
RESPONSE

ELECTORAL MAINTENANCE[†]

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ABSTRACT

According to the U.S. Supreme Court, the right to vote is fundamental because it is preservative of all rights, and yet in many cases legal protections for the right to vote fall short of protections for the other rights that voting is meant to preserve. Redefining the right to vote cannot solve this problem alone. Election administration has at least as much consequence on the right to vote as any particular definition or legal theory. In Democracy's Bureaucracy, Michael Morse draws our attention to one of the most important yet understudied issues of election administration: voter list maintenance. In addition to his descriptive account of the novel way states have cooperated to perform list maintenance, Morse's analysis provides a window into three pathologies of America's election administration more generally. First, the mechanics of elections directly implicate the fundamental right to vote, raising questions of how stringently these procedures should be evaluated by courts. Second, political interference in the administration of elections can flip representative government on its head by insulating elected officials from political accountability and making elections less secure. Finally, several challenges related to the administration of elections are rooted in our electoral system that narrowly links geography and political representation. Relaxing this link may foster a more effective, responsible, and inclusive system of government.

[†] An invited response to Michael Morse, *Democracy's Bureaucracy: The Complicated Case of Voter Registration Lists*, 103 B.U. L. REV. 2123 (2023).

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INTRODUCTION

In the almanac of election administration, “list maintenance” is perhaps the least sexy and yet most important task for ensuring that individuals can exercise their right to vote effectively. List maintenance refers to the process of curating the roll of registered voters: adding new records, updating the records of individuals who move within a state, and removing individuals who relocate to a new state, move to another country, or die. More than 160 million people are registered to vote in the United States,¹ and 42 million people move each year,² nearly 8 million of which move out of state.³ Another 3.5 million people die each year in the U.S.⁴ making the task of list maintenance a continual challenge.

List maintenance is crucial for ensuring that registered voters are able to cast a valid ballot on Election Day, that resources like voting machines and ballots are distributed appropriately, and that voter fraud does not happen. Despite its importance, list maintenance has largely been ignored by legal scholars.⁵ Michael Morse nicely fills this gap in *Democracy’s Bureaucracy*, providing the first sustained examination of list maintenance and the interstate compacts that have developed to facilitate it.⁶ Morse lays out the stakes of list maintenance, provides a descriptive analysis of the development and regulation of list maintenance, and provides a few policy proposals for addressing privacy and logistical issues in proper list maintenance. Morse’s analysis of list maintenance is a welcome contribution to the literature, and his central diagnosis is most

¹ *Voting and Registration in the Election of November 2022*, U.S. CENSUS BUREAU (Apr., 2023), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-586.html> (use “Reported Voting and Registration, by Sex and Single Year of Age: November 2022” link to download and view data).

² Justin V. Palarino, James K. Pugh & Brian McKenzie, *Fewer People Reported Moving in Previous Year in 2021 Than in 2019*, U.S. CENSUS BUREAU (Apr. 11, 2023), <https://www.census.gov/library/stories/2023/04/fewer-people-moving-between-2019-and-2021.html> [<https://perma.cc/T9EQ-9G2G>].

³ Mehreen S. Ismail, Justin M. Palarino & Brian McKenzie, *Going with the Flow: State-to-State Migration*, U.S. CENSUS BUREAU (June 8, 2023), <https://www.census.gov/library/stories/2023/06/state-to-state-migration.html> [<https://perma.cc/RV27-VQW2>].

⁴ *Deaths and Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/fastats/deaths.htm> [<https://perma.cc/5PKV-YTT4>] (last reviewed Jan. 17, 2023).

⁵ There is a small literature in political science that analyzes list maintenance through the lens of record matching, to which Morse has also contributed. *See generally* Sharad Goel, Marc Meredith, Michael Morse, David Rothschild & Houshmand Shirani-Mehr, *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections*, 114 AM. POL. SCI. REV. 456 (2021); Stephen Ansolabehere & Eitan D. Hersh, *ADGN: An Algorithm for Record Linkage Using Address, Date of Birth, Gender, and Name*, 4 STAT. & PUB. POL’Y, No. 1, at 1; Stephen Pettigrew & Charles Stewart III, *A Population Model of Voter Registration and Deadwood 2* (Mass. Inst. of Tech., Working Paper No. 2016-5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2758437; Michael P. McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 ELECTION L.J. 111 (2008).

⁶ Michael Morse, *Democracy’s Bureaucracy: The Complicated Case of Voter Registration Lists*, 103 B.U. L. REV. 2199 (2023).

certainly correct: record matching across states poses serious algorithmic matching challenges and, due to the resource constraints that Morse highlights, is subject to manipulation.

By drawing our attention to the administration of list maintenance, Morse's article provides a window into three pathologies of election administration more generally. First, election administration procedures directly implicate the fundamental right to vote, raising questions on how stringently these procedures should be evaluated by courts. Second, political interference in election administration can have pernicious effects. Politically opportunistic meddling in election administration not only undermines effective policymaking, but can affirmatively push people into worse outcomes. Politicizing election administration can also insulate incumbents from political accountability. Third, several challenges related to the administration of elections are rooted in our electoral system that narrowly links geography to political representation. In the cost-benefit analysis of relaxing this link, improvements in the administration of elections, including easier-to-maintain and more accurate voter lists, should be front and center on the list of benefits. Among these benefits is an election system that is likelier to foster a more effective, responsible, and inclusive system of government.

I. ELECTION ADMINISTRATION AND THE FUNDAMENTAL RIGHT TO VOTE

The administration of America's elections directly implicates the right to vote.⁷ List maintenance, in particular, not only *affects* every voter but can *determine* who is able to vote.⁸ As Morse argues, proper list maintenance is "the quintessential example of how an intergovernmental bureaucracy could promote the right to vote."⁹ Election administration policies, more generally, are a critical factor for the exercise of one's voting rights, and these policies can either promote or impede the right to vote.

The U.S. Constitution is notably silent with respect to the manner in which federal elections should be administered. Article I § 2 states that "[T]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States"¹⁰ but nowhere does the Constitution lay out the rules by which the process should take place. Instead, the Constitution delegates the authority to determine the "Times, Places and Manner" of holding elections to state legislatures, while also reserving a role for Congress to check the states with federal legislation.¹¹ In practice, state legislatures delegate many

⁷ *Id.* at 2126 (pointing to "intimate connection" between election administration and right to vote).

⁸ *Id.* at 2129, 2133 (noting that list maintenance affects "a significant segment of the American population" and "a voter is only *able* to vote if they are properly registered in the jurisdiction in which they reside").

⁹ *Id.* at 2127.

¹⁰ U.S. CONST. art. I, § 2, cl. 1.

¹¹ U.S. CONST. art. I § 4, cl. 1.

administrative tasks to county clerks and other local registrars of voters. The result is an electoral apparatus that is fragmented, with different policies and voter experiences dependent on where one lives.¹² The style and design of ballots largely varies by local jurisdiction; voting machine technology and the location and hours of polling place are generally determined at the county level, while voter ID, candidate filing, and campaign finance rules are regulated at the state level. Although Congress has weighed in infrequently, Morse highlights the most important federal regulations related to election administration. The National Voter Registration Act (“NVRA”) of 1993 requires states to provide simultaneous applications for voter registration and drivers licenses, as well as voter registration materials at local offices of public assistance and disability services.¹³ The NVRA also requires states to provide voter registration materials by mail, and to perform list maintenance on the list of registered voters.¹⁴ The Help America Vote Act (“HAVA”) of 2003 mandated that states maintain a single statewide electronic list of registered voters.¹⁵

These various policies related to the administration of elections, or “democracy’s bureaucracy” as Morse calls it, directly impact the ability of citizens to exercise their right to vote. Although the U.S. Constitution is silent with respect to voter access and participation, the U.S. Supreme Court has recognized the right to vote as fundamental to our system of government. In 1866, the Court defended the right to vote in the strongest terms that it has ever articulated. Acknowledging that voting is not a natural right, but instead a right “conceded by society according to its will,” the Court declared that the right to vote is a “fundamental political right, because [it is] preservative of all rights.”¹⁶ The Court’s definition raises questions about how election administration procedures should be evaluated: do election rules that prevent a significant number of individuals from voting raise constitutional concerns? Do procedures that disproportionately impact a class of voters, whether by party, race, age, or otherwise, unconstitutionally infringe on the fundamental right to vote? In theory, because the administration of election necessarily limits the right to vote in some way, every election rule, policy, or practice might be subject to strict scrutiny in keeping with other fundamental rights and equal protection cases. In practice, courts have not applied strict scrutiny for fear of gumming up the voting apparatus. If every polling place location, every ballot design question, every policy related to crowd control at the polls, every decision to purchase new voting machines, and every evaluation of the voter registration list were subject to strict scrutiny, the mechanics of democracy would grind to a halt. The

¹² Election administration has been referred to as “hyperfederalized.” See ALEC C. EWALD, *THE WAY WE VOTE* 3 (2009).

¹³ 52 U.S.C. § 20504 (requiring state driver license applications to serve as voter registration unless applicants opt out).

¹⁴ *Id.* § 20505 (requiring states to provide voter registration materials by mail); *id.* § 20507 (describing states’ obligations for maintaining accurate voter lists).

¹⁵ 52 U.S.C. § 21083.

¹⁶ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

Supreme Court recognized as much when it held in 1974 that “as 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.”¹⁷

As a result, courts have applied a more flexible balancing test when it comes to matters of election administration and mechanics. This balancing test was articulated in two ballot access cases and is often referred to as the “Anderson-Burdick” test in election law. In *Anderson v. Celebrezze*,¹⁸ the Court acknowledged that the right of voters to associate and select candidates of their choice was fundamental, but also concluded that any burdens on these rights could be justified by a reasonable state interest.¹⁹ The Court described its holding in the following terms:

[Courts] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights.²⁰

Applying this test, the Court invalidated an Ohio state law that required independent candidates to file for office five months before partisan candidates.²¹ The Court concluded the differential filing deadline was not necessary to protect the state’s interests in voter education, equal treatment, and political stability.

In 1992, the Supreme Court provided more specific guidance for applying this balancing test. In *Burdick v. Takushi*,²² the Court explained:

[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn” to advance a state interest of compelling importance. But when a state election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment

¹⁷ *Storer v. Brown*, 415 U.S. 724, 730 (1974).

¹⁸ 460 U.S. 780 (1983).

¹⁹ *Id.* at 788. (“Nevertheless, the State’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.”).

²⁰ *Id.* at 789.

²¹ *Id.* at 805-06.

²² 504 U.S. 428 (1992).

rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions.²³

In practice, the Anderson-Burdick balancing test operates on a sliding scale. The more severe the burden on voting rights, the more scrutiny courts give to a state’s purported interests. This approach *could* have developed in parallel to substantive due process cases where severe burdens on fundamental rights are subject to strict scrutiny, and incidental burdens are subject to rational basis review. However, the Anderson-Burdick test has been far more flexible and permissive of state action. Likewise, the Anderson-Burdick test *could* have had limited application to candidate qualifications and ballot access cases. However, courts have turned to this test to evaluate challenges to all kinds of election administration issues.²⁴ And herein lies the rub: if a court determines that an election law discriminates against voters based on their race, or gender, or political beliefs, then it will apply some level of heightened review under the First or Fourteenth Amendments. But if a court determines that the law in question merely deals with the mechanics or administration of elections, it will apply the malleable Anderson-Burdick test. Thus, framing becomes crucial to the outcome of these cases.

Take the case of *Crawford v. Marion County Election Board*,²⁵ where the Supreme Court considered a challenge to Indiana’s voter ID law.²⁶ Although this law disproportionately affected racial minority voters who were less likely to possess ID, and for whom ID was more expensive to procure, a lower court conceptualized the state’s voter ID law as part of the mechanics of running an election, namely the need to verify a voter’s identity.²⁷ Because the burden on voters was determined to be negligible,²⁸ the lower court, citing to the Anderson-Burdick test,²⁹ deferred to the state’s interest in preventing voter fraud, despite no evidence of voter impersonation fraud in Indiana’s history.³⁰ This decision

²³ *Id.* at 434 (citation omitted).

²⁴ See, e.g., JAMES A. GARDNER & GUY-URIEL CHARLES, *ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM* 546 (2d ed. 2017) (“The Court and lower courts have fused the standards articulated in the Anderson and Burdick cases to develop a balancing test to resolve not just ballot access cases but a whole host of laws that are alleged to burden rights of political participation.”).

²⁵ 553 U.S. 181 (2008).

²⁶ *Id.* at 185.

²⁷ *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 841 (S.D. Ind. 2006).

²⁸ *Id.* at 822 (“Plaintiffs have produced not a single piece of evidence of any identifiable registered voter who would be prevented from voting pursuant to SEA 483 because of his or her inability to obtain the necessary photo identification.”).

²⁹ *Id.* at 821-22.

³⁰ *Id.* at 792-793 (“Defendants concede that ‘the State of Indiana is not aware of any incidents or person attempting vote, or voting, at a voting place with fraudulent or otherwise false identification.’”).

was affirmed by the Seventh Circuit³¹ and reaffirmed by the U.S. Supreme Court.³² Three years later, a different federal court struck down Wisconsin's voter ID law because of its disparate impact on Black voters in violation of the Voting Rights Act and the Fourteenth Amendment.³³ The Seventh Circuit reversed, citing to its own precedent in the Indiana case a few years prior.³⁴ The importance of framing the issue of voter ID was crystalized by Judge Posner who dissented from a vote of the Seventh Circuit to deny a rehearing en banc. Judge Posner had authored the original Seventh Circuit opinion upholding Indiana's voter ID law as a reasonable regulation of the state's electoral mechanics. Highlighting the racially discriminatory impact of voter ID laws, Posner asked the Seventh Circuit to reconsider. A year prior, Judge Posner published a book in which he admitted regret for his opinion in *Crawford*, writing that voter ID laws are "a type of law now widely regarded as a means of voter suppression rather than of fraud prevention."³⁵

Another important example of framing is seen in the Supreme Court's decision in *Bush v. Gore*,³⁶ which considered a challenge to Florida's inconsistent recount procedures in the 2000 presidential election.³⁷ Although the question presented squarely dealt with a matter of electoral mechanics, the Court conceptualized the issue as one of equal protection—voters in different counties facing different probabilities that their votes would be counted—and stopped the recount in Florida as a result. The Court did not cite to *Burdick* a single time, and their single citation to *Anderson* was for a different proposition; that presidential elections are uniquely important affairs.³⁸ Framing the issue as a disparate burden on the fundamental right to vote proved decisive for the Court.

Recently, two candidates in New Jersey challenged the state's law permitting them to publish a slogan next to their names on the ballot, but prohibiting the slogan from including the name of a person or corporation without their written consent.³⁹ Although this regulation burdens a fundamental right to free speech, the lower court argued that the regulation was more about the preservation of an orderly ballot than a restriction on candidate speech and so it applied the

³¹ *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007). Notably, Judge Evans dissented because he disagreed with the framing of the case as one of electoral mechanics. On the contrary, Judge Evans wrote: "Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic. We should subject this law to strict scrutiny" *Id.* at 954 (Evans, J., dissenting).

³² *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 201, 202 (2008).

³³ *Frank v. Walker*, 17 F. Supp. 3d 837, 879 (E.D. Wis. 2014).

³⁴ *Frank v. Walker*, 768 F.3d 744, 755 (7th Cir. 2014).

³⁵ RICHARD A. POSNER, REFLECTIONS ON JUDGING 85 (2013).

³⁶ 531 U.S. 98 (2000).

³⁷ *Id.* at 100.

³⁸ *Id.* at 112.

³⁹ *Mazo v. Way*, 551 F. Supp. 3d 478, 488 (D.N.J. 2021), *aff'd* 54 F.4th 124 (3d Cir. 2022), *cert. denied*, No. 22-1033, 2023 WL 6377826 (U.S. Oct. 2, 2023).

Anderson-Burdick test.⁴⁰ The Third Circuit admitted that “the distinction between ‘pure speech’ and the mechanics of the electoral process is not always easy to ascertain” but affirmed the lower court’s reliance on the Anderson-Burdick test.⁴¹

List maintenance is yet another example of an election law that has the potential to severely burden the right to vote in disparate ways. Whether one’s name is on the voter rolls greatly impacts their ability to cast a ballot and have it counted. When states engage in list maintenance—something they are bound to do by statute—courts will have to decide whether such maintenance is a matter of electoral mechanics, emphasizing institutions and responsible policymaking (with its flexibility), or whether list maintenance severely burdens an individual’s right to vote (with its rigidity and lack of compromise). These framing decisions will more than likely be outcome determinative.

II. POLITICAL INTERFERENCE IN THE ADMINISTRATION OF ELECTIONS

One of the most important contributions of *Democracy’s Bureaucracy* is its detailed, behind-the-scenes account of the Electronic Registration Information Center (“ERIC”) and Crosscheck program. These entities have largely flown under the radar, and Morse has done a service by elevating these programs and alerting election scholars to their origins and the stakes of their respective institutional design. Unfortunately, one of the most important parts of the story is the interference of political actors. As Morse outlines, eight of ERIC’s thirty-three member states have withdrawn from the organization in the past nineteen months, including Virginia which was a founding member of the group.⁴² Withdrawing states have articulated a number of reasons for pulling out of the cooperative: concerns about privacy, cost, and the requirement that member states contact eligible but unregistered voters.⁴³ However, as Morse points out, the genesis of these recent withdrawals is a conspiracy theory that ERIC is acting as a pawn of the Democratic Party, and pumping the voter rolls full of Democrats.⁴⁴ Never mind the actual fact that ERIC was created by, and is governed by, the states themselves, with no connection to national, state, or local

⁴⁰ *Id.*

⁴¹ *Mazo*, 54 F.4th at 142.

⁴² Ben Paviour & Miles Park, *Virginia Becomes the Latest GOP-Governed State To Quit a Voter Data Partnership*, NPR (May 11, 2023, 6:47 PM), <https://www.npr.org/2023/05/11/1175662382/virginia-eric-withdrawal> [<https://perma.cc/X5GB-7C3L>].

⁴³ See Matt Vasilogambros, *Why Are GOP-Led States Leaving Voter Registration Group ERIC?*, GOVERNING (May 23, 2023), <https://www.governing.com/politics/why-are-gop-led-states-leaving-voter-registration-group-eric> [<https://perma.cc/EC9Y-ME5V>].

⁴⁴ Morse, *supra* note 6, at 2174-76; see also Miles Parks, *Right-Wing Conspiracies Have a New Target: A Tool That Fights Actual Voter Fraud*, NPR (Feb. 9, 2022, 5:00 AM), <https://www.npr.org/2022/02/09/1076529761/right-wing-conspiracies-have-a-new-target-a-tool-that-fights-actual-voter-fraud> [<https://perma.cc/9HHX-SNE2>].

party organizations. And never mind that several Republican-led states—Arizona, Georgia, Kentucky, South Carolina, Utah, Wisconsin—remain.⁴⁵

The criticism of ERIC appears to boil down to a concern that the organization lacks political accountability and thus was failing to root out voter fraud. Some critics even claim that ERIC was itself perpetrating voter fraud. Ironically, by withdrawing from ERIC, states have only increased the chances that double-voting, i.e., casting a ballot in more than one jurisdiction, will go undetected.⁴⁶ This “fraud cycle” where critics baselessly allege voter fraud to push for a less secure alternative, which then justifies more complaints about voter fraud, is not limited to the case of list maintenance.⁴⁷ Consider the case of voter ID laws.

In 2005, Indiana became the first state to require voters to show a non-expired, government-issued, photo identification card in order to cast a ballot.⁴⁸ The motivation for this new strict ID requirement was a generalized fear of voter fraud and a desire to protect public confidence in elections. By 2022, thirty-six states (nearly three-fourths of all states) had passed laws requiring or requesting some kind of identification in order to vote.⁴⁹ Despite no systemic evidence of voter impersonation fraud⁵⁰ (the only kind of fraud that a voter ID could expose) state legislatures had pushed to make in-person voting more difficult. The result is that voters are now more likely to avail themselves of other modes of voting, such as absentee or mail-in voting. This shift would be quite ironic, given the

⁴⁵ Georgia, South Carolina, and Utah have GOP “trifectas” (both houses of the state legislature and the governor), while Arizona, Kentucky, and Wisconsin are led by GOP state legislatures with a Democratic governor.

⁴⁶ Wendy Underhill, *More Withdrawals from Voter Data Group ERIC Likely*, NAT'L CONF. OF STATE LEGIS. (June 20, 2023), <https://www.ncsl.org/state-legislatures-news/details/more-withdrawals-from-voter-data-group-eric-likely> [<https://perma.cc/2JNU-GUJJ>] (quoting Maryland state Senator Cheryl Kagan who said “I am alarmed by the exodus of Republican-led states from ERIC. Not only does this hurt the accuracy of their voter rolls, but it reduces the accuracy for the rest of us.”).

⁴⁷ Michael Wines, *How Charges of Voter Fraud Became a Political Strategy*, N.Y. TIMES (Oct. 21, 2016), <https://www.nytimes.com/2016/10/22/us/how-charges-of-voter-fraud-became-a-political-strategy.html>. Richard Hasen has referred to proponents of this fraud cycle as the “fraudulent fraud squad.” See generally RICHARD L. HASEN, *THE FRAUDULENT FRAUD SQUAD: UNDERSTANDING THE BATTLE OVER VOTER ID: A SNEAK PEEK FROM THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012).

⁴⁸ *Supra* notes 25-32 and accompanying text. *Photo ID Law*, IND. SEC. OF STATE, <https://www.in.gov/sos/elections/voter-information/photo-id-law/> [<https://perma.cc/X5BX-D4D7>] (last visited Nov. 10, 2023).

⁴⁹ “Voter ID Laws,” NAT'L CONF. OF STATE LEG. (Mar. 9, 2023), <https://www.ncsl.org/elections-and-campaigns/voter-id> [<https://perma.cc/AK55-28AN>].

⁵⁰ Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST. (Aug. 6, 2014, 6:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/>; Sami Edge & Sean Holstege, *Voter Fraud Is Not a Serious Problem*, VOTING WARS NEWS21 (Aug. 20, 2016), <https://votingwars.news21.com/voter-fraud-is-not-a-persistent-problem/> [<https://perma.cc/22HF-3KYJ>].

documented evidence of absentee ballot fraud that dwarfs that of voter impersonation fraud. An investigation into voter fraud by the Heritage Foundation, a long-time vocal advocate for voter ID laws, found just five instances of impersonation fraud between 1994-2015 compared to 149 instances of absentee ballot fraud.⁵¹ Another study by a news consortium evaluated every alleged instance of election fraud between 2000-2012 reported just ten credible instances of voter impersonation fraud compared to 491 instances of absentee ballot fraud.⁵² Perhaps more damning, at least fourteen elections have been invalidated or overturned by a court between 1978-2018 due to absentee ballot fraud while not a single election has been overturned due to voter impersonation fraud.⁵³ The logic of these findings is relatively straight forward: it's much easier and less risky to steal or purchase absentee ballots in bulk than it is to impersonate a voter in person one polling place at a time. To the extent that state legislatures were truly concerned about voter fraud, perceptions of fraud, and voter confidence when enacting voter ID laws, the result potentially pushed voters to a more vulnerable mode of voting.

In many ways, the politically-motivated withdrawal of states from ERIC is far more deleterious than voter ID laws and the rise in absentee voting.⁵⁴ The disenfranchising effects of voter ID are negligible,⁵⁵ and while the best available evidence suggests that absentee ballot fraud is an order of magnitude worse than voter impersonation fraud, the effect on turnout of this fraud is still in the

⁵¹ *Election Fraud Cases*, HERITAGE FOUND., <https://www.heritage.org/voterfraud/search> [<https://perma.cc/ZTW5-FCS5>] (last visited Nov. 10, 2023).

⁵² *Election Fraud in America*, NEWS21 (Aug. 12, 2012, 2:10 PM), <https://votingrights.news21.com/interactive/election-fraud-database/> [<https://perma.cc/NM99-HSS5>].

⁵³ The following elections were overturned (with the loser determined to be the winner) due to absentee ballot fraud: *Petition of Byron*, 398 A.2d 599 (N.J. Super. Ct. 1978) (mayor and borough council); *Kiehne v. Atwood*, 604 P.2d 123 (N.M. 1979) (county clerk); *Eubanks v. Hale*, 752 So. 2d 1113 (Ala. 1999) (sheriff); *In re Protest of Election Returns & Absentee Ballots*, 707 So. 2d 1170 (Fla. Dist. Ct. App. 1998) (mayor); *Womack v. Foster*, 8 S.W.3d 854 (Ark. 2000) (municipal judge).

The following elections were either invalidated or a court ordered a special election: *Stebbins v. White*, 235 Cal. Rptr. 656 (Cal. Ct. App. 1987) (city council); *Gooch v. Hendrix*, 851 P.2d 1321 (Cal. 1993) (school board); *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994) (state senate); *Adkins v. Huckabay*, 755 So. 2d 206 (La. 2000) (sheriff); *Straughter v. Collins*, 819 So. 2d 1244 (Miss. 2002) (district supervisor); *Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004) (mayor); *McClendon v. Hodges*, 272 S.W.3d 188 (Ky. 2008) (mayor); *McCready v. Harris*, N.C. Bd. of Elec. (2018) (administrative hearing invalidating election of U.S. House of Representatives and ordering new election).

⁵⁴ Indeed, voter ID might be *necessary* for effective list maintenance. One of Morse's primary concerns is that matching algorithms can only do so much work without a unique identifier for each voter. A national voter ID could provide just such an identifier without the risks of sharing SSNs which are used in a wide variety of contexts and can thus be manipulated to steal people's identity.

⁵⁵ Enrico Cantoni & Vincent Pons, *Strict ID Laws Don't Stop Voters: Evidence from a U.S. Nationwide Panel, 2008-2018*, 136 Q.J. ECON. 2615, 2643 (2021).

fractions of a percent. In contrast, Morse points to a study that shows how registering people to vote after they move (a core part of ERIC's mission) can increase turnout by up to 6%.⁵⁶ Thus, political interference in ERIC is likely to have real consequences for the electorate. And there is another aspect of political interference in list maintenance that is making things worse for voters. Some states have engaged in sloppy list maintenance; a practice that has derisively been called "voter purging." Removing individuals who have moved or died is required by statute, but some states are removing far more individuals than is justified. As Morse's analysis illustrates, some states conduct overinclusive matches (in the example of Iowa's records compiled from the Crosscheck program, 75% of identified double-voters could not be verified as unique records of somebody who might have moved).⁵⁷ Morse also points to states that remove more records than required by statute (namely by removing individuals for failure to vote in a single election).⁵⁸ The effects of voter purging on voter turnout is straightforward. But there are downstream effects as well, as incomplete or incorrect lists give election administrators a faulty picture when they are making important resource allocation decisions: how many ballots should be printed, how many polling places are needed, how many poll workers to hire, and how many voting machines to deploy in each polling place. It is this latter effect that touches *every voter* and not just those who are mislisted or aggressively removed.

Unfortunately, political interference in election administration does not just impact voter turnout or risk exacerbating voter fraud. Political interference also impedes election administrators from doing their jobs. Indeed, the blowback against poll workers and election judges in the wake of President Trump's insistence that he was cheated out of an election he lost fair and square has led hundreds of poll workers to quit or retire.⁵⁹ Political interference can turn representative government on its head by empowering politicians to choose their voters, instead of the other way around. Politically-motivated decisions about voter ID, or drop boxes, or absentee voting, shape the electorate in important

⁵⁶ Morse, *supra* note 6, at 2129-30 (citing Seo-young Silvia Kim, *Automatic Voter Registration as a Housewarming Gift: Quantifying Causal Effects on Turnout Using Movers*, 3 AM. POL. SCI. REV. 1137 (2022)).

⁵⁷ *Id.* at 2165-66.

⁵⁸ *Id.* at 2186-87.

⁵⁹ Michael Beckel et al., *The High Cost of High Turnover*, ISSUE ONE (Sept. 2023), <https://issueone.org/wp-content/uploads/2023/09/The-High-Cost-of-High-Turnover-Report.pdf> [<https://perma.cc/4JHC-NC5K>]; *Battleground 2024: How Swing States Changed Voting Rules After the 2020 Election*, VOTING RTS. LAB (Oct. 5, 2023), <https://votingrightslab.org/battleground-2024-how-swing-states-changed-voting-rules-after-the-2020-election/> [<https://perma.cc/XX9W-QQEU>] ("High turnover in local election offices in several key states, including Arizona, North Carolina, and Pennsylvania, following an exodus of career professionals, means these offices will be understaffed or staffed with inexperienced administrators [in 2024]."); Michael Wines, *After a Nightmare Year, Election Officials Are Quitting*, N.Y. TIMES (July 2, 2021), <https://www.nytimes.com/2021/07/02/us/politics/2020-election-voting-officials.html>.

ways. Politicized list maintenance can literally decide who gets to vote and who does not. While the politicization of election administration is often framed (by those doing the politicizing) as necessary to increase accountability, the reality is quite the opposite. By shaping the electorate in their favor, elected officials are trying to insulate themselves from the accountability they so fervently profess to favor.⁶⁰

Election administration decisions that are normally staid, bureaucratic affairs are increasingly becoming exposed to strong partisan winds. And these winds can whip up quickly and forcefully, as we saw in the case of ERIC. When Morse began his project, ERIC was healthy and thriving and in one single year the collaboration imploded in response to chatter in right wing media that metastasized and started a movement. In short, the story of ERIC should serve as a wake-up call to the risks of political interference in the administration of elections.

III. RETHINKING THE LINK BETWEEN GEOGRAPHY AND POLITICAL REPRESENTATION

One of the more subtle arguments in *Democracy's Bureaucracy* is the role that political geography plays in the administration of elections. As Morse writes, “[o]ur voter registration is tied to our residential address because where we live dictates who represents us.”⁶¹ This statement is true as a matter of fact, and it also signifies something deeper about political representation in the United States, namely the centrality of geography. Several features of the federal government protect the power of the states, in recognition of the way that local culture and history can drive politics.⁶² More specifically, the vast majority of state and federal legislators are elected from single member districts, linking political power to even smaller geographic regions.⁶³ There are several reasons

⁶⁰ Douglas M. Spencer, Opinion, *The False Flag of Political Accountability in Election Reform*, REGUL. REV. (Sept. 21, 2021), <https://www.theregreview.org/2021/09/21/spencer-the-false-flag-of-political-accountability-in-election-reform/> [<https://perma.cc/YF4H-WLE7>] (“[I]t is not likely that state legislators will face heat for their controversial election-related decisions when the very purpose of those controversial decisions is to insulate them from political accountability.”).

⁶¹ Morse, *supra* note 6, at 2127.

⁶² See, e.g., U.S. CONST. art. I § 3 (ensuring equal representation of states in the U.S. Senate); *id.* art. II § 1 (empowering states to choose the President); *id.* amend. X (reserving non-enumerated powers to the states).

⁶³ Every member of Congress has been elected from a single-member district since 1842. See Act of June 25, 1842, ch. 58, 5 Stat. 491 (“[I]n every case where a State is entitled to more than one Representative, the number to which each State shall be entitled under this apportionment shall be elected by districts, composed of contiguous territory, equal in number to the number of Representatives to which said State may be entitled; no one district electing more than one Representative.”). Nearly 90% of all state legislators are also elected from single-member districts. See *State Legislative Chambers That Use Multi-Member Districts*, BALLOTPEdia, https://ballotpedia.org/State_legislative_chambers_that_use_multi-member_

why political power is linked to geography. Theoretically, effective representation is most likely when elected officials relate to the communities they represent. More effective governance—appropriate funding for roads and schools, inclusive and effective zoning, responsive social policy—depends on representatives who drive on the same roads and attend the same schools as their constituents, as well as understand the economic and social needs of the communities they serve. More pragmatically, smaller districts drive down the costs of political campaigns and increase the likelihood that candidates physically interact with voters. Geographically-constrained elections can also be easier to administer as ballots are typically shorter and voter rolls are typically smaller, such that there are fewer opportunities for administrative error.

Or so the argument goes. As the Supreme Court held in 1964, “[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.”⁶⁴

In practice, elections that privilege geography have several defects. First, districting opens the door to gerrymandering which empowers representatives to define their political communities instead of political communities choosing their representatives.⁶⁵ Second, districting naturally mutes the political power of minority groups.⁶⁶ Proactive districting can ameliorate this effect, but only to a degree.⁶⁷ Third, the continued use of districting ignores important changes in population mobility and mass communication that allows representatives to connect with their constituents regardless of physical proximity.⁶⁸

It should come as no surprise, then, that efforts to relax the link between geography and representation are gaining traction. As Edward Foley recently reminded us, “[t]raditionally, geography has been the basis of dividing citizens

districts [<https://perma.cc/BXU6-YBKP>] (reporting that of 7,386 seats in state legislatures, 6,510 are elected from single-member districts) (last visited Nov. 10, 2023).

⁶⁴ *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

⁶⁵ See, e.g., ERIK J. ENGSTROM, *PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY* 192-98 (2013).

⁶⁶ See, e.g., LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 121 (1994) (“It’s districting in general—not race-conscious districting in particular—that is the problem.”).

⁶⁷ Jessica Trounstine & Melody E. Valdini, *The Context Matters: The Effects of Single-Member Versus At-Large Districts on City Council Diversity*, 52 AM. J. POL. SCI. 554, 555-56 (2008) (reporting limited effect of single-member districts as remedy for minority vote dilution); Moon Duchin & Douglas M. Spencer, *Models, Race, and the Law*, 130 YALE L.J.F. 744, 745 (2021) (“The ability of the VRA to remediate historical discrimination and underrepresentation thus depends on proactive redistricting. As a matter of practice, when a set of districts empowers minority communities to elect representatives in rough proportion to their population, courts have held the promise of political equality to have been fulfilled. However, proportionality has functionally operated as a ceiling even when viewed as normatively desirable: White voters will never be represented by less than their share of the population while minority communities nearly invariably will.” (footnotes omitted)).

⁶⁸ See Douglas M. Spencer, *Redistricting’s Ultimate Antidote*, 111 KY. L.J. 719, 726 (2023) (noting increasing reliance of candidates on e-mail, Twitter, TikTok, and other social media to engage with constituents.).

for legislative representation, especially in the United States. But geography is by no means the only possible basis, or the only one used historically.”⁶⁹ Nine states elect members to at least one chamber of their state legislature, and many more local jurisdictions—county commissions, city councils, school boards, utility districts—are shifting to multi-member districts or at-large elections coupled with some version of ranked choice or instant runoff voting.

Morse helpfully (if unwittingly) contributes a new dimension to the disadvantages of districting. As he notes, “the difficulty with local political districts, from an election administration perspective, is that residential mobility breaks the fixed link between a voter’s registration and their residential address.”⁷⁰ And, because geography is central to representation, Morse reminds us that “a voter is only *able* to vote if they are properly registered in the jurisdiction in which they reside.”⁷¹ While the administrative burden of tracking voters who move between counties within a state is not sufficiently onerous by itself to expand the size of districts or to eliminate them completely, Morse has provided useful counterevidence to claims that districting necessarily improves the ease and accuracy of administering elections. Fewer district lines would mean fewer touchpoints for list maintenance, meaning fewer reporting burdens on voters, fewer record matches and, thus, fewer errors. Morse’s important project has made this much clear.

CONCLUSION

The story of voter list maintenance is the story of American elections more broadly. List maintenance is an intricate and vital process that often goes unnoticed but, as Michael Morse persuasively demonstrates in *Democracy’s Bureaucracy*, stands as a linchpin of America’s electoral apparatus. With more than 160 million registered voters and a constant flux of relocations and deaths, the maintenance of accurate voter lists is a Herculean task. Morse has provided the authoritative account of the history and process of list maintenance in the digital age. His article should also prompt us to think about broader challenges affecting our electoral system: the role of judicial review in the electoral process, the detrimental effects of politicizing this process, and the complications stemming from America’s geographically-bound system of representation. Morse’s article adds to the growing calls for more transparency, efficiency, and inclusivity in the administration of elections. If democracy is indeed in the details, then list maintenance is undeniably one of its foundational pillars.

⁶⁹ Edward B. Foley, *Self-Districting: The Ultimate Antidote to Gerrymandering*, 111 KY L.J. 693, 715 (2023).

⁷⁰ Morse, *supra* note 6, at 2127.

⁷¹ *Id.* at 2133.