Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud

*Jocelyn Friedrichs Benson**

This Article seeks to highlight the collateral effect of several inconsistent recent federal court decisions that consider a state's interest in addressing the impact of fraud on the electoral process. In an effort to evaluate the impact of varying types of election-related fraud on the political process, I propose that courts view the concept with a focus on (1) the entity that commits the deceptive acts and (2) the effect those acts have on the democratic process. Evaluating recent opinions through this lens illustrates that federal courts are more likely to exhibit deference to a state's interest in limiting avenues for voters acting fraudulently, or what I term "voter-initiated" fraud, than to issues relating to what I call "voter-targeted" fraud, or actions by various entities intended to deceive, defraud, or intimidate voters. Conversely, quantitative and qualitative evidence, while only mildly conclusive, suggests that the most prevalent and problematic type of election fraud is voter-targeted fraud.

This Article suggests that federal courts' current inconsistent evaluation of a state's interest in addressing election fraud stems in part from the lack of a test for evaluating that interest. Such a test should differentiate between the several different types of fraudulent acts that can affect the electoral process. Specifically, I argue that courts could engage in a more consistent approach by linking the analysis of the state's interest in combating election fraud to both the level of broad qualitative and quantitative evidence available regarding the prevalence of that particular strain of fraud, and to the constitutional rights that the fraudulent acts, and limits on those acts, implicate.

I. Introduction

Multiple entities, from poll workers to candidates, voters to volunteers, election administrators to challengers, interact to ensure that the outcomes of elections match and reflect the will of a majority of voters. Any of these entities, however, is capable of committing potentially fraudulent acts that threaten the legitimacy of an electoral outcome. Individuals volunteers may misrepresent the subject of a ballot initiative campaign to garner support or signatures to place the initiative on the ballot,[1] or may submit false registra-

* Assistant Professor of Law, Wayne State University Law School. B.A. Wellesley College; M.Phil, Oxford University; J.D., Harvard Law School. I am grateful for the suggestions and comments provided by Heather Gerken, Zanita Fenton, Michael Pitts, James Tucker, Ellen Dannin, Lance Gable, and Derek Bambauer in the formulation of this article. I am also indebted to Melanie Elturk and Tierney Eaton for their invaluable and meticulous research assistance. All errors and omissions are my own.

[1] Howard Fischer, *Petitioners Accused of Misleading Signers*, Ariz. Daily Star.net, June 6, 2007, http://www.azstarnet.com/allheadlines/187145 (describing petition gatherers who encouraged voters to endorse a petition for a ballot initiative to lower gasoline prices when the petition itself was about changing the redistricting process).

tion forms to local officials.[2] Election administrators may use questionable methods to remove or "purge" voters from registration lists.[3] Entities may circulate anonymous fliers falsely telling voters of a particular party that they must vote on the day after Election Day.[4] Campaigns may submit false absentee ballots in order to stuff a ballot box in their favor.[5]

Our judicial and legislative branches at the state and federal levels are empowered to intervene in some circumstances to address, limit, or otherwise prevent electoral fraud.[6] Though the administration of elections is primarily a state responsibility,[7] the federal government has a long-established duty to intervene to protect the electoral process.[8] Lawmakers and judges frequently must balance a state's interest in administering elections against any burdens on the fundamental right to vote.[9]

A snapshot of recent events in Michigan, however, illustrates a larger trend emerging out of federal court decisions in which the courts seek to balance state efforts to address election-related fraud against any constitutional rights those efforts implicate. Over the course of several months in 2004 and 2005, paid petition circulators approached hundreds of thousands of Michigan voters in an effort to collect signatures endorsing a proposed amendment to the state constitution to ban the use of racial and gender preferences in "public employment, public education, [and] public contracting"

---

[2] Mary Pat Flaherty, *The ACORN Storm; from John McCain, Hyperbole about Potential Voter Fraud*; WASH. POST, Oct. 25, 2008, at A14 (describing allegations that individual voters working for ACORN submitted false registration forms and noting also "the enormous gulf between improper voter registration—whether fraudulent or merely erroneous—and actualy committing fraud at the ballot box").

[3] Ford Fessenden, *Florida List for Purge of Voters Proves Flawed*, N.Y. TIMES, July 10, 2004, at A13.

[4] *See Prevention of Deceptive Practices and Voter Intimidation in Federal Elections: Hearing on S. 453 Before the Sen. Comm. on the Judiciary*, 110th Cong. 161 (2007) [hereinafter *Hearing, Prevention of Deceptive Practices*] (testimony of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary); *see also* DECEPTIVE PRACTICES AND INTIMIDATION, FACT SHEET OF THE NATIONAL NETWORK ON STATE ELECTION REFORM 1-2, http://www.azadvocacy.org/images/Decptive_Practices_handout_part_II.PDF (describing efforts in 2004 to encourage Democrats to vote the day after Election Day).

[5] Abby Goodnough, *Orlando Mayor Is Indicted in Absentee Ballot Case*, N.Y. TIMES, March 12, 2005, at A10.

[6] *See, e.g.*, Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process.").

[7] *See* U.S. CONST. art 1, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.").

[8] *See* Baker v. Carr, 369 U.S. 186, 234 (1962); Storer v. Brown 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."); *see also* James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 489-90 (1999) (citing JOHN HART ELY, DEMOCRACY AND DISTRUST 88 (1980)).

[9] *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 441-42 (1992); Munro v. Socialist Workers Party, 479 U.S. 189, 199 (1986).

in the state of Michigan.[10] Titled the Michigan Civil Rights Initiative, the signature gathering process became mired in allegations that the circulators deceptively represented the initiative to voters as one that supported affirmative action policies, while in reality it sought to limit them.[11] Finding that petition circulators "engaged in a pattern of voter fraud by deceiving voters into believing that the petition supported affirmative action," a federal district court concluded that several state entities, "including the Michigan Courts, Board of State Canvassers, Secretary of State, Attorney General, and Bureau of Elections" demonstrated "an almost complete institutional indifference to the credible allegations of voter fraud."[12] Nevertheless, the court declined to intervene to address this "institutional indifference," concluding that the fraudulent acts targeting voters did not violate any federal law.[13]

While this series of events played out in the courts, many of the same state authorities who failed to respond to allegations of voter-targeted fraud supported the reinstatement of a dormant part of Michigan law that required all voters to present a "picture identification card" or sign an affidavit prior to voting.[14] Though lawmakers were not confronted with or responding to any evidence of voter-initiated fraud,[15] the legislature enacted the identification requirement in order to enhance the "integrity" of elections.[16] Because

---

[10] The text of the proposed amendment read:

> A Proposal to amend the Michigan Constitution by . . . (1) prohibit[ing] . . . any . . . public college or university, community college, or school district from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting; (2) prohibit[ing] the State from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting . . . .

Operation King's Dream v. Connerly, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at *8 n.2 (E.D. Mich. Aug. 29, 2006).

[11] *Id.* at *6-*8.

[12] *Id.* at *5.

[13] *See id.* at *52-*53 (noting, in part, that "minority and non-minority voters had equal access to a deceptive political process" and therefore, the Voting Rights Act was not implicated). The U.S. Court of Appeals for the Sixth Circuit subsequently declined to revisit the district court's decision, reasoning that while "the solicitation and procurement of signatures in support of placing [the Michigan Civil Rights Initiative] on the general election ballot was rife with fraud and deception," any post-election discussion or analysis on the merits of the case would be "merely advisory." Operation King's Dream v. Connerly, 501 F.3d 584, 591-92 (6th Cir. 2007).

[14] *See* MICH. COMP. LAWS SERV. §168.523 (LexisNexis 2008). Pursuant to the statutory provision, in the event that the voter is unable to produce photo identification, she is required to sign an affidavit in the presence of an election official attesting to her identity in order to vote.

[15] *In re* Request for Advisory Opinion Regarding Constitutionality of 2005 Pa 71, 740 N.W.2d. 444, 467 (Mich. 2007).

[16] Kelly Chesney, a spokesperson for Secretary of State Terri Lynn Land, has stated: "'We have a number of checks and balances inherent in the process to prevent "fake people" from voting . . . . We do believe the safeguards in place will protect the integrity of the election.'" Chad Selweski, *Flood of Voter Registrations Raises Specter of Election Fraud*, MACOMB DAILY.COM, September 30, 2004, http://www.macombdaily.com/articles/2004/09/30/

the Michigan Attorney General had previously found the law to be an unconstitutional burden on the right to vote that was unjustified by any significant state interest,[17] a state legislator asked the Michigan Supreme Court to issue an opinion as to the constitutionality of the law. The state Supreme Court—the same court that refused to intervene to address allegations of fraud targeting voters in the signature gathering process—upheld the law as constitutional. The court reasoned that the photo identification requirement for voters was a reasonable, nondiscriminatory burden on the right to vote that furthered Michigan's interest in addressing voter-initiated fraud.[18]

The Michigan court's decision on the voter identification law stands in stark contrast to the federal district court's indifference to the allegations of fraud that surrounded the signature gathering process for the Michigan Civil Rights Initiative. The state courts and legislatures concluded that the potential for voter-initiated fraud was of such concern that it was necessary to require each voter to identify herself prior to voting on Election Day.[19] But, during nearly the same time period, many of the same state actors were "indifferent"[20] to allegations and evidence of voter-targeted fraud.

This snapshot of the issue of election fraud in Michigan is emblematic of the larger pattern that this Article seeks to illustrate: Courts and other entities pay a great deal of attention to issues of voter-initiated fraud, but appear to express less concern for voter-targeted fraud. This is not to imply that one type of "fraud" as a general concept is inherently any worse or better than another type of fraud. Rather, I suggest that a problematic legal definition of election-related fraud has led courts (and policy-makers) to engage in an inconsistent evaluation of efforts to reduce fraud.

The absence of a clear legal definition of election fraud contributes to this inconsistent evaluation.[21] Federal legislation and government agencies offer "laundry list" definitions based on examples of acts of deception in the

---

local/20040930-archive0.txt (quoting Kelly Chesney); *see also* Bay County Democratic Party v. Land, 347 F. Supp. 2d 404, 437 (E.D. Mich. 2004).

[17] Frank J. Kelley, Mich. Office of the Att'y Gen., Att'y Gen. Op. No. 6930, at 1 (Jan. 29, 1997), *available at* http://www.ag.state.mi.us/opinion/datafiles/1990s/op10001.htm.

[18] *See In re* Request for Advisory Opinion Regarding Constitutionality of 2005 Pa 71, 740 N.W.2d at 459.

[19] The word "potential" is important because there was no evidence presented to the Michigan Supreme Court, nor to the legislators who voted to enact the bill, that Michigan voters were actively deceiving poll workers by showing up on Election Day and claiming to be someone else. At the time of the law's original enactment, former Michigan Secretary of State Candice Miller, the State's chief elections officer, declared that "Michigan has a strong tradition of clean elections," while an opinion from the Michigan Attorney General stressed that "it is clear that the State of Michigan is not experiencing any substantial voter fraud." Kelley, *supra* note 17.

[20] *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *5.

[21] LORRAINE C. MINNITE, THE ADVANCEMENT PROJECT, THE POLITICS OF VOTER FRAUD 6 (2006) (noting that "there is no single accepted legal definition of voter fraud . . . and no uniform standards"); U.S. ELECTIONS ASSISTANCE COMMISSION, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 11-12 (2006) [hereinafter EAC, ELECTION CRIMES] (asserting that there is no universally agreed upon definition of election fraud).

electoral process;[22] these are "nonexhaustive" lists that exemplify the large scope of the definition.[23] These descriptive definitions capture both fraudulent acts that are directed at and committed by voters, as well as those directed at and committed by other entities, such as campaigns and government officials.[24] But these definitions fail to provide courts any guidance for evaluating whether some acts pose a greater threat to democracy than others. Courts are thus evaluating the propriety of legislation by determining whether it remedies a harm (i.e. a form of election fraud) of undefined scope. Accordingly, federal court opinions offer inconsistent levels of deference to a state's interest in addressing "fraud" in elections.[25] In the absence of an objective, uniform formula to determine the amount of deference to a legislature that is appropriate, courts tend to an inconsistent review of election fraud.

The lack of clarity in the definition permits significant judicial discretion in determining how much weight to give to a state's interest in addressing election fraud. The result, as this Article seeks to illustrate, is that court opinions reflect a pattern of significant deference to a state's interest in limiting what I term voter-initiated fraud, even where the furtherance of that interest risks burdening rights of political participation. Concurrently, several

---

[22] For instance, the U.S. Elections Assistance Commission ("EAC") broadly defines the concept as "intentional acts or willful failures to act . . . designed to cause ineligible persons to participate in the election process; eligible persons to be excluded from the election process; ineligible votes to be cast in an election; eligible votes not to be cast or counted; or other interference with or invalidation of election results." *See* EAC, ELECTION CRIMES, *supra* note 21, at 13. In a 1995 attorney training manual, the U.S. Department of Justice loosely defined election fraud as any act that "corrupts the process by which ballots are obtained, marked, or tabulated; the process by which election results are canvassed and certified; or the process by which voters are registered." CRAIG C. DONSANTO & NANCY STEWART, FEDERAL PROSECUTION OF ELECTION OFFENSES 21 (U.S. Department of Justice, Criminal Division, Public Integrity Section, 6th ed. 1995). It is important to note that much of election fraud prosecution is in the purview of state and local authorities. In addition, one of the leading tomes on election administration lists several types of election fraud that encompass acts committed by several individuals in the electoral process. *See* JOSEPH P. HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES 370-75 (1934) (defining ten types of election fraud, ranging from voter-perpetrated registration fraud and repeat voting to deceptive assistance to voters, intimidation and violence, altering ballots, substitution of ballots, and altered returns).

[23] *See* EAC, ELECTION CRIMES, *supra* note 21, at 12-14.

[24] *See, e.g.*, LORI MINNITE & DAVID CALLAHAN, DEMOS, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD 14 (2003) (defining election fraud as "the corruption of the process of casting and counting votes" involving "either individual voters or . . . organized groups such as campaigns or political parties"); *see Hearing, Prevention of Deceptive Practices*, *supra* note 4, at 24 (testimony of Peter N. Kirsanow, Commissioner, U.S. Commission on Civil Rights) (describing two "prongs" of election fraud: attempts to prevent eligible voters from voting and votes fraudulently cast by individuals), *available at* http://judiciary.senate.gov/print_testimony.cfm?id=2798&wit_id=6517.

[25] In September 2005, the Commission on Federal Election Reform noted this imbalance in its report, emphasizing that the "[i]nvestigation and prosecution of election fraud should include those acts committed by individuals, including election officials, poll workers, volunteers, challengers or other nonvoters associated with the administration of elections, and not just fraud by voters." BUILDING CONFIDENCE IN U.S. ELECTIONS, THE REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 45 (2005), *available at* http://www.american.edu/ia/cfer/report/full_report.pdf.

recent federal court decisions have not offered a similar level of deference to state efforts to combat what I term voter-targeted fraud, despite qualitative and quantitative evidence indicating the prevalence of this type of election fraud and its impact on voters seeking to exercise their political rights.

In an effort to develop a more concise tool for evaluating a state's interest in reducing fraud in the electoral process, I propose that courts view the concept with a focus on (1) who commits the deceptive acts and (2) the aggregate impact of those acts on the democratic process. It is through this inquiry that two primary perspectives of election fraud emerge: "voter-initiated" fraud and "voter-targeted" fraud.

"Voter-initiated" fraud captures fraudulent and deceptive acts that voters commit, such as casting votes in the name of other individuals, voting multiple times, or otherwise impersonating a voter. The Election Assistance Commission ("EAC") definition of election fraud similarly describes voter-initiated acts, including "[s]igning a name other than his/her own to a petition proposing an initiative, referendum, recall, or nomination of a candidate for office, . . . [v]oting or attempting to vote more than once during the same election, . . . [r]egistering to vote without being entitled to register," and "knowingly making a materially false statement on an application for voter registration or re-registration."[26]

"Voter-targeted" fraud incorporates deceptive acts that others commit and that are aimed at defrauding voters. These include acts of fraud that seek to deceive or use falsehoods to intimidate voters, such as "knowingly . . . distributing . . . literature that includes false information about the voter's precinct or polling place, the date and time of the election[,] or a candidate."[27] It also includes the use of "force, coercion, violence, restraint, or inflicting . . . harm . . . to induce or compel that person to vote or refrain from voting or to register or refrain from registering to vote"[28] and

---

[26] *See* EAC, ELECTION CRIMES, *supra* note 21, at 13-14.

[27] *Id.* at 13.

[28] *Id.* at 14. Other "Acts of Coercion" defined in the report include:

> [k]nowingly paying, offering to pay, or causing to be paid money or other thing of value to a person to vote or refrain from voting for a candidate or for or against an election proposition or question; [k]nowingly soliciting or encouraging a person who is not qualified to vote in an election; [k]nowingly challenging a person's right to vote without probable cause or on fraudulent grounds, or engaging in mass, indiscriminate, and groundless challenging of voters solely for the purpose of preventing voter from voting or to delay the process of voting; [a]s an employer, attempting by coercion, intimidation, threats to discharge or to lessen the remuneration of an employee, to influence his/her vote in any election, or who requires or demands an examination or inspection by himself/herself or another of an employee's ballot; . . . [i]nducing or attempting to induce an election official to fail in the official's duty by force, threat, intimidation, or offers of reward; [d]irectly or through any other person advancing, paying, soliciting, or receiving or causing to be advanced, paid, solicited, or received, any money or other valuable consideration to or for the use of any person in order to induce a person not to become or to withdraw as a candidate for public office; and [s]oliciting, accepting, or agreeing to accept money or other thing of value in exchange for registering to vote.

"[d]estroying completed voter registration applications."[29]

Viewing state efforts to address—or failures to address—election fraud through this bifurcated lens of voter-initiated and voter-targeted fraud emphasizes a troubling trend. An examination of several recent federal court decisions, undertaken in Sections III and IV of this piece, illustrates the trend of courts exhibiting greater deference to states seeking to eliminate "voter-initiated" fraud, and a lesser concern for issues involving "voter-targeted" fraud. Section III looks particularly at federal case law under the U.S. Constitution, while Section IV examines challenges brought under Section 2 of the Voting Rights Act. Both sections seek to illustrate the greater deference that recent opinions give to the state interest in reducing the potential for voter-initiated fraud against the lesser deference courts give to a state's interest in deterring voter-targeted election fraud.

Making this trend more troubling is that the imbalance arguably proceeds in an inverse relationship to the areas of the electoral process that are most susceptible to fraud. Qualitative and quantitative evidence consistently indicates that the most notorious and widespread acts of fraud and deception in the electoral process can be classified as voter-targeted fraud.[30] There is little empirical or systemic evidence to support the contention that voter-initiated fraud is widespread, be it ineligible voters seeking to vote or eligible voters casting multiple ballots in several locations.[31] Evidence suggests that voter-targeted fraud, including election administrators that use questionable methods to remove voters from registration lists,[32] is more widespread.[33] In addition, voter-targeted fraud has a greater aggregate effect on democracy than voter-initiated fraud.[34]

Further exacerbating this imbalance is its effect on the fundamental right to vote and protections for political speech. Acts of voter-targeted

---

Id. at 14.

[29] *Id.* at 15. Other "Acts of Damage or Destruction" include:

> "[r]emoving or destroying any of the supplies or other conveniences placed in the voting booths or compartments; [r]emoving, tearing down, or defacing election materials, instructions or ballots; . . . [k]nowingly removing, altering, defacing or covering any political sign of any candidate for public office for a prescribed period prior to and following the election; [i]ntentionally changing, attempting to change, or causing to be changed an official election document including ballots, tallies, and returns; and [i]ntentionally delaying, attempting to delay, or causing to be delayed the sending of certificate, register, ballots, or other materials whether original or duplicate, required to be sent by jurisdictional law."

Id. at 15.

[30] *See infra* Part IV.

[31] *See, e.g.*, Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, April 12, 2007, at A1; EAC, ELECTION CRIMES, *supra* note 21, at 15.

[32] Fessenden, *supra* note 3, at A13.

[33] *See infra* text accompanying notes 259-277; *see also* Operation King's Dream v. Connerly, No. 06-12773, 2006 Dist. LEXIS 61323, at *33-*35 (E.D. Mich. Aug. 29, 2006) (describing a "widespread" effort to deceive voters as to the content of a ballot initiative as petitioners collected signatures in support of the proposal).

[34] *See infra* text accompanying notes 278-300.

fraud directly burden two intertwined constitutional rights: the right to cast a vote and the right to engage in political speech. By contrast, voter-initiated fraud, if rampant, may lead to the dilution of votes cast by legitimate voters.[35] But this effect is not as direct, nor as certain, as the effect of deceptive acts that target eligible voters seeking to cast their ballot. This latter effect results in blocking citizens from voting, or causes them to cast a ballot that does not accurately reflect their will. In addition, many state laws aimed at reducing voter-initiated fraud, such as photo identification laws, burden some citizens' ability to exercise their constitutional right to vote.[36] These laws thus threaten to have a detrimental effect on democracy.

As a solution, I propose an objective analytical approach that courts can apply to ensure a more balanced and consistent review of state efforts to address election fraud. The analysis incorporates qualitative and quantitative considerations to place fraudulent acts on a spectrum, which then suggests the level of deference a court should grant to a state's decision to address the acts. It is designed to promote a view of election fraud that recognizes some types of fraud as more prevalent—and thus requiring more attention and action from states—than others.

This analytical approach to election fraud supplants the laundry list of acts on which the current vague and descriptive definition is based. The inquiry asks, for instance, whether state decisions aimed at reducing fraudulent election behavior are supported with significant quantitative data that indicate that such fraud occurs on a widespread basis in a way that affects the legitimacy and accuracy of electoral contests. It also urges courts to consider qualitative and contextual elements, offering greater deference to state actions that seek to address the types of election fraud and deception that have been most rampant throughout history. A third component encourages courts to take account of the burden that the fraudulent acts impose on constitutional rights. It suggests that courts should grant greater deference to a state's interest in limiting fraudulent acts when those acts have the effect of interfering with the exercise of those rights—namely the right to vote and the right to political speech. This proposed approach to evaluating fraud in elections ultimately recommends that courts should increase their deference to state acts that are aimed at reducing voter-targeted fraud.

---

[35] *See, e.g.*, Purcell v. Gonzales, 549 U.S. 1, 4 (2006) ("Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.").

[36] The Eagleton Institute of Politics et al., Report to the U.S. Election Assistance Commission on Best Practices to Improve Voter Identification Requirements Pursuant to the Help America Vote Act of 2002, at 7-8 (2006) ("Stricter voter identification requirements. . .were correlated with reduced voter turnout . . . . [A] statistically significant relationship exists . . . ."). For further discussion of the burden that photo identification laws place on voters, see Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 648 (2007).

II. The Evolution of Federal Policies to Address Election Fraud

Federal efforts to address election fraud have evolved over time in a way that illustrates the multiple approaches to addressing the problem. In particular, as accounts of all types of fraud—voter-initiated, voter-targeted, candidate-initiated, and others—escalated in the post-Civil War era,[37] early legislative and judicial acts sought to respond with equal force. In 1870, Congress passed the Enforcement Act, the first significant federal statute aimed at combating election fraud.[38] This statute sought to address voter-initiated fraud by banning duplicate voting.[39] It also punished anyone employing force, bribery, threats, and intimidation in an effort to stop citizens from voting or registering to vote.[40]

During this same time period, the U.S. Supreme Court, in *Ex Parte Siebold*, found election officials guilty of stuffing ballot boxes during Congressional elections.[41] Within four years of the *Siebold* decision, the Court held in *Ex Parte Yarbrough*[42] that Congress had the power to intervene in federal elections to protect voters against fraud and intimidation.[43] The petitioners in *Yarbrough* sought a writ of habeas corpus after they were convicted of beating and violently intimidating Berry Saunders, a former slave, in order to prevent him from voting in Georgia's 1882 Congressional Elections.[44]

The dawn of modern election law began nearly 100 years later, marked most significantly by the passage of the Voting Rights Act in 1965 ("VRA").[45] Chief among the provisions was a ban on "tests" or "devices," such as literacy tests, which were implemented to deter African Americans

---

[37] *See* Tracy Campbell, Deliver the Vote: A History of Election Fraud, an American Political Tradition—1742-2004 46 (2005) (noting that "by the late 1850s, election fraud and violence had reached new levels in America"); *see also* James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. Pitt. L. Rev. 189, 234 (1990) ("There can be no doubt, however, that American, if not human, ingenuity at perpetrating electoral fraud reached its zenith in the post-Civil War south where whites stubbornly and persistently resisted attempts to enfranchise black citizens.").

[38] 16 Stat. 140 (1870). Several states also passed legislation in the late 1800s to combat election fraud. *See* Richard A. Schurr, Burson v. Freeman*: Where the Right to Vote Intersects with the Freedom to Speak*, 15 Whittier L. Rev. 869, 890-91 (1994) (describing state efforts to enact reforms that protected voters against election fraud and voter intimidation, like the secret ballot and a campaign free zone).

[39] *See* 16 Stat. at 144.

[40] *See* 16 Stat. at 141.

[41] 100 U.S. 371, 399 (1879). In upholding the convictions, the Court held that Congress could impose duties and sanctions against state officials who fraudulently conduct federal elections, declaring that the government of the United States "certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed" in Congressional elections. *Id.* at 388.

[42] 110 U.S. 651 (1884).

[43] *Id.* at 667; *see also id.* at 658-59.

[44] *Id.* at 658.

[45] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

from voting.[46] The VRA also banned acts of voter intimidation that targeted voters based on race or color.[47] The enactment of the VRA, which included an attempt to limit voter-targeted fraud, was the culmination of a bloody series of events seeking political empowerment for African Americans in the United States.[48] Congress's focus was a deliberate response to significant evidence of pervasive and long-term deception.[49]

Over the subsequent forty years, alongside multiple renewals and amendments to the VRA made in response to evidence of ongoing nefarious acts,[50] the focus of other federal legislation shifted to address voter-initiated fraud. But unlike the evidence-based emphasis on voter-targeted fraud that marked the deliberations over the VRA, this policy shift stemmed from political compromise rather than any evidence of an increase in voter-initiated fraud.

In 1993, Congress enacted the National Voter Registration Act of 1993 ("NVRA").[51] The NVRA substantially increased opportunities for voter registration, most significantly through enabling citizens to register to vote in a federal election when they applied for their driver's license.[52] But the new policy also engendered fears that easing registration requirements might encourage voter-initiated fraud.[53] These fears were not driven by a response to data. Scholars and election administrators cautioned Congress that incidents of voters acting fraudulently were "extremely rare,"[54] and noted that the vast majority of election fraud incidents were committed by election officials,

---

[46] *Id.* § 4; *see* South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966) (discussing purpose).

[47] *Id.* § 11; *see also id.* § 2. Section 2 of the Voting Rights Act, as amended in 1982, reads, in part: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (2000).

[48] *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 263-69 (2000) (describing events leading to the passage of the VRA).

[49] *Katzenbach*, 383 U.S. at 312-15.

[50] *See, e.g.*, Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 400-22 (2008) (describing evidence submitted to Congress during the 2006 renewal to document an increasing and ongoing need for the protections of the Voting Rights Act).

[51] Pub. L. No. 103-31, 107 Stat. 88 (codified at 42 U.S.C.A. §§ 1973gg-1973gg-10 (2008)).

[52] *Id.* § 5 (codified at 42 U.S.C.A. § 1973gg-3 (2008)).

[53] *See* Jonathan E. Davis, *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, 135 (1997) (discussing concerns, though noting that "no relationship between easing access and voter fraud has been proven on the national level"); *see also* H.R. REP. NO. 103-9, at 35 (1993), *reprinted in* 1993 U.S.C.C.A.N. 105, 137 (quoting letter from the Republican Party leadership, entitled Minority Views on H.R. 2: "We oppose H.R. 2 in its current form because . . . the bill would substantially increase the risk of voter fraud.").

[54] Davis, *supra* note 53, at 136 (citing *Fraud Prevention and the National Voter Registration Act: Hearing Before the Comm. on House Oversight*, 104th Cong. (1995) (testimony of Sonya Jarvis, Professor of Communications, George Washington University)).

candidates, and campaigns, rather than voters themselves.[55] Nevertheless, Congress added provisions to the NVRA that empowered state election officials to preempt possible acts of voter-initiated fraud.[56]

The debates over the NVRA set the stage for an amplified focus on voter-initiated fraud in the debates surrounding the Help America Vote Act[57] ("HAVA") in 2002.[58] HAVA provided funding for states to replace outdated voting machines,[59] required states accepting federal funding to offer provisional ballots[60] and state-wide computerized registration lists,[61] and required voters participating for the first time to provide identification.[62] This latter reform, the Act's "anti-fraud" provision,[63] established new guidelines for states registering voters to participate in federal elections. It required all new voters to fill out a form that included their driver's license number, the last four digits of their Social Security number, or, if the individual attempting to register had neither of these, mandated that they present another type of identification number issued by the state.[64] If a new voter registered by mail, they were required to present some kind of photo identification or other source of identification, such as a utility bill, the first time they voted.[65] Advocates for the identification requirements argued that they were necessary to stop people from voting multiple times, impersonating other voters, and registering and voting under fictitious names.[66] Opponents argued that the provision was based upon unsubstantiated and speculative accusations of voter-initiated fraud, and warned that the requirement would place a burden

---

[55] *Id.* at 136-37 (citing Dayna A. Cunningham, *Who Will Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370, 385 (1991)).

[56] *See* National Voter Registration Act of 1993 § 8(b) (codified at 42 U.S.C.A. § 1973gg-6(b) (2008)) (allowing states to investigate suspicious voter registration applications); *id.* § 8(a)(4) (codified at 42 U.S.C.A. 1973gg-6(a)(4) (2008)) (requiring states to purge the names of voters thought to be ineligible from their records).

[57] Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified at 42 U.S.C.A. §§ 15201-15545 (2008)).

[58] *See* Gabrielle B. Ruda, Note, *Picture Perfect: A Critical Analysis of the Debate on the 2002 Help America Vote Act*, 31 FORDHAM URB. L.J. 235, 246 (2003) ("While crafting HAVA, most members of Congress agreed that the implementation of strong anti-fraud measures should be the cornerstone of the bill." (citing 148 CONG. REC. 1,965-67 (2002) (statement of Sen. Bond))).

[59] Help America Vote Act § 102 (codified at 42 U.S.C.A. § 15302 (2008)).

[60] *Id.* § 302(a) (codified at 42 U.S.C.A. § 15482(a) (2008)).

[61] *Id.* § 303(a) (codified at 42 U.S.C.A. § 15483(a) (2008)).

[62] *Id.* § 303(b)(2) (codified at 42 U.S.C.A. § 15483(b)(2) (2008)).

[63] *See generally* Ruda, *supra* note 58, at 236-37 (referring multiple times to the voter identification provision as "anti-fraud").

[64] Help America Vote Act § 303(a)(5) (codified at 42 U.S.C.A. § 15483(a)(5) (2008)).

[65] *Id.* § 303(b)(2)(A)(ii) (codified at 42 U.S.C.A. § 15483(b)(2)(A)(ii) (2008)).

[66] *See* 148 CONG. REC. 20,315-16 (2002) (statement of Rep. Ney) ("People should not be permitted to register by mail and then vote by mail without ever having to demonstrate . . . that they are the actual human being who is eligible to vote.").

on the constitutionally protected right to vote, particularly for poor voters or voters of color.[67]

This brief look at the three most significant pieces of federal legislation aimed at protecting and promoting democracy in modern times—the Voting Rights Act of 1965, the National Voter Registration Act of 1993, and the Help America Vote Act of 2002—illustrates the implications of a broad definition of election fraud. Though each piece of legislation attempted to address fraud and promote the integrity of the electoral process, there is a marked evolution in emphasis from the VRA's data-driven focus on voter-targeted fraud aimed at voters of color to HAVA's focus on reducing voter-initiated fraud despite an absence of data that such fraud is epidemic, widespread, or impacting the outcome of electoral contests. In addition, this shift in emphasis from voter-targeted fraud to voter-initiated fraud does not coincide with a similar trend in qualitative or quantitative evidence that there has been an increase in voter-initiated fraud or a decrease in voter-targeted fraud. Empirical and anecdotal data still indicates that voter-targeted fraud is a greater threat to the accuracy and integrity of the electoral system than acts of voter-initiated fraud.[68] Despite this, several recent federal court decisions appear to mirror this imbalanced effort to address fraud in the electoral process. This Article now turns to a description and an analysis of that imbalance.

III. Federal Courts, Election Fraud, and the U.S. Constitution

In recognizing the state's interest in combating fraud in elections, early federal court opinions instruct courts to balance protection of the fundamental right to vote under the Equal Protection Clause[69] and the right to political

---

[67] *See, e.g.*, Scott Shepherd, *Senate Approves Election Reforms; Bill May Take Effect by Contests This Fall*, Atlanta J.-Const., April 12, 2002, at A3 (noting that "[a] coalition of 180 civil rights organizations" opposed the identification measure as a setback for voting rights for voters of color). The debates over HAVA also fell sharply along partisan lines. *See, e.g.*, Ruda, *supra* note 58, at 236 ("The House and Senate Republicans argued that the Anti-Fraud provision was necessary . . . to 'combat problems of votes being cast on behalf of dead people and dogs.' Democrats vociferously opposed the provision because of the obstacles to voting that it creates for lower socio-economic groups and racial/ethnic minorities.").

[68] *See* Minnite, *supra* note 21.

[69] *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964) ("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. . . . Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."); *see also* Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) (describing the right to vote as "a fundamental matter in a free and democratic society").

speech under the First Amendment[70] against the government's duty to protect the integrity of the electoral process.[71]

A. Federal Court Decisions Considering the Constitutional Implications of State Efforts to Address Voter Fraud: 1960-1990

In *Reynolds v. Sims*[72] and *Harper v. Virginia Board of Elections*,[73] the U.S. Supreme Court applied a strict scrutiny analysis in evaluating any laws that potentially infringe on "the right to exercise the franchise in a free and unimpaired manner."[74] The same year that it decided *Reynolds*, the Court reinforced similar constitutional protections for political speech in *New York Times v. Sullivan*,[75] emphasizing that it would also apply strict scrutiny to any limitations on such speech.[76] Under the strict scrutiny standards articulated in *Reynolds* and *Sullivan*, a state must demonstrate a compelling interest and show that any action that burdens a fundamental right is narrowly tailored to serve that interest. The analysis carries a significant presumption against any policy affecting a fundamental right, and the Court has emphasized repeatedly that it is "rare" for a law to survive such scrutiny.[77]

Shortly after deciding *Harper* in 1966, the Court struck down a state law that made it a crime for newspapers to publish an editorial on Election Day urging readers to vote in a particular way.[78] While the Court did not hesitate to denounce the statute as an "obvious and flagrant abridgment" of First Amendment rights,[79] it was quick to point out that its holding "in no way involved the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there."[80]

Two subsequent U.S. Supreme Court decisions issued in the 1970s illustrate the Court's careful review of state efforts to reduce election fraud. In *Dunn v. Blumstein*, the Court struck down a Tennessee voter residency requirement that, in part, required citizens wishing to vote in the state to reside there for one year prior to the election.[81] The state of Tennessee explicitly justified the law as a "[p]rotection against [voter-initiated] fraud" perpe-

---

[70] *See, e.g.*, Roth v. United States, 354 U.S. 476, 484 (1957) (emphasizing that the First Amendment affords the broadest protection to such political expression in order "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

[71] *See* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 231 (1989) (concluding that "[a] State indisputably has a compelling interest in preserving the integrity of its election process").

[72] *Reynolds*, 377 U.S. 533.

[73] 383 U.S. 663 (1966).

[74] *Reynolds*, 377 U.S. at 561-62.

[75] 376 U.S. 254 (1964).

[76] *Id.* at 268.

[77] *See* Burson v. Freeman, 504 U.S. 191, 211 (1992).

[78] Mills v. Alabama, 384 U.S. 214, 219 (1966).

[79] *Id.*

[80] *Id.* at 218.

[81] Dunn v. Blumstein, 405 U.S. 330, 352 (1972).

trated by nonresidents of the state attempting to influence the outcome of an election.[82] Recognizing the relevance of residency requirements in preventing voter-initiated fraud,[83] the Court expressed a concern that the Tennessee law was not "the least restrictive means necessary for preventing fraud" in the state's electoral process, emphasizing that "Tennessee has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared."[84] *Dunn* thus serves as an example of the Supreme Court carefully balancing the type of fraud addressed by the state statute against the overall need for the state to address or reduce that type of fraud. Concluding that the need, if evident, could be addressed elsewhere, the Court chose not to defer to the state's decision to enact the law.

Just one year after the *Dunn* decision, the Court upheld the constitutionality of a fifty-day voter residency and registration requirement in Arizona as a justifiable effort to reduce fraud.[85] In *Marston v. Lewis*, the Court deferred to what it termed an "amply justifiable legislative judgment" that that fifty-day residency and registration requirements were "necessary to promote the State's important interest in [maintaining] accurate voter lists" that would thereby reduce the potential for voter-initiated fraud.[86] The majority explicitly referenced *Dunn* by emphasizing that the two opinions stood together to support the need for a state to "complete whatever administrative tasks are necessary to prevent fraud."[87] Notably, however, the *Marston* Court maintained that courts should not defer blindly to a state's interest in combating election fraud. Rather, the per curiam opinion emphasized that the acceptability of residency and registration requirements as a method of addressing voter-initiated fraud is a "matter of degree" and that residency requirements of a year or three months would be "too much."[88] Thus, under *Dunn* and *Marston*, where a state's effort to address election fraud burdens voter participation, the action must be proportional and based on evidence that the particular action is necessary to protect the integrity of the democratic system.

Ten years later, this carefully constructed framework began to fray. In 1983, in *Anderson v. Celebrezze*,[89] the Supreme Court faced the question of whether an early filing deadline for presidential candidates in Ohio placed an unconstitutional burden on the voting and associational rights of independent candidates and their supporters.[90] In striking down the filing deadline, the Court looked to the constitutional provision granting states the power to establish the time, place, and manner of holding elections for Senators and

---

[82] *Id.* at 345.
[83] *Id.*
[84] *Id.* at 353.
[85] Marston v. Lewis, 410 U.S. 679, 681 (1973) (per curiam).
[86] *Id.* at 681.
[87] *Id.* (quoting *Dunn*, 405 U.S. at 348).
[88] *Id.* (quoting *Dunn*, 405 U.S. at 348).
[89] 460 U.S. 780 (1983).
[90] *Id.* at 782.

Representatives.[91] The *Anderson* Court held that any court evaluating a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[92] While the *Anderson* Court stated that the state's "important" interest in regulating elections is "generally sufficient to justify reasonable, nondiscriminatory restrictions,"[93] the opinion concluded that the state interest in the instant case was "minimal."[94]

This longstanding practice of requiring precise state regulations in order to justify restrictions of First and Fourteenth Amendment rights was absent from the Court's 1992 decision in *Burdick v. Takushi*.[95] In *Burdick*, the Court rejected a constitutional challenge to a Hawaii law prohibiting write-in voting.[96] Applying the somewhat relaxed standard of review set forth in *Anderson*, the Court concluded that Hawaii's prohibition on write-in voting did not unreasonably infringe upon its citizens' rights under the First and Fourteenth Amendments. The Court reasoned that all election laws "invariably impose some burden upon individual voters" and that subjecting "every voting regulation to strict scrutiny and [requiring] that the regulation be narrowly tailored to advance a compelling state interest [ties] the hands of States seeking to assure that elections are operated equitably and efficiently."[97] The court explained that *Anderson* stood for "a more flexible standard,"[98] re-emphasizing that a state's regulatory interests are "generally sufficient to justify" any "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters.[99]

This "more flexible standard"[100] allows for greater consideration of the state's interest in enacting or imposing an election regulation. The combination of this standard and courts' oversimplified definition of election fraud has led to an assortment of results in recent federal case law seeking to balance the state interest in curbing election fraud against potential infringements on constitutional rights. Absent clarity on these fronts, courts have handed down a series of decisions in which they sometimes defer to the state's interest in addressing fraud and sometimes do not. Out of this incon-

---

[91] U.S. CONST. art. I, § 4, cl. 1.
[92] *Anderson*, 460 U.S. at 789.
[93] *Id.* at 788.
[94] *Id.* at 806. The State of Ohio had defended its law by claiming a state interest in "voter education, equal treatment for partisan and independent candidates, and political stability." *Id.* at 796.
[95] 504 U.S. 428 (1992).
[96] *Id.* at 441.
[97] *Id.* at 433.
[98] *Id.* at 434.
[99] *Id.* (quoting *Anderson*, 460 U.S. at 788).
[100] *Id.*

sistency emerges a pattern, detailed in the subsequent sections, of courts granting greater deference to policies that target voter-initiated fraud and exhibiting less deference to policies addressing voter-targeted fraud.

B. Recent Federal Court Decisions Considering the Constitutional Implications of State Efforts to Address Voter-Initiated Fraud

Several recent federal court decisions address the constitutionality of laws aimed at curbing voter-initiated fraud,[101] particularly state voter identification and voter purging laws.

Photo Identification Requirements

The most recent and widespread attempts to enact policies to limit fraudulent voter behavior have involved photo identification requirements for voters.[102] The most significant federal challenges to these laws, which range in severity but generally require voters to present some form of voter identification each time they appear to vote,[103] have occurred in Georgia,[104] Indiana,[105] and Arizona.[106] Most notably, the U.S. Supreme Court in recent opinions has exhibited a great deference to the state decision to require voters to produce photo identification as a means of combating voter-initiated fraud.

In October 2006, the U.S. Supreme Court in *Purcell v. Gonzalez* rejected a challenge to an Arizona law that required voters to present proof of

---

[101] *See, e.g.*, Griffin v. Roupas, 385 F.3d 1128, 1131 (7th Cir. 2004) (upholding absentee voting restrictions as a method to combat voter fraud because "the striking of the balance between discouraging fraud . . . and encouraging turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry"); League of Women Voters v. Blackwell, 340 F. Supp. 2d 823, 829 (N.D. Ohio 2004) (upholding a voter identification requirement after balancing the interest in avoiding fraud against the interest in making sure that every vote counts to conclude that "though some small number of provisional ballots may not be counted as a result of the identification requirements . . . the risk of loss of those ballots . . . is justified by the likely inability . . . to detect and prevent election fraud").

[102] *See* Overton, *supra* note 36 (describing modern attempts to use voter identification policies ostensibly to combat voter fraud in elections, despite little evidence the legislation is necessary or effective).

[103] The Help America Vote Act requires only that new voters present identification the first time they vote. *See* § 303 (codified at 42 U.S.C.A. § 15483 (2008)).

[104] Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

[105] Crawford v. Marion County Elections Bd., 128 S. Ct. 1610 (2008).

[106] Purcell v. Gonzalez, 127 S. Ct. 5 (2006) (per curiam). A challenge to an Albuquerque ordinance is pending with the Tenth Circuit Court of Appeals. *See* ACLU v. Santillanes, 506 F. Supp. 2d 598 (D.N.M. 2007) (declaring the voter identification ordinance unconstitutional); Notice of Appeal, ACLU v. Santillanes, 506 F. Supp. 2d 598 (D.N.M. 2007) (No. C.V.-05-1136), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/ACLU-noticeofappeal.pdf.

citizenship when registering to vote and photo identification when voting.[107] In a per curiam opinion expressing the unanimous view of the Court,[108] the Court emphasized that states have a "compelling interest in preserving the integrity of [their] election process[es],"[109] stressing that "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government."[110] The Court explicitly declined to issue a more substantive ruling on the constitutionality of Arizona's voter identification and verification law,[111] overturning the appellate court's rejection of the law on procedural terms.[112] Nevertheless, the Court's discussion of voter fraud, and the opinion's effect of allowing the enforcement of Arizona's identification requirement, indicated an implied deference to the state's effort to address voter-initiated fraud over concerns of any burden the action would impose on the ability of citizens to vote.

In April 2008, the Court deferred to the state's interest when it upheld an Indiana voter identification requirement as a justifiable method for preventing voter fraud in *Crawford v. Marion County*.[113] In reviewing the law, which generally required that all citizens voting in person present government-issued photo identification,[114] the Court's majority split in interpreting its own precedent.[115] The lead opinion, disclaiming any "litmus test,"[116] followed the analysis in *Anderson v. Celebrezze*[117] that required a court to weigh the state's interest in a specific election regulation against the burden it placed on the voters.[118] The concurrence, meanwhile, asserted that *Burdick* had laid down a two-part test which required the Court first "to decide whether a challenged law severely burdens the right to vote."[119] Finding no

---

[107] *Purcell*, 127 S. Ct. at 8. The Arizona law was enacted through a voter-endorsed ballot initiative, Proposition 200, in November 2004. The law is codified at ARIZ. REV. STAT. ANN. §§ 16-166, 16-579 (2007).

[108] Justice Stevens also issued a concurring opinion. *Purcell*, 127 S. Ct. at 8 (Stevens, J., concurring).

[109] *Id.* at 7 (per curiam) (quoting Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 231 (1989) (bracket added by author)).

[110] *Id.*

[111] *Id.* at 8.

[112] *Id.* at 7-8 (finding that the Court of Appeals for the Ninth Circuit failed to sufficiently explain why it rejected and overturned the district court's analysis and decision to uphold the law).

[113] 128 S. Ct. 1610 (2008).

[114] *See* IND. CODE ANN. §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1 (West 2008). The law makes individuals voting absentee or living in a nursing home exempt from the requirements. IND. CODE ANN. §§ 3-11-8-25.1(f), 3-11-10-1.2 (West 2008); *see also Crawford*, 128 S. Ct. at 1613.

[115] Justice Stevens delivered the judgment of the Court, joined by Chief Justice Roberts and Justice Kennedy. Justice Scalia filed a concurring opinion, joined by Justices Thomas and Alito.

[116] *Crawford*, 128 S. Ct. at 1616.

[117] 460 U.S. 780, 789 (1983).

[118] *Crawford*, 128 S. Ct. at 1616.

[119] *Id.* at 1624 (Scalia, J., concurring).

such burden,[120] the concurrence admonished the lead opinion for even reaching the question of state interest.[121]

Despite this criticism from the concurrence, the lead opinion nonetheless inquired into the state's interest with less skepticism than did the Court in *Anderson*. As was the case in Arizona, Indiana's primary justification for enacting the photo identification law was, in the view of the Court, "in-person voter impersonation at polling places."[122] Justice Stevens, writing the lead opinion, noted that the factual record before the Court "contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history,"[123] and acknowledged the petitioners' argument that, as the Court found decades earlier in *Dunn*, "provisions of the Indiana Criminal Code punishing such conduct as a felony provide adequate protection against the risk that such conduct will occur in the future."[124]

Despite the scant evidence of this form of voter-initiated fraud, the Court deferred to the state's decision and upheld the law as a justifiable burden on the right to vote. It reasoned that while it was "debatable" whether the law was "the most effective method of preventing election fraud," the state's ability to choose the method was "perfectly clear."[125] Thus the Court deferred to Indiana's decision to justify a law that created an additional prerequisite to voting[126] with, at best, very little analysis as to whether the law addressed the type of fraud that the state claimed to be fighting and no evidence that such fraud was present in Indiana.

Voter Purging Laws

This pattern of deference to a state's interest in preventing voter-initiated fraud, even where such fraud is unsubstantiated, and even where the interest leads to policies that make it more difficult to vote, is not limited to court decisions supporting voter identification laws. The courts have shown similar deference in several recent federal decisions upholding efforts to "purge" voters from registration lists.[127] In 1991, the Fourth Circuit Court of Appeals upheld the constitutionality of a voter purge statute in Maryland that required the cancellation of voter registrations for any registered voter who had "been registered but has not voted at least once at a primary, general or special election within the five preceding calendar years."[128] In rejecting

---

[120] *Id.* at 1624-1625.

[121] *Id.* at 1627 ("The lead opinion's record-based resolution of these cases . . . will embolden litigants who surmise that our precedents have been abandoned.").

[122] *Id.* at 1618-19 (majority opinion).

[123] *Id.* at 1619. The Court also reviewed evidence of "scattered" instances of "in-person" fraud in other areas of the country. *Id.* at 1619 n.12.

[124] *Id.* at 1619.

[125] *Id.*

[126] *Id.* at 1623.

[127] *See., e.g.*, Hoffman v. Maryland, 928 F.2d. 646, 649 (4th Cir. 1991).

[128] *Id.* at 648 (citing MD. CODE ANN., [ELEC. LAW] § 3-20 (West 2008)).

arguments that the law violated the First and Fourteenth Amendments of the Constitution by "restricting [plaintiffs'] right not to vote, infring[ing] on equal protection principles and burden[ing] their right of free speech," the court emphasized that the challenged law was specifically "designed to curb vote fraud."[129] The court noted that "[w]ithout removing the names [of voters who have not voted in five years], there exists the very real danger that impostors will claim to be someone on the list and vote in their places."[130] The court, recognizing the burden that the regulation may have placed on individuals seeking to exercise their right to vote, concluded that the burden was "a small price to pay for the prevention of vote fraud."[131]

Three years later, the Third Circuit Court of Appeals confronted the question of whether a similar law in Pennsylvania, which purged voters from registered lists if they did not vote over the course of two years, violated Section 2 of the Voting Rights Act and the First and Fourteenth Amendments of the U.S. Constitution.[132] In *Ortiz v. City of Philadelphia*, the Third Circuit reviewed evidence that state law would cause the removal of "approximately 21 percent of Philadelphia's registered voters (193,000 voters)," a disproportionate number of whom may have been African American, due to the fact that they had not participated in elections for two years.[133] The court concluded that because turnout disparities, rather than the challenged statute, caused the purging to have a disproportionate impact on voters of color, the law itself did not violate Section 2 of the Voting Rights Act.[134] In upholding the law, the court noted repeatedly that it was a justified action by Pennsylvania to meet the "important and legitimate civic interest" of preventing voter fraud, emphasizing "a scattering of evidence" of people voting illegally prior to the law's enactment.[135]

In 2004, the Sixth Circuit Court of Appeals also weighed in on the voter purge issue in *Bell v. Marinko*.[136] There, the court heard a challenge to an Ohio statute that required married men and women to register to vote where their families reside, even if they lived elsewhere for a majority of the year.[137] Several voters who were removed from registration lists as a result of the enforcement of the law sued, arguing that the enforcement of this restriction violated the Equal Protection Clause of the U.S. Constitution because it treated married voters different from unmarried voters.[138] They also alleged that it contravened the National Voter Registration Act, which pro-

---

[129] *Id.* at 649.
[130] *Id.*
[131] *Id.*
[132] Ortiz v. City of Philadelphia, 28 F.3d 306, 307 (3d Cir. 1994) (citing 25 PA. CONS. STAT. § 623-40 (2007)).
[133] *Id.*
[134] 42 U.S.C. § 1973 (2000).
[135] *Ortiz*, 28 F.3d at 314.
[136] 367 F.3d 588 (6th Cir. 2004).
[137] *Id.* at 592.
[138] *Id.* at 593.

tects voters from unauthorized removal from registration lists.[139] Recognizing Ohio's intention to enforce the law as a means of protecting the "integrity of the electoral process"[140] by ensuring that "voters qualify as bona fide residents of the precinct in which they are registered or wish to register to vote,"[141] the Sixth Circuit upheld the statute as a permissible exercise of the state's power to regulate elections.[142]

It is certainly reasonable for federal courts to respect state efforts to address voter-initiated fraud. Yet in stark contrast to these decisions are a multitude of recent rulings where courts decline to place similar emphasis on the state's interest in protecting voters from the fraudulent acts of other participants in the electoral process.

C. Recent Federal Court Decisions Considering the Constitutional Implications of State Efforts to Address Voter-Targeted Fraud

Over the past twenty years, the U.S. Supreme Court has evaluated the constitutionality of state actions seeking to address voter-targeted fraud on four separate occasions. In *Meyer v. Grant*,[143] the Court rejected a Colorado statute that banned the per-signature payment of individuals gathering signatures for a ballot initiative, concluding that the law was an unconstitutional restriction on citizens' First Amendment right to engage in political speech.[144] The Court recognized Colorado's interest in ensuring that petition circulators gather signatures through "authentic" and non-fraudulent methods,[145] thus identifying the state interest in addressing voter-targeted fraud. But the Court subsequently declined to defer to the state's justification that the ban was necessary to protect against voter-targeted fraud in the petition process.[146] Instead, the Court emphasized that the legislature had enacted the policy in spite of an absence of evidence that signature gatherers, when paid on a per-signature basis, engaged in deceptive tactics.[147] And similar to the *McIntyre* opinion, the Court also emphasized that other provisions of Colo-

---

[139] *Id.* at 592.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 592-93; *see also* Pepper v. Darnell, 24 Fed. App'x 460, 462 (6th Cir. 2001) (upholding a Tennessee statute requiring that registered voters provide a specific physical location as an address, regardless of the transient lifestyle of the potential voter).
[143] 486 U.S. 414 (1988).
[144] *Id.* at 424; *see also* Buckley v. Am. Const. Law Found., 525 U.S. 182 (1999) (striking down state regulations for signature gatherers on the grounds that they significantly inhibited communication with voters about proposed political change and were not warranted by the state interest in reducing deception aimed at voters).
[145] *Meyer*, 486 U.S. at 426.
[146] *Id.*
[147] *See id.* at 425-28.

rado law explicitly prohibited canvassers from forging signatures or otherwise deceiving voters into signing the petition.[148]

A few years later, in *McIntyre v. Ohio Elections Commission*,[149] the U.S. Supreme Court used similar reasoning to strike down an Ohio statute that banned the distribution of anonymous, unsigned literature designed to influence voters in an election.[150] Finding the law to be a violation of the First Amendment protection of core political speech, the Court declined to defer to Ohio's argument that the ban was justified by the state's "interests in preventing fraudulent and libelous statements" directed at voters.[151] The Court recognized the importance of such an interest but reasoned that the challenged law was not the state's "principal weapon against fraud."[152] The Court noted two deterrent provisions in the Ohio Election Code that prohibited "making or disseminating false statements during political campaigns,"[153] and couched the state's ban on anonymous leafleting "as an aid to enforcement . . . and as a deterrent to the making of false statements by unscrupulous prevaricators."[154] In the view of the Supreme Court, however, these "ancillary benefits," while legitimate, did not justify the statute's "extremely broad prohibition" on anonymous literature.[155]

A third recent Supreme Court decision illustrating this trend of federal courts' minimal concern for a state's interest in deterring voter-targeted fraud is the 2004 case of *Spencer v. Pugh*.[156] Early on the morning of Election Day, November 2, 2004, the Supreme Court refused to vacate the circuit court's stay[157] of the Ohio district courts' limited injunctions barring voter challenges inside polling places in Ohio.[158] This decision permitted political parties to place observers in polling sites throughout the state to question the

---

[148] *See id.* at 427 (noting that, under Colorado law, it "is a crime to forge a signature on a petition, to make false or misleading statements relating to a petition, or to pay someone to sign a petition" (internal citations omitted)).

[149] 514 U.S. 334 (1995).

[150] *Id.* at 357; *see also* Talley v. California, 362 U.S. 60, 64 (1960) (striking down a Los Angeles ordinance banning all anonymous literature even though the ordinance was "aimed at providing a way to identify those responsible for fraud").

[151] *McIntyre*, 514 U.S. at 348.

[152] *Id.* at 350.

[153] *Id.* at 349 (citing OHIO REV. CODE ANN. §§ 3599.09.1(B), 3599.09.2(B) (LexisNexis 1998)).

[154] *Id.* at 350-51.

[155] *Id.* at 351.

[156] 543 U.S. 1301 (2004).

[157] Summit County Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547, 551 (6th Cir. 2004).

[158] *See* Spencer v. Blackwell, 347 F. Supp. 2d 528, 529 (S.D. Ohio 2004) (granting preliminary injunction barring challengers from the polls in Hamilton County); Summit County Democratic Cent. & Exec. Comm. v. Blackwell, No 5:04CV2165, 2004 U.S. Dist. LEXIS 22539 (N.D. Ohio Oct. 31, 2004) (granting a temporary restraining order prohibiting the state from allowing challengers in the polls during the November 2004 election and finding in part that the law was intended to prevent voter-initiated fraud but could lead to voter deception and intimidation).

eligibility of any citizen appearing to vote.[159] The case arose in part after the Hamilton County Republican Party indicated that over 600 challengers received permission under state law to be stationed in polling places throughout the day "in order to challenge voters' eligibility to vote."[160] Of the 251 additional challengers that the Hamilton County Republican party requested to have added beyond the typically filed list of precinct executive challengers, two-thirds were assigned to be in predominantly African American precincts,[161] leading to allegations from those who brought the case that "African American voters . . . will face an imposing array of 'challengers' deployed to their precincts on Election Day."[162] As a result, "African American voters will be intimidated; racial tension will rise and African American voters will be blocked from exercising their right to vote" in the name of preventing voter fraud.[163]

On November 1, 2004, the District Court for the Southern District of Ohio halted the placement of challengers in polling places, as permitted under the state law.[164] Among the district court's primary concerns was the poor training of potential challengers and their lack of experience, which, combined with the dearth of legal guidelines setting the parameters for their duties, created "an extraordinary and potentially disastrous risk of intimidation and delay."[165] Recognizing that voter-targeted fraud "severely burdens the right to vote,"[166] the district court weighed heavily the state's interest in limiting voter-targeted fraud against its interest in enabling challengers to root out and limit voter-initiated fraud.[167] The court thus overturned the state's decision to allow the use of challengers on Election Day.[168] This case

---

[159] *See* OHIO REV. CODE ANN. § 3505.20 (LexisNexis 2007) ("Any person offering to vote may be challenged at the polling place by any judge of elections."); OHIO REV. CODE ANN. § 3505.21 (LexisNexis 2007) ("At any primary, special, or general election, any political party supporting candidates to be voted upon at such election and any group of five or more candidates may appoint . . . to any of the precincts . . . one person, a qualified elector, who shall serve as observer for such party or such candidates during the casting and counting of the ballots . . . .").

[160] *Spencer*, 347 F. Supp. 2d at 530.

[161] *Id.* The court also noted that "evidence presented at the hearing reflects that 14% of new voters in a majority white location will face a challenger . . . but 97% of new voters in a majority African American voting location will see such a challenger." *Id.*

[162] *Summit County*, 388 F.3d at 550 (quoting Amended Complaint).

[163] *Id.*

[164] *Spencer*, 347 F. Supp. 2d 528.

[165] *Id.* at 535.

[166] *Id.*

[167] *Id.* at 536. The court also noted, "Ohio argues that in light of the huge numbers of newly registered voters and reports of fraudulent registration, a system allowing private challengers to question voter eligibility is a critical process." *Id.*

[168] The court also found compelling other protections the state had in place to prevent voter-initiated fraud. *See, e.g.*, *id.* at 537 ("As registrations are received, the Board of Elections processes them and works to ensure that they are not fraudulent. The Board of Elections may conduct investigations, summon witnesses, and take testimony under oath regarding the registration of any voter. . . . Further, any qualified elector of the county may challenge the right to vote of any registered elector to vote and the challenge will be considered by the Board of Elections at a hearing.").

represented a collision of the interests in preventing voter-initiated fraud and voter-targeted fraud, and the court recognized that addressing voter-targeted fraud may be the more critical of the two.[169]

Because of the nature of the allegations in the case—addressing the presence of challengers in polling places during an election taking place the very day the decision was issued—the Sixth Circuit heard an immediate appeal and, just a few hours after the district court issued its opinion, rejected and overturned the decision.[170] Two judges on a three-judge panel recognized the lower court's decision to allow challengers in polling places could lead to "enormous risk of chaos, delay, intimidation, and pandemonium."[171] But unlike the lower court, the Sixth Circuit weighed the "strong public interest in allowing every registered voter to vote freely" against the "strong public interest" in addressing voter-initiated fraud, and concluded that the latter interest was more compelling.[172] In a dissenting opinion, Judge Cole challenged this over-emphasis on voter-initiated fraud, stressing the near inevitability of voter-targeted fraud and intimidation as a result of the law.[173] Noting that "the rights of those seeking to prevent voter fraud are already well protected by the election protocols established by the state,"[174] Judge Cole declared that "when the fundamental right to vote without intimidation . . . is pitted against the rights of those seeking to prevent voter fraud, we must err on the side of those exercising the franchise."[175]

As the clock ticked throughout Election Day, plaintiffs quickly filed an emergency appeal to the U.S. Supreme Court. Justice Stevens reviewed the case without referring the matter to the full court and upheld the Sixth Circuit's decision.[176] His brief opinion noted that, although "the threat of voter intimidation is not new to our electoral system," there was simply no evidence that voter-targeted fraud would occur if challengers were permitted in the polling place.[177] Emphasizing his "faith" that voter-targeted deception and intimidation would not occur and that "the elected officials and numerous election volunteers on the ground will carry out their responsibilities in a way that will enable qualified voters to cast their ballots," Justice Stevens upheld the Sixth Circuit's decision to allow challengers in the polling place.[178]

The *Spencer* litigation underscores the inclination of federal courts to express great concern about the potential for voter-initiated fraud without

---

[169] *See id.* at 536 (describing the "persistent battle between two evils: voter intimidation and election fraud" (citing Burson v. Freeman, 504 U.S. 191, 206 (1992))).
[170] Spencer v. Blackwell, 388 F.3d 547 (6th Cir. 2004).
[171] *Spencer*, 347 F. Supp. 2d at 535.
[172] *Spencer*, 388 F.3d at 551.
[173] *Id.* at 553 (Cole, J., dissenting).
[174] *Id.* at 552.
[175] *Id.*
[176] Spencer v. Pugh, 543 U.S. 1301 (2004).
[177] *Id.* at 1302.
[178] *Id.* at 1302-03.

analysis or explanation, while failing to articulate a similarly high level of concern for protecting voters against intimidation and deception. In fact, the Supreme Court has deferred to the state's interest in addressing voter-targeted fraud only once. In *Burson v. Freeman*,[179] the Court reviewed a challenge to a Tennessee law that banned the distribution of campaign materials within 100 feet of a polling place.[180] A fractured court upheld the 100-foot campaign-free zone as not violating the protections of the First and Fourteenth Amendment, in part because four Justices recognized that Tennessee "has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process."[181] The plurality reached this conclusion in part due to its belief in the "logical connection" between ballot secrecy and the restricted zones.[182] The plurality stressed that it was faced with one of those "rare cases" in which the use of a facially content-based restriction was justified by interests unrelated to the suppression of ideas.[183]

Scholars have widely cited the Supreme Court's plurality decision in *Burson*, but at least one has noted the tenuous nature of the opinion.[184] This fragility is emphasized by the fact that *Burson* was followed just three years later by *McIntyre*, where the Court gave much less deference to the state's interest in protecting voters from fraud.[185]

This inconsistency can potentially be explained by an effort to balance competing constitutional rights—the right to vote versus the First Amendment right to freedom of speech—that the above decisions implicate. In some ways, it appears that courts are simply more likely to reject a state's interest in addressing fraud when the state's policy or law directly burdens the First Amendment rights of the fraudulent actors. In *McIntyre*, for example, the Supreme Court concluded that despite an interest in banning anonymous leafleting to protect against voter-targeted fraud, the ban unconstitutionally infringed on the ability of individuals to engage in political speech, even when that speech was deceptive.[186] Similarly, in *Meyer*, the Court rejected the regulation of payments for individuals gathering signatures for ballot initiatives because, though it may have reduced the potential for voter-targeted fraud, the regulation placed a burden on the political speech of individuals engaged in campaigning for the initiatives.[187]

---

[179] 504 U.S. 191 (1992).
[180] *Id.*
[181] *Id.* at 199.
[182] *Id.* at 208 n.10.
[183] *Id.* at 211.
[184] Blake D. Morant, *The Jurisprudence of the Media's Access to Voting Polls*, 4 First Amend. L. Rev. 107, 117 (asserting that the Court's holding in *Burson* "remains on somewhat precarious grounds," due to "Scalia's concurrence, which was the fifth and deciding vote, [and which] left the decision in *Burson* on tenuous legal footing").
[185] *See supra* text accompanying notes 149-155.
[186] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).
[187] Meyer v. Grant, 486 U.S. 414, 422-24 (1988).

That explanation, however, fails to consider that the potentially fraudulent actors in voter-initiated fraud—the voters—possess fundamental rights under both the First and Fourteenth Amendments to participate in the electoral process. It is a right so fundamental that its protections are found twice in the U.S. Constitution: the First Amendment right to political speech, expressed through voting, and the Fourteenth Amendment's protection of the act of voting as a fundamental right.[188] The Supreme Court specifically articulated the right to vote as a right protected under the First and Fourteenth Amendments in *Burdick v. Takushi*, when the Court upheld a limitation on write-in voting as a "reasonable burden[ ] on First and Fourteenth Amendment rights."[189] Judge Cole also emphasized this dual implication in his dissent from the Sixth Circuit's decision in *Spencer*,[190] explaining that efforts to address voter-initiated fraud burden the fundamental right to cast a ballot and, thereby, to speak one's mind in the political process.

The rights burdened by the policies evaluated in all of the above cases are fundamental. The analysis then becomes a balancing test between the competing rights, with, presumably, the protection going to the right with the greatest burden. Under this view, more concern should be directed towards policies that either greatly or significantly burden or block complete access to a particular right, or that implicate or burden two rights as opposed to one. This argument is discussed further in Section IV C.

IV. The Election Fraud Interest and Section 2 of the Voting Rights Act

The above cases illustrate a pattern in several recent federal decisions of granting two different levels of deference to a state's decision to address election fraud. Though the consideration of a state's interest generally plays a lesser role in decisions evaluating claims under Section 2 of the Voting Rights Act,[191] in this area of law federal courts have also given greater weight to a state's effort to address voter-initiated fraud while failing to grant similar weight to voter-targeted fraud.

A violation of Section 2 of the Voting Rights Act is established where a voting practice or procedure is shown, in purpose or effect, to discriminate on the basis of race or color.[192] Where there is no evidence of intent to discriminate, a violation "is established if, based on the totality of circum-

---

[188] *See* Reynolds v. Sims, 377 U.S. 533 (1964).

[189] Burdick v. Takushi, 504 U.S. 428, 441 (1992); *see also Recent Development—First Amendment*, 104 Harv. L. Rev. 657, 664 (1990) (describing the district court opinion in the *Burdick* case as "reconceptualizing the right to vote as an element of political speech").

[190] *See supra* text accompanying notes 173-175.

[191] *See* 42 U.S.C. § 1973 (2000).

[192] 42 U.S.C. §1973(a) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .").

stances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[193] Under this language, a successful Section 2 challenge to an election law that does not involve redistricting is established where, under the "totality of the circumstances," the challenged policy or action led to the dilution of the voting power of the group of voters whom the plaintiffs represent.[194]

A. Section 2 and State Efforts to Address Voter-Initiated Fraud

Relevant federal decisions under Section 2 reveal the courts' consideration of the state interest behind certain election laws, particularly where such policies address voter-initiated fraud. One of the most direct examples of a court seriously weighing the state's interest in addressing voter-initiated fraud is the Third Circuit's 1994 decision in *Ortiz*.[195] In addition to the constitutional claim, the Third Circuit rejected a Section 2 challenge to the state's voter purge law despite evidence that the law operated in an electoral system where there was racially polarized voting,[196] a "general pattern" of racial appeals in political campaigns,[197] and other factors relevant to the totality of the circumstances analysis.[198] Instead, the court concluded that there was no evidence that the law *caused* the disparities that led to the removal of a disproportionate number of voters of color from registration lists.[199] A notable aspect of the court's analysis was its indication that it was inclined to uphold the law in part because the voter purge procedure was

---

[193] 42 U.S.C. §1973(b) (2000).

[194] In evaluating whether the law violated Section 2 under the "totality of the circumstances," courts relied on nine factors published in the Senate Judiciary Committee Report that accompanied the bill amending Section 2. Included in the report's analysis of which factors should be considered in evaluating the "totality of the circumstances" were: (1) the extent of any history of official discrimination by the state or local government against members of the minority group in question that affected their right to participate in the democratic process; (2) racially polarized voting; (3) the presence of other voting practices or procedures that "enhance" the opportunity for discrimination against the minority group; (4) ease of ballot access for minority candidates; (5) presence of discriminatory effects in areas of education, employment, and health against the minority group; (6) presence of race in political campaigns; (7) the extent to which members of the minority group have been elected to public office in the jurisdiction where the law applies; (8) the responsiveness on the part of elected officials to the minority group; and (9) whether the goal of the challenged practice is "tenuous." S. REP. NO. 97-205, at 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07.

[195] Ortiz v. City of Philadelphia, 28 F.3d 306 (3d Cir. 1994); *see also supra* text accompanying notes 132-135.

[196] *Ortiz*, 28 F.3d at 312 (citing Ortiz v. City of Philadelphia, 824 F. Supp. 514, 532-33 (E.D. Pa. 1993)).

[197] *Id.* (citing *Ortiz*, 824 F. Supp. at 536-37).

[198] *Id.*

[199] *Id.* at 314.

"needed to prevent electoral fraud."[200] Though it was not necessary to the court's Section 2 analysis, the opinion stresses at no fewer than five separate points that the state's justification for the purge statutes—that they reduced voter-initiated fraud—was the "sole purpose" of the law.[201]

Opinions in other circuits have embraced a similar consideration of policies aimed at deterring voter-initiated fraud. In their analyses of felon disenfranchisement laws, for example, the Sixth and Second Circuits consider the role of such laws in "protecting" the electoral process from voter-initiated fraud.[202] While historical evidence indicates that the laws are rooted in past attempts to limit African Americans' access to the ballot box,[203] felon disenfranchisement laws are often described in these opinions, most famously by the U.S. Supreme Court in *Richardson v. Ramirez*,[204] as "necessary to prevent vote frauds,"[205] in part because of a concern that allowing individuals who violate the law to vote taints the electoral process. In 1986, for example, the Sixth Circuit Court of Appeals cited the state's interest in preventing fraudulent or otherwise corrupt voter behavior as a motivation for the laws.[206]

In *Wesley v. Collins*,[207] the Sixth Circuit upheld a Tennessee law that banned all individuals with felony convictions from electoral participation[208] in the face of a claim under Section 2 that the law, under the "totality of the circumstances," had a disparate impact on African American citizens in the state.[209] The *Wesley* court found that the law had a disproportionate impact on African Americans, but did not find a causal connection between the

---

[200] *Id.* at 316.

[201] *See id.* at 317; *see also id.* at 312-13 (noting that the policy justifications behind Philadelphia's "implementation of the voter purge were substantial and were based upon a valid state interest of ensuring that elections in Philadelphia are not plagued with [voter-initiated] fraud"); *id.* at 314 ("[I]t is well established that purge statutes are a legitimate means by which the State can attempt to prevent voter fraud."); *id.* at 316 ("[W]e are satisfied that a review of the record and present reality demonstrates that the City's purge statute . . . is needed to prevent electoral fraud."); *id.* at 317 ("Once again, we emphasize that the sole purpose of that [voter purge] act is to prevent the very electoral fraud which can diminish the voting power of all citizens . . . .").

[202] *See* Wesley v. Collins, 791 F.2d 1255, 1261-62 (6th Cir. 1986); Green v. Bd. of Elections of New York, 380 F.2d 445, 451 (2d Cir. 1967). *But see* Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003).

[203] *See, e.g.*, Alysia Robben, *A Strike At The Heart Of Democracy: Why Legal Challenges To Felon Disenfranchisement Laws Should Succeed*, 10 D.C. L. REV. 15 (2007); David Zetlin-Jones, *Right To Remain Silent?: What The Voting Rights Act Can And Should Say About Felony Disenfranchisement*, 47 B.C. L. REV. 411, 420 (2006).

[204] Richardson v. Ramirez, 418 U.S. 24 (1974).

[205] Richardson, 418 U.S. at 79 (Marshall, J., dissenting) (identifying but rejecting this rationale).

[206] *Wesley*, 791 F.2d. at 1261-62 (6th Cir. 1986).

[207] *Id.*

[208] *See* Wesley v. Collins, 605 F. Supp. 802, 804 (D. Tenn. 1985) (citing TENN. CODE ANN. § 2-19-143 (1985)). The Tennessee law stated in part that no person "who has been convicted of [a felony] in this state shall be permitted to register to vote or vote at any election unless he shall have been pardoned by the governor. . . ." TENN. CODE ANN. § 2-19-143 (1985).

[209] *See Wesley*, 791 F.2d at 1259-60.

Tennessee law and the impact. The court reasoned that felons were not denied the right to vote by their race *per se*, but as a result of an act—the felony—that they chose to commit.[210]

Noting "the state's legitimate and compelling rationale for enacting the statute,"[211] the Sixth Circuit opinion relied on reasoning advanced in the Second Circuit's opinion in *Green v. Board of Elections*.[212] The *Green* opinion, which also upheld a law that barred felons from voting, reasoned in part that "it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part" in the political process, "especially so when account is taken of the heavy incidence of recidivism and the prevalence of organized crime."[213] Similarly, the district court in *Wesley* discussed prevention of fraudulent or otherwise corrupt voter behavior as a motivation behind the laws, citing language from the Tennessee Constitution granting the state the power to enact laws in order to "secure the . . . purity of the ballot box."[214]

Subsequent Section 2 challenges to felon disenfranchisement laws in the Second,[215] Eleventh,[216] and Ninth[217] Circuits were also unsuccessful, though the courts' analyses in those opinions emphasize the impact of the laws on voters of color. The Eleventh Circuit opinion, however, which reviewed Florida's strict ban on voting by former felons, specifically cited to the analysis in *Green*, and referred to Florida's "public policy reason" for disenfranchising felons as similarly "valid" in the context of the court's Equal Protection analysis.[218]

---

[210] *See id.* at 1262.

[211] *Id.* at 1261.

[212] *Id.* at 1261-62 (citing Green v. Bd. of Elections of New York, 380 F.2d 445, 451-52 (2d Cir. 1967)).

[213] *Id.*

[214] Wesley v. Collins, 605 F. Supp. 802, 806 (D. Tenn. 1985) (citing TENN. CONST. art. IV, § 1).

[215] Hayden v. Pataki, 449 F.3d 305, 322-23 (2d Cir. 2006) (concluding that claims challenging felon disenfranchisement statutes were beyond the scope of Section 2).

[216] Johnson v. Governor of Florida, 405 F.3d 1214, 1232-33 (11th Cir. 2005) (concluding, based on a questionable review of legislative history, that the language in Section 2 banning any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" was not intended to encompass felon disenfranchisement statutes).

[217] *See* Farrakhan v. Washington, 338 F.3d 1009, 1020 (9th Cir. 2003) (concluding that Section 2 was intended to reach the legality of state felon disenfranchisement provisions and that disparities in the criminal justice system should be considered in determining the impact of the law under the "totality of the circumstances"). On remand, however, the district court determined that plaintiffs had failed to present sufficient data to show a Section 2 violation under the totality of the circumstances and dismissed the claim. Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 U.S. Dist. LEXIS 45987 (E.D. Wash. July 7, 2006).

[218] *Johnson*, 405 F.3d at 1225.

B. Section 2 and State Efforts to Address Voter-Targeted Fraud

The *Ortiz* and *Wesley* decisions illustrate instances where, even when they are not required to do so under the claims before them, federal courts have articulated an implicit endorsement of policies aimed towards limiting voter-initiated fraud. Other federal decisions addressing allegations of voter-targeted fraud under Section 2 have reached different results. *Operation King's Dream v. Connerly* in the Eastern District of Michigan, later affirmed by the Sixth Circuit Court of Appeals,[219] addressed the issue of voter-targeted fraud during the signature-gathering phase of a ballot initiative.[220] Though the factual findings of the district court indicated that the initiative campaign "committed voter fraud in obtaining signatures in support of the petition," the court ultimately concluded that there was nothing it could do to intervene.[221] The case involved allegations that petition circulators gathering signatures from registered voters for an anti-affirmative action ballot initiative were specifically directed to areas with large African American populations and instructed to present the proposal as pro-affirmative action.[222] The court described "overwhelming[ ]" [223] evidence that voters were fraudulently deceived into signing the petitions, emphasizing that "the conduct of the circulators went beyond mere 'puffery' and was in fact fraudulent because it objectively misrepresented the purpose of the petition."[224] The court described the acts of the campaign organization behind the ballot initiative as "best characterized by the use of deception and connivance to confuse the issues in the hopes of getting the proposal on the ballot."[225]

Though the opinion explicitly criticized several state actors, including the Michigan Secretary of State and Attorney General, for failing to take the "allegations of voter fraud seriously,"[226] the court declined to find that the acts violated Section 2 of the Voting Rights Act.[227] The court explained that the plaintiffs "established voter fraud but have not established the inequality of access necessary to establish a violation" of Section 2.[228] As a result, the acts of voter-targeted fraud went unpunished.

---

[219] Operation King's Dream v. Connerly, No. 3:06cv138/LAC/EMT, 2007 U.S. App. LEXIS 20550 (6th Cir. Aug. 28, 2007).

[220] Operation King's Dream v. Connerly, No. 06-12773, 2006 U.S. Dist. LEXIS 61323 (E.D. Mich. Aug. 29, 2006).

[221] *Id.* at *57.

[222] *Id.* at *7.

[223] *Id.* at *33.

[224] *Id.*; *see also id.* at *35 ("[Some of the circulators] were themselves led to believe that they were circulating a petition supporting affirmative action. Other circulators obviously knew that the petition opposed affirmative action and deliberately misrepresented the petition's purpose. In either situation, the signers were in a position to reasonably rely on the circulators' misrepresentations.").

[225] *Id.* at *32-*33.

[226] *Id.* at *5.

[227] *Id.* at *53.

[228] *Id.* at *51.

Section 2 was also not of any use to litigants seeking to challenge voter-targeted fraud in *Welch v. McKenzie*.[229] In *Welch*, the Fifth Circuit Court of Appeals heard allegations of, among other things, "fraud in the distribution and counting of absentee ballots" following a local election in Mississippi.[230] In one instance, the court described six voters who had intended to vote for the African American candidate, Welch, but who were counted by the county registrar as supporting Welch's white opponent.[231] The *Welch* Court found numerous "decidedly suspicious" incidents,[232] but found "no evidence that racially discriminatory intent underlay those infractions,"[233] and found that the infractions "resulted in the counting of [improper] ballots cast by both black and white voters."[234] As a result, the court concluded that there was no violation of Section 2 of the Voting Rights Act.[235]

Of course, the purpose of Section 2 is to attack racial discrimination and not election fraud. The distinction in the legal analysis of the above cases can be explained by the underlying difference in the state actions the courts were evaluating. In the cases challenging purging and felon disenfranchisement laws, the courts were evaluating state actions justified, in part, by a desire to protect the electoral process from voters' nefarious acts. In the cases alleging voter-targeted fraud, the courts simply declined to intervene in light of the states' failure to act because of the lack of sufficient evidence of racial discrimination.

Nonetheless, the above cases are relevant because they illustrate courts' greater concern for the democratic implications of voter-initiated fraud than of voter-targeted fraud. In *Wesley* and *Ortiz*, voter-initiated fraud is of enough concern to the courts that their opinions discuss it at length as a justification for the laws they uphold under Section 2. In *Operation King's Dream* and *Welch*, the courts construed Section 2 as unable to address incidents of voter-targeted fraud, even where they have a disparate impact on voters of color. These cases implicitly endorse state efforts to address voter-initiated fraud while simultaneously indicating that federal courts will not intervene when states fail to address voter-targeted fraud.

V. Towards an Analytical Approach to Evaluating a State's Interest in Addressing Election Fraud

The preceding analysis illuminates the cumulative trend among a series of recent court decisions evaluating the legality of state actions to address election fraud. The jurisprudence collectively illustrates that the language

---

[229] 765 F.2d 1311 (5th Cir. 1985).
[230] *Id.* at 1312.
[231] *Id.* at 1314 (citing Welch v. McKenzie, 592 F. Supp. 1549, 1557 (S.D. Miss. 1984)).
[232] *Id.* at 1317.
[233] *Id.* at 1312.
[234] *Id.* at 1316.
[235] *Id.*

and holdings in federal opinions convey a message of great concern for the impact of voter-initiated fraud on democracy, and evince little concern about the need to address voter-targeted fraud. As discussed above, part of this imbalance is caused by the lack of an analytical definition of fraud in the electoral process,[236] which enables federal courts to selectively defer to a state's interest in preventing election fraud without requiring a more objective inquiry into whether states have a higher interest in addressing some kinds of election fraud than others.

It is also important to emphasize that this imbalanced emphasis is problematic not because voter-initiated fraud does not have the potential to harm our democracy,[237] but because the imbalance is inapposite to what the data suggests: voter-targeted fraud poses a widespread threat to the health and integrity of our democracy. For example, a lower court opinion in the *Crawford* case notes plaintiff's contention that "as far as anyone knows, no one in Indiana, and not many people elsewhere, are known to have been prosecuted for impersonating a registered voter."[238] The Supreme Court similarly cited only "scattered" evidence of in-person voter-initiated fraud.[239] Yet in Cook County, Illinois, in the same circuit from which *Crawford* originated, there were accounts of voter-targeted fraud during the 2004 Presidential election. Shortly after the election, reports from nonpartisan voter protection organizations alleged that police officers were stationed outside a polling place in Cook County, Illinois, falsely telling voters that they must present identification and warning them that if they had been convicted of a felony they could not vote.[240]

In addition to being more prevalent, acts that involve voter-targeted fraud pose a direct threat to the constitutional rights of American citizens, threatening not only their fundamental right to vote but also their First Amendment rights to political speech. In contrast, voter-initiated fraud has the potential to "dilute" the strength of votes cast by legitimate voters,[241] an important but less direct harm to democracy.

In response to what I have characterized as federal courts' inconsistent approach to evaluating election-related fraud, I suggest a test that, if applied in future cases, could ensure that the courts employ a more reasoned approach to evaluating a state's interest in addressing election fraud. This approach considers data indicating the significance of a certain type of fraud and urges courts to evaluate the impact of a particular strain of fraud on the

---

[236] *See supra* text accompanying notes 21-25.

[237] *See* Crawford v. Marion County Elections Bd., 128 S. Ct. 1610, 1619 (2008) (citing a 2003 example of absentee ballot fraud as evidence that "not only is the risk of voter[-initiated] fraud real but that it could affect the outcome of a close election").

[238] Crawford v. Marion County Elections Bd., 472 F.3d 949, 953 (7th Cir. 2007).

[239] *Crawford*, 128 S. Ct. at 1619 n.12.

[240] People for the American Way, *Election Protection 365: Intimidation and Deceptive Practices*, *available at* http://www.ep365.org/site/c.fnKGIMNtEoG/b.2052599/k.6FF4/Intimidation_and_Deceptive_Practices.htm.

[241] *Crawford*, 472 F.3d at 952.

individual right to vote and protection of broader democratic values. This section thus argues that in deferring to state efforts to address, or not to address, election fraud, courts should embrace an analysis that considers quantitative and qualitative evidence of the prevalence of the particular type of fraud, as well as the constitutional rights that are implicated by the furthering of the fraudulent act. That analysis ultimately suggests that courts' current emphasis on voter-initiated fraud, and lesser emphasis on voter-targeted fraud, is misplaced.

A. Data-driven Decisions and Election Fraud

The first component of this suggested test for evaluating a state's interest in addressing election fraud requires courts to exercise greater deference to decisions that are based on data that certain types of election fraud exist and affect the health and integrity of the electoral system. Under this approach, for example, courts evaluating constitutional challenges to election laws that burden voting participation in the name of curbing election fraud would grant more deference to state actions that respond to proven fraudulent behavior. Similarly, courts would give less deference to policies aimed at reducing a type of election fraud when there is little or no evidence that such fraud occurs.[242]

This method would discourage what Professor Spencer Overton describes as the tendency for judges to "wander into the political thicket blindly" and make "decisions based on their own assumptions about fraud . . . rather than empirical evidence."[243] It would also encourage state lawmakers to devise ways to address election fraud in response to actual problems the electoral process was currently facing, as opposed to "solution[s] in search of a problem."[244]

This proposal would not require "elaborate[ ] empirical verification" of a State's justification for a law,[245] nor would it necessitate an unnecessary intrusion on the state's independent ability to enact election laws. It merely suggests that polices enacted to curb fraud be subjected to higher scrutiny if enacted in the absence of such evidence. The U.S. Supreme Court has in the past deemphasized the importance of empirical evidence, so long as laws do

---

[242] *See, e.g.*, Overton, *supra* note 36, at 653 (emphasizing the importance of using empirical data to determine the scope and presence of fraud in modern elections); Daniel P. Tokaji, *The Moneyball Approach to Election Reform*, ELECTION LAW @ MORITZ, Oct. 18, 2005, http://moritzlaw.osu.edu/electionlaw/comments/2005/051018.php (suggesting a "research-driven inquiry" into developing practices for successful election administration, "in place of the anecdotal approach that has too often dominated election reform conversations").

[243] *See* Overton, *supra* note 36, at 637.

[244] Panel Discussion, *Voter ID Laws: Preventing Fraud or Suppressing the Vote?*, 13 GEO. PUB. POL'Y REV. 109, 110 (2007).

[245] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 352 (1997) (citing Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986)).

not "significantly impinge on constitutionally protected rights."[246] Yet at other times, when the Constitution is concerned, the Supreme Court has energetically endorsed the importance of enacting legislation in response to a careful consideration of empirical evidence showing the nature of the harm. The Court's 1997 opinion in *City of Boerne v. Flores*,[247] for example, discusses the importance of evidentiary support for legislative decisions enacted to enforce the Fourteenth Amendment of the U.S. Constitution.[248]

Further, federal courts already apply a spectrum of deference, linked to qualitative evidence of election fraud, in evaluating the constitutionality of laws that limit payments to signature gatherers for ballot initiatives. In 1988, the U.S. Supreme Court held in *Meyer v. Grant*[249] that a law banning the per-signature payment of individuals gathering signatures for a ballot initiative[250] was an unconstitutional infringement on the First Amendment political speech rights of individuals seeking to change law via the initiative process, in part because there was no actual evidence that campaigns paying petition circulators per signature led to those circulators fraudulently inducing registered voters to sign their petitions.[251]

In the nearly twenty years following *Meyer*, similar laws have survived constitutional scrutiny in the Eighth and Ninth Circuits, but only after those courts found that the restrictions were enacted in response to qualitative and quantitative evidence of actual fraud in the signature gathering process.[252] In 2001, for example, the Court of Appeals for the Eighth Circuit upheld a North Dakota law banning per-signature payments to canvassers, finding the regulation justified by the state's interest in reducing voter-targeted fraud in the signature gathering process.[253] In upholding the ban, the court cited empirical evidence of fraud that had occurred in a previous signature campaign

---

[246] *Munro*, 479 U.S. 189, 195-96 (1986). In this case, the Court cautioned that "requir[ing] States to prove actual [harm] as a predicate to the imposition of reasonable . . . restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' . . . [and] would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Id.* at 195. The Court's opinion in *Munro* grants legislatures permission to "respond to potential deficiencies in the electoral process with foresight rather than reactively," so long as the "response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.* at 195-96.

[247] 521 U.S. 507 (1997).

[248] *Id.* at 525 (describing the importance of evidence in supporting the constitutionality of the Voting Rights Act).

[249] Meyer v. Grant, 486 U.S. 414 (1988).

[250] COLO. REV. STAT. § 1-40-110 (1980).

[251] *Meyer*, 486 U.S. at 427-28. The Supreme Court also held in *Meyer* that a complete ban on paid circulators restricted the expression of "core political speech" because such a ban limited the number of people who could convey a political message to only those who could volunteer. *Id.* at 422-23.

[252] *See* Prete v. Bradbury, 438 F.3d 949, 969 (9th Cir. 2006); Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614, 618 (8th Cir. 2001).

[253] *See Jaeger*, 241 F.3d at 618; *see also* Citizens for Tax Reform v. Deters, 462 F. Supp. 2d 827, 836 (S.D. Ohio 2006) (noting that in *Jaeger*, "North Dakota produced evidence concerning an incident in 1994 where 17,000 petition signatures were invalidated and 'a subsequent investigation revealed that payment per signature was an issue'").

in North Dakota, evidence that was explicitly discussed in the legislative record and which led to the enactment of the legislation.[254]

The Court of Appeals for the Ninth Circuit upheld a similar statute in Oregon five years later.[255] The Ninth Circuit was persuaded by the defendant's arguments that the Oregon law was enacted in furtherance of an "important regulatory interest in preventing fraud and forgery in the initiative process," and that its enactment was supported with "evidence that signature gatherers paid per signature actually engage in such fraud and forgery."[256] The court discussed evidence that prior to the law's enactment there were "reports of interviews of various signature gatherers (paid per signature) who had forged signatures on their petitions; purchased signature sheets filled with signatures . . . ; or participated in 'signature parties' in which multiple petition circulators would gather and sign each others' petitions."[257] In light of this significant evidence of fraudulent behavior, the court concluded that the state's interest in reducing such incidents of fraud and deception justified any minimal burden on the political speech rights of the signature gatherers.

Under this approach, policies requiring voters to produce photo identification when they appear to vote on Election Day would be one example of a law that would receive less deference from the courts. Several empirical studies have concluded that the potential for this type of voter-initiated fraud, or the likelihood that individuals will seek to cast a vote using someone else's identity, is "rare" and "negligible."[258] In scenarios such as this, laws not bolstered by empirical evidence would receive less deference from the courts. The courts would then consider the state interest in reducing election fraud not as great as it would be were there actual evidence of widespread fraud.

---

[254] *Jaeger*, 241 F.3d at 618 (emphasizing that in enacting the legislation, "the legislators were aware of, and contemplated, the bill's effect on the circulation of petitions, but that they were more concerned with the testimony they had heard regarding signature fraud"). The only additional evidence of fraud cited in the *Jaeger* opinion is that "in 1994 approximately 17,000 petition signatures were invalidated [and a] subsequent investigation revealed that payment per signature was an issue" in their invalidation. *Id.*

[255] *Prete*, 438 F.3d 949.

[256] *Id.* at 970-71.

[257] *Id.* at 969.

[258] *See, e.g.*, MINNITE, *supra* note 21, at 3 (concluding that the "intentional corruption of the electoral process by the voter" is "extremely rare," and noting that "at the federal level, records show that only 24 people were convicted of or pleaded guilty to illegal voting between 2002 and 2005" and that "available state-level evidence of voter fraud, culled from interviews, reviews of newspaper coverage and court proceedings, while not definitive, is also negligible"); *see also* Amy Goldstein, *Democrats Predict Voter ID Problems*, WASH. POST, Nov. 3, 2006, at A01 (quoting Mary G. Wilson, national president of the League of Women Voters, referring to identification laws as "odious" and adding that "[t]here is very little evidence [that] there's been any kind of voting by people who are ineligible to vote").

B. The Relevance of Historical and Qualitative Evidence in Evaluating a State's Interest in Curbing Fraud in Elections

Courts should also consider other types of evidence when determining the amount of weight to grant to efforts relating to election fraud. For example, an additional component to a court's analysis could allow for greater deference to policies targeting fraudulent acts that affect individuals, groups, or entities that historically have suffered from widespread fraud and deception in the electoral context.

The U.S. Supreme Court case of *Burson v. Freeman*[259] illustrates the value of this type of heightened focus on policies that consider or respond to deeper historical data of fraudulent acts. In *Burson*, the Court held that a Tennessee law prohibiting political campaigning within 100 feet of the entrance to a polling place advanced the state's interest in preventing voter intimidation and voter-targeted fraud.[260] Justice Blackmun's plurality opinion applied strict scrutiny to review the law's potential restriction on speech, but concluded that the law was justified because of the extensive history—however distant[261]—of acts of intimidation and fraud directed at voters at the polling place throughout the country, dating back to colonial times.[262] Blackmun's analysis of justifications for the law even included a discussion of similar historical problems in Australia, England, and Belgium.[263] This thorough examination of the historical nature of the type of fraud—and the "long history" of intimidation at the polls on Election Day—that the Tennessee law sought to eliminate was the critical component in the plurality's conclusion that the policy survived strict scrutiny.[264] In contrast, the Supreme Court's consideration of the history of the in-person, voter-initiated fraud targeted by the Indiana photo identification law references a single "infamous example" of multiple voting from an 1868 election in New York City.[265]

Were federal courts to more fully embrace the Supreme Court's analysis in *Burson* and grant greater consideration to a state's interest in combating types of election fraud with heavy historical prevalence, courts would likely need to recognize that the vast majority of historical accounts of voter fraud indicate that the fraudulent acts of political campaigns, voters, and political

---

[259] 504 U.S. 191 (1992).

[260] *Id.* at 204.

[261] *See* Brian K. Pinaire, *Strange Brew: Method and Form in Electoral Speech Jurisprudence*, 14 S. CAL. INTERDISC. L.J. 271, 277-78 (2005) (discussing how Justice Blackmun's evaluation of the law in *Burson* relied "almost exclusively on the state's catalog of abuses from the distant past," including "eight history books, each focusing on the intimidation generated by political 'machines' and the prevalence of electoral fraud throughout the nineteenth century").

[262] *Burson,* 504 U.S. at 202.

[263] *Id.* at 202-03; *see also* Pinaire, *supra* note 261, at 279.

[264] *Burson*, 504 U.S. at 211.

[265] Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1619 n.11 (2008).

parties have been relatively minimal. In his tome on the history of the right to vote in the United States, for example, esteemed historian Alexander Keyssar writes that in the nineteenth and early twentieth century, this type of election fraud and corruption "clearly did exist," particularly in acts committed by party leaders and politicians.[266] However, Keyssar emphasizes that "recent studies have found that claims of widespread corruption were grounded almost entirely in sweeping, highly emotional allegations backed by anecdotes and little systematic investigation or evidence."[267] He cites the work of several other historians indicating that there are "few documented cases" of fraudulent acts such as ballot box stuffing and voters "trooping from precinct to precinct to vote early and often."[268] Where there is evidence of such fraud, it originated from politicians and empowered entities, rather than with the voters.[269] Though he refers to smatterings of accounts of voter-initiated fraud, Keyssar describes the historical fears of voters acting fraudulently as being "spawned by germs of fact, cultured in a medium of class and ethnic (or racial) prejudice and apprehension."[270]

In contrast, attempts to deceive and intimidate voters, particularly voters of color, have been perhaps the most prevalent type of election fraud in the history of our democracy,[271] as the Supreme Court emphasized by deferring to the state interest of addressing election fraud in *Burson*.[272] In addition, historian Nicholas Danigelis and others have described at length the effect that widespread acts of physical and verbal intimidation had on reducing the political participation of African Americans in the post-Reconstruction South, noting that the intimidation "was not short-lived but remained as part of the white southerner's arsenal of weapons against black suffrage for a long time."[273] Descriptions of specific incidents range from police in Cincinnati arbitrarily arresting over one hundred African American males the night before Election Day and releasing them after the polls closed the next day without pressing charges,[274] to a future Supreme Court Justice attempting to intimidate and discourage voters at the polling place, saying, among

---

[266] KEYSSAR, *supra* note 48, at 159; *see also* Peter H. Argersinger, *New Perspectives on Election Fraud in the Guilded Age*, 100 POL. SCI. Q. 669 (1985).

[267] KEYSSAR, *supra* note 48, at 159.

[268] *Id.*

[269] *See* Argersinger, *supra* note 266, at 677-79 (discussing accounts of politicians attempting to manipulate the outcome of elections); *id.* at 686 (noting that election fraud perpetrated by political parties was a "common characteristic of Guilded Age elections").

[270] KEYSSAR, *supra* note 48, at 160-61. A recent report by the Advancement Project offers a more blunt observation: "The historically disenfranchised are often the target of voter fraud allegations. Fraud allegations [in the twenty-first century] typically point the finger at those belonging to the same categories of voters accused of fraud in the past—the marginalized and formerly disenfranchised, urban dwellers, immigrants, blacks, and lower status voters." MINNITE, *supra* note 21, at 4.

[271] *See, e.g.*, Nicholas L. Danigelis, *A Theory of Black Political Participation in the United States*, 56 SOC. FORCES 31, 36-37 (1977).

[272] *See* Burson v. Freeman, 504 U.S. 191, 200-08 (1992).

[273] Danigelis, *supra* note 271, at 37.

[274] Argersinger, *supra* note 266, at 685.

other things, that such voters had "no business" being there on Election Day.[275] These historians argue that the widespread nature of these acts of intimidation, deception, and fraud geared towards voters of color have the aggregate effect of preventing large numbers of citizens from voting,[276] ultimately harming the health and legitimacy of our democracy.[277]

History instructs us that the type of election fraud that has been most rampant, and perhaps most harmful, over time is the type of fraud that is directed at intimidating and deceiving the voter. Courts embracing a qualitative component to defining election fraud should recognize, as the Court did in *Burson*, that states have a greater interest in addressing election fraud when targeting a type of fraud that qualitative or historical evidence suggests is particularly harmful to the democratic values of our country. Similarly, courts could also rely on a historical approach in concluding that states have a significant interest in enacting policies to reduce acts of fraud and deception aimed at voters of color, as history indicates a widespread pattern of such acts aimed at these voters.

C. Election Fraud and the Implication of Constitutional Rights

In addition to these evidentiary considerations, an analysis of the constitutional rights that voter-targeted and voter-initiated fraud implicates also amplifies the importance of efforts to address voter-targeted fraud. Although federal courts must carefully consider any state policies that burden protections promised to citizens under the U.S. Constitution, certain strains of election fraud pose a greater threat to those protections than others. To that end, a legal analysis that balances the constitutional burdens that a particular fraudulent act imposes against the impact of a state action targeting that act would lead courts to grant greater deference to state policies seeking to limit voter-targeted fraud.

Deceptive practices that target voters implicate two important and overlapping constitutional interests: the fundamental right to vote[278] and the individual right to political speech.[279] In the facts giving rise to litigation in *Spencer v. Blackwell*,[280] for example, the Hamilton County Republican Party sought to place party representatives in the polling places in order to challenge voters' eligibility and planned to station most representatives in Afri-

---

[275] *William Rehnquist's Early History of Discouraging Black Voters,* J. BLACKS HIGHER EDUC., Winter, 2000-2001, at 26-27.

[276] Danigelis, *supra* note 271, at 37.

[277] Overton, *supra* note 36, at 636 ("Widespread participation furthers democratic legitimacy by producing a government that reflects the will of the people and allowing diverse groups of citizens to hold government officials accountable for their decisions.").

[278] *See* Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

[279] *See* U.S. CONST. amend. I; *see also* Burdick v. Takushi, 504 U.S. 438, 441 (1992).

[280] 347 F. Supp. 2d 528 (S.D. Ohio 2004).

can American precincts.[281] As a result, litigants feared that the party representatives would intimidate or otherwise block voters, many of whom would be African American, from exercising their right to vote.[282] Attempts to block voters from participating, based on false information that they were not permitted to vote, were not registered, or that voting would somehow lead to them to be prosecuted for unpaid parking tickets,[283] illustrate how voter-targeted fraud directly limits the ability of voters to exercise their fundamental constitutional right to vote. The Fifteenth Amendment, which bans limits on voting based on race or color, is also implicated when fraud is intentionally targeted at voters of color.[284]

Further, acts of voter-targeted fraud also threaten the political speech rights of citizens, protected under the First Amendment of the U.S. Constitution, because the acts directly affect the ability of citizens to express their voice within the political arena. For example, shortly before Election Day 2004, held on November 2, voters in Polk County, Florida reported receiving telephone calls informing them that Election Day was on Wednesday, November 3.[285] Wisconsin citizens received flyers warning that if they had already voted in "any election this year, you can't vote in the Presidential Election" or if "anybody in your family has ever been found guilty of anything you can't vote in the Presidential Election."[286] When voters are intentionally deceived in this way, their right to express themselves in the political arena is limited because they are either deterred from voting or because they are misled about the day on which they must cast their vote.

On the flip side, efforts to limit voter-targeted fraud risk placing a correlating burden on First Amendment protections for political speech through limiting the time, place, or manner in which those individuals approach or interact with voters.[287] Limits on the ability of political parties to place chal-

---

[281] *Id.* at 530. The court also noted that "evidence presented at the hearing reflects that 14% of new voters in a majority white location will face a challenger . . . but 97% of new voters in a majority African-American voting location will see such a challenger." *Id.*

[282] *Id.* at 531.

[283] *See, e.g.*, *Hearing, Prevention of Deceptive Practices*, *supra* note 4, at 149 (testimony of John Trasviña, Director and General Counsel, Mexican American Legal Defense and Education Fund). The testimony that Trasviña and others provided to the U.S. Senate Judiciary Committee in support of S. 453 described several incidents in which voters were intentionally deceived about voting requirements. Trasviña noted: "[In] Lake County, Ohio, for example, a fraudulent memo written on fake Board of Elections letterhead was sent to county residents informing them that registration obtained through Democratic Party and NAACP registration drives were invalid. . . . In Pittsburgh, Pennsylvania, flyers printed on county letterhead advertised the wrong election date, stating that the voting date had been changed to one day later than the actual voting date." *Id.*

[284] U.S. CONST. amend. XV.

[285] People for the American Way, *supra* note 240.

[286] *Hearing, Prevention of Deceptive Practices*, *supra* note 4, at 149 (statement of Sen. Benjamin L. Cardin).

[287] Burson v. Freeman, 504 U.S. 191, 218-19 (1992) (Stevens, J., dissenting) ("The fact that campaign-free zones cover such a large area in some States unmistakably identifies censorship of election-day campaigning as an animating force behind these restrictions. . . . The

lengers in precincts on Election Day,[288] or on how close candidate representatives can stand to precinct entrances,[289] increase the burden on individuals, campaigns, or political parties to communicate their message to the voters. In *Meyer*, for example, the U.S. Supreme Court based its rejection of bans on per-signature payments for individuals circulating ballot petitions explicitly because the ban burdened the political speech of individuals engaged in campaigning for the initiatives.[290] Yet unlike voters' ability to engage in political speech at polling locations, or the fundamental right to exercise the franchise, adequate alternative avenues exist for campaigns, signature gatherers, or others who wish to reach voters and vie for their support, such as standing outside of polling locations but not close enough to violate any "safety zone" limitations. The burden on their constitutional rights is arguably not as stringent as that faced by voters who are targeted with deceptive acts. Voters, on the other hand, have one unique, markedly powerful avenue for expressing their political views and exercising their right to vote: an avenue that exists only at the ballot box, on Election Day.

Acts involving voter-initiated fraud implicate the Constitution, but in a different, arguably less direct, manner. Individuals who cast invalid votes, as courts have recognized, potentially dilute the strength or power of the legitimate votes cast by eligible voters.[291] The U.S. Supreme Court described this indirect interest in its brief 2006 opinion in *Purcell v. Gonzalez*, noting that "voters who fear their legitimate votes [are] outweighed by fraudulent ones . . . feel disenfranchised."[292] Indeed, many challenges to redistricting plans under Section 2 of the Voting Rights Act seek to enforce protections against vote dilution,[293] and the Supreme Court in the seminal election law case of *Reynolds v. Sims* emphasized that the right to vote "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."[294] But the dilutive effect of voter-initiated fraud is directly related to the ratio of fraudulently cast votes to legitimate ones—one or two or a handful of illegitimate votes, for example, will have a miniscule impact, if any, on the effect of hundreds of thousands of legitimate votes. In addition, the concern of the Court in *Purcell* is not so much actual dilution or what amount of dilution is necessary to give rise to a constitutional violation, but rather whether voters will "feel" disenfranchised from a "fear" of legitimate votes being *outweighed* by "fraudulent ones."[295] These concerns for voters' fears

---

notion that such sweeping restrictions on speech are necessary to maintain the freedom to vote and the integrity of the ballot box borders on the absurd.").

[288] *See supra* text accompanying notes 156-178.

[289] *Burson*, 504 U.S. at 211 (majority opinion).

[290] Meyer v. Grant, 486 U.S. 414, 423 (1988).

[291] *See, e.g.*, Crawford v. Marion County Election Bd., 472 F.3d 949, 952 (7th Cir. 2007).

[292] Purcell v. Gonzalez, 127 S. Ct. 5, 7 (2006).

[293] *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986).

[294] Reynolds v. Sims, 377 U.S. 533, 555 (1964).

[295] *Purcell*, 127 S. Ct. at 7.

and feelings are important considerations in determining the extent of constitutional infringements, but are distinctly less direct than the rights that are burdened when citizens are deceived into not voting, or are otherwise obstructed from exercising the franchise.

In contrast to the indirect effect that voter-initiated fraud has by potentially diluting the aggregate effect of legitimate votes, many efforts ostensibly enacted to limit voter-initiated fraud risk directly burdening citizens' fundamental right to vote. Many efforts to reduce voter-initiated fraud, such as registration or photo identification requirements, do have the potential to exclude otherwise legitimate voters who forget to register within the allotted time period or do not possess or forget to bring their photo identification on Election Day. A 2006 study that researchers from Rutgers University's Eagleton Institute presented to the Election Assistance Commission indicated that states with stringent photo identification requirements experienced voter turnout rates that were nearly five percent lower than in states with the minimum requirement—stating one's name at the polls.[296] Election law scholar Spencer Overton argues that, potentially, "for every ten cases of voter fraud, a photo-identification requirement [deters] from voting one, one hundred, or ten thousand legitimate voters."[297] Though the Seventh Circuit Court of Appeals dismissed evidence indicating that voters would be disfranchised by Indiana's photo identification requirements as "totally unreliable,"[298] the court's opinion noted that there was "[n]o doubt there are at least a few . . . people in Indiana" whom the law would deter from voting.[299]

Balancing the above impositions on constitutional rights indicates that, though both types of fraud implicate constitutional concerns, voter-targeted fraud potentially poses a greater threat to constitutional rights than voter-initiated fraud, and is, as a concept, deserving of more attention from federal courts than it now receives. Voter-targeted fraud imposes direct burdens on two separate but overlapping constitutional rights—political speech, under the First Amendment, and the fundamental right to vote, under the Fourteenth Amendment. Voter-initiated fraud, though unquestionably harmful to the health of our democracy, primarily imposes an indirect burden, on the rights of legitimate voters to have their vote undiluted by fraudulently cast votes—the extent of which depends on the amount of invalid votes that are also counted. At the same time, efforts to address voter-targeted fraud, such as limits on campaigning close to polling places, may reduce access to ave-

---

[296] THE EAGLETON INSTITUTE OF POLITICS, REPORT TO THE U.S. ELECTION ASSISTANCE COMMISSION ON BEST PRACTICES TO IMPROVE PROVISIONAL VOTING PURSUANT TO THE HELP AMERICA VOTE ACT OF 2002, PUBLIC LAW 107-252, at 14 (2006), http://www.eagleton.rutgers.edu/News-Research/Best_Practices_to_Improve_Provisional_Voting.pdf.

[297] Overton, *supra* note 36, at 648 (cautioning that photo-identification requirements for voting may "do more harm than good").

[298] Crawford v. Marion County Election Bd., 472 F.3d 949, 952 (7th Cir. 2007).

[299] *Id.* at 953; *see also* Purcell v. Gonzalez, 127 S. Ct. 5, 7 (2006) (describing "the possibility that qualified voters might be turned away from the polls" as a result of Arizona's photo identification requirement).

nues for political speech, protected under the First Amendment. Efforts to address voter-initiated fraud, such as stringent photo identification requirements, risk completely blocking access to the fundamental right to vote for citizens who do not possess proper identification. In the words of Judge Guy Cole in his dissent from the Sixth Circuit's opinion in *Summit County v. Blackwell*, "when the fundamental right to vote . . . is pitted against the rights of those seeking to prevent voter fraud, we must err on the side of those exercising the franchise."[300]

VI. Conclusion

The central goal of this Article is to illustrate the collateral effect of many recent federal court decisions involving claims that invite the court to consider the role of fraud in the electoral process. A review of many of the most prominent cases reveals that courts are more likely to exhibit greater deference to, or express significant concern for protecting, a state's interest in addressing voter-initiated fraud than they do with regard to issues of voter-targeted fraud. A review of the quantitative and qualitative evidence of the prevalence of voter-targeted fraud, as well as a comparison of the different constitutional rights that both types of fraud implicate, indicates that this tendency is misguided.

As the above analysis demonstrates, this imbalance is problematic in part because, without explanation or defense, it places greater emphasis on policies that seek to limit voter-initiated fraud and comparatively less emphasis on policies addressing voter-targeted fraud. Furthermore, this imbalanced emphasis is in direct contrast to the quantitative and qualitative evidence of where fraud is most prevalent.[301]

There are lines separating the courts from the policy-making role of legislatures that courts do not and should not cross. But it remains the duty of the judicial system to evaluate the importance and validity of the state interest that the policy is ostensibly seeking to further, particularly when a policy may burden the exercise of a constitutional right.

Just as Justice Scalia refers to the definition of "traditional public forum" in First Amendment jurisprudence as a "tool of analysis rather than a conclusory label,"[302] identifying election fraud should be a starting point in a court's analysis. This identification should be followed by an analytical process that pins the amount of emphasis a court places on the state's interest in combating election fraud to the level of qualitative and quantitative evidence

---

[300] Summit County Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547, 553 (6th Cir. 2004) (Cole, J., dissenting).

[301] *See supra* text accompanying notes 242-276; *see also* Operation King's Dream v. Connerly, 501 F.3d 584, 589 (6th Cir. 2007) (describing a "widespread" effort to deceive voters about the content of a ballot initiative as petitioners collected signatures to support the proposal).

[302] Burson v. Freeman, 504 U.S. 191, 214 (Scalia, J., concurring).

available indicating that the type of fraud targeted is widespread and analyzing the constitutional rights that are implicated by the fraud and the effort to combat it. This approach would lead courts to exhibit a more accurate and consistent level of deference to state efforts to address election fraud.