’ registration information might not “match” motor vehicle

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<sup>20</sup> Jess Henig, *ACORN Accusations*, FACTCHECK.ORG, Oct. 18, 2008, <http://www.newsweek.com/id/164722>.

<sup>21</sup> See, e.g., Tokaji, *supra* note 3, at 28 n.232; Daniel P. Tokaji, *The Politics of Justice*, ELECTION LAW @ MORITZ, May 22, 2007, <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=15>; *Changing Tides: Exploring the Current State of Civil Rights Enforcement Within the Department of Justice: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 114–121 (2007) (statement of Joseph D. Rich, Director, Fair Housing Community Development Project); *Oversight Hearing on the Voting Section of the Civil Rights Division of the U.S. Department of Justice: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Dr. Toby Moore, Political Geographer, Voting Section, U.S. Department of Justice); MARK A. POSNER, THE POLITICIZATION OF JUSTICE DEPARTMENT DECISIONMAKING UNDER SECTION 5 OF THE VOTING RIGHTS ACT: IS IT A PROBLEM AND WHAT SHOULD CONGRESS DO?, 5–6 (2006), available at <http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf>.

<sup>22</sup> See Tokaji, *supra* note 3, at 27.

<sup>23</sup> *Id.* at 29.

<sup>24</sup> *Id.* at 27.

<sup>25</sup> Justin Levitt et al., *Making the List: Database Matching and Verification Processes for Voter Registration* (Brennan Center for Justice Voting Rights & Elections Series 2006).

records, due to the omission of a hyphenated name, the transposition of first and last names, the use of nicknames, or data entry errors.<sup>26</sup> Excluding voters from registration lists based on such a mismatch could therefore result in many voters being left off the rolls. The Brennan Center also commenced litigation in two states to prevent the erroneous exclusion of non-matched voters, securing a preliminary injunction in Washington state,<sup>27</sup> but failing to obtain relief in Florida.<sup>28</sup>

As the 2008 general election approached, the “matching” issue assumed greater significance. At the heart of this controversy is a vaguely written provision of HAVA pertaining to the maintenance of statewide registration lists. As described above, Section 303 requires every state to have such a computerized statewide registration list in place by 2006. It also mandates agreements between state election and motor vehicle authorities:

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.<sup>29</sup>

Section 303 further requires agreements between state motor vehicle authorities and the Commissioner of Social Security, “for the purpose of verifying applicable information” while ensuring confidentiality.<sup>30</sup>

What is clear about this provision is that there must be some sort of agreement between state election and motor vehicle authorities to “match information” in their respective databases “to the extent required . . . to verify the accuracy of the information provided on applications for voter registration.”<sup>31</sup> But it leaves open two major questions: (1) how such matching is to be accomplished, and (2) what the consequences of a failure to match should be.<sup>32</sup>

The first question requires states to balance the risks of excluding eligible voters against the risks of including duplicates or ineligible voters. An overly stringent matching protocol could result in many voter records *not* matching, despite the fact that

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<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Wash. Ass’n of Churches v. Reed*, 492 F. Supp. 2d 1264 (W.D. Wash. 2006).

<sup>28</sup> *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008).

<sup>29</sup> 42 U.S.C. § 15483(a)(5)(B)(i) (2006).

<sup>30</sup> *Id.* § 15483(a)(5)(B)(ii) & (C).

<sup>31</sup> As my colleague Nate Cemenska has pointed out, this is an important qualification. It implies that states need not match if they have enacted other means by which to ensure voter eligibility, such as ID requirements. Nathan Cemenska, *HAVA Matching: Is It Necessary?*, 11 RICHMOND J. OF LAW & PUB. INT. (forthcoming 2009).

<sup>32</sup> For a discussion of how different swing states resolved these issues, see NATHAN CEMENSKA & SARAH CHERRY, *KEY QUESTIONS FOR KEY STATES: EXECUTIVE SUMMARY* (2008).

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the voters are eligible and reside at the addresses listed on their registration application. Examples include:

- a discrepancy between the spelling of the voter's name in registration and motor vehicle records (e.g., a voter's last name is listed as "Worzelbacher" in registration records but as "Wurzelbacher" in motor vehicle records),<sup>33</sup>
- a discrepancy between the address in registration records and the address on the absentee voter application or envelope (e.g., 320 W. Broad St. instead of 302 W. Broad Street),
- a discrepancy between the driver's license or social security number in registration records and that in motor vehicle records (e.g., 3543 instead of 3534),
- the use of a maiden name in one record and the married name in another (e.g., Susan Rose rather than Susan Collins), and
- the omission of a hyphenated name in one record but not the other (e.g., Gabriel Marquez instead of Gabriel Garcia-Marquez).

The other unanswered question is what states are supposed to do if the information in voter registration and motor vehicle records do *not* match. Should they simply allow those voters to vote, regardless of whether there has been a mismatch? Should election officials make some further effort to verify their eligibility? Should voters whose information does not match be left off the list entirely? The consequence of this would be to compel the voter to cast a provisional ballot if she shows up to vote. Taking such voters off the list and compelling them to cast provisional ballots would in turn raise another question: What standards and procedures should states follow in counting such provisional ballots?

Arcane as these questions may seem, they are of great importance insofar as their resolution affects whose names show up on voter rolls and ultimately whose votes will be counted. Part of the reason that this issue did not attract much public attention before the 2008 general election was the states' lack of transparency with respect to their matching procedures. Matching procedures are not typically set forth in a statute or regulation, but are instead the product of internal guidelines and procedures that may not be easily accessible to the public. A study of seventeen states conducted shortly before the election found considerable variation in the matching practices followed in swing states.<sup>34</sup> Some states require an exact match, while others allow a substantial match based upon the judgment of officials. When a failed match occurs, only one of the states researched—Florida—prevented voters from casting a ballot that would be counted.<sup>35</sup> Most other states required voters to present documentary identification at the polls.<sup>36</sup>

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<sup>33</sup> Stephen Koff, *Joe the Plumber May Not Be Joe, and He May Need a Provisional Ballot*, CLEVELAND PLAIN DEALER POLITICS BLOG, Oct. 16, 2008, [http://blog.cleveland.com/openers/2008/10/joe\\_the\\_plumber\\_is\\_really\\_a\\_sa.html](http://blog.cleveland.com/openers/2008/10/joe_the_plumber_is_really_a_sa.html) (reporting that Joe the Plumber's name was misspelled as "Worzelbacher" rather than "Wurzelbacher" in the registration records of Lucas County, Ohio).

<sup>34</sup> CEMENSKA & CHERRY, *supra* note 32, at 10.

<sup>35</sup> *Id.* at 11.

<sup>36</sup> *Id.* at 11.

In two states that did *not* require voters to be left off registration lists based on a failed match, Republicans sued state election authorities to compel action. In Wisconsin, the state's Republican attorney general, joined by the Republican Party of Wisconsin, brought a state court action against the Government Accountability Board, which oversees election administration in the state. Although the prayer for relief in *Van Hollen v. Government Accountability Board*<sup>37</sup> was less than precise, Attorney General Van Hollen's petition alleged that the failure to "remove ineligible voters and to conduct or require HAVA checks" could result in tens of thousands of people being allowed to vote despite discrepancies that "may, in fact, provide evidence that they are not eligible to vote."<sup>38</sup> The state circuit court dismissed the case a few days before the election, finding that petitioners had failed to show that a violation of state or federal law had occurred or was about to occur.<sup>39</sup>

A similar argument was made in *Ohio Republican Party v. Brunner*.<sup>40</sup> In that case, a federal district court granted the state Republican Party's request for a temporary restraining order (TRO), finding that HAVA "requires matching for the purpose of verifying the identity and eligibility of the voter before counting that person's vote."<sup>41</sup> A panel of the Sixth Circuit stayed this order, concluding that the district court had misunderstood HAVA's requirements, but the Sixth Circuit granted en banc review and reinstated the district court's TRO. That led the U.S. Supreme Court to grant Ohio Secretary of State Jennifer Brunner's motion to stay the TRO. The unanimous per curiam opinion of the Court did not reach the merits, but instead reasoned that there was no private right of action to enforce HAVA's matching requirement.<sup>42</sup> The Supreme Court's opinion thus does not resolve what exactly HAVA requires when it comes to matching.

While HAVA is not crystal clear, the best reading of the statute is that it does not require that any adverse action be taken against the voter due to a failure to match. There is nothing in federal law that expressly requires voters to be left off registration lists based on a failure to match. Leaving voters off the list, moreover, would have unfortunate consequences, as the examples of Ohio and Wisconsin highlight. In Ohio, the Secretary of State estimated that approximately 200,000 of the almost 786,000 people

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<sup>37</sup> Documents from this case may be found at <http://moritzlaw.osu.edu/electionlaw/litigation/vanhollenv.gab.php>.

<sup>38</sup> Petition for Writ of Mandamus at 12, *Van Hollen v. Gov't Accountability Bd.*, No. 08-cv-004085 (Wis. Ct. App. October 23, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/VanHollen-Complaint.pdf>.

<sup>39</sup> Order at 16, *Van Hollen v. Gov't Accountability Bd.*, No. 08-cv-004085 (Wis. Ct. App. Oct. 23, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/VanHollen-Order-10-23-08.pdf>.

<sup>40</sup> Documents from this case may be found at <http://moritzlaw.osu.edu/electionlaw/litigation/ohiorepublicanpartyv.brunner.php>.

<sup>41</sup> Opinion and Order at 8–9, *Ohio Republican Party v. Brunner*, No. 2:08-cv-00913 (S.D. Ohio Oct. 9, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/R52Order.pdf>.

<sup>42</sup> *Brunner v. Ohio Republican Party*, 129 S. Ct. 5 (2008).



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who registered in 2008 were mismatched.<sup>43</sup> And in Wisconsin, four of the six members of the board that runs state elections failed the cross-check of registration and motor vehicle records.<sup>44</sup> Voters who don't match would still be entitled to cast a provisional ballot, but there is no telling whether those ballots would be counted. Directing voters toward provisional ballots has problems of its own. A significant number of these ballots in every election are not counted. Moreover, a heavy reliance on provisional ballots increases the so-called margin of litigation, making post-election disputes over the outcome of a close race more likely.<sup>45</sup>

Rather than requiring non-matched voters to be left off the registration list, the matching requirement should be read in tandem with the identification requirement contained in the same section. The same section of HAVA that creates the statewide registration database requirement also imposes a limited identification requirement, applicable only to first-time voters who registered by mail.<sup>46</sup> Specifically, those voters must either present "current and valid photo identification" or a "utility bill, bank statement, government check, paycheck, or other government document" with the voter's name and address.<sup>47</sup> Voters are exempt from HAVA's ID requirement, however, if election officials are able to "match" the newly registered voter's information against "an existing State identification record bearing the same number, name and date of birth as provided in such registration."<sup>48</sup> This language reveals that the true purpose of HAVA matching is to provide a way around HAVA's identification requirement, analogous to an EZ pass system for toll roads.<sup>49</sup> Newly registered voters whose information is matched against existing state records are not required to present the ID required of other newly registered voters.<sup>50</sup> HAVA does provide that a registration application may be rejected if a voter who has a driver's license or social security number refuses to provide it.<sup>51</sup> It also authorizes states to enact laws by which to determine whether registration applicants'

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<sup>43</sup> Mark Niquette, *Brunner Disallows Mismatch Challenges*, COLUMBUS DISPATCH, Oct. 23, 2008, available at [http://www.dispatch.com/live/content/local\\_news/stories/2008/10/23/no\\_challenge.ART\\_ART\\_10-23-08\\_B1\\_E3BM90B.html?sid=101](http://www.dispatch.com/live/content/local_news/stories/2008/10/23/no_challenge.ART_ART_10-23-08_B1_E3BM90B.html?sid=101).

<sup>44</sup> Press Release, Wisconsin Government Accountability Board, Accountability Board Members' Voter Data Do Not Match Department of Transportation Records, Sept. 4, 2008, available at <http://elections.state.wi.us/docview.asp?docid=14689&locid=47>.

<sup>45</sup> Daniel P. Tokaji, *Are Election Reforms Increasing the Margin of Litigation?*, ELECTION LAW @ MORITZ, June 21, 2005, <http://moritzlaw.osu.edu/electionlaw/comments/2005/050621.php>.

<sup>46</sup> 42 U.S.C. § 15483(b) (2006).

<sup>47</sup> *Id.* § 15483(b)(2)(A)(i).

<sup>48</sup> *Id.* § 15483(b)(3).

<sup>49</sup> Ian Urbina, *Ruling May Impede Thousands of Ohio Voters*, N.Y. TIMES, Oct. 15, 2008, at A28.

<sup>50</sup> It follows that HAVA's matching requirement serves little or no purpose in states that require ID of *all* voters, and not just new voters who registered by mail. See CEMENSKA & CHERRY, *supra* note 32.

<sup>51</sup> 42 U.S.C. § 15483(a)(5)(A) (2006).

information is “sufficient.”<sup>52</sup> But nothing in HAVA requires that a voter be left off the lists or denied a regular ballot based on a state’s failure to match.

Other provisions of Section 303 confirm Congress’ intent to prevent eligible voters from being left off registration lists. Section 303 does require that states implement a system of list maintenance that “makes a reasonable effort to remove registrants who are ineligible to vote,”<sup>53</sup> but this is not tied to the matching requirement. Instead, it applies to those voters who have not voted in two consecutive federal general elections, and may therefore be removed under the NVRA.<sup>54</sup> Section 303 also provides that “only voters who are not registered or who are not eligible to vote be removed,”<sup>55</sup> and requires states to implement “[s]afeguards to ensure that eligible voters are not removed in error . . . .”<sup>56</sup> These provisions apply to voters who are already on registration lists, rather than to new registrants who are omitted from the rolls in the first place due to a failure to match, but they demonstrate Congress’ concern with making sure that administrative errors did not wrongly keep voters from casting a vote that would count.

Accordingly, HAVA should not be read to require that adverse action be taken against a prospective voter—including omission from registration lists or being compelled to cast a provisional ballot—based on a failed match. The question remains whether states are *permitted* to require matching as a precondition to inclusion on registration lists. The provisions of Section 303 quoted above prohibit states from removing voters from registration lists erroneously, and would thus bar purging voters based solely on a failed match. But nothing in HAVA expressly prohibits states from adopting laws that require matching as a precondition to being added to a registration list in the first place.

There is another provision of federal law that could be read to prohibit the omission of voters based on a failed match. Under 42 U.S.C. § 1971(a)(2)(B), states may not “deny the right of any individual to vote in any Federal election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to vote, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” This provision, part of the Civil Rights Act of 1964, was designed to eliminate election practices used to disfranchise southern blacks. It was quickly overshadowed by the more comprehensive provisions of the Voting Rights Act of 1965, and case law interpreting Section 1971 is sparse. But given that database errors are likely to result in a failed match for reasons having nothing to do with the voter’s eligibility, there is a strong argument that the failure to include a voter on registration lists for this reason alone would violate federal law.

I do not mean to imply that the legal argument against excluding non-matched voters is airtight. Rather, like so much of federal law governing election administration, the rules governing states’ registration databases are murky and subject to reasonable disagreement. This not only leads to pronounced differences in state practices, but

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<sup>52</sup> *Id.* § 15483(a)(5)(A)(iii).

<sup>53</sup> *Id.* § 15483(a)(4)(A).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* § 15483(a)(2)(B)(ii).

<sup>56</sup> *Id.* § 15483(a)(4)(B).

provides room for partisan election officials to manipulate the rules to their side's advantage. The limitations on federal judicial review of these questions exacerbate the problem. The Supreme Court's ruling in *Ohio Republican Party v. Brunner*,<sup>57</sup> although correctly applying precedent regarding federal rights of action, has the unfortunate consequence of making it more difficult for private plaintiffs to challenge an alleged failure to comply with HAVA's registration requirements. This can be expected to make it more difficult to ensure the fair application of registration rules within states and consistency across states.

### III. The Case for Institutional Reform

In thinking about the prospects for registration reform, it is helpful to step back from HAVA's fine print and consider the big-picture questions that advocates and legislators should confront as they consider amendments to federal voter registration laws. The battle over registration matching highlights the oft-discussed tension in election administration between the values of access and integrity.<sup>58</sup> As discussed above, the access-integrity debate is a venerable one, going back at least to the nineteenth century. It has continued through more recent debates over such issues as provisional voting, voter ID, and now voter registration. The legislative history of HAVA and the more recent court fights over its registration requirements exemplify this ongoing tension.

There are good reasons why the values of access and integrity have played such a prominent role in the election reform debates since 2000. It would be a mistake, however, to let this dichotomy continue to dominate discussions of voter registration and election reform. First, liberalized registration practices will not necessarily lead to more voter fraud. In this regard, there is an important, though under-recognized, distinction between registration fraud and voter fraud. Registration fraud refers to phony registration applications being submitted to election authorities—bearing, for example, the names of dead or nonexistent people—while voter fraud refers to ineligible people knowingly voting. There is evidence of registration fraud in the form of applications submitted on behalf of nonexistent voters like “Mickey Mouse,” apparently by canvassers getting paid

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<sup>57</sup> In recent years, the U.S. Supreme Court has raised the bar for plaintiffs seeking to assert a private right of action when a federal statute does not expressly provide one, even in cases where 42 U.S.C. § 1983 is asserted as a basis for relief. In such cases, it is not enough to allege that a federal statutory obligation has been violated. For a 1983 claim to lie, there must be an “unambiguously conferred right.” *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002). Section 303 of HAVA imposes an obligation on states, but does not unambiguously confer a right on anyone. Accordingly, *Brunner v. Ohio Republican Party* correctly applied existing precedent—even though, as explained in Part III, the failure to accord a private right of action to enforce HAVA has serious negative consequences.

<sup>58</sup> See generally THE CENTURY FOUNDATION WORKING GROUP ON STATE IMPLEMENTATION OF ELECTION REFORM, BALANCING ACCESS AND INTEGRITY (2005) (discussing possible improvements to the HAVA framework).

for work they failed to do.<sup>59</sup> This is unfortunate, but there is little evidence that phony registration forms resulted in fraudulent voting. Mickey Mouse's name may have appeared on a registration form, but he did not attempt to vote. The real problem is not that these nonexistent voters have actually voted. It is instead the unnecessary administrative costs borne by state and local government, which arise from "deadwood" on the voting rolls. Among the things that the access-integrity debate misses are other values important to election administration, such as efficiency and finality.

The access-integrity dichotomy, moreover, misses other facets of election administration that cry out for reform. The most intransigent deficiencies in the administration of American elections arise from their endemic decentralization and partisanship.<sup>60</sup> The United States has not one election system or even fifty, but thousands and thousands, consisting of the various county and municipal units that administer elections. HAVA did little or nothing to change the hyper-decentralization of American election administration. Adding to the difficulty of securing systemic reform is the pervasive partisanship in the administration of American elections. In most states, the chief election official is elected on a partisan basis.<sup>61</sup> Partisanship also reigns at the local level, with roughly two-thirds of local jurisdictions electing their local election officials and party-affiliated officials running elections in roughly half.<sup>62</sup>

Much of the difficulty in getting registration right arises from these peculiar characteristics of American democracy. Decentralization presents a problem insofar as it makes it more difficult to track voters when they move. The move from local to statewide registration databases can be expected to make it easier to keep track of those who move within a state, but does little or nothing to help with the many citizens who move from one state to another. Decentralization also gives rise to a lack of consistency among states in their implementation of the law. The different ways in which the states have interpreted HAVA and applied its "matching" requirement exemplify this inconsistency. Given the weakness of the Election Assistance Commission ("EAC"), including its lack of authority to issue binding regulations interpreting HAVA,<sup>63</sup> states have largely been left to their own devices in interpreting the law's requirements.

HAVA's key substantive requirements, including those pertaining to registration databases, contain an almost mind-numbing level of detail. This may perhaps be explained by the lack of an administrative agency empowered to promulgate regulations.

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<sup>59</sup> See *Mickey Mouse for Obama: A Rash of Fraudulent Registrations*, THE ECONOMIST, Oct. 16, 2008.

<sup>60</sup> Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 ELECTION L.J. 118, 121–26 (2007).

<sup>61</sup> DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 281 (4th ed. 2008).

<sup>62</sup> David C. Kimball et al., *Helping America Vote? Election Administration, Partisanship and Provisional Voting in the 2004 Election*, 5 ELECTION L.J. 447, 452–53 (2006).

<sup>63</sup> 42 U.S.C. § 15329 (2006) ("The [Election Assistance] Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 9(a) of the National Voter Registration Act of 1993 (42 U.S.C. § 1973gg-7(a)).").

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Because it failed to create an administrative agency with the authority to fill in the statutory gaps, Congress effectively compelled itself to micro-legislate, writing a statute with the detail of administrative regulations. But as the matching litigation demonstrates, HAVA's descent into the details of voter registration did not eliminate statutory ambiguity or the need for clarifying interpretations. Without an effective regulatory agency, it is left to the federal courts to clarify the many vague and ambiguous provisions of HAVA.

For the same reason, the Supreme Court's ruling in *Ohio Republican Party v. Brunner*—though correct as a matter of precedent—creates a serious institutional problem. If federal courts are not available to private litigants, as the Supreme Court found to be the case, it will be very difficult to secure authoritative interpretations of HAVA. Only in cases where the Department of Justice (“DOJ”) initiates an action against state or local election authorities will federal courts have the opportunity to weigh in.<sup>64</sup> This is not likely to serve as a sufficient check on dubious interpretations of federal law adopted by state and local election officials, particularly when those officials are of the same party as the President. A Republican administration, for example, may not be especially vigorous in enforcing HAVA's requirement that states have safeguards to prevent the wrongful removal of eligible voters.<sup>65</sup> By the same token, one would not expect a Democratic administration to be especially vigorous in enforcing HAVA's requirement that states develop a system to remove ineligible voters from the rolls.<sup>66</sup>

The limited access to federal courts is especially problematic given the pervasive partisanship of American election administration. State and local officials enjoy considerable discretion in how they discharge their responsibilities, including those pertaining to voter registration. Inevitably, some of them will exercise this discretion to the advantage of their political allies—or will at least be suspected of doing so. This phenomenon is also evident in the debates over voter registration that surfaced during the 2008 election. Florida, for example, has a Republican-dominated legislature and a Republican Secretary of State. Not surprisingly, Florida enacted what is probably the most stringent registration rules among the key swing states, keeping voters off the list in the event of a failed match.<sup>67</sup> By contrast, Ohio's Democratic Secretary of State promulgated a liberal matching rule, going so far as to prohibit voters from being challenged based solely on a failed match.<sup>68</sup> There is no way of reading election officials' minds and ascertaining whether they made their decisions for partisan reasons. Indeed, these and other officials no doubt believe that they acted fairly, without regard to which party is likely to be harmed or helped by their decisions. At the same time, it

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<sup>64</sup> Note that there may be other provisions of HAVA as to which a private right of action will lie. Although the “matching” requirement does not unambiguously confer a right, other provisions of the statute may. See, e.g., *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004) (finding that Section 302 of HAVA did unambiguously confer a right for voters to cast a provisional ballot in certain circumstances).

<sup>65</sup> 42 U.S.C. § 15483(a)(4)(B) (2006).

<sup>66</sup> 42 U.S.C. § 15483(a)(4)(A) (2006).

<sup>67</sup> CEMENSKA & CHERRY, *supra* note 32, at 11.

<sup>68</sup> Ohio Secretary of State Directive 2008-99 (Oct. 22, 2008).

would be naive to expect that these election officials—however fair and neutral they may seem and attempt to be—will be able to completely blind themselves to the partisan consequences of their actions.

In thinking about future election reform, Congress should shift away from its preoccupation with access and integrity and focus on confronting decentralization and partisanship in the administration of elections. Preoccupied as Congress was with the twin goals of access and integrity, HAVA did little to address these attributes of American election administration. In fact, its silence on whether a private right of action is available for violations may tend to abet partisanship by election administrators, making it more difficult to secure review in the relatively neutral forum of a federal court. This does not mean that HAVA's substantive reforms were wrongheaded. Still, without addressing these underlying institutional characteristics, there are limits to how effectively federal laws can improve voter registration and other aspects of election administration. A relatively easy starting point would be to amend federal law to clarify that private rights of action are available in cases where state or local officials are alleged to be acting in violation of federal election laws. This would at least ensure a relatively neutral forum for the resolution of disputes arising under HAVA, including disputes over its voter registration rules.

More sweeping institutional reforms are necessary if Congress is serious about systemic improvements to American voter registration. There are certainly some registration reforms that could be adopted within the existing institutional structure that HAVA left more or less untouched.<sup>69</sup> Some of these might result in marginal, and perhaps even significant, improvements. For example, states could adopt Election Day registration or at least enhance registration portability to make it easier for voters to participate in elections after they have moved. States might also adopt some form of automatic voter registration by which people would become registered when they interface with certain government entities—for example, when they graduate from high school.

If more ambitious registration reforms are to be realized, however, Congress will have to confront the institutional deficiencies in American election administration. One of the proposed reforms that has gained currency in recent months is universal voter registration, through which the government would take on affirmative responsibility for ensuring that every eligible citizen is registered. The most promising model combines universal registration with federalization of registration lists, to vest authority and responsibility for registering all American citizens in a single federal agency. Canada's National Register of Electors serves as a worthy model.<sup>70</sup> Canada's election list is drawn from a range of sources, including citizenship applications, provincial voter lists, tax returns, and driver's licenses.<sup>71</sup> It has resulted in the registration of 93.1% of eligible

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<sup>69</sup> I discuss the reforms mentioned in this paragraph in somewhat greater length in Tokaji, *supra* note 3.

<sup>70</sup> See Election Canada, *Description of the National Register of Electors*, Feb. 2005, available at <http://www.elections.ca/content.asp?section=ins&document=national&dir=nre&lang=e>.

<sup>71</sup> Frank Emmert et al., *Trouble Counting Votes? Comparing Voting Mechanisms in the United States and Selected Other Countries*, 41 CREIGHTON L. REV. 3, 16 (2007).

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Canadian citizens as of 2000,<sup>72</sup> compared to 69.5% of United States citizens that same year.<sup>73</sup> The available evidence tends to show that Canada's federal registration system results in a more inclusive electorate, while facilitating participation by new voters and those who have moved.<sup>74</sup> Moreover, Canada's system reduces the risk of manipulation, both by eliminating the "bounty hunter" system and by vesting responsibility over list maintenance in a nonpartisan entity.<sup>75</sup>

Moving to a Canadian-style universal registration system is a worthy idea.<sup>76</sup> But for the United States to register all voters and to keep track of them when they move across state lines, it would have to transfer authority from state and local election authorities to the federal government. Such a major upward transfer of power would in turn require development of a politically neutral and effective institution to manage elections. As history teaches, voter registration is inevitably subject to manipulation by the party that controls the creation and maintenance of the lists. Unfortunately, none of the federal institutions that now exist presents a particularly attractive model. Putting control over elections under the exclusive control of the executive branch is dangerous, as the DOJ's enforcement of voting laws in recent years demonstrates. There will always be an incentive for such an entity to act in a way that benefits the party currently in power. An alternative model is to create a bipartisan board like the EAC or Federal Election Commission (FEC), which have equal numbers of Republican and Democratic appointees. The major problem endemic to such institutions is stalemate along partisan lines.<sup>77</sup> Such concerns are especially acute with respect to areas like voter registration, which have a clear partisan valence.

We must not kid ourselves into believing that federalization is a panacea. Still, it should be possible to create a federal entity that would avoid the problems of partisanship and stalemate that have plagued existing agencies with responsibility over elections. One possible model is Wisconsin's Government Accountability Board, whose members are nominated by the Governor but must be confirmed by a supermajority of the state

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<sup>72</sup> Jerome H. Black, *From Enumeration to the National Register of Electors: An Account and Evaluation*, 9 CHOICES, No. 7, at 22 (Aug. 2003).

<sup>73</sup> U.S. Census Bureau, U.S. Dep't of Commerce, *Voting and Registration in the Election of November 2000: Population Characteristics 5* (Feb. 2002), available at <http://www.census.gov/prod/2002pubs/p20-542.pdf>.

<sup>74</sup> LOUIS MASSICOTTE ET AL., ESTABLISHING THE RULES OF THE GAME: ELECTION LAW IN DEMOCRACIES 78–79 (2004).

<sup>75</sup> Emmert et al., *supra* note 71, at 14, 17.

<sup>76</sup> See, e.g., Richard L. Hasen, *Registering Doubt: If We Can Nationalize Banks, Why Not Our Election Process?*, SLATE, Oct. 27, 2008, <http://www.slate.com/id/2203138/>.

<sup>77</sup> Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 833 (2006) (describing problems endemic to bipartisan structure of FEC and EAC); Donald Simon, *Current Regulation and Future Challenges for Campaign Financing in the United States*, 3 ELECTION L.J. 474, 485 (2004) (describing FEC's problems of deadlock and ineffective enforcement).

senate.<sup>78</sup> Although there are constitutional issues surrounding the creation of a like body at the federal level, there may be ways of structuring a new federal agency to ensure a comparable degree of neutrality. If we are to achieve systemic registration reform, rather than merely tinkering around the edges, it is vital to examine such institutional restructuring.

#### IV. Conclusion

Congress' greatest sin when it enacted HAVA was one of omission. The access-integrity debate predominated, with one side claiming that liberalized registration rules were needed to promote access, while the other asserted that stricter rules were needed to prevent fraud. In this sense, the registration matching battles of 2008 are a replay of battles that we have repeatedly witnessed, not only in the years since 2000 but throughout the history of American democracy. The tension between access and integrity is understandable and to some extent inevitable. Meaningful reform of voter registration, however, demands that we must move beyond this paradigm and confront the pervasive decentralization and partisanship of American elections. Institutional reform is thus a prerequisite for systemic registration reform at the federal level. One relatively modest reform that Congress should enact is to provide a federal right of action so that state and local officials' compliance with often confusing federal laws may be reviewed in federal court. The weakness of the EAC makes this reform especially vital. More ambitiously, Congress should consider restructuring the authority over voter registration, creating a new body that would be more effective and neutral than existing entities like the EAC, FEC or DOJ. This is a tall order, to be sure, but such institutional reform is a prerequisite for any large-scale overhaul of voter registration in the United States.

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<sup>78</sup> STEVEN F. HUEFNER ET AL., FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 115 (2007), *available at* <http://moritzlaw.osu.edu/electionlaw/joyce/book.pdf>.

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