

ABOLISHING THE TIME TAX ON VOTING

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A “time tax” is a government policy or practice that forces one citizen to pay more in time to vote compared with her fellow citizens. While few have noticed the scope of the problem, data indicate that, due primarily to long lines, hundreds of thousands if not millions of voters are routinely unable to vote in national elections as a result of the time tax, and that the problem disproportionately affects minority voters and voters in the South. This Article documents the problem and offers a roadmap for legal and political strategies for solving it. The Article uses as a case study *NAACP State Conference of Pennsylvania v. Cortés*, the first-ever case in which a court has granted prospective relief to plaintiffs who sought to reduce wait times at the polls, as well as the first successful voter access case since the Supreme Court discouraged facial challenges to state voting restrictions in *Crawford v. Marion County Election Board*. Drawing on the litigation strategy in *Cortés*, the Article canvasses the available constitutional and statutory avenues for a legal challenge to the time tax and identifies conditions for relief to be granted. Those conditions include exhausting the political process, targeting a momentous election and choosing appropriate plaintiffs, using primary election experiences and expert testimony to develop an adequate evidentiary record, and seeking narrow and politically neutral relief. The Article concludes by suggesting policies that can be implemented at the state and federal levels to mitigate the time tax.

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INTRODUCTION

On April 22, 2008, Richard Brown, a resident of North Philadelphia, arrived at his polling place to cast his ballot in the primary election. He arrived even before the polls opened and joined a line of eager voters. But when the polls opened at 7:00 a.m., both machines at his precinct were broken. No one could vote. The line of voters first grew longer and then shorter as voters left without casting their ballots. After 9:00 a.m., Brown and remaining voters finally cast their ballots on a repaired voting machine. Others did not have time to spare that morning. From 7:00 a.m. to 8:45 a.m., approximately seventy-five to one hundred voters left the precinct without casting a ballot.¹

Did Brown and other voters at his precinct have a constitutional right to vote without having to wait an inordinately long period of time? If so, could they enforce that right *before* the election in which they sought to vote? State and local officials in Pennsylvania said no. When questioned by a reporter about the likelihood of many voters leaving the polls because of long lines in the 2008 general election, Fred Voight, the Deputy Election Commissioner of Philadelphia, responded: “Are there lines? Of course there are. Tough. That’s the

1 Declaration of Richard Brown ¶¶ 1–18, NAACP State Conference of Pa. v. Cortés, 591 F. Supp. 2d 757 (E.D. Pa. 2008) (No. 2:08-cv-05048).

way it works. . . . People are always going to have to wait in line. I mean, get a life.”²

It is hardly surprising that Voight and other government officials could not fathom that long lines at the polls could violate a voter’s constitutional rights.³ Waits at the polls have long been considered “garden variety election irregularities”⁴ that are par for the course in every election.⁵ Prior to the 2008 election, no federal court had ever held that a state policy that would contribute to long lines at the polls in an upcoming election violated a voter’s constitutional rights. That changed when *NAACP State Conference of Pennsylvania v. Cortés*⁶ was decided days before the 2008 election.

In October 2008, Brown—together with other voters, the NAACP State Conference of Pennsylvania, and the Election Law Network—headed to federal court. They sought statewide preliminary injunctive relief requiring poll workers to distribute emergency paper ballots to voters when half or more of the electronic voting machines in a precinct became inoperable on Election Day. They argued that such relief would prevent many voters from being turned away from the polls by long lines. Chief Judge Harvey Bartle III of the Eastern District of Pennsylvania granted the relief.⁷ He found that the potential injury to the plaintiffs and other voters throughout the Common-

2 *Philly Official Scoffs at Voting Problems* (American News Project online video Oct. 17, 2008), <http://www.americannewsproject.com/videos/155>. When asked whether poll workers should take simple measures, such as distributing paper ballots, to alleviate long lines, Voight dismissed those suggestions: “A long line is not justification for anything except waiting.” *Voters Sue Pennsylvania, Election Official Scoffs* (American News Project online video Oct. 23, 2008), <http://americannewsproject.com/videos/voters-sue-pennsylvania-election-official-scoffs>.

3 According to the Secretary of State for the Commonwealth of Pennsylvania, Pedro A. Cortés, “prospective fears of long lines . . . are at most a trivial burden on voting rights and are not a Constitutional violation.” Memorandum of Law of Defendants Secretary Pedro A. Cortés and Commissioner Chet Harnut in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 27, *Cortés*, 591 F. Supp. 2d 757 (No. 2:08-cv-05048) [hereinafter Defendants’ Memorandum of Law].

4 *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978).

5 See, e.g., *id.* at 1076–78; *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975) (affirming district court decision that long lines at polls caused by, among other factors, voting machine malfunctions were “at most irregularities caused by mechanical or human error” that “did not rise to the level of a constitutional violation”). As recently as the eve of the 2004 general election, the Court of Appeals for the Sixth Circuit explained that the prospect of long lines at the polls “does not amount to the severe burden upon the right to vote” and a line-producing procedure need not be declared unconstitutional. *Summit County Democratic Cent. & Executive Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004).

6 591 F. Supp. 2d 757 (E.D. Pa. 2008).

7 *Cortés*, 591 F. Supp. 2d at 767.

wealth would, if it occurred, violate the Equal Protection Clause.⁸ To prevent such a violation, the court ordered the Commonwealth to implement the plaintiffs' proposal.

Cortés is a landmark voting rights case. It is the first to recognize that the prospect of long lines at the polls may constitute a "time tax"⁹ and that state policies that impose such lines can cause an injury of constitutional magnitude. Like the poll tax, the time tax burdens a citizen's fundamental right to vote. It is a government policy or practice that forces one citizen to pay more in time to vote compared with her neighbor across town, across the state, across state lines, or even across the street.

The time tax may result from statewide election policy—which the plaintiffs challenged in *Cortés*—or from problematic election infrastructure, such as insufficient numbers of polling locations, voting machines, and poll workers to efficiently accommodate all those who seek to vote.¹⁰ Whatever the cause, the effect is long lines that severely burden the right to vote. Those who cannot afford to wait—say, because of work obligations, family responsibilities, or health constraints that do not pause for Election Day—are denied the right to vote.

Until very recently, data on the time tax were simply unavailable, and so very few noticed its disenfranchising effects. In the 2008 election, more than ten million voters had to wait longer than an hour to vote and hundreds of thousands had to wait longer than five hours.¹¹ Hundreds of thousands more left the polls without casting a ballot because lines were too long. Hundreds of thousands of others were so discouraged by long lines that they did not show up at the polls at all.

Comprehensive data, available in 2008 for the first time, reveals that the time tax falls disproportionately on particular segments of the U.S. electorate. In 2008, blacks bore the brunt of the time tax bur-

8 *Id.* at 765.

9 The phrase "time tax" appears to have first been used in print by Berkeley Law School Dean Christopher Edley, Jr. His protest of the time tax appeared in the *Washington Post* on October 28, 2008, the same day that Judge Bartle held a hearing in *Cortés*. See Christopher Edley, Jr., *A Voting Rights Disaster?*, WASH. POST, Oct. 28, 2008, at A17.

10 See ADVANCEMENT PROJECT, PREPARING FOR A SURGE IN VOTER TURNOUT IN THE NOVEMBER 2008 GENERAL ELECTION 3 (2008), available at <http://www.advancement-project.org/pdfs/vpp/PollingPlaceResourcesReport.pdf>. The plaintiffs in *Virginia State Conference of NAACP v. Kaine* challenged problematic infrastructure on the eve of the 2008 general election. Complaint at 25–26, *Va. State Conference of NAACP v. Kaine*, No. 2:08-cv-508 (E.D. Va. dismissed Nov. 18, 2008). For further discussion of *Kaine*, see discussion *infra* Part IV.E.

11 See discussion *infra* Part II.A.

den, as did Latinos to a lesser extent. While only 5% of whites nationwide waited longer than an hour to vote in 2008, 15% of blacks and 8% of Hispanics waited that long.¹² In the South, wait times were longer than elsewhere in the country.¹³ There, approximately 8% of white voters, 19% of blacks, and 14.5% of Hispanics waited longer than an hour to cast a ballot.¹⁴

Polling data suggest that it does not take an unusually long wait to severely burden the right to vote. If all registered voters in the United States were required to wait just sixty minutes to vote on Election Day, that wait time alone might turn away more than 40% of registered voters.¹⁵ A generation ago, both political action and litigation were needed to abolish poll taxes. This Article is a primer on how to do the same to the equally intolerable tax on voters' time.

Part I examines *Cortés* as a case study of successful voter access litigation that reduced the time tax. It reviews the political backdrop of the case, the court battle that ensued, and why the victory matters. In doing so, particular attention is paid to how plaintiffs created an evidentiary record in support of their facial challenge to Pennsylvania's election policy. This exercise is necessary in the wake of the Supreme Court's recent decision in *Crawford v. Marion County Election Board*,¹⁶ where the Court rejected a facial challenge to Indiana's voter identification law on the ground that the plaintiffs had failed to demonstrate "how common" disenfranchisement was as a result of the law.¹⁷ Post-*Crawford*, those pursuing a facial challenge to a state election policy bear a particularly high evidentiary burden. Thus far, the only federal constitutional case in which plaintiffs seeking to guarantee access to the franchise have surmounted that burden is *Cortés*.¹⁸

Part II places the time tax in national and historical context. Little was known about the time tax until very recently. I first review the available data on its burdens, and then suggest three reasons why policymakers, judges, litigators, academics, and voters should be concerned about the time tax. The first is pragmatic: assuming a non-random distribution of wait times, votes lost due to the time tax can decide close elections. The second focuses on electoral access: no votes should be lost due to an administrative hurdle like long waits. The third and arguably the most pressing concern relates to equality:

12 See *infra* tbl. 3.

13 See *infra* tbl. 4.

14 See *infra* tbl. 5.

15 See *infra* notes 114–18 and accompanying text.

16 128 S. Ct. 1610 (2008).

17 *Id.* at 1623.

18 See *infra* note 54 and accompanying text.

the time tax appears to disproportionately burden racial minorities and those in certain regions of the country.

Part III explores six doctrinal bases for challenging a time tax: the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the First Amendment, the Twenty-Fourth Amendment, and Sections 2 and 5 of the Voting Rights Act.¹⁹ Although litigation challenging the time tax has been successful on only Equal Protection grounds to date, the other grounds are virtually untested and ripe for litigation in this emerging area of law.

Part IV offers a model for voter access litigation. It suggests five conditions for judicial relief to be granted: exhausting the political process, a momentous pending election, seeking pre- rather than post-election relief, bringing sufficient evidence to succeed on a facial challenge, and pursuing narrow and politically neutral relief. None of these criteria alone is sufficient to obtain federal court intervention against long lines. The presence of all of the criteria does not guarantee such intervention. But these factors are what a federal court is likely to consider in deciding whether or not to grant relief to voters seeking to ensure access to the franchise.

Part V argues that a judicial victory against the time tax should not be the endgame. Rather, policymakers, advocates, and voters ultimately must use the political process to mitigate the sweeping burdens imposed by the time tax. Part V reviews a number of measures worth advocating on a state-by-state basis to reduce the time tax, including a relatively low-cost means of ensuring that no voter is turned away due to long lines at the polls: distributing paper ballots. Part V also suggests a potential congressional remedy for mitigating the time tax: amending the Help America Vote Act to allow for the use of paper and provisional ballots by those who, when faced with a long line at a polling booth, cannot afford to wait.

I. THE TIME TAX IN PENNSYLVANIA

A. *Unsuccessful Lobbying Efforts*

The story of *Cortés* begins with the April 22, 2008 statewide primary in Pennsylvania, which included the presidential primary contests.²⁰ At polling places throughout the Commonwealth, many voters were forced to leave the polls before casting their ballots because of

19 42 U.S.C. §§ 1973, 1973c (2006).

20 Fed. Election Comm'n, 2008 Presidential Primary Dates and Candidate Filing Deadlines for Ballot Access 2 (2008), <http://www.fec.gov/pubrec/2008pdates.pdf>.

long lines caused by inoperable voting machines.²¹ Most of the problems with inoperable voting machines and long lines occurred in precincts with higher than average concentrations of poverty and people of color.²² The 2008 primary experience was consistent with prior Pennsylvania elections fraught with the disparate imposition of the time tax on voters.²³

The long lines afflicting the 2008 primary should not have come as a surprise to any observer of Pennsylvania elections, least of all Commonwealth officials. It was widely known that direct-recording electronic voting (“DRE”) machines, used in fifty of sixty-seven Pennsylvania counties,²⁴ routinely broke down on Election Day. According to Dr. Michael Ian Shamos, a computer scientist at Carnegie Mellon University who has served as the principal consultant to the Commonwealth on DRE machines since 2004, approximately ten percent of DRE machines fail in some respect during the average thirteen hours the machines are in use on an election day.²⁵ Other researchers have found failure rates as high as twenty percent when DRE machines are tested under conditions replicating an election day.²⁶

After the primary, public pressure mounted on Commonwealth officials to develop a mechanism for ensuring access to the franchise in the event of DRE machine failures. For the first time, the Pennsylvania Department of State—headed by Secretary Pedro A. Cortés, an appointee of Democratic Governor Edward Rendell—began to consider a uniform policy that would allow the use of emergency

21 See Letter from Kathryn Boockvar, Senior Att’y at Advancement Project, to Albert Masland, Chief Counsel, Pa. Dep’t of State (June 12, 2008) (on file with author).

22 See *id.* In *Cortés*, the Commonwealth argued that these problems were insignificant because in none of these counties was more than two percent of precincts afflicted by an inoperable machine. See Declaration of Harry A. VanSickle ¶ 17, *NAACP State Conference of Pa. v. Cortés*, 591 F. Supp. 2d 757 (E.D. Pa. 2008) (No. 2:08-cv-05048).

23 See, e.g., *VOTERSUNITE.ORG ET AL., E-VOTING FAILURES IN THE 2006 MID-TERM ELECTIONS* 17–18 (2007), <http://www.votersunite.org/info/E-VotingIn2006Mid-Term.pdf> (focusing on problems in Allegheny County during the 2006 mid-term election).

24 Declaration of Harry A. VanSickle, *supra* note 22, ¶ 15.

25 Michael Ian Shamos, *Voting as an Engineering Problem*, *BRIDGE*, Summer 2007, at 35, 38. According to Shamos, “[v]oting machines are among the least reliable devices on this planet.” *Id.* at 38.

26 *MATT BISHOP ET AL., ANALYSIS OF VOLUME TESTING OF THE ACCUVOTE TSX/ACCUVIEW 4* (2005), available at http://www.sos.ca.gov/elections/voting_systems/vstaab_volume_test_report.pdf.

paper ballots in the event of voting machine failures.²⁷ Until then, the Commonwealth had offered local election officials no guidance whatsoever on whether or not they should distribute paper ballots if some or all DRE machines in a precinct broke down.²⁸ Across the Commonwealth, various counties, elected inspectors of elections, and even individual poll workers used their own judgment to determine whether or not to distribute emergency paper ballots to voters.²⁹

Voter-rights groups argued that this lack of uniformity caused unequal access to the ballot box and disenfranchised voters who could not afford to wait until DRE machines were repaired.³⁰ A broad coalition of public interest groups urged Secretary Cortés to ensure more equal access to the franchise for the general election. Seventeen organizations—including local, statewide, and national civil rights and voting rights groups—presented a proposal to Secretary Cortés on August 26, 2008, asking for a directive, binding on the counties, that would require poll workers to offer emergency paper ballots to voters as soon as half of the voting machines in a precinct were not functioning.³¹

Secretary Cortés rejected the proposal.³² Instead, on September 3, 2008, he issued a directive requiring the distribution of emergency paper ballots only when all DRE machines in a precinct were simultaneously inoperable.³³ The Directive mandated the use of emergency

27 Defendants' Memorandum of Law, *supra* note 3, at 5–6; *see also* 25 PA. CONS. STAT. ANN. §§ 3031.20(b), 3031.5(a) (West 2007) (providing that the Secretary of State “may issue directives or instructions for implementation of electronic voting procedures and for the operation of electronic voting systems.”).

28 *See* Declaration of Harry A. VanSickle, *supra* note 22, ¶¶ 23–24.

29 Press Statement, Advancement Project, Voting Rights Groups Call for Equal Rights in PA Election Administration and Uniform Standards for Emergency Paper Ballots (Aug. 25, 2008), *available at* <http://www.voteraction.org/node/583>.

30 *See* Letter from Kathryn Boockvar, Senior Att’y at Advancement Project, to Albert Masland, Chief Counsel, Pa. Dep’t of State (Aug. 26, 2008) (on file with author).

31 *Id.*; *see also* Complaint at 16–17, NAACP State Conference of Pa. v. Cortés, 591 F. Supp. 2d 757 (E.D. Pa. 2008).

32 Declaration of Harry A. VanSickle, *supra* note 22, ¶ 31.

33 *See* Pennsylvania Dep’t of State, Directive Concerning the Use, Implementation and Operation of Electronic Voting Systems by the County Boards of Elections 3 (Sept. 3, 2008) [hereinafter Directive], *available at* <http://voteraction.org/files/EVS%20Directive%20Final%20090308.pdf> (“[I]f all electronic voting machines in a precinct are inoperable, paper ballots . . . for registering votes . . . shall be distributed immediately to eligible voters” (emphasis omitted) (internal quotation marks omitted)). While the Directive left open the theoretical possibility of distributing paper ballots when fewer than all voting machines were inoperable, state officials testified that paper ballots would be distributed only when all machines were nonfunc-

paper ballots only until a single machine was repaired or replaced, regardless of the condition of the remainder of the machines at the precinct or how long voters were waiting to cast a ballot.³⁴

The Directive was fundamentally flawed. It provided assistance to voters in only the most extreme case of a catastrophic precinct-wide failure of all machines; it provided no assistance at all to voters in the far more likely circumstance of a breakdown of fewer than all available machines. After Secretary Cortés issued the Directive, it was clear that lobbying efforts to mitigate long lines at the polls statewide had not succeeded.³⁵ Voters and public interest groups were left with two choices—to sit back and wait as thousands of voters faced inevitable long lines on Election Day or to pursue relief in court, however unlikely success might be. They chose the latter course.

B. *The Court Battle*

On October 23, 2008,³⁶ three individual voters who had difficulties voting in the April primary, together with the Election Reform Network and the statewide NAACP, filed *Cortés*. The plaintiffs sought the same relief that had been requested of Secretary Cortés: a directive requiring poll workers to distribute emergency paper ballots to voters when half the DRE machines in a precinct were nonoperational on Election Day (the “Fifty Percent Rule”).³⁷ The plaintiffs argued that without the requested relief, hundreds, if not thousands, of voters would have their right to vote severely burdened in violation of the

tioning and in no other circumstances, so that there would be uniformity across the Commonwealth. See Second Declaration of Aaron Zisser ¶¶ 2–4, *Cortés*, 591 F. Supp. 2d 757 (No. 2:08-cv-05048).

34 Directive, *supra* note 33, at 3 (“Emergency paper ballots shall be used . . . until the county board of elections is able to make the necessary repairs to the machine(s) or is able to place into operation a suitable substitute machine(s).”).

35 Thereafter, civil rights groups continued to lobby at the local level for the distribution of paper ballots. See, e.g., Aaron Zisser, Editorial, *Spoiled Voters or a Spoiled Election*, SUNDAY SUN (Phila.), Oct. 12, 2008, at 7.

36 After the September 3 Directive was issued, the NAACP State Conference of Pennsylvania joined forces with Voter Action, the Public Interest Law Center of Philadelphia (PILCOP), and the law firm of Heller Ehrman to develop litigation to reduce long lines at the polls on Election Day. Several weeks later, however, the team lost a critical member as it was announced that Heller Ehrman would dissolve. See Jonathan D. Glater, *Big Law Firm May Vote to Dissolve*, N.Y. TIMES, Sept. 27, 2008, at C9. Thereafter, Emery Celli Brinckerhoff & Abady, LLP, the firm where I practice law, joined the team on extremely short notice.

37 *Cortés*, 591 F. Supp. 2d at 758.

Equal Protection and Due Process Clauses and the First Amendment.³⁸

Five days later, on October 28, 2008, Judge Bartle held an eight-hour evidentiary hearing in the case. At the hearing, the Commonwealth argued that the Fifty Percent Rule was unworkable³⁹: it would cause confusion and chaos at the polls, it would be difficult to provide privacy to voters using such ballots, those ballots might be tampered with and would increase the risk of an overvote,⁴⁰ and any last minute changes to statewide election policy would be unduly burdensome to implement. The Commonwealth further argued that the relief was unwarranted because it did not “see the constitutional burden on the right to vote.”⁴¹ The plaintiffs’ claims were merely “speculative,”⁴² a “parade of horrors, of perspective [sic] horrors.”⁴³ No federal court had ever granted the type of prospective relief the plaintiffs sought.⁴⁴

The plaintiffs countered with evidence of voter disenfranchisement in the April primary caused by DRE machine failures,⁴⁵ statistical evidence on the likelihood of DRE machine breakdowns,⁴⁶ and poll workers who said they would have no problems distributing paper ballots to voters if half of the DRE machines in their precincts broke down.⁴⁷

Because the plaintiffs advanced a facial challenge to Commonwealth policy, their burden was heavy. Just months before in *Crawford*, the Supreme Court had rejected a facial challenge to Indiana’s photo identification law, which required voters to present ID before casting a ballot at the polls.⁴⁸ There, voters and the Democratic Party argued

38 At the time, Pennsylvania did not allow for no-excuses absentee voting. To qualify for an absentee ballot in Pennsylvania in 2008, a voter had to qualify as, *inter alia*, absent from her municipality because of electoral duties, occupation, military service, illness or disability, or religious observance. See Pa. Dep’t of State, Voting by Absentee Ballot, <http://www.votespa.com/HowToVote/VotingbyAbsenteeBallot/tabid/78/language/en-US/Default.aspx> (last visited Oct. 24, 2009).

39 See *Cortés*, 591 F. Supp. 2d at 766–67.

40 An overvote results from extraneous marks on the ballot which might result in a ballot not being counted at all.

41 Transcript of Preliminary Injunction Hearing at 357, *Cortés*, 591 F. Supp. 2d 757 (No. 2:08-cv-05048) [hereinafter Preliminary Injunction Hearing].

42 *Id.* at 358.

43 *Id.* at 360.

44 *Id.* at 361–62.

45 See *Cortés*, 591 F. Supp. 2d at 760.

46 See *id.*

47 See Preliminary Injunction Hearing, *supra* note 41, at 191–92.

48 *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008); see also Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature*

that the law burdened the right to vote in violation of the Fourteenth Amendment.⁴⁹ Justice Stevens's plurality opinion, in which Chief Justice Roberts and Justice Kennedy joined, ruled against the petitioners on evidentiary grounds: the petitioners had failed to demonstrate "how common" voter disenfranchisement was as a result of the law⁵⁰ and no evidence in the record showed that the statute imposed "'excessively burdensome requirements' on any class of voters."⁵¹ "A facial challenge must fail where the statute has a 'plainly legitimate sweep'"⁵² and "'imposes only a limited burden on voters' rights."⁵³ Post-*Crawford*, the only successful federal constitutional challenge (facial or as applied) to state election practices that pose obstacles to the franchise has been *Cortés*.⁵⁴ For this reason, it

and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions, 93 MINN. L. REV. 1644, 1667–72 (discussing *Crawford*'s implications for facial and as-applied challenges in election law cases); discussion *infra* Part IV.D (analyzing standing and ripeness in election disputes post-*Crawford*).

49 *Crawford*, 128 S. Ct. at 1614.

50 *Id.* at 1623.

51 *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 738 (1974)).

52 *Id.* (quoting *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008)).

53 *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 439 (1992)).

54 Specifically, *Cortés* has been the only successful constitutional voter-access case challenging state election administration in the period from April 28, 2008, when *Crawford* was issued, to October 19, 2009. During this time, one voter-access challenge has been successful on statutory grounds, namely the Americans with Disabilities Act. See *Ray v. Franklin County Bd. of Elections*, No. 2:08-cv-1086, 2008 WL 4966759, at *2 (S.D. Ohio Nov. 17, 2008). In the same period, numerous constitutional challenges to state election practices have been unsuccessful. See, e.g., *Simmons v. Galvin*, 575 F.3d 24, 70 (1st Cir. 2009) (rejecting challenge to state statute disenfranchising incarcerated felons); *Molinari v. Bloomberg*, 564 F.3d 587, 590 (2d Cir. 2009) (rejecting challenge to city law extending the term limit for certain elected officials); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353–57 (11th Cir. 2009) (rejecting challenge to state photo ID law); *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1321–25 (10th Cir. 2008) (rejecting challenge to city photo ID law); *In re Ass'n of Cmty. Orgs. for Reform Now*, No. 08-14419-J (11th Cir. Sept. 24, 2008) (unpublished order) (denying petitioners' writ of mandamus and affirming district court finding that petitioners had not made a prima facie showing of infringement on associational right); *Fla. State Conf. of the NAACP v. Browning*, 569 F. Supp. 2d 1237, 1251–59 (N.D. Fla. 2008) (rejecting challenge to state voter identification law); *Stewart v. Marion County*, No. 1:08-cv-586, 2008 WL 4690984, at *3 (S.D. Ind. Oct. 21, 2008) (same); *Ray v. Texas*, No. 2-06-cv-385, 2008 U.S. Dist. LEXIS 59852, at *15–21 (E.D. Tex. Aug. 7, 2008) (rejecting challenge to state absentee voting laws); *Paralyzed Veterans of Am. v. McPherson*, No. C 06-4670, 2008 U.S. Dist. LEXIS 69542, at *81–86 (N.D. Cal. Sept. 9, 2008) (rejecting challenges by eligible voters with visual and manual disabilities to voting systems). It is worth noting that, during this same period, one ballot access case has been successful, see *Moore v. Brunner*, No. 2:08-cv-224, 2008

is worth reviewing in some detail the evidence that the plaintiffs presented.⁵⁵

The plaintiffs began with narratives of disenfranchisement from the April primary. Plaintiff Angel Coleman testified that she could not vote on the morning of the primary due to lines at the polls, which resulted from two of the three DRE machines at her Philadelphia precinct being broken.⁵⁶ Although Coleman waited in line about fifteen minutes,⁵⁷ she could not wait longer because, as a single mother, she needed to take her son to school and then report to work.⁵⁸ Likewise, plaintiff Genevieve Geis, a kindergarten teacher, testified that she could not vote on the morning of the primary at her precinct in Montgomery County, a suburb northwest of Philadelphia.⁵⁹ A poll worker refused to let any voters enter because all the voting machines were broken, yelling, “[G]o home, [the machines] [a]re broken . . . come back later.”⁶⁰ Geis could not wait for the machines to be fixed; she had to report to work.⁶¹ As Coleman and Geis left the polls, others did the same without casting a ballot.⁶²

That Coleman and Geis could not afford to wait to vote did not in any way reflect that voting was not important to them. Coleman was “very passionate”⁶³ about voting but was “torn” about whether she

U.S. Dist. LEXIS 64463, at *12–14 (S.D. Ohio Aug. 21, 2008) (granting preliminary injunction to place the Socialist Party and its candidates on the 2008 general election ballot in Ohio); *Moore v. Brunner*, No. 2:08-cv-224, 2008 U.S. Dist. LEXIS 43737, at *4–15 (S.D. Ohio June 2, 2008) (enjoining directive prohibiting unregistered and nonresident voters from circulating petitions for President); as well as a challenge to a state public financing scheme for candidates for state offices, *see Green Party of Conn. v. Garfield*, No. 3:06-cv-1030, 2009 U.S. Dist. LEXIS 78188, at *226–38 (D. Conn. Aug. 27, 2009); and a challenge to Puerto Rico’s Spanish-only ballot system, *see Diffenderfer v. Gomez-Colon*, 587 F. Supp. 2d 338, 344–51 (D.P.R. 2008).

55 It is also worth noting what evidence plaintiffs did *not* present. Plaintiffs did not present evidence on the frequency of long waits during the primary election, or on the number of precincts that actually experienced DRE machine failures in the primary, and of those, the percentage of occurrences when more than half of the machines were nonfunctional. Plaintiffs could not present this evidence because the Commonwealth had not collected it.

56 Preliminary Injunction Hearing, *supra* note 41, at 55.

57 *Id.* at 60.

58 *Id.* at 55, 58; Declaration of Angel Coleman ¶¶ 3–12, NAACP State Conference of Pa. v. Cortés, 591 F. Supp. 2d 757 (E.D. Pa. 2008) (No. 2:08-cv-05048).

59 Preliminary Injunction Hearing, *supra* note 41, at 271–73.

60 *Id.* at 272.

61 *Id.* at 273–74.

62 Declaration of Angel Coleman, *supra* note 58, ¶ 13; Declaration of Genevieve Geis ¶¶ 4–5, *Cortés*, 591 F. Supp. 2d 757 (No. 2:08-cv-05048).

63 Preliminary Injunction Hearing, *supra* note 41, at 56.

could wait to cast a ballot if faced with long lines.⁶⁴ Simply because one person has “more responsibilities [than] somebody else,” she explained, does not mean she should be denied the right to vote.⁶⁵ For Geis, voting was “important” because “people have fought for the right to vote for a long time,” but she worried that long lines would force her to leave the polls.⁶⁶ These narratives invoked the experiences of people throughout the Commonwealth who would struggle to balance competing responsibilities with a commitment to voting if faced with long wait times on Election Day.

Whyatt Mondesire, the President of the NAACP State Conference of Pennsylvania, reiterated these themes with a focus on his constituents. He testified that he had frequently seen breakdowns of DRE machines “in low income, African American neighborhoods.”⁶⁷ The resulting disenfranchisement caused “[f]rustration, anxiety, [and] anger” among these voters because “they think that their voting franchise is going to be robbed from or taken from them” and “[they] tend to think that it was done on purpose.”⁶⁸

Plaintiffs supplemented these and other narratives of disenfranchisement with statistical evidence demonstrating that the Fifty Percent Rule would enfranchise significantly more voters than the Commonwealth’s Directive: 90% of Philadelphia’s precincts are equipped with two or fewer machines and more than 99% have three or fewer machines, a distribution not atypical of precincts in the Pennsylvania counties that rely on DRE machines.⁶⁹ Where at least one but fewer than all machines fail, the Directive meant that a precinct would function at dramatically lower voter capacity than the Commonwealth had previously deemed permissible.⁷⁰ This was particularly problem-

64 *Id.* at 58.

65 *Id.* at 59.

66 *Id.* at 275–76.

67 *Id.* at 149.

68 *Id.*

69 *See* NAACP State Conference of Pa. v. Cortés, 591 F. Supp. 2d 757, 760 (E.D. Pa. 2008).

70 When approving any DRE machine, the Secretary of State must issue a report which “shall specify . . . the number of voters who may reasonably be accommodated by the voting devices.” 25 PA. CONS. STAT. ANN. § 3031.5(b) (West 2007). Any county that adopts an approved system “shall provide the components of such a system in a number no less than that sufficient to accommodate the voters of that county or municipality in accordance with the minimum capacity standards so prescribed by the secretary.” *Id.* As of the 2008 election, the Secretary had determined that each model 1242 DRE unit could accommodate at least 350 voters on Election Day. *See* PEDRO A. CORTÉS, PA. DEP’T OF STATE, EXAMINATION RESULTS OF DANAHER INDUSTRIAL CONTROLS’ ELECTRONIC 1242 DIRECT RECORDING ELECTRONIC VOTING SYSTEM WITH

atic because 23% of precincts already had more registered voters assigned to them than state law permitted.⁷¹

The plaintiffs' voting technology expert, Douglas Jones, testified that the failure rate for DRE machines ranges from 8% to 20%.⁷² Assuming a conservative failure rate of 10% would mean that in any given two-machine precinct, there is an 18% probability that the precinct will be operating at half of its capacity by the end of an election day but only a 1% probability that *both* machines will be nonfunctioning by the end of an election day.⁷³ These estimates mean "[i]t's highly likely that the failures will occur," and "a lot of precincts [will] fac[e] difficulties."⁷⁴ A rule requiring emergency paper ballots to be made available to voters when half the machines are nonfunctioning would significantly mitigate lines compared with the Commonwealth's Directive.⁷⁵

Given that Pennsylvania polls are open for only thirteen hours, the plaintiffs presented testimony on the time-consuming process of fixing or replacing a nonfunctioning DRE machine on Election Day.⁷⁶ Poll workers testified that such delays caused long lines and caused voters to leave the polls without casting a ballot.⁷⁷ Poll workers also testified that the Fifty Percent Rule would be easy to implement since they were already accustomed to handling thousands of paper provisional ballots, paper absentee ballots, and paper ballots from overseas.⁷⁸

C. Lowering Pennsylvania's Time Tax

On October 29, 2008, less than twenty hours after the hearing concluded, Judge Bartle announced that on Election Day in Penn-

GUARDIAN ELECTION MANAGEMENT SYSTEM 8 (2005), http://www.dos.state.pa.us/dos/lib/dos/press/danaher_report_120105.pdf.

71 Declaration of Stephanie Frank Singer ¶ 3, *Cortés*, 591 F. Supp. 2d 757 (No. 2:08-cv-05048); *see also* 25 PA. CONS. STAT. ANN. § 2702 (West 2007) (limiting capacity of individual precincts to 1200 registered voters).

72 Preliminary Injunction Hearing, *supra* note 41, at 105–06; *see* Shamos, *supra* note 25, at 38; BISHOP ET AL., *supra* note 26, at 4. Defendants did not introduce contrary evidence.

73 *See* Preliminary Injunction Hearing, *supra* note 41, at 108; Declaration of Daniel P. Lopresti ¶ 18, *Cortés*, 591 F. Supp. 2d 757 (No. 2:08-cv-05048); *see also* Preliminary Injunction Hearing, *supra* note 41, at 108 (describing what a failure rate of eight to ten percent would mean to a precinct with two or three DRE machines).

74 Preliminary Injunction Hearing, *supra* note 41, at 109.

75 *Id.* at 114–15.

76 *See Cortés*, 591 F. Supp. 2d at 760–62.

77 *Id.* at 761.

78 *See id.* at 762–63.

sylvania, emergency paper ballots would be distributed at a precinct when half or more of the DRE machines were nonoperational.⁷⁹ He explained, “The right to vote is at the foundation of our constitutional form of government. Ultimately, all our freedoms depend on it.”⁸⁰ Within hours, Secretary Cortés announced that defendants would not appeal the decision and would ensure uniform application of the Fifty Percent Rule.⁸¹

More than any prior opinion, *Cortés* reflects an acute sensitivity to voters’ time constraints on Election Day:

It is undisputed that the turnout as always will be concentrated in the first several hours of voting before people go to work and after 5:00 p.m. after their return from work. Even in the best of circumstances, voters can expect and must tolerate more delay than usual on November 4. Nonetheless, we would be blind to reality if we did not recognize that many individuals have a limited window of opportunity to go to the polls due to their jobs, child care and family responsibilities, or other weighty commitments. Life does not stop on election day. Many must vote early or in the evening if they are to vote at all.⁸²

The decision explains that the combination of voters’ time constraints, high turnout, voting machine failures, and limited voting hours would result in disenfranchisement because when machines fail “time is of the essence. The polls are open for one day and one day only and then for only 13 hours. There is no rain date.”⁸³

While the opinion is long on facts, it is understandably concise in its legal reasoning. The legal analysis begins by explaining the importance of voting in a democracy.⁸⁴ It then applies the balancing test set forth in *Anderson v. Celebrezze*,⁸⁵ which requires courts to consider all relevant factors in weighing the right to vote against state-imposed limitations on the voting process.⁸⁶ Applying *Anderson*, the court con-

79 *Id.* at 767–68.

80 *Id.* at 767.

81 Press Release, Pa. Dep’t of State, Secretary Cortés Responds to Court Decision (Oct. 29, 2008), available at <http://www.dos.state.pa.us/dos/lib/dos/press/2008/dos-paperballotinjunctiongrantedrel102908.pdf>.

82 *Cortés*, 591 F. Supp. 2d at 765.

83 *Id.*

84 *Id.* at 764.

85 460 U.S. 780 (1983).

86 The *Anderson* test provides:

Constitutional challenges to specific provisions of a State’s election laws . . . cannot be resolved by any “litmus-paper test” that will separate valid from invalid restrictions. . . . [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Four-

cluded that the likelihood of long lines caused by DRE machine breakdowns would violate voters' constitutional rights:

Based on the record before us, we find that there is a real danger that a significant number of machines will malfunction throughout the Commonwealth, and this occurrence is likely to cause unacceptably long lines on November 4 The delay resulting from a situation where 50% or more of the voting machines are inoperable will unduly burden and thus deprive many citizens of their right to vote. This injury, if it occurs, will be of the gravest magnitude and will give rise to a violation of at least the Equal Protection Clause of the Fourteenth Amendment.⁸⁷

In support of its one-sentence Equal Protection analysis, the court cited two cases: *Harper v. Virginia State Board of Elections*,⁸⁸ which struck down Virginia's poll tax, and *O'Brien v. Skinner*,⁸⁹ which invalidated New York's policy of failing to provide qualified voters—pretrial detainees and misdemeanants—with means of registering and voting. Judge Bartle did not analyze either of these cases, nor did he reach the plaintiffs' Due Process or First Amendment claims.⁹⁰

On Election Day, Judge Bartle's order appears to have been implemented in at least some counties. Limited data released by the Commonwealth show that in every Philadelphia and Delaware County precinct in which emergency paper ballots were distributed, the ballots were distributed because at least half of the DRE machines broke down—not because all machines were simultaneously nonfunctional.⁹¹ While some Pennsylvania voters waited one to two hours to cast their ballots, and while others in Philadelphia waited longer than

teenth 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. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 789 (citation omitted).

87 *Cortés*, 591 F. Supp. 2d at 765.

88 383 U.S. 663 (1966).

89 414 U.S. 524 (1974).

90 *Cortés*, 591 F. Supp. 2d at 765–66.

91 See E-mail from Ian Harlow, Deputy Comm'r, Pa. Bureau of Comm'ns, Elections and Legislation, to Aaron B. Zisser, Staff Attorney, PILCOP (Jan. 28, 2009, 9:48 EST) (on file with author). The Commonwealth has not released statewide data on this issue.

five hours, these wait times were not attributed to DRE machine breakdowns⁹²—a mark of the success of *Cortés*.

Following the election, on January 28, 2009, the district court issued an order granting the plaintiffs' motion for a permanent injunction, so that the Fifty Percent Rule will remain in place indefinitely.⁹³ The time for appealing that order has long passed.

II. THE TIME TAX NATIONWIDE

A. *Its Scope*

It appears that neither the federal government nor any state has ever made data publicly available on how long voters have waited before casting a ballot. Until 2004, no federal agency had ever attempted to systematically collect data on wait times at the polls or the causes of long lines.⁹⁴ That year, when the federal Election Assistance Commission (EAC) tried to gather data on these issues for the first time, it could not because of what it called “survey confusion,” which led the EAC to conclude that “answers are not possible at this time.”⁹⁵ Neither the 2006 nor the 2008 EAC surveys asked questions about wait times at the polls.⁹⁶ At the state level, there do not appear to be any states that have made comprehensive data publicly available on the length of lines at the polls.⁹⁷

92 See Editorial, *Bring Early Voting to Pennsylvania*, *READING EAGLE* (Pa.), Nov. 10, 2008, at C4; Pauline Vu, *Election Day Mostly Smooth*, *STATELINE.ORG*, Nov. 6, 2008, <http://www.stateline.org/live/details/story?contentId=353684>.

93 Order, Jan. 28, 2009, *Cortés*, 591 F. Supp. 2d 757 (E.D. Pa. Jan. 28, 2009) (No. 2:08-cv-5048).

94 Perhaps the dearth of centralized data is not surprising given the extent of local control over the administration of elections in the United States.

95 U.S. ELECTION ASSISTANCE COMM'N, FINAL REPORT OF THE 2004 ELECTION DAY SURVEY, at 10-2 (2005) [hereinafter U.S. ELECTION ASSISTANCE COMM'N, 2004 SURVEY], available at <http://www.eac.gov/clearinghouse/2004-election-day-survey-1>; see also *id.* pt. 3, at 7 (noting “[c]onfusion over question wording in the 2004 survey prevents proper analysis from being conducted on one potential cause of the long lines in various states”).

96 See U.S. Election Assistance Comm'n, 2006 ELECTION ADMINISTRATION & VOTING SURVEY (2007), available at <http://www.eac.gov/clearinghouse/2006-election-administration-and-voting-survey/?searchterm=2006ElectionAdministration&voting> Survey; U.S. ELECTION ASSISTANCE COMM'N, 2008 ELECTION ADMINISTRATION & VOTING SURVEY (2008), available at http://www.eac.gov/program-areas/research-resources-and-reports/eac-research-in-progress/2008-election-administration-voting-survey-1/attachment_download/file.

97 Heather Gerken has suggested, and I agree, that “[t]here’s no reason that state[s] and localities, with adequate financial support and the help of nonprofit

Not only has the issue of wait times on Election Day been off the radar of state and federal governments, it also has been overlooked by polling organizations until recently. Only in the last five years has any attempt been made to collect national data on long lines. In 2004, the Pew Research Center for the People & the Press was the first polling organization to collect national data about wait times at the polls, and it gathered data on this issue again in 2006 and 2008.⁹⁸

Pew's surveys reveal the startling length of time that significant numbers of voters reported they must wait to cast a ballot. In 2004, 42% of voters reported that they had to wait in line to cast a ballot, of whom 14% waited one to two hours, and 5% waited longer than two hours. For the 2006 midterm elections, 28% of voters reported that they had to wait to cast a ballot, of whom 7% waited one to two hours, and 4% waited longer than two hours. In 2008, 36% of voters had to wait to cast a ballot (on Election Day or during in-person early voting), of whom 17% waited one to two hours, and 11% waited longer than two hours. Table 1 summarizes how long voters waited in 2004, 2006, and 2008, according to Pew data.

TABLE 1. WAIT TIMES AT THE POLLS, 2004–2008

*Data from the Pew Research Center for the People & the Press*⁹⁹

In-Person Voters	2004	2006	2008
Percentage who waited in line	42%	28%	36%
Of those who waited, percentage who waited under 15 minutes	31%	50%	31%
Of those who waited, percentage who waited 15 to 29 minutes	6%	25%	22%
Of those who waited, percentage who waited 30 to 59 minutes	24%	11%	19%
Of those who waited, percentage who waited 1 to under 2 hours	14%	7%	17%
Of those who waited, percentage who waited 2 hours or more	5%	4%	11%

groups" cannot collect and report information on lines and other problems afflicting elections. HEATHER GERKEN, *THE DEMOCRACY INDEX* 141 (2009).

⁹⁸ See *infra* notes 102–06.

⁹⁹ These data come from telephone polling conducted by the Pew Research Center for the People and the Press. In each year listed, the Pew Center interviewed registered voters shortly after Election Day, and the full results of each survey are available online. See Pew Research Center Poll Database, Nov. 2004 Election Poll: Q. 39, available at <http://people-press.org/questions/?qid=1610768&pid=51&ccid=51#>

According to Pew, waiting in line was the problem voters reported most frequently. Of those who voted in the 2006 election, 96% did not have any problems or difficulties in voting other than waiting in line;¹⁰⁰ in 2008, that percentage was 97%.¹⁰¹

In 2008, Pew was not the only source of national data on wait times. The Cooperative Congressional Election Survey (CCES), a consortium of more than 150 university researchers, collected detailed nationwide data on wait times that voters faced in the 2008 election.¹⁰² According to CCES data, in 2008, 6% of those who voted—or nearly 8 million people—waited longer than an hour to cast a ballot, with an average wait time of seventy-five minutes.¹⁰³ As Table 2 illustrates, those who cast an in-person ballot during early voting generally waited significantly longer than those who voted on Election Day: Whereas 5% of voters on Election Day waited longer than an hour, 10% waited that long during early voting.

top; Pew Research Center Poll Database, Nov. 2006 Election Poll: Q. 14, *available at* <http://people-press.org/questions/?qid=1670427&pid=51&ccid=50#top>; Pew Research Center Poll Database, Nov. 2008 Election Poll: Q. 43, *available at* <http://people-press.org/questions/?qid=1720783&pid=51&ccid=51#top>.

100 See Pew Research Center Poll Database, Nov. 2006 Election Poll: Q. 15, *available at* <http://people-press.org/questions/?qid=1670428&pid=51&ccid=51#top>.

101 See Pew Research Center Poll Database, Nov. 2008 Election Poll: Q. 45, *available at* <http://people-press.org/questions/?qid=1720785&pid=51&ccid=51#top>.

102 That survey was based on data collected from 32,800 individuals. See STEPHEN ANSOLABEHRE, *GUIDE TO THE COOPERATIVE CONGRESSIONAL ELECTION SURVEY* (forthcoming 2009) (manuscript at 6), *available at* http://web.mit.edu/polisci/portl/cces/material/CCES_Guide_2008_Rough_Draft_v2.pdf.

103 These data were reported to me in an interview and subsequent correspondence with Stephen Ansolabehere, the CCES project's lead researcher. The calculation of nearly 8 million voters waiting longer than an hour to cast a ballot relies on Ansolabehere's testimony that there were 133 million voters in the 2008 General Election. See *Voter Registration: Assessing Current Problems: Hearing Before the S. Rules Comm.*, 111th Cong. 4 (2009) [hereinafter *Voter Registration hearing*] (testimony of Stephen Ansolabehere, Professor, Department of Government, Harvard University).

There are notable differences in the wait times reported to Pew and CCES, with the wait times reported to Pew being significantly longer than those reported to CCES. While explaining the differences is beyond the scope of this Article, even the more conservative CCES data reveals the significant and burdensome wait times required of millions of voters.

TABLE 2. WAIT TIMES AT THE POLLS IN 2008

*Data from the Cooperative Congressional Election Survey*¹⁰⁴

Wait Time at Poll	2008 Election Overall	November 4, 2008	Early In-Person Voting
Not at all	37%	40%	28%
Less than 10 minutes	28%	28%	26%
10 to 30 minutes	19%	18%	23%
31 to 60 minutes	10%	10%	12%
Longer than 60 minutes	6% (average wait of 75 minutes)	5%	10%

The CCES data are the first comprehensive source that can be used to examine whether or not the burden of waiting to vote falls disproportionately on particular segments of the U.S. population. According to the data, there was no statistically significant correlation between wait times at the polls in 2008 and income or education.¹⁰⁵ However, there are stark racial and regional differences in the times that voters had to wait to cast a ballot.¹⁰⁶

Table 3 presents the disparate burdens of the time tax on white, black, and Hispanic voters. While 40% of white voters did not wait at all to cast a ballot, only 22% of blacks reported the same. While 9% of whites waited thirty to sixty minutes to vote, nearly twice as many blacks, 17%, had to wait that length of time. While only 5% of whites waited longer than an hour to vote, 15% of blacks bore that burden. For Hispanic voters, wait times were longer than for whites but shorter than for blacks. Thirty-three percent of Hispanics did not wait at all to cast a ballot, 10% waited thirty to sixty minutes, and 8% waited longer than an hour.

104 See ANSOLABEHRE, *supra* note 102 (manuscript at 53–54); Telephone Interview with Stephen Ansolabehere, Professor, Department of Government, Harvard University (Mar. 12, 2009).

105 Telephone Interview with Stephen Ansolabehere, *supra* note 104.

106 See *infra* tbls. 3–5. Before the CCES data was available, others had suggested that long wait times correlated with the concentration of racial minorities. See, e.g., ADVANCEMENT PROJECT, THE END OF THE LINE? 3–4 (2008), available at <http://www.advancementproject.org/pdfs/vpp/PollingPlaceResourcesReport.pdf>; VoteBackHome.com, Long Lines at Polling Places (By State), <http://votebackhome.com/longlines> (last visited Oct. 25, 2009) (concluding “long lines are strongly correlated with race” such that long lines are correlated with a higher concentration of black voters).

TABLE 3. WAIT TIMES AT THE POLLS IN 2008 BY RACE

*Data from the Cooperative Congressional Election Survey*¹⁰⁷

Wait Time at Poll	Whites	Blacks	Hispanics
Not at all	40%	22%	33%
Less than 10 minutes	28%	23%	27%
10 to 30 minutes	18%	23%	22%
31 to 60 minutes	9%	17%	10%
Longer than 60 minutes	5%	15%	8%

Regional differences in wait times are worth noting. Only 2% of voters in Northeastern and Western states waited longer than an hour to vote, while 5% of Midwesterners and 11% of Southerners waited that long. Table 4 reflects the differential wait times faced by those in the South, compared with those in the Northeast, Midwest, and West.

TABLE 4. WAIT TIMES AT THE POLLS IN 2008 BY REGION

*Data from the Cooperative Congressional Election Survey*¹⁰⁸

Wait Time at Poll	Northeast	Midwest	South	West
Not at all	42%	39%	30%	44%
Less than 10 minutes	34%	27%	25%	27%
10 to 30 minutes	15%	19%	21%	18%
31 to 60 minutes	7%	10%	13%	8%
Longer than 60 minutes	2%	5%	11%	2%

In the Midwest, the burden of waiting fell disproportionately on black voters: while 3.8% of white and 3.9% of Hispanic voters waited longer than an hour to vote, 18% of blacks waited that long. In the South, the burden of waiting fell on blacks and to a lesser extent on Hispanics: 8% of whites waited longer than an hour to vote, while 19%

107 Telephone Interview with Stephen Ansolabehere, *supra* note 104; E-mail from Stephen Ansolabehere, Professor, Department of Government, Harvard University to Author (Mar. 13, 2009 09:24 EST) (on file with author). These data combine the responses of those who voted at the polls on Election Day and during early in-person voting.

108 Telephone Interview with Stephen Ansolabehere, *supra* note 104; E-mail from Stephen Ansolabehere, *supra* note 107. These data combine the responses of those who voted at the polls on Election Day and during early in-person voting.

of blacks and 14.5% of Hispanics waited that long. Table 5 captures the regional and racial disparities in wait times in the 2008 election.

TABLE 5. WAIT TIMES AT THE POLLS IN 2008 BY REGION AND RACE

*Data from the Cooperative Congressional Election Survey*¹⁰⁹

Wait Time at Poll	Northeast	Midwest	South	West
Not at all	Whites: 44% Blacks: 32% Hispanics: 35%	Whites: 42% Blacks: 22% Hispanics: 34%	Whites: 33% Blacks: 18% Hispanics: 18%	Whites: 48% Blacks: 31% Hispanics: 9%
Less than 10 minutes	Whites: 35% Blacks: 31% Hispanics: 36%	Whites: 27% Blacks: 20% Hispanics: 28%	Whites: 27% Blacks: 20% Hispanics: 23%	Whites: 26% Blacks: 24% Hispanics: 30%
10 to 30 minutes	Whites: 15% Blacks: 21% Hispanics: 18%	Whites: 19% Blacks: 24% Hispanics: 27%	Whites: 20% Blacks: 25% Hispanics: 23%	Whites: 17% Blacks: 22% Hispanics: 20%
31 to 60 minutes	Whites: 5% Blacks: 13% Hispanics: 9%	Whites: 9% Blacks: 17% Hispanics: 8%	Whites: 12% Blacks: 18% Hispanics: 14%	Whites: 7% Blacks: 18% Hispanics: 8%
Longer than 60 minutes	Whites: 2% Blacks: 4% Hispanics: 3%	Whites: 4% Blacks: 18% Hispanics: 4%	Whites: 8% Blacks: 19% Hispanics: 15%	Whites: 2% Blacks: 5% Hispanics: 4%

Unsurprisingly, many voters cannot wait a long time to vote on Election Day or during early voting. In 2008, hundreds of thousands of voters were forced to wait not just an hour but five hours or longer if they wished to cast a ballot.¹¹⁰ According to CCES data, over 8% of registered voters who did not cast a ballot—several hundreds of thousands of eligible citizens—tried to vote but could not because of a “long line at polls.”¹¹¹ The only available study of this issue prior to 2008 found that the burden of waiting caused more than 129,500

109 E-mail from Stephen Ansolabehere, *supra* note 107. This data combines the responses of those who voted at the polls on Election Day and during early in-person voting. Due to formatting considerations, the percentages listed in Table 5 have been rounded to the nearest whole number.

110 See Critical Election Infrastructure Act of 2009, H.R. 253, 111th Cong. § 2 (2009); ELECTION PROTECTION, ELECTION PROTECTION 2008 19–20, 22, available at www.866ourvote.org/tools/documents/files/0077.pdf; Vu, *supra* note 92; *NewsHour with Jim Lehrer: Voters Encounter Long Lines amid Heavy Turnout* (PBS television broadcast Nov. 4, 2008), available at http://www.pbs.org/newshour/bb/politics/july-dec08/fessler_11-04.html. For a collection of news reports on long lines during early voting, see *Rachel Maddow Show* (MSNBC television broadcast Nov. 2, 2008).

111 *Voter Registration Hearing*, *supra* note 103, at 20 (testimony of Ansolabehere).

Ohio voters—2% of the state’s electorate—to leave the polls without voting in Ohio in the 2004 general election.¹¹²

The data discussed so far do not capture how many voters were so discouraged by the prospect of long lines that they did not show up to the polls at all in the 2008 election. According to CCES data, 3% of registered voters did not even try to cast a ballot because they were discouraged by a “long line at polls.”¹¹³

Polling data from the Marist College Institute for Public Opinion, presented in Table 6, sheds further light on this issue. Six days before Election Day 2008, significant numbers of registered voters nationwide expected to wait in long lines before casting their ballots: 35% of voters believed it was “very likely” and 37% of voters believed it was “likely” that they would encounter “long lines at [their] polling place on election day.”¹¹⁴ Nearly 60% of voters reported that they could not wait “as long as it takes” to cast their ballot.¹¹⁵ Twenty-seven percent said that “the longest amount of time” that they could wait in line to vote was thirty minutes or less.¹¹⁶ Seventeen percent reported that they could wait thirty-one to sixty minutes.¹¹⁷ Fifteen percent said they could wait more than an hour but not “as long as it takes.”¹¹⁸ These data suggest that 44% of eligible voters expected not to vote on November 4, 2008 if they faced a line at their polling place longer than sixty minutes. Polling data from just before the 2004 election reveal strikingly similar responses.¹¹⁹

112 VOTING RIGHTS INST., DEMOCRATIC NAT’L COMM., *DEMOCRACY AT RISK: THE 2004 ELECTION IN OHIO* § III, at 2 (2005), available at http://www.democrats.org/a/2005/06/democracy_at_ri.php.

113 *Voter Registration Hearing*, *supra* note 103, at 20 (testimony of Ansolabhere).

114 Press Release, Marist Inst. for Pub. Opinion, *The American Electorate: Great Expectations?* (Nov. 3, 2008) [hereinafter 2008 Marist Press Release], available at <http://maristpoll.marist.edu/wp-content/misc/usapolls/Vote081103.pdf>.

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 Press Release, Marist Inst. for Pub. Opinion, *National Poll: Campaign 2004—Election Eve Results* (Nov. 2, 2004), available at <http://maristpoll.marist.edu/wp-content/misc/usapolls/PZ041102.pdf>.

TABLE 6. "LONGEST AMOUNT OF TIME" VOTERS CAN WAIT
AT THE POLLS, 2004 & 2008

*Data from the Marist College Institute for Public Opinion*¹²⁰

	Voters who could wait a maximum of 30 minutes	Voters who could wait 31 to 60 minutes	Voters who could wait longer than an hour but not "as long as it takes"	Voters who would wait "as long as it takes"
2004	24%	17%	11%	48%
2008	27%	17%	15%	41%

B. *Reasons for Concern*

When asked about long lines at the polls on the eve of the 2008 election, Marge Tartaglione, the chairwoman of the Philadelphia Voting Commission, scoffed: "You see people waiting in line" for "baseball tickets," "ipod[s]," and at "the supermarket"—those "same people" just need to wait to vote.¹²¹ Tartaglione is wrong, of course. In a society committed to democratic governance, waiting in line to vote is different than waiting in line for consumer goods. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."¹²² When many citizens are forced to wait on long lines at the polls such that their right to vote is denied or abridged, Americans should be concerned. There are at least three reasons why.

The first is pragmatic. Recent presidential elections have been decided by a relatively small number of votes. In 2008, two to four million registered voters—or one percent to two percent of the eligible electorate—were discouraged from voting due to administrative hassles, including long lines.¹²³ The number of people prevented from voting in 2008 exceeded the popular vote margin in the previous two presidential elections.¹²⁴ In Ohio in 2004, more than 129,500 vot-

¹²⁰ For the 2004 data, see *id.*, and for the 2008 data, see 2008 Marist Press Release, *supra* note 114.

¹²¹ *Chaos Looms Over Pennsylvania Vote* (American News Project online video Oct. 31, 2008), <http://americannewsproject.com/videos/chaos-looms-over-pennsylvania-vote>.

¹²² *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

¹²³ Ansolabehere Testimony, *supra* note 103, at 19.

¹²⁴ See Ian Urbina, *Hurdles to Voting Persisted in 2008*, N.Y. TIMES, Mar. 10, 2009, at A18.

ers left the polls because of long lines, and the presidential contest was decided by a margin of 118,000 ballots.¹²⁵ Those who arrive at the polls but are turned away by long lines or who do not come at all because of long lines can decide the fate of elections, assuming a non-random distribution of wait times. Elections should be decided based on voters' preferences, not their time constraints.

The second reason centers on electoral access. No voter should be discouraged from voting by long lines at the polls. An administrative hurdle of this sort simply should not deprive a citizen of the most precious right to vote. All eligible citizens should have access to the franchise.

The third reason for concern focuses on disparate burdens. Perhaps if the burden of long lines fell on all Americans equally regardless of race or place of residence, we should be less concerned. But if, as seems to be the case, the burden of waiting disproportionately falls on black and Latino voters (especially in the South), it offends our sense of fundamental fairness. That minority voters, nationwide and in the South, in 2008 *still* do not have equal access to the ballot box is unfair and intolerable.

Given that the time tax is a significant problem and one that Americans should care about, we should work to mitigate its burden on the right to vote. The subsequent parts of this Article focus on reform through the federal judiciary and, more importantly, through the political process.

III. CHALLENGING THE TIME TAX

The Constitution prohibits state and local officials from requiring voters to wait too long to vote because that would risk turning away a significant portion of the electorate. The Constitution also prohibits forcing some voters, especially racial minorities, to wait longer than others to cast a ballot. But how are such constitutional guarantees to be enforced when federal courts routinely and strenuously decline to interfere in state election administration?¹²⁶

125 See DEMOCRATIC NAT'L COMM. VOTING RIGHTS INST., *supra* note 112, at 2.

126 See, e.g., *Welch v. McKenzie*, 765 F.2d 1311, 1317 (5th Cir. 1985) (denying voters relief because "ordinary dispute over the counting and marking of ballots" is "not actionable in federal court because of our federal system's recognition that states are primarily responsible for regulating their own elections" (internal quotation marks omitted)); *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980) (denying voters relief because "[i]f every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be

Until now, it has been assumed that long lines at the polls are neither an issue of constitutional dimension nor even an issue worth litigating. No treatise has laid out any framework for challenging a time tax. One leading election law casebook mentions long lines in just two sentences and suggests that nothing is to be done about the problem: “Voters may express concern and even outrage if, for example, tie-ups on election day cause the lines to swell and delays to mount. But rarely will mere inconvenience attract anything beyond the most fleeting attention.”¹²⁷ Another leading election law casebook mentions long lines in questions buried over three pages and expresses skepticism about whether the Equal Protection Clause reaches the problem.¹²⁸ These cursory mentions of long lines suggest

superseded by a 1983 gloss”); *Hennings v. Grafton*, 523 F.2d 861, 865 (7th Cir. 1975) (denying voters relief because “the work of conducting elections in our society is typically carried on by volunteers and recruits for whom it is at most an avocation and whose experience and intelligence vary widely” and “[g]iven these conditions, errors and irregularities . . . are inevitable, and no constitutional guarantee exists to remedy them”); *Pettengill v. Putnam County R-1 Sch. Dist.*, 472 F.2d 121, 122 (8th Cir. 1973) (denying voters relief because a federal court is not the “arbiter of disputes over whether particular persons were or were not entitled to vote or over alleged irregularities in the transmission and handling of absentee voter ballots” absent factors such as denial of the vote based on race or fraud).

The reluctance of federal courts to intervene in the nuts and bolts of election administration manifests itself in what Christopher Elmendorf calls the “trans-clausal” doctrinal framework that the Supreme Court uses in constitutional challenges to election laws. The Supreme Court’s analytic framework remains constant whether those challenges are predicated on the Equal Protection right to vote on equal terms with others, as in *Crawford*; or the First Amendment right to associate for political purposes, as in *Anderson*, as well as *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184 (2008), and *California Democratic Party v. Jones*, 530 U.S. 567 (2000); or the First Amendment right to engage in political speech, see, e.g., *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999); *Randall v. Sorrell*, 548 U.S. 230 (2006); *Davis v. FEC*, 128 S. Ct. 2759 (2008). The same intuitions also animate due process decisions that draw a line between fundamental unfairness and garden variety election irregularities. See discussion *infra* Part III.B; see also *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1624–27 (2008) (Scalia, J., concurring) (arguing that the burden imposed by state law was minimal); *Clingman v. Beaver*, 544 U.S. 581, 597–98 (2005) (discussing plaintiffs’ challenge to election laws on First Amendment grounds).

127 SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 1016 (3d ed. 2007).

128 DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW* 312 (2008) (“Suppose that in one county, the average voter must wait in a ten-minute line in order to vote while, in a neighboring county, the average voter need only wait in a two-minute line. . . . Should such disparities trigger strict scrutiny?”); *id.* at 329–30 (“Should a ‘tax on the voter’s time’ be considered a severe burden, sufficient to trigger strict scrutiny? If so, what is the logical stopping point?”).

that few people realize the extent to which long lines can and actually do disenfranchise voters.¹²⁹

Part of this Article's project is to help judges, litigators, and voters understand that long lines at the polls are problems of constitutional dimension and that they are litigable. To this end, this Part suggests six doctrinal grounds for challenging a time tax: the Equal Protection Clause, the Due Process Clause, the First Amendment, the Twenty-Fourth Amendment, and Sections 2 and 5 of the Voting Rights Act.

In presenting these grounds, I offer two caveats. First, they are not the only means of successfully challenging a time tax. Challenges based on state law have potential¹³⁰ but a state-by-state analysis is beyond the scope of this Article. Second, the likelihood of succeeding in time tax litigation may vary depending on the opportunities to vote in any given state. In states without no-excuses absentee voting, time tax litigation may be the most likely to succeed because voters must cast their ballot on Election Day or not at all. In such states, the absence of other voting opportunities exacerbates the burden on voters' rights caused by long lines.¹³¹

A. *Equal Protection Clause*

As discussed in Part I.C, voters succeeded in *Cortés* on equal protection grounds. While the decision is unique in that it is the only recorded judicial opinion, state or federal, that ordered a time tax to be mitigated before an upcoming election in which the plaintiffs sought to vote, it is not surprising. Rather, the case is a logical outgrowth of *Harper v. Virginia State Board of Elections*¹³² and one-person, one-vote doctrine.

In *Harper*, the Supreme Court considered the constitutionality of a provision of the Virginia Constitution which required payment of an annual poll tax of \$1.50, the proceeds of which supported public schools and other public purposes. The Court declined to consider whether the poll tax, "born of a desire to disenfranchise the Negro," served that same invidious end in 1966.¹³³ Instead the Court held that

129 *But see* SPENCER OVERTON, *STEALING DEMOCRACY* 42–46 (2006) (discussing disparities in wait times at the polls in Ohio in 2004 election).

130 *See, e.g., In re* 1984 Gen. Election for Office of Council of Twp. of Maple Shade, 497 A.2d 577, 592 (N.J. Super. Ct. Law Div. 1985) (invalidating election results and ordering new election where no voting machine was available for three-and-a-half hours on Election Day, causing unreasonable delays in voting and voter disenfranchisement).

131 *See* discussion *infra* Part V.

132 383 U.S. 663 (1966).

133 *Id.* at 666 n.3.

“a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.”¹³⁴ The Court could not have been clearer: the Constitution bars a “system which excludes those unable to pay a fee to vote or who fail to pay. . . . To introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant.”¹³⁵

In so ruling, the Court overturned *Breedlove v. Suttles*,¹³⁶ which had held that a poll tax was not repugnant to the Equal Protection Clause.¹³⁷ To explain the dramatic doctrinal change, the *Harper* Court stated: “[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.”¹³⁸

It is hardly a leap to apply *Harper*’s evolving theory of the Equal Protection Clause to long lines at the polls today. Underlying *Harper* is concern that one’s monetary status (or lack thereof) should not preclude a citizen from casting a ballot. Just as a poll tax disenfranchises voters who cannot afford to pay in dollars, so too do long lines disenfranchise those who cannot afford to pay in time. It is plausible that when faced with long lines, the working poor are more likely to leave the polls without casting a ballot than the wealthy, due in part to inflexible work schedules, child care obligations, and other responsibilities that they alone must shoulder.¹³⁹ *Harper* forbids this. To the extent that paying in time to vote is “a measure of a voter’s qualifica-

134 *Id.* at 666.

135 *Id.* at 668.

136 302 U.S. 277 (1937); *see also* *Butler v. Thompson*, 341 U.S. 937 (1951) (summarily affirming denial of challenge to Virginia poll tax).

137 *Breedlove*, 302 U.S. at 281. When the Justices first considered *Harper* at conference, they voted 6 to 3 to uphold *Breedlove*, not overturn it. The Justices reconsidered their position after Justice Arthur Goldberg circulated a dissenting opinion that relied on the Twenty-Fourth Amendment. *See* Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 Nw. U. L. REV. 63, 112 (2009); Bernard Schwartz, *More Unpublished Warren Court Opinions*, 1986 SUP. CT. REV. 317, 320–21; discussion *infra* Part III.D.

138 *Harper*, 383 U.S. at 669.

139 Assessing this question empirically is beyond the scope of this Article.

tions,” it is “capricious” and “irrelevant.”¹⁴⁰ A “system” that excludes those unable or unwilling to pay in time to vote is unconstitutional.¹⁴¹

At what point might waiting in line to vote result in a constitutional violation? One reading of *Harper* might suggest that the Constitution forbids paying *any* time tax as a prerequisite to voting. Just as a \$1.50 poll tax was unconstitutional, so too would be a 25¢ poll tax or a 1¢ poll tax.¹⁴² Likewise, just as an hour’s wait offends the Constitution, so too does a fifteen minute wait or a five minute wait.¹⁴³

While this reasoning may have theoretical appeal, it is unworkable in practice on Election Day. In *Cortés*, the court rejected the notion that a wait time becomes unconstitutional after a certain minute. “There is no bright line or ‘litmus-paper test.’”¹⁴⁴ “Some waiting in line . . . is inevitable and must be expected.”¹⁴⁵ “Nonetheless, there can come a point when the burden of standing in a queue ceases to be an inconvenience or annoyance and becomes a constitutional violation because it, in effect, denies a person the right to exercise his or her franchise.”¹⁴⁶

Here *Harper* might provide some guidance. If we adjust Virginia’s 1966 poll tax for inflation, we can calculate how much lost wages *Harper* might deem constitutionally impermissible for a voter waiting in line to cast a ballot in November 2008. Virginia’s \$1.50 poll tax in 1966 is the equivalent of \$9.97 in 2008.¹⁴⁷ A citizen earning the federal minimum wage of \$6.55 in November 2008¹⁴⁸ would be required to forgo income from just over ninety minutes of work (in pre-tax dollars) if such a poll tax were imposed today. Alternatively, we can place the \$1.50 poll tax in the context of wages in 1966. A worker in 1966 earning the then-federal minimum wage of \$1.25¹⁴⁹

140 See *Harper*, 383 U.S. at 668.

141 *Id.*

142 *Id.*

143 See Michael Churchill, *Philadelphia Federal Court Acts to Prevent Constitutional Problems from Election Day Delays*, UPON FURTHER REV., Mar. 9, 2009, <http://uponfurtherreview.philadelphiabar.org/page/Article?articleID=2a7fe01f-e535-4558-bcff-524b9c907ea1>.

144 NAACP State Conference of Pa. v. Cortés, 591 F. Supp. 2d 757, 764 (E.D. Pa. 2008) (quoting *Anderson v. Celebrezze*, 400 U.S. 780, 789 (1983)).

145 *Id.*

146 *Id.*

147 See U.S. Bureau of Labor Statistics, Consumer Price Index Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Oct. 25, 2009).

148 EMPLOYMENT STANDARDS ADMIN., U.S. DEP’T OF LABOR, FEDERAL MINIMUM WAGE RATES UNDER THE FAIR LABOR STANDARDS ACT, 1938–2009 (2009), <http://www.dol.gov/esa/minwage/chart.pdf>.

149 *Id.*

would have to forgo earnings from seventy-two minutes of work to pay Virginia's poll tax (in pre-tax dollars). By these measures, an extension of *Harper* suggests that the Equal Protection Clause forbids a state from requiring a voter earning today's federal minimum wage to forego earnings from seventy-two or ninety minutes of income as a prerequisite of voting.

There are certainly limits to applying a Supreme Court case from more than forty years ago simply by adjusting for inflation or wage increases. But this type of analysis might be persuasive to several members of the Supreme Court. In his dissenting opinion in *Crawford*, Justice Souter explained that making voters travel to the Bureau of Motor Vehicles to obtain photo identification "translates into an obvious economic cost" "in work time lost."¹⁵⁰ Likewise, Justice Breyer adjusts the 1966 Virginia poll tax for inflation in discussing the burdens that *Harper* forbids today.¹⁵¹

One-person, one-vote doctrine offers another equal protection rationale for mitigating the time tax.¹⁵² The weight of one's vote cannot be diminished or denied based on where one lives. "A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm."¹⁵³ If data show that a state policy "discriminates against the residents of the populous counties of the State in favor of rural sections," by producing long lines at the polls in the former but not the latter, for example, the policies "lack[] the equality to which the exercise of political rights is entitled under the Fourteenth Amendment."¹⁵⁴ To make out such a claim successfully, empirical evidence on the differential wait times is critical to show that the principle of "one person, one vote"¹⁵⁵ is being undermined by nonrandomly distributed long lines.¹⁵⁶

150 *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1630 (Souter, J., dissenting).

151 *Id.* at 1644 (Breyer, J., dissenting).

152 *See, e.g.*, *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969) ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964) (holding that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment"); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (holding that each voter's vote is entitled to be counted once and to be protected from dilution).

153 *Reynolds*, 377 U.S. at 568; *see also Gray*, 372 U.S. at 379 ("[A]ll who participate in the election are to have an equal vote . . . wherever their home may be . . .").

154 *Moore*, 394 U.S. at 819.

155 *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (quoting *Gray*, 372 U.S. at 381).

156 *Cf.* U.S. ELECTION ASSISTANCE COMM'N, 2004 SURVEY, *supra* note 95, at 12-5 (concluding that "[s]mall, rural jurisdictions and large, urban jurisdictions tended to

Harper and one-person, one-vote doctrine show that *Cortés* is not an aberration in equal protection doctrine. For more than a century, from *Yick Wo v. Hopkins*¹⁵⁷ to *Bush v. Gore*,¹⁵⁸ it has been recognized that the right to vote is fundamental. Indeed, in *Bush*, the Supreme Court relied on the Equal Protection Clause in protecting the exercise of the right to vote: “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.”¹⁵⁹ In considering a recent challenge to unreliable voting equipment, a Sixth Circuit panel said that “[v]iolations of the Equal Protection Clause are no less deserving of protection because they are accomplished with a modern machine than with outdated prejudices.”¹⁶⁰ Similarly, such violations are no less deserving of protection because they are accomplished by long lines rather than poll taxes.

The Supreme Court has instructed federal courts on when to apply strict scrutiny versus a balancing test for examining state-imposed burdens on the right to vote.¹⁶¹ Where the burden on the right to vote is “severe,” a court should apply strict scrutiny and the challenged law must be “‘narrowly drawn to advance a state interest of compelling importance.’”¹⁶² Where, instead, a state election law “imposes only reasonable, nondiscriminatory restrictions” on voters’ rights, a court should apply a balancing test that weighs “‘the character and magnitude of the asserted injury to the rights’ . . . against ‘the precise interests put forward by the State’ . . . , taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’”¹⁶³

When plaintiffs can prove that a state policy’s effect is long lines at the polls that impose severe or discriminatory burdens, the appro-

report higher rates of inadequate [numbers of] poll workers within polling places or precincts”—a factor that could contribute to long lines).

157 118 U.S. 356, 370 (1886) (noting, in dicta, that voting “is regarded as a fundamental political right, because preservative of all rights”).

158 531 U.S. 98, 104 (2000) (per curiam) (“When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental.”).

159 *Id.* Some argue that *Bush v. Gore* is the first Supreme Court case applying equal protection analysis to the “nuts and bolts” of election administration. See LOWENSTEIN ET AL., *supra* note 128, at 299.

160 *Stewart v. Blackwell*, 444 F.3d 843, 880 (6th Cir. 2006), *vacated on other grounds by* 473 F.3d 692 (6th Cir. 2007).

161 See *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (discussing when the two tests should be applied).

162 *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

163 *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

appropriate standard of review is strict scrutiny.¹⁶⁴ More frequently, federal courts apply a balancing test in analyzing nuts-and-bolts voter access cases,¹⁶⁵ and Judge Bartle did so in *Cortés*.¹⁶⁶ In the context of such a balancing test, it may be difficult for a state to justify policies that tolerate voting machine failures or overcrowded precincts which cause lines so long that many voters are turned away.

Under a balancing test, a state policy lacks constitutional validity when its effects target the exercise of political rights of an “identifiable” group.¹⁶⁷ The effect of a state policy that produces long lines may particularly target blacks, Latinos, the poor, the elderly, and those physically unable to wait for long periods of time.¹⁶⁸ During the hearing for *Cortés*, Judge Bartle expressed concern that, while the time tax may not burden those privileged enough to “take an hour off”

164 See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 629 (1969) (applying “exact-ing examination” in evaluating why “some . . . citizens are permitted to participate and some are not.”); *Reynolds v. Sims*, 377 U.S. 533 562 (1964) (“[A]ny alleged infringement on the right of citizens to vote must be carefully and meticulously scruti-nized.”); *O’Brien v. Skinner*, 414 U.S. 524, 531–35 (1974) (Marshall, J., concurring) (“‘[T]he Court must determine whether the exclusions are necessary to promote a compelling state interest.’ It is this standard which must be employed here.” (cita-tions omitted) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972))). In this analy-sis, the intent of the state policy is irrelevant. Cf. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 n.3 (1966) (stating that invidious intent is irrelevant in assessing consti-tutionality of poll tax).

165 See Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 316–17 (2007). It is worth not-ing that five Justices in *Crawford* endorsed the *Anderson* and *Burdick* balancing tests. See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008) (Stevens, J., with Roberts, C.J. and Kennedy, J.); *id.* at 1628, 1635–36 (Souter, J., dissenting, with Ginsburg, J.). Three Justices endorsed only *Burdick*. *Id.* at 1624 (Scalia, J., concur-ring, with Thomas, J. and Alito, J.). Justice Breyer endorsed neither. *Id.* at 1643–45 (Breyer, J., dissenting) (endorsing a balancing test that balances whether a statute’s burdens on some outweigh the statute’s salutary effects on others).

166 See discussion *supra* Part I.C.

167 See *Anderson*, 460 U.S. at 793 (“[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.”).

168 Similarly, in *Crawford*, Justice Souter found it troubling that “the travel costs and the fees” required to obtain photo identification “are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile.” 128 S. Ct. at 1631 (Souter, J., dissenting). In striking down Georgia’s 2005 photo identification law as unconstitutional, one court explained that for these types of vul-nerable groups of individuals, “the loss of their right to vote . . . is undeniably demor-alizing and extreme, as those citizens are likely to have no other realistic or effective means of protecting their rights.” *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1366 (N.D. Ga. 2005).

from work, it especially burdens those “punching a time clock” and those who “have a supervisor [saying] [you]’ve got to be on the assembly line”¹⁶⁹—i.e., those workers most in need of income and with the least job security.¹⁷⁰

One interest the Commonwealth did not raise in *Cortés* is cost. The Commonwealth could not raise that defense because the relief sought by the plaintiffs required only a minor expense, the expenditure of photocopying costs for additional emergency paper ballots. Elsewhere, however, the specter of expenses associated with election administration is likely to be raised in defense of a state policy that produces long lines: we cannot afford more voting machines or more poll workers or more polling places. Fiscal excuses of this kind are insufficient for denying a fundamental right,¹⁷¹ particularly when there is a relatively low-cost means of ensuring the right, such as the distribution of paper ballots.

Finally, it is worth noting that *Cortés* is not the only case recognizing that long lines can violate citizens’ federal constitutional right to vote. In one other federal case, *Ury v. Santee*,¹⁷² a court concluded that long lines unreasonably restricted access to the ballot box in violation of the Equal Protection Clause.¹⁷³ Unlike in *Cortés*, the violation in *Ury* was found post-election and a new election was ordered.¹⁷⁴

169 Preliminary Injunction Hearing, *supra* note 41, at 356.

170 This is not to say that the time tax does not burden others as well. Judge Bartle expressed concern about the effects of long lines on “teacher[s] in school [who] can’t just take off and leave the kids at school” and “business person[s]” whose responsibilities permit only limited time for voting. *Id.* Yet, it may be that hourly workers earning the federal minimum wage (or less) are more likely to value and need each extra dollar of earnings compared with those at higher income levels.

171 Consider, for example, the indigent criminal defendant’s fundamental right to counsel. No court would tolerate a state’s refusal to bear the expense of providing such a defendant with counsel. *See* Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963); *see also* Douglas v. California, 372 U.S. 353, 357–58 (1963) (holding that indigent defendants have right to counsel on appeal). In the voting rights context, fiscal excuses have been rejected as insufficient to deny the fundamental right to vote. *See, e.g.,* Duncan v. Poythress, 515 F. Supp. 327, 342 (N.D. Ga. 1981) (“The cost to the state of holding [a new] election certainly is, or should be, a matter of concern for all citizens of this state; nevertheless, it is not a sufficiently compelling reason to deny [the] plaintiffs the relief they seek. The restoration of the plaintiffs’ right to vote outweighs the public expenditure involved.”), *aff’d* 657 F.2d 691, 708 (5th Cir. Unit B 1981); *Ury v. Santee*, 303 F. Supp. 119, 127 (N.D. Ill. 1969) (same).

172 303 F. Supp. 119 (N.D. Ill. 1969).

173 *Id.* at 126.

174 *Id.* at 127.

At issue in *Ury* were the procedures implemented by local officials for the election of four members of a seven-person Village Board.¹⁷⁵ Voters brought a class action suit to challenge the decision of local officials to consolidate thirty-two voting precincts into six voting precincts for the election.¹⁷⁶ The consolidation “forced [voters] to wait unreasonable lengths of time to obtain and cast their ballots in certain of the precincts.”¹⁷⁷ Wait times ranged from two to four hours and “hundreds of voters were effectively deprived of their right to vote.”¹⁷⁸ The plaintiffs contended that these wait times violated their rights.¹⁷⁹ The court agreed:

It was the duty of defendants as the responsible officers and trustees of the Village of Wilmette to provide adequate and substantially equal voting facilities to the citizens of Wilmette. . . .

As a consequence of the failure of defendants to provide substantially equal voting facilities, the plaintiffs and those similarly situated were discriminated against in the exercise of their franchise and were denied the right secured by the United States Constitution to equal protection of the laws.

. . . .

United States citizens do have a right guaranteed by the Constitution to a reasonable opportunity to vote in local elections, that is, to be given reasonable access to the voting place, to be able to vote within a reasonable time¹⁸⁰

The court determined that “[t]he injury suffered by the plaintiffs and other citizens similarly situated . . . would far outweigh the cost of conducting a fair, proper and valid election.”¹⁸¹ It voided the flawed election and ordered a new one “at the earliest possible date.”¹⁸²

B. Due Process Clause

A claim based on the Due Process Clause of the Fourteenth Amendment should be included in any challenge to the time tax. Although no case has explicitly held that the Due Process Clause prohibits long lines at the polls, a logical extension of substantive due

175 *Id.* at 125.

176 *Id.* at 126.

177 *Id.* at 124.

178 *Id.*

179 *See id.* at 121.

180 *Id.* at 126.

181 *Id.* at 127.

182 *Id.*

process doctrine protects voters against disenfranchisement by unduly burdensome wait times.

The Constitution protects citizens' fundamental right to vote and to have their votes counted by way of election procedures that are fundamentally fair.¹⁸³ The touchstone of due process analysis is "fundamental fairness"—that state officials cannot conduct an election in a manner so flawed as to amount to a denial of voters' rights to cast a ballot. Where "organic failures in a state or local election process threaten to work patent and fundamental unfairness, a . . . claim lies for a violation of substantive due process."¹⁸⁴ Organic failures include "across-the-board disenfranchisement" that signal a "breakdown of the electoral process."¹⁸⁵ This is an "extraordinary circumstance," more sweeping in degree than garden variety election irregularities.¹⁸⁶

In the seminal case *Griffin v. Burns*,¹⁸⁷ the Court of Appeals for the First Circuit explained when federal courts should act to prevent a violation of due process in the context of election irregularities:

[Federal courts have properly intervened when] the attack was, broadly, upon the fairness of the official terms and procedures under which the election was conducted. The federal courts were not asked to count and validate ballots and enter into the details of the administration of the election. Rather they were confronted with an officially-sponsored election procedure which, in its basic aspect, was flawed. Due process, "representing a profound attitude of fairness between man and man, and more particularly between individual and government," . . . is implicated in such a situation.¹⁸⁸

183 See *United States v. Mosley*, 238 U.S. 383, 386 (1915); *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978).

184 *Bonas v. Town of N. Smithfield*, 265 F.3d 69, 74 (1st Cir. 2001); see also *Siegel v. LePore*, 234 F.3d 1163, 1187 (11th Cir. 2000) (stating that a federally protected right is implicated "where the entire election process—including as part thereof the state's administrative and judicial corrective process—fails on its face to afford fundamental fairness" (citations omitted)); *Marks v. Stinson*, 19 F.3d 873, 888 (3d Cir. 1994) (holding that a substantive due process violation exists where there is a "broad-gauged unfairness" that infects the results of an election); *Duncan v. Poythress*, 657 F.2d 691, 700 (5th Cir. 1981) ("[T]he due process clause of the [F]ourteenth [A]mendment prohibits action by state officials which seriously undermine [sic] the fundamental fairness of the electoral process."); *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) ("If the election process itself reaches the point of patent and fundamental unfairness, a violation of the [D]ue [P]rocess [C]lause may be indicated and relief under § 1983 therefore in order.").

185 *Bonas*, 265 F.3d at 75.

186 *Id.*

187 570 F.2d at 1065.

188 *Id.* at 1078 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring)).

A state policy that produces long lines at the polls—say, lines longer than sixty minutes that put more than forty percent of voters at risk of being turned away—is flawed. To the extent that such lines are not justified by a weighty governmental interest, such a policy is unconstitutional. The Due Process Clause protects against precisely this type of arbitrariness. Faced with a state policy that is likely to create long lines and thereby disenfranchise voters, “a federal judge need not be timid, but may and should do what common sense and justice require.”¹⁸⁹

C. *First Amendment*

The First Amendment may prove to be a useful tool in challenging the time tax. Although the right to vote is not typically analyzed through a First Amendment framework, there is an undeniable link between the First Amendment and political participation. The Supreme Court recognized this link in *Harper*, but declined to elaborate on it:

It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment and that it may not constitutionally be conditioned upon the payment of a tax or fee. We do not stop to canvass the relation between voting and political expression. For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.¹⁹⁰

From there, *Harper* proceeded with an equal protection analysis, and many subsequent cases have followed suit.¹⁹¹

While the connection between political participation and the First Amendment may be undertheorized,¹⁹² a challenge to the time tax can be made out on First Amendment grounds. The right to vote

189 *Id.*

190 *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) (internal citations omitted).

191 *See* discussion *supra* Part III.A.

192 According to Daniel Tokaji, the *Harper* Court’s decision not to delve into First Amendment analysis has “hindered the recognition of the links between the First Amendment and the principle of equal participation.” Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2495–96 (2003). Tokaji urges recognition of the connections between the two doctrinal areas. *Id.* at 2498. Others have suggested that it is unnecessary and possibly unwise to use the First Amendment as a textual basis for the constitutional right to vote. *See* Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 338–40 (1993).

has been analogized to “having a voice,” i.e., speech, in an election.¹⁹³ Elsewhere, the right to vote has been linked to the right to associate: “[T]he right of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . to cast their votes effectively . . . rank among our most precious freedoms.”¹⁹⁴ Both the right to speak and the right to associate, in the context of voting or otherwise, are at the heart of the First Amendment.¹⁹⁵

Perhaps the connection between the right to vote and the First Amendment is strongest in the context of ballot access cases. Courts have struck down state parties’ ballot access schemes in primary elections where they “pose[] an undue burden in [their] totality on the right to vote under the First Amendment.”¹⁹⁶ Moreover, the Supreme Court has recognized that “[t]he exclusion of candidates [from the ballot] . . . burdens voters’ freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens.”¹⁹⁷ Just as excluding candidates from the ballot “burdens voters’ freedom of association,”¹⁹⁸ so too does the exclusion of actual voters for a candidate. Just as “[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot,”¹⁹⁹ the right of a party to be on the ballot means little if voters cannot cast a ballot for that party. In the former scenario, the voter cannot associate with the party because the party is not on the ballot. In the latter, the voter cannot associate with the party because a voter cannot get to the ballot box. In both scenarios,

193 *Wesberry v. Sanders*, 376 U.S. 1, 17 (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.”).

194 *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *see also* *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (“[T]he First Amendment protects ‘the freedom to join together in furtherance of common political beliefs’” (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214–15 (1986))).

195 The rights to speak and associate freely have also been protected under the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *NAACP v. Alabama*, 57 U.S. 449, 460 (1958) (“It is beyond debate that the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”).

196 *Molinari v. Powers*, 82 F. Supp. 2d 57, 71–78 (E.D.N.Y. 2000) (discussing comparable cases).

197 *Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983).

198 *Id.*

199 *Williams*, 393 U.S. at 31.

the voter's right to associate with a candidate and to have a voice in the election is not only burdened, but eviscerated.

Notwithstanding the appeal of the First Amendment as grounds for challenging a time tax, a litigator may wish to proceed with some caution in raising this claim. Thus far, the First Amendment generally has not been a successful ground for voter access litigation.²⁰⁰

D. *Twenty-Fourth Amendment*

The Twenty-Fourth Amendment is a potentially important means of challenging the time tax, although it has never before been raised in time tax litigation. Often forgotten and overlooked, the Amendment marked a critical achievement in voting rights,²⁰¹ banning the poll tax and any other tax that "denie[s] or abridge[s]" the right to vote in federal elections.²⁰²

Challenges brought by voters under the Twenty-Fourth Amendment are rare indeed. The first and only Supreme Court opinion to discuss the Amendment at any length is *Harman v. Forssenius*.²⁰³ At issue in *Harman* was a Virginia law imposing burdensome annual re-registration requirements on Virginians who wished to vote in federal elections without paying a poll tax.²⁰⁴ Developed in 1963 in anticipation of the Twenty-Fourth Amendment,²⁰⁵ the law required a voter who wished to avoid paying a poll tax to file a witnessed or notarized certificate of residence no earlier than October 1 of the year immediately preceding that in which the voter desired to vote and not later than six months prior to the election.²⁰⁶ If a voter failed to file the certificate and was unable or unwilling to pay the poll tax, she could not vote.²⁰⁷

200 See, e.g., *Hayden v. Pataki*, No. 00 Civ. 8586, 2004 U.S. Dist. Lexis 10863, at *19–20 (S.D.N.Y. June 14, 2004) (holding that First Amendment is not a basis for enfranchising those convicted of felonies and collecting cases), *aff'd in part, rev'd in part* by 449 F.3d 305 (2d Cir. 2006) (en banc).

201 For a history of the Twenty-Fourth Amendment, see Ackerman & Nou, *supra* note 137, at 69–87.

202 U.S. CONST. amend. XXIV, § 1 ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.").

203 380 U.S. 528 (1965).

204 *Id.* at 529.

205 *Id.* at 531.

206 *Id.* at 531–32.

207 *Id.* at 532.

The Supreme Court struck down the Virginia law on Twenty-Fourth Amendment grounds. “For federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed.”²⁰⁸ Virginia’s interest in requiring voters to prove their residence was inadequate to justify the burden on the right to vote.²⁰⁹ “[C]onstitutional deprivations may not be justified by some remote administrative benefit to the State.”²¹⁰ The Court instructed that the text of the Amendment must be taken seriously:

[T]he Twenty-fourth Amendment does not merely insure that the franchise shall not be “denied” by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be “denied or abridged” for that reason. Thus, like the Fifteenth Amendment, the Twenty-fourth “nullifies sophisticated as well as simple-minded modes” of impairing the right guaranteed. “It hits onerous procedural requirements which effectively handicap exercise of the franchise by those claiming the constitutional immunity.”²¹¹

Harman’s reasoning applies equally to long lines at the polls that disenfranchise voters.²¹² The right to vote is “‘of little value if [it] could be . . . indirectly denied,’ or ‘manipulated out of existence’”²¹³ by long wait times at the polls. Any “remote administrative benefit to the State” in having voters wait in long lines is inadequate to justify disenfranchisement.²¹⁴ Like filing a certificate of residence, waiting in line to vote can be an “onerous procedural requirement[] which effectively handicap[s] exercise of the franchise.”²¹⁵ To the extent that a long line is a “milder substitute” for the poll tax, the Twenty-Fourth Amendment forbids it: “no equivalent or milder substitute [of the poll tax] may be imposed.”²¹⁶

If the precedential weight of *Harman* is not enough to challenge a time tax, the plain text of the Twenty-Fourth Amendment is helpful: “The right of citizens of the United States to vote . . . shall not be

208 *Id.* at 542.

209 *Id.* at 543.

210 *Id.* at 542.

211 *Id.* at 540–41 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

212 *Cf. Ackerman & Nou*, *supra* note 137, at 138–46 (discussing the Twenty-Fourth Amendment’s applicability to voter identification law at issue in *Crawford*).

213 *Harman*, 380 U.S. at 540 (omission in original) (citation omitted) (quoting first *Smith v. Allwright*, 321 U.S. 649, 664 (1944), then *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960)).

214 *Id.* at 542.

215 *Id.* at 541.

216 *Id.* at 542.

denied or abridged by the United States or any state by reason of failure to pay any . . . *other tax*.”²¹⁷ The phrase “other tax” was not a mere afterthought, but critical to the amendment and much debated.²¹⁸ William L. Higgs, a Mississippi lawyer, testified before the House Committee on the Judiciary about the disenfranchising effects of the poll tax in his state. He explained that the “other tax” language was necessary to the amendment because “[t]he State legislature moves very fast in this area—I think far faster than [Congress] can move—and it is very dedicated to denying the Negro the right to vote.”²¹⁹ If the poll tax were prohibited, Higgs explained, Mississippi would enact myriad other taxes to disenfranchise black citizens.²²⁰

The House was persuaded. The House Committee Report on the Twenty-Fourth Amendment explains that the prohibition on any “other tax” is necessary to “prevent both the United States and any State from setting up *any substitute tax* in lieu of a poll tax as a prerequisite for voting. . . . This prevents the nullification of the amendment’s effect by a resort to subterfuge in the form of other types of taxes.”²²¹ The substitute taxes explicitly considered by the House Committee on the Judiciary included the property tax, the real estate tax, the ad valorem tax, and the automobile tax—the payment of which a state might make a prerequisite to voting in the absence of the “other tax” language.²²²

Admittedly, a “time tax” was not mentioned on the floors of Congress. But the “other tax” language can certainly be read to cover a tax on a voter’s time. For many Americans, time spent waiting in line to vote is like paying a tax to the state in the form of lost wages, and a burdensome time tax can “den[y] or abridge[]” the right to vote. As Bruce Ackerman has noted, waiting in line is an in-kind burden comparable to the required rendition of services, which has traditionally been understood as a tax.²²³

217 U.S. CONST. amend. XXIV, § 1 (emphasis added).

218 See, e.g., *Abolition of Poll Tax in Federal Elections: Hearing on H.R. 404, 425, 434, 594, 601, 632, 655, 663, 670, and S. 29 Before the H. Comm. on the Judiciary*, 87th Cong. 19–20 (1962) [hereinafter *Poll Tax Hearings*] (statements of Reps. Henry B. Gonzalez & Byron G. Rogers); *id.* at 25 (statement of Sen. Holland); *id.* at 50–52 (statement of William L. Higgs, Att’y).

219 See *Poll Tax Hearings*, *supra* note 218, at 51 (statement of William L. Higgs).

220 *Id.* at 51–52.

221 H.R. REP. NO. 87-1821, at 5 (1962) (emphasis added).

222 See *Poll Tax Hearings*, *supra* note 218, at 51 (statement of William L. Higgs).

223 Posting of Bruce Ackerman, bruce.ackerman@yale.edu, to election-law@mailman.lls.edu (Dec. 3, 2008, 10:54:12 PST) (archived at <http://mailman.lls.edu/pipermail/election-law/2008-December/017982.html>).

As a whole, the Twenty-Fourth Amendment sought to ensure that *all* citizens could cast a ballot in federal elections, regardless of wealth or state of residence. Explained Senator Spessard Holland of Florida, the Amendment's leading sponsor, "[the Amendment] will operate in favor of colored people and of white people, in favor of people of all colors, religions, and creeds."²²⁴ Holland emphasized that his concern was economic, not racial, discrimination: "[T]he proposal does not come under the ordinary classification of the ordinary civil rights legislation. It applies to majorities, to minorities, and to every person of every color. It attempts to give to people who otherwise qualify the right to cast their votes for elected federal officials."²²⁵

In 1962, when Holland introduced the Amendment on the Senate floor,²²⁶ five Southern states—Alabama, Arkansas, Mississippi, Texas, and Virginia—continued to impose a poll tax as a condition of voting.²²⁷ Proponents of the amendment sought to guarantee "equality" in citizens' access to the ballot box.²²⁸ In Holland's view it was intolerable that a poll tax disenfranchised poor Alabamians while neighboring Floridians could vote freely.²²⁹ After the amendment passed the Senate and the House, it was ratified by thirty-eight states in seventeen months and rejected only by Mississippi.²³⁰ With respect to access to the franchise, the American people would tolerate nothing less than "a straitjacket"²³¹ on states to ensure that no eligible

224 108 CONG. REC. 2851, 4154 (1962).

225 *Id.* Holland was motivated to sweep away the poll tax because it was a barrier to voting for poor whites who would support the Democratic Party. See Ackerman & Nou, *supra* note 137, at 73 (describing Holland as a "proud racist").

226 Interestingly, the Amendment was introduced in the Senate as an amendment to a resolution to make Alexander Hamilton's house a national monument. Holland designed this maneuver to overcome opponents who had seven times before defeated the amendment. STAFF OF SUBCOMM. ON THE CONSTITUTION, S. COMM. ON THE JUDICIARY, 99TH CONG., AMENDMENTS TO THE CONSTITUTION 80–81 (Comm. Print 1985) [hereinafter AMENDMENTS TO THE CONSTITUTION]; Ackerman & Nou, *supra* note 137, at 81.

227 H.R. REP. NO. 87-1821, at 3 (1962); 108 CONG. REC. 2851, 4151 (1962).

228 108 CONG. REC. 2851, 4153 (1962).

229 *Id.* Opponents of the amendment such as Senator Richard Russell, Jr. of Georgia, claimed that a poll tax "does not really prevent anyone from voting." *Id.* at 4153. These claims were demonstrably wrong. The "five States which still require[d] payment of a poll tax were among the seven States with the lowest voter participation in the 1960 presidential election." H.R. REP. NO. 87-1821, at 3 (1962). Where a poll tax had been abandoned, voter participation increased. *Id.*

230 AMENDMENTS TO THE CONSTITUTION, *supra* note 226, at 81–82.

231 108 CONG. REC. 4152 (1962) (statement of Sen. Russell) (likening the amendment to abolish poll taxes to a previously rejected amendment to establish a national voting age of 18).

voter would be disenfranchised based on inability to pay a “poll tax or other tax.”²³²

The concerns animating the Twenty-Fourth Amendment apply equally to the time tax. Like the poll taxes at issue in the early 1960s, the time tax disproportionately burdens the poor and those in certain Southern states. Just as Americans in the 1960s believed that all citizens should have equal access to polls regardless of their ability to pay, we believe the same today. Equal access to the polls for eligible voters has become ingrained in our national ethos.

The text of the Twenty-Fourth Amendment, its legislative history, and the precedential weight of *Harman* suggest that the Twenty-Fourth Amendment should be grounds for challenging a time tax. A caveat is necessary: litigating a time tax under this Amendment requires overcoming certain doctrinal obstacles. In the wake of *Harman*, few challenges outside the scope of what has been described as an “explicit and unambiguous poll tax” have succeeded on Twenty-Fourth Amendment grounds.²³³ But it is possible for voters seeking access to the polls to win on such a claim. Recently, a district court invalidated Georgia’s 2005 voter identification law for running afoul of the Twenty-Fourth Amendment.²³⁴ This case shows that part of the civil rights project of our generation should be to understand and value the broad reach of the Twenty-Fourth Amendment in contexts outside an “explicit and unambiguous poll tax.”²³⁵

232 U.S. CONST. amend. XXIV, § 1.

233 See *Johnson v. Bredesen*, 579 F. Supp. 2d 1044, 1056 (M.D. Tenn. 2008) (holding that a statute requiring convicted felons to pay court-ordered restitution before having their voting rights restored was not inconsistent with Twenty-Fourth Amendment); see also *Gonzalez v. Arizona*, 485 F.3d 1041, 1048–49 (9th Cir. 2007) (holding that a statute requiring proof of citizenship for first-time voter registration and identification at polls was not inconsistent with Twenty-Fourth Amendment); *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at *2 (4th Cir. Feb. 23, 2000) (holding that requiring a convicted felon to pay a fee to restore his right to vote did not violate the Twenty-Fourth Amendment); *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1343 (S.D. Fla. 2002) (same), *aff’d on other grounds*, 405 F.3d 1214 (11th Cir. 2005) (en banc).

234 *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1366–70 (N.D. Ga. 2005) (holding that Georgia’s photo identification requirement violates the Twenty-Fourth Amendment with respect to federal elections and violates the Equal Protection Clause with respect to state and municipal elections); see also *Bynum v. Conn. Comm’n on Forfeited Rights*, 410 F.2d 173, 177 (2d Cir. 1969) (holding that there was a “substantial issue” as to whether requiring indigent felons to pay five dollars to regain the right to vote violates the Twenty-Fourth Amendment and remanding for consideration by three-judge court).

235 See *Ackerman & Nou*, *supra* note 137, at 148 (noting “[i]t is time for a new generation of lawyers to give legal expression [to the Twenty-Fourth Amendment]”).

E. Section 2 of the Voting Rights Act

In addition to constitutional bases for challenging the time tax, there are also statutory options, such as Section 2 of the Voting Rights Act. Section 2 prohibits the use of any electoral practice or procedure that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”²³⁶ It affords sweeping protection to “all action necessary to make a vote effective,” including any “action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly.”²³⁷ An electoral practice or procedure violates Section 2

if, based on the totality of circumstances, it is shown that the political processes leading to . . . election in the State or political subdivision are not equally open to participation by members of a class of [protected] citizens . . . in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.²³⁸

Under Section 2, plaintiffs need not prove discriminatory intent but only discriminatory impact,²³⁹ and the provision “should be interpreted in a manner that provides ‘the broadest possible scope’ in combating racial discrimination.”²⁴⁰

Where state or local policies or practices disproportionately produce long lines in precincts with higher than average concentrations of minorities, a Section 2 claim may be viable. In considering whether to litigate such a claim, it is important to assess the empirical evidence supporting the claim. For obvious reasons, an ideal challenge would include data showing vastly different wait times in overwhelmingly white precincts compared with overwhelmingly minority precincts accompanied by depressed numbers of ballots cast in the latter precincts.

In the somewhat similar context of challenges to voting machine technology, Section 2 challenges have met with some success when the plaintiffs bolstered their claims of “a denial or abridgment” on account of race with empirical support.²⁴¹ For example, in *Black v.*

236 42 U.S.C. § 1973(a) (2006).

237 *Id.* § 1973l(c)(1).

238 *Id.* § 1973(b).

239 *See Thornburg v. Gingles*, 478 U.S. 30, 46 (1986).

240 *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

241 *See, e.g., Black v. McGuffage*, 209 F. Supp. 2d 889, 896 (N.D. Ill. 2002); *Common Cause S. Christian Leadership Conference of Greater L.A. v. Jones*, 213 F. Supp. 2d 1106, 1110 (C.D. Cal. 2001). Section 2 challenges bolstered by empirical evidence also have met with limited success in the context of felon disenfranchisement laws. In

McGuffage,²⁴² the plaintiffs brought a Section 2 challenge alleging that voting technology used in predominately black and Latino precincts caused higher error rates and greater risk that minority ballots would not be counted.²⁴³ In denying defendants' motion to dismiss, the court considered, among many factors, the likelihood of error rates in Chicago (white population of about forty-two percent)²⁴⁴ compared with that of nearby McHenry County (white population greater than ninety-five percent).²⁴⁵ The court found the comparison rather shocking: "In the 2000 Presidential race, the probability of an uncounted vote was twenty-two times greater in Chicago, which used one of the challenged voting systems, than in McHenry County, which did not."²⁴⁶

McGuffage suggests that a court may find empirical evidence supporting a Section 2 claim against a time tax persuasive if the evidence demonstrates that the wait time in a majority-minority precinct is far greater than in an overwhelmingly white precinct. As the aggregate data discussed in Part II reveals, black and Latino voters nationwide generally wait significantly longer than their white counterparts to vote. Where state- or local-level data reveal significant disparities in wait times by race, a Section 2 claim is likely to be viable. The more stark the disparity, the greater the likelihood of success on the claim.

F. Section 5 of the Voting Rights Act

Section 5 of the Voting Rights Act offers a possibility for mitigating a time tax before it is assessed. In covered jurisdictions, Section 5 applies to "[a]ny voting qualification or prerequisite to voting, or stan-

Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003), the Court of Appeals for the Ninth Circuit held that evidence of racial discrimination in the criminal justice system, considered under the totality of the circumstances, could be sufficient for a state law requiring felon disenfranchisement to be invalidated on Section 2 grounds. *Id.* at 1016. *But see* *Muntaqim v. Coombe*, 366 F.3d 102, 124 (2d Cir. 2004) (holding that Section 2 does not reach New York's felon disenfranchisement statute); *Wesley v. Collins*, 791 F.2d 1255, 1259–61 (6th Cir. 1986) (assuming that Section 2 applies to felon disenfranchisement laws but holding there was no violation); *see also* *Farrakhan v. Washington*, 359 F.3d 1116, 1120–25 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc) (arguing that Section 2 does not apply to felon disenfranchisement laws).

242 209 F. Supp. 2d at 889.

243 *Id.* at 891–92.

244 U.S. Census Bureau, Illinois QuickFacts: Chicago, <http://quickfacts.census.gov/qfd/states/17/1714000.html> (last visited Sept. 25, 2009).

245 U.S. Census Bureau, Illinois QuickFacts: McHenry County, <http://quickfacts.census.gov/qfd/states/17/17111.html> (last visited Sept. 25, 2009).

246 *McGuffage*, 209 F. Supp. 2d at 895.

dard, practice or procedure with respect to voting.”²⁴⁷ To prevent changes that have a discriminatory purpose or effect, Section 5 requires covered jurisdictions to obtain either judicial preclearance from a three-judge panel of the U.S. District Court for the District of Columbia or administrative preclearance from the Attorney General before implementing a voting change.²⁴⁸ “Such preclearance is granted only if the change neither ‘has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.’”²⁴⁹ Where voting changes have not been precleared, voters may obtain a federal injunction prohibiting them.²⁵⁰

In the context of the time tax, a Section 5 claim may be viable in a covered jurisdiction if a new state policy is likely to produce disproportionately long lines in precincts with higher than average minority populations. Such a policy can take many forms. For example, if new state policies allow counties to utilize voting technologies that have varying error and breakdown rates or permit nonuniformity with regard to the number of voters who may vote on a given voting machine, the likely result is longer lines at some polls compared with others. If the burden falls disproportionately on minority voters, such a policy should not be precleared.

In this analysis, politics might matter. According to the Department of Justice, “[w]ell over ninety-nine percent of the changes affecting voting are reviewed administratively,” rather than by judicial preclearance.²⁵¹ Annually, the Department receives between 4500 and 5500 submissions for administrative preclearance under Section 5, which require review of between 14,000 and 20,000 voting changes.²⁵² It remains to be seen whether the Department under Barack Obama’s Administration will scrutinize administrative preclearance petitions with greater care than the previous administra-

247 42 U.S.C. § 1973c(b) (2006). Section 4 of the Voting Rights Act defines covered jurisdictions. *See id.* § 1973b(b).

248 *Id.* § 1973c; *see also* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2509 (2009) (discussing the criteria a jurisdiction must meet to obtain a favorable judgment from a district court or the Attorney General).

249 *Holder*, 129 S. Ct. at 2509 (quoting 42 U.S.C. § 1973c).

250 *See, e.g.*, *Clark v. Roemer*, 500 U.S. 646, 652–53 (1991) (holding that Louisiana should have been enjoined from conducting judicial elections that constituted changes in voting practices and procedures and were not properly precleared by a three-judge panel or the attorney general); *see also* *Allen v. State Bd. of Elections*, 393 U.S. 544, 554–57 (1969) (recognizing private right of action to seek injunctive relief against a Section 5 violation).

251 U.S. Dep’t of Justice, About Section 5 of the Voting Rights Act, http://www.usdoj.gov/crt/voting/sec_5/about.php (last visited Oct. 30, 2009).

252 *Id.*

tion. If it does, the Department may become more wary of the disenfranchising effects of long lines. For this reason alone, it is important to raise awareness of the extent to which the time tax disenfranchises voters.

IV. MODEL FOR VOTER ACCESS LITIGATION

This Part builds a model for voter access litigation based on the success of *Cortés*. The lessons offered here apply specifically to challenges to long lines but also extend to other challenges to “electoral mechanics”—state-mandated procedures for registration, voting, and vote-counting—the so-called “nuts and bolts of elections.”²⁵³ I share these lessons with the caveat that resort to the federal courts should be used as a last-ditch effort to guarantee access to the franchise or as one part of a multipronged political strategy because, as discussed in Part V, the political process—not the courts—offers the greatest potential for ensuring that voters can actually cast ballots.

A. *Exhausting the Political Process*

One of the most important lessons of *Cortés* is that voters seeking to raise access claims prior to an election should exhaust the political process before resorting to the courts. “Intervention by the federal courts in state elections has always been a serious business,” not to be lightly engaged in.²⁵⁴ As in the administrative law context, in which one must exhaust administrative remedies before seeking relief in an Article III court,²⁵⁵ so too, as a practical matter, must voters seeking to curb the disenfranchising effects of long lines (or other access obstacles) pursue advocacy efforts outside the federal judiciary first.

In practice, this may entail voters and public interest groups lobbying policymakers with regard to specific voting-related concerns in the months before an election. Those lobbying for change should develop concrete and workable proposals for reform and then engage in good-faith advocacy to obtain the desired results. Such lobbying should take place well in advance of an election, so that reforms may actually be implemented on Election Day. Only if such advocacy efforts fail should voters seek recourse in court.

253 Elmendorf, *supra* note 165, at 315–17 (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345 (1995) (holding that Ohio statute that imposed fine for distributing anonymous campaign literature was not narrowly drawn and violated the First Amendment, and coining the term “electoral mechanics”)).

254 *Oden v. Brittain*, 396 U.S. 1210, 1211 (1969).

255 *See, e.g., Sims v. Apfel*, 530 U.S. 103, 107 (2000).

As Part I.A explained, voters and public interest groups in Pennsylvania advocated for months for a rule requiring the distribution of emergency paper ballots when half or more of DRE machines in a precinct failed. Their efforts were flatly rejected by the Secretary of State, leaving voters with no choice but to seek judicial intervention if they wanted to forestall potentially unacceptable lines on Election Day. In their complaint, in briefing, and at the evidentiary hearing in *Cortés*, plaintiffs emphasized the nature and extent of voters' advocacy efforts to which the Commonwealth paid no heed.²⁵⁶ While this advocacy history was not explicitly mentioned in the court's written decision, it likely played an important subdoctrinal role in convincing the court that a potential disaster was on the horizon that only the court could mitigate.²⁵⁷

Where plaintiffs do not demonstrate exhaustion of the political process, it is much less likely that a federal court will intervene on their behalf. *Virginia State Conference of NAACP v. Kaine*²⁵⁸ illustrates the point. This 2008 time tax challenge alleged that, due to inequitable allocation of polling place resources, Virginia voters, and especially black voters, "will face even longer lines than existed in 2004, and many more voters will lose their right to vote in this [2008] Presidential election than the last."²⁵⁹ The plaintiffs sought to allocate a greater number of voting machines to Norfolk, Richmond, and Virginia Beach by Election Day.²⁶⁰ While seeking sweeping relief,²⁶¹ the written record makes no mention of any attempts by the plaintiffs to work out their concerns in the political process.²⁶² The absence of evidence on this issue might well have shaped the court's perception

256 See, e.g., Preliminary Injunction Hearing, *supra* note 41, at 151 (testimony of Jerome Mondesire) ("[W]e tried to have a conversation with [the] office [of the Secretary of State] and we were turned down several times.").

257 Cf. Elmendorf, *supra* note 165, at 380 (discussing subdoctrinal role of empirical evidence in persuading a federal court of the extent of an electoral mechanics problem).

258 No. 2:08-cv-508 (E.D. Va. dismissed Nov. 18, 2008).

259 Complaint at 2, *Kaine*, No. 2:08-cv-508 (E.D. Va. Oct. 28, 2008).

260 *Id.*

261 See discussion *infra* Part IV.E.

262 See Complaint, *Kaine*, No. 2:08-cv-508 (E.D. Va. Oct. 28, 2008); Declaration of Walter Richard Mebane, Jr., *Kaine*, No. 2:08-cv-508 (E.D. Va. Oct. 27, 2008); Plaintiffs' Memorandum of Law in Support of their Motion for a Declaratory Judgment and Preliminary Injunction, *Kaine*, No. 2:08-cv-508 (E.D. Va. Oct. 28, 2008); Motion to Intervene by Albermarle County Republican Committee, *Kaine*, No. 2:08-cv-508 (E.D. Va. Nov. 3, 2008); Memorandum in Support of Motion to Dismiss filed by Albermarle County Republican Committee, *Kaine*, No. 2:08-cv-508 (E.D. Va. Nov. 3, 2008).

that its intervention was not essential to protect the rights of those marginalized by the political process.

In this regard, *Cortés* is emblematic of the special role for federal court intervention when no other actors are willing to redress harms to vulnerable populations through ordinary politics.²⁶³ In the voting rights context, Justice Clark's concurring opinion in *Baker v. Carr*²⁶⁴ reveals how these considerations may weigh on a federal judge's mind in deciding whether or not to intervene in a state's administration of elections. Even where a state election law "offends the Equal Protection Clause," Justice Clark would not intervene "into so delicate a field if there were any other relief available" to people in the state.²⁶⁵ Federal judicial intervention, on this approach, is warranted only when voters lack "'practical opportunities' for exercising their political weight at the polls" and "without judicial intervention will be saddled with the present discrimination in the affairs of their state government."²⁶⁶

Two years later, in *Lucas v. Forty-Fourth General Assembly of Colorado*,²⁶⁷ the Court rejected political exhaustion as a doctrinal requirement.²⁶⁸ But such considerations may still be at work. Given traditional federalism concerns in state election matters, judges are likely to weigh whether "practical opportunities" other than federal judicial relief are available to voters and whether "the people" will be "stymied . . . without judicial intervention" in deciding whether to grant relief that would mitigate a time tax or otherwise guarantee access to the franchise.²⁶⁹

Elsewhere, in the context of constitutional challenges to state and local land-use decisions, the Supreme Court has established explicit political exhaustion requirements in recognition of the traditional

263 See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (arguing that courts should use judicial review to reinforce democratic processes).

264 369 U.S. 186 (1962).

265 *Id.* at 258 (Clark, J., concurring).

266 *Id.* at 259 (quoting *MacDougall v. Green*, 335 U.S. 281, 284 (1948)).

267 377 U.S. 713 (1964).

268 *Id.* at 736 ("[I]ndividual constitutional rights cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial remedy through which relief . . . the individual voters seek, might be achieved.").

269 *Baker*, 369 U.S. at 259 (Clark, J., concurring). Of course, this political advocacy must not come at the expense of a timely filed lawsuit. See discussion *infra* Part IV.C.; cf. *Barthelmes v. Morris*, 342 F. Supp. 153, 160 (D. Md. 1972) (holding that "[t]he fact that [the plaintiffs] first sought redress through legislative change was an election on their part which affords no valid excuse for the delay" in filing suit seeking injunctive relief against upcoming primary).

prerogatives of the states over land use matters.²⁷⁰ Just as states traditionally are the masters of land use matters, so too do states have primary authority over “The Times, Places and Manner of holding Elections.”²⁷¹ That federalism-minded exhaustion doctrines are explicit in some areas of law makes it more likely that loosely analogous doctrines are at play in other areas, such as voter access, over which the states have traditionally held sway.

B. *Momentous Elections*

The Supreme Court has held time and again that, except for elections for special purpose districts,²⁷² elections are equally important in terms of the right to vote²⁷³ and the subject of an election is irrelevant.²⁷⁴ While this may be the stated doctrine, it does not reflect what the federal judiciary actually does in practice with respect to intervening in state election administration. In fact, it appears that the federal judiciary is more likely to intervene in closely contested elections and particularly in presidential races. In considering whether to intervene, it may be that federal courts look to the intensity of the election contest and its national implications. Where court intervention may influence the outcome by, for example, guaranteeing ballot access for voters who may not otherwise be able to vote, intervention is more likely.

Consider this scenario: a federal suit is filed to contest wait times in a local school board election in an overwhelmingly Republican precinct where the outcome of the election is guaranteed to favor the Republican candidate. Here, it is highly unlikely that a federal court would intervene to mitigate the prospect of long lines. The court might label the lines garden variety election irregularities, unworthy of federal judicial involvement, or decide that prudential doctrines prevent it from reaching the merits of the plaintiffs’ claims at all.

270 See *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985).

271 U.S. CONST. art. I, § 4.

272 See *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973) (establishing the special-purpose district exception to one-person, one-vote doctrine).

273 See *Christopher S. Elmendorf, N.Y. State Bd. of Elections v. Torres: Is the Right to Vote a Constitutional Constraint on Partisan Nominating Conventions*, 6 ELECTION L.J. 399, 403–04 (2007).

274 See, e.g., *Bullock v. Carter*, 405 U.S. 134, 146–47 (1972) (treating primary elections and general elections interchangeably); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 629–31 (1969) (extending the right to vote to local government elections); *Avery v. Midland County, Tex.*, 390 U.S. 474, 475–76 (1968) (same).

By contrast, closely contested presidential elections appear to have a special status in terms of the likelihood of federal court intervention, particularly after *Bush v. Gore*. In both *Bush* and *Cortés*, federal court intervention might have been considered surprising in light of a strict reading of relevant precedents. But in both cases, a close presidential election was being contested. The cases suggest a sub silentio doctrine at work: federal courts are more willing to intervene in a state's administration of an election in a momentous election, such as a presidential contest in a swing state, than in a local election, particularly if the winner is a foregone conclusion.²⁷⁵

In *Cortés*, the plaintiffs presented ample evidence on the momentous nature of the 2008 contest: Pennsylvania was a key swing state in the presidential election; electronic voting machines were virtually guaranteed to break down in substantial numbers and cause long lines; officials refused to enact reasonable policies to mitigate long lines; nearly 400,000 new citizens had registered to vote since the primary; nearly a quarter of precincts had more registered voters assigned to them than state law permitted; and the primary showed that thousands of voters were likely to be disenfranchised if the court did nothing. NAACP President Mondesire testified: “[T]his will be an epic election in Philadelphia, in Reading and in Pittsburgh and in Harrisburg. Turnout is going to be phenomenal. We expect the lines to be of epic proportions like they were in South Africa when Nelson Mandela was [running for President].”²⁷⁶ In this election, unlike others, there would be consequences if voters were turned away by long lines: “[Voters] will become disgruntled and they will lose faith in the system and may leave and may even take stronger action.”²⁷⁷ This threat of “stronger action” was broadcast in the news media before the decision was announced.²⁷⁸

275 See, e.g., *Donohue v. Bd. of Elections*, 435 F. Supp. 957, 968 (E.D.N.Y. 1976) (“The fact that a national election might require judicial intervention, concomitantly implicating the interests of the entire nation, if anything, militates in favor of interpreting the equity jurisdiction of the federal courts to include challenges to Presidential elections.”).

276 Preliminary Injunction Hearing, *supra* note 41, at 146. Mondesire’s predictions were accurate: 220,000 more voters in Pennsylvania cast a ballot in 2008 compared with 2004. Most of the increases in voter turnout were in the most populous counties—which include Philadelphia, Reading, and Pittsburgh—and among black and Latino voters. See NONPROFIT VOTER ENGAGEMENT NETWORK, VOTER TURNOUT BRIEF: PENNSYLVANIA 2008, http://www.everybodyvote.com/component/option,com_docman/Itemid,0/task,doc_download/gid,78.

277 Preliminary Injunction Hearing, *supra* note 41, at 147.

278 See, e.g., Cynthia Henry, *U.S. Judge Hears Pa. Ballot Lawsuit*, PHILA. INQUIRER, Oct. 29, 2008, at B01.

The ruling in *Cortés* reflects an acute awareness of the momentous nature of the 2008 election: “While all elections are important, this year a president and vice-president of the United States will be chosen. . . . [T]he number of voters at this election will probably be the highest on record.”²⁷⁹ In other words, the 2008 presidential contest in Pennsylvania was particularly worthy of federal court intervention.

While a close presidential contest in a swing state may make it more likely for a federal court to intervene, it offers no guarantee of such involvement. In *Kaine*, for example, the plaintiffs alleged that the democratic process in Virginia was at risk because of the misallocation of voting machines,²⁸⁰ but this was insufficient for federal court intervention. Litigating in the context of a momentous contest, then, may be a necessary but not sufficient factor in succeeding in voter access litigation.

C. Pre-Election Litigation

The purpose of voter access litigation should be to ensure that as many citizens as possible can vote in an election. Such challenges should be forward looking, rather than reactive, and pursue pre-election relief to prevent harm before it occurs. Post-election voter access challenges—such as those seeking a recount or a new election—should be litigated sparingly.²⁸¹

There are myriad disadvantages of federal courts invalidating election results. Among them are additional expenditures of time and resources entailed by a new election, its destabilizing impact on the political process, and an antidemocratic effect that may result from lesser interest and participation in a rerun of an old race.²⁸² An additional problem with any post-election judicial intervention is that it requires a court to inject itself “in the worst way into the political thicket,” which can “undermine the legitimacy of the courts.”²⁸³ The

279 *NAACP State Conference of Pa. v. Cortés*, 591 F. Supp. 2d 757, 764 (E.D. Pa. 2008).

280 See Complaint at 2, *Va. State Conference of NAACP v. Kaine*, No. 2:08-cv-508 (E.D. Va. dismissed Nov. 18, 2008).

281 For the types of remedies that are imposed post-election, see Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 *STAN. L. & POL'Y REV.* 350, 362–74 (2007); Steven F. Huefner, *Remedying Election Wrongs*, 44 *HARV. J. ON LEGIS.* 265 (2007).

282 Kenneth W. Starr, *Federal Judicial Invalidation as a Remedy for Irregularities in State Elections*, 49 *N.Y.U. L. REV.* 1092, 1105–08 (1974).

283 Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 *WASH. & LEE L. REV.* 937, 993 (2005).

chaos and confusion resulting from judicial intervention in the wake of the 2000 presidential election shows what a mess post-election judicial intervention can create.²⁸⁴

The disadvantages of post-election judicial intervention are likely to apply equally in the context of post-election time tax litigation. The class of cases in which federal courts would look favorably on a post-election time tax challenge is likely limited, as courts generally examine the plaintiffs' pre-election diligence in deciding whether or not to grant relief in voter access cases.²⁸⁵ This is not to say that such a challenge cannot be won. Twice before, post-election challenges to long lines have been successful.²⁸⁶ In both cases, local contests were at stake and the courts ordered new elections.

In litigating a pre-election voter access issue, plaintiffs must convince a judge that only pre-election relief is a realistic option. At the hearing for *Cortés*, this issue arose when the Commonwealth suggested that the plaintiffs should seek post-election relief. Plaintiffs' counsel Andrew G. Celli, Jr. responded sharply: "[A]sking [the court] to set aside a statewide election in a presidential year where this state promises to be a critical state in deciding who the next president's going to be" is "exactly what we're trying to avoid."²⁸⁷ "[T]hat the [C]ommonwealth's lawyer would stand before a federal judge and say they should come back later and hold up the rest of the country is absurd."²⁸⁸ A post-election time tax challenge in Pennsylvania in 2008, in other words, simply was not an option—a fact reflected in the judicial opinion.²⁸⁹

In encouraging pre-election voter access challenges, I fall squarely in line with scholars who urge courts "[to] be more willing to entertain pre-election challenges and less willing to entertain post-election challenges, at least for those issues that could reasonably have

284 See generally *id.* at 938–44 (discussing the confusion following the 2000 presidential election).

285 See, e.g., *Toney v. White*, 488 F.2d 310, 313–15 (5th Cir. 1973).

286 *Ury v. Santee*, 303 F. Supp. 119, 127 (N.D. Ill. 1969); *In re 1984 Gen. Election for the Office of the Council of the Twp. of Maple Shade*, 497 A.2d 577, 591–92 (N.J. Super. Ct. Law Div. 1985).

287 Preliminary Injunction Hearing, *supra* note 41, at 370.

288 *Id.*

289 *NAACP State Conference of Pa. v. Cortés*, 591 F. Supp. 2d 757, 765 (E.D. Pa. 2008) ("This is not a matter we can decide through hindsight after the election has concluded We must do our best, based on the record before us, to determine whether inoperable machines are likely to cause any serious burden to the fundamental right to vote").

been foreseen and raised before the election.”²⁹⁰ The only meaningful post-election remedy for voters turned away from the polls is a renewed opportunity to cast their ballots in a new election, which is rarely justifiable as an equitable remedy.²⁹¹

In terms of the timing of a pre-election challenge, *Cortés* was exceptional with regard to the speed with which the federal court intervened.²⁹² Most cases filed just before an election are not successful.²⁹³ In *Purcell v. Gonzalez*,²⁹⁴ the Supreme Court admonished federal courts not to intervene in state election policies on the eve of an election: “Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”²⁹⁵ These

290 Hasen, *supra* note 283, at 991; *see generally id.* at 991–99 (arguing that pre-election challenges should be favored over post-election challenges).

291 *See* Hasen, *supra* note 283, at 993–94; Starr, *supra* note 282, at 1105–08.

292 Ideally, the case would not have been filed just twelve days before the election but instead in early September 2008, just after Secretary Cortés announced the problematic Directive. Unavoidable circumstances left the plaintiffs with no choice but to file less than two weeks before the election if they were to file at all. *See supra* note 36. Rather than ignore the issue of the late filing date, the plaintiffs affirmatively explained these circumstances to the court to demonstrate that any delay in filing the case was not without basis. Because of the late date at which the suit was filed, the plaintiffs bore the additional burden of demonstrating that the relief sought could be rapidly implemented throughout the Commonwealth on Election Day. The late date of the judicial victory likely complicated on-the-ground implementation of the court order on Election Day, as most poll workers statewide had already been trained by the time the order was issued. *See Cortés*, 591 F. Supp. 2d at 766.

293 For example, *Kaine*, filed just six days before the general election, did not result in any federal court intervention. *Ohio Republican Party v. Brunner*, 582 F. Supp. 2d 957 (S.D. Ohio 2008), is at the other end of the unsuccessful spectrum. There, the Ohio Republican Party filed suit in late September 2008 to, *inter alia*, enjoin the Secretary of State to update a statewide voter registration database to comply with Section 303 of the Help America Vote Act (HAVA) of 2002, 42 U.S.C. §§ 15301–15545 (2006). The district court granted plaintiffs a temporary restraining order (TRO). *Id.* A Sixth Circuit panel vacated the TRO, *Ohio Republican Party v. Brunner*, 543 F.3d 357, 362 (6th Cir. 2008), but an en banc panel reinstated it. *Ohio Republican Party v. Brunner*, 544 F.3d 711, 721 (6th Cir. 2008) (en banc). Ultimately, the Supreme Court intervened to vacate the TRO. *Brunner v. Ohio Republican Party*, 129 S. Ct. 5 (2008) (per curiam) (holding that it is not sufficiently likely that Congress authorized a district court to enforce Section 303 of HAVA in an action brought by a private litigant).

294 549 U.S. 1 (2006) (per curiam).

295 *Id.* at 4–5; *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (warning lower courts to “consider the proximity of a forthcoming election” and “avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court’s decree”).

considerations counsel filing a pre-election voter access challenge as early as practicable before an election to maximize the likelihood of success.

D. *Facial Challenges After Crawford*

Establishing standing and ripeness is especially difficult in election disputes because courts routinely use such prudential doctrines to avoid interfering with state election practices.²⁹⁶ A series of recent Supreme Court cases, in the election law context and otherwise, offer yet another prudential ground on which a court can decline to intervene in a state's administration of an election: facial invalidation is an inappropriate remedy.²⁹⁷ In *Crawford*, the plurality held that for facial invalidation, plaintiffs must demonstrate that "the statute imposes 'excessively burdensome requirements' on a [] class of voters."²⁹⁸ By contrast, for an as-applied challenge, plaintiffs do not "bear [such] a heavy burden of persuasion."²⁹⁹ *Crawford* highlights the difficulties that plaintiffs in voter access cases will encounter in pursuing facial challenges to election laws.

Notwithstanding the Court's reluctance to entertain facial challenges, it is worth developing such challenges to state policies or practices where the risk of disenfranchisement is substantial and a facial challenge is the only effective means of ensuring access to the franchise for all eligible voters. In many instances, a pre-election as-applied challenge will be awkward because of the difficulties associated with identifying and proving exactly who will be harmed by a challenged election policy on Election Day. In *Cortés*, for example, voting rights groups knew that DRE machine failures would be widespread throughout the Commonwealth on Election Day, but they could not pinpoint exactly where such failures would occur and so could not bring an as-applied challenge on behalf of voters in only those precincts. In situations like this, it makes sense to pursue a facial challenge because of the certainty of disenfranchisement but

296 See Hasen, *supra* note 283, at 994.

297 See Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873 (2005) (reviewing facial challenges outside the election law context and arguing that the Court's jurisprudence inappropriately exaggerates the difference between facial and as-applied challenges and obscures the important roles that severability and substantive constitutional law play in facial challenges); Persily & Rosenberg, *supra* note 48, at 1644 & nn.1-2 (collecting recent Supreme Court cases that express a "strong preference" for as-applied, rather than facial, challenges in the election law context).

298 *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623 (2008) (quoting *Storer v. Brown*, 415 U.S. 724, 738 (1974)).

299 *Id.* at 1621.

the uncertainty of who will be deprived of the vote. Moreover, there are situations where a facial challenge to a state election law will be more palatable to the federal judiciary than an as-applied challenge because the former may be designed to help all voters access the franchise and thus be politically neutral, whereas the latter may be designed to assist only a certain portion of the electorate.³⁰⁰

With compelling evidence, prudential concerns about facial challenges, as well as standing and ripeness, can be overcome. Numerous concrete examples of disenfranchisement as well as empirical evidence proving that the harm is likely to be widespread are likely to go a long way in motivating a federal judge to intervene in state election policies to correct or stave off an injustice. *Cortés* offers three insights into how to build a compelling evidentiary record in support of a facial challenge in a voter access case.

The first involves the importance of a primary election. A primary election can be an ideal testing ground for determining whether a state policy unduly burdens the rights of many to vote. If, by the eve of a general election, a state has taken no steps—or only minimal steps—toward modifying the problematic state policy, the primary experience may be a strong predictor of disenfranchisement on Election Day. In litigating *Cortés*, the plaintiffs repeatedly relied on Pennsylvania's April 2008 primary experience as a predictor of long lines and voters leaving the polls without casting ballots on Election Day.³⁰¹ The court found the comparison persuasive, reasoning, "History is our guide."³⁰²

Second, it is essential to choose plaintiffs who have suffered or are at high risk of suffering violations of a constitutional right. In the context of a challenge to the time tax, individual plaintiffs should be voters who had no choice but to leave the polls without casting their ballots because of long lines in the recent past and/or those who are at high risk of the same in an upcoming election. The individual plaintiffs in *Cortés* fit into those categories.³⁰³ Their testimony reflected that, despite their commitments to voting, they each had difficulty voting in the primary and, due to pressing work or childcare obligations or both, long lines put them at risk of being unable to cast

300 See discussion *infra* Part IV.E.

301 See discussion *supra* Part I.B.

302 NAACP State Conference of Pa. v. Cortés, 591 F. Supp. 2d 757, 765 (E.D. Pa. 2008). In contrast, the complaint in *Kaine* made scant mention of Virginia's 2008 primary experience and the problems that attended it. Complaint, Va. State Conference of NAACP v. Kaine, No. 2:08-cv-508 (E.D. Va. Oct. 28, 2008).

303 *Cortés*, 591 F. Supp. 2d at 760–61.

ballots on Election Day.³⁰⁴ Their narratives of disenfranchisement evoked those of many unknown but similarly situated Pennsylvania voters.³⁰⁵

Relying on individual plaintiffs alone may not be sufficient to convince a court to grant relief in a facial challenge to a state's election policy because it may appear that only a handful of citizens are concerned about the issue. To overcome this perception, it is advisable to include bi- or nonpartisan³⁰⁶ statewide organizations as plaintiffs in voter access litigation. In *Cortés*, two nonpartisan organizations served as plaintiffs, the Election Reform Network and the NAACP State Conference of Pennsylvania.³⁰⁷ Both organizations seek to ensure access to the franchise for Pennsylvania citizens.³⁰⁸ The NAACP State Conference of Pennsylvania has a particularly large membership, with more than 15,000 members among forty-six branches across the Commonwealth.³⁰⁹ By participating in the suit, these organizations lent their institutional credibility to the case and demonstrated the breadth of statewide concern about long lines.

The Supreme Court's close examination of the record in *Crawford* highlights the importance of framing the issue through the experiences of plaintiffs who have suffered real harm. The *Crawford* plurality found that not one plaintiff had expressed a personal inability to vote due to the challenged law.³¹⁰ For a single elderly plaintiff unable to obtain a birth certificate, the option of voting absentee was available.³¹¹ In *Crawford*, it is conceivable that had all the plaintiffs challenging the law actually been unable to cast a ballot because of the photo identification requirement, the Court would have struck down the law. Three Justices in *Crawford* would have struck down the Indiana law at issue on the record before the Court. In the plurality opinion, Justice Stevens, along with Chief Justice Roberts and Justice Kennedy, did not do so because of the lack of "any concrete evidence of the burden imposed on voters who currently lack photo identifica-

304 *Id.*

305 These narratives of disenfranchisement might be most compelling in states where voters must cast a ballot on Election Day or not at all, i.e., states with no-excuses absentee voting.

306 See discussion *infra* Part IV.E.

307 *Cortés*, 591 F. Supp. 2d at 758.

308 See Election Reform Network, About The Election Reform Network, <http://www.electionreformnetwork.us/node/2> (last visited Sept. 4, 2009); Pennsylvania State Conference of NAACP Branches, NAACP Mission, <http://pastatenaacp.org/mission.htm> (last visited Sept. 4, 2009).

309 See *Cortés*, 591 F. Supp. 2d at 758 n.1.

310 *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1622 (2008).

311 *Id.*

tion.”³¹² In just the previous Term, the Supreme Court unanimously held in the context of a challenge to an Arizona law requiring proof of citizenship at the polls that “the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs’ challenges.”³¹³ This apparent sensitivity from all members of the Court suggests that with plaintiffs whose experiences demonstrate concrete harm, a facial challenge to a state law that restricts voter access to the polls might well garner the favor of at least five Justices.

This raises the third point: use of empirical evidence to demonstrate the likelihood of the feared harm. Narratives of disenfranchisement should be supplemented with hard numbers demonstrating a likelihood of disenfranchisement. The plurality opinion in *Crawford* suggests that a collection of anecdotes is not enough, ruling against the plaintiffs because, among other omissions, they had not presented “how common the problem is”³¹⁴ or “the number of registered voters without photo identification”³¹⁵—facts at the heart of the case. The *Crawford* dissent grudgingly acknowledged the latter omission.³¹⁶ While pointing to cases in which “empirical precision” had not been “demanded for raising a voting-rights claim,”³¹⁷ the dissent conceded that “of course it would greatly aid a plaintiff to establish his claims beyond mathematical doubt.”³¹⁸

Where comprehensive data are unavailable, reliable expert testimony is essential. The plaintiffs in *Crawford* submitted expert testimony, but the district court rejected it “as utterly incredible and unreliable,”³¹⁹ inadmissible under Federal Rule of Evidence 702, and supportive of defendants’ claims, not plaintiffs’.³²⁰ Obviously this is not how any plaintiff would want her expert testimony to be received by a court. By contrast, in *Cortés* plaintiffs called experts to opine on the empirical question of the likelihood of long lines at the polls on

312 *Id.*

313 *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

314 *Crawford*, 128 S. Ct. at 1623.

315 *Id.* at 1622.

316 *Id.* at 1634 (Souter, J., dissenting) (“Petitioners, to be sure, failed to nail down precisely how great the cohort of discouraged and totally deterred voters will be . . .”).

317 *Id.*

318 *Id.*

319 *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 803 (S.D. Ind. 2006), *aff’d sub nom.*, *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff’d*, 128 S. Ct. 1610 (2008).

320 *Id.*

November 4.³²¹ Douglas Jones testified at the hearing³²² and Daniel Lopresti, also a voting technology expert, submitted written testimony.³²³ Both conveyed that significant disenfranchisement was likely as a result of the Commonwealth's Directive.³²⁴ Jones's testimony was not rebutted and it apparently influenced the court, as it was cited extensively in the decision.³²⁵

E. Narrow and Politically Neutral Remedies

No matter how great a case is assembled, there are some forms of relief that a federal court simply cannot grant.³²⁶ To take an extreme example, a federal court will not decree an end to all wait times at all polling places in a state. Nor will a federal court decree an end to wait times in only overwhelmingly Democratic districts without granting such relief in Republican ones. A court must act within institutional constraints.³²⁷ To maximize the likelihood of success in voter access litigation, plaintiffs should be cognizant of these institutional constraints and seek narrow and politically neutral relief.

321 Preliminary Injunction Hearing, *supra* note 41, at 112.

322 *Id.* at 96–97, 107.

323 Declaration of Daniel P. Lopresti ¶ 18, *Cortés*, 591 F. Supp. 2d. 757 (No. 2:08-cv-05048).

324 Preliminary Injunction Hearing, *supra* note 41, at 107, 112.

325 See NAACP State Conference of Pa. v. *Cortés*, 591 F. Supp. 2d 757, 761, 765 (E.D. Pa. 2008).

326 For a theoretical discussion of the rights-remedy distinction, see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

327 In the voting rights context, the Supreme Court has frequently commented on institutional constraints, perhaps nowhere more painfully than in *Giles v. Harris*, 189 U.S. 475 (1903). There, the Court denied relief to Giles and more than five thousand black citizens who wished to be added to the voting rolls of Alabama. *Id.* at 488. Justice Holmes, who fought for the Union Army, explained that the political situation in Alabama precluded the Court from granting any relief:

Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.

Id. at 488. Although the passage of time has undermined the holding of *Giles*, the opinion still reflects the Court's sensitivity to political considerations in voting rights cases. More recently, this sensitivity has manifested in the weight the Court has afforded to concerns about voter fraud in upholding state photo identification laws. See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1618–20 (2008); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

Narrow relief is that which builds on existing state policies, compared with sweeping relief which seeks an overhaul of a state's election apparatus. Politically neutral relief is that which is not overtly political. Narrow and politically neutral relief is more likely to be granted than sweeping and partisan relief. In terms of the *Anderson* test,³²⁸ it may be that a state's interest in refusing to implement a minor, nonpartisan modification to its election administration procedures is presumptively weak where such a change has the potential to enfranchise many voters.

It is tricky to pursue narrow and politically neutral relief that will guarantee voters' access to the polls. In developing *Cortés*, plaintiffs' counsel took great care to pursue relief that a court might be willing to grant just days before an election.³²⁹ In the grand scheme of things, the relief sought appears very limited: a minor modification to the existing state policy so that emergency paper ballots are distributed when half or more DRE machines fail, instead of when all DRE machines fail.

The nature of the relief sought influenced the court in *Cortés*. At the hearing, Judge Bartle agreed with the plaintiffs' attorney that "if the remedy is benign, if it's easy to accomplish," then the "burden of demonstrating an interference with the right to vote is not as high as it would be" if more dramatic relief were sought, such as having the court "order all sixty-seven counties in the [C]ommonwealth to purchase sixteen new machines per precinct."³³⁰ The court noted that the "plaintiffs' request for relief is reasonable and even modest in light of the grave injury they seek to prevent."³³¹

The importance of seeking narrow and politically neutral relief is highlighted in *Crawford*. There, the plaintiffs did not seek a tweak of Indiana's election policies. Rather, the plaintiffs sought a dramatic court order that would preclude the state from implementing the core provision of its system for identifying voters. Complicating matters further, the case had an overt political bias, as the Indiana Democratic Party and the Marion County Democratic Central Committee had filed suit to challenge the voter identification law promptly after

328 See *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

329 Initially, plaintiffs sought both the Fifty Percent Rule and a requirement that, on Election Day, each precinct have available emergency paper ballots equal in number to at least twenty percent of the registered voters in that precinct. Complaint at 22, *Cortés*, 591 F. Supp. 2d 757 (No. 2:08-cv-05048). Plaintiffs chose not to pursue the latter relief, a sacrifice made because it was of doubtful feasibility in light of the limited time available.

330 Preliminary Injunction Hearing, *supra* note 41, at 366.

331 *Cortés*, 591 F. Supp. 2d at 767.

its enactment.³³² Considered in terms of the federal judiciary's constraints, perhaps it is unsurprising that every court that considered the plaintiffs' request for relief declined to grant it.³³³

The same lessons are evident in *Kaine*. Six days before the election, the plaintiffs sought a dramatic order requiring, among other things, that the cities of Norfolk, Richmond, and Virginia Beach

secure an adequate number of machines and allocate those machines in a more equitable manner and in a way that ensures that voters do not have to wait more than 45 minutes to vote, or re-allocate the existing inventory of machines in a more equitable manner and instruct poll workers to offer voters whose wait to vote by machine is likely to exceed 45 minutes the option to wait for a machine or to vote with a paper ballot.³³⁴

The relief sought required significant changes to Virginia's election apparatus, and left many questions unanswered: Why are Norfolk, Richmond, and Virginia Beach subject to special treatment? How are enough voting machines to be secured for those cities with the election less than a week away? How will polling places outside Norfolk, Richmond, and Virginia cope if voting machine places are reallocated to those cities? Who will make reallocation decisions so quickly? Why is forty-five minutes the apparent cut-off time for a long line in only the selected cities? The record in the case did not adequately address these complicated issues,³³⁵ which likely contributed to the court's decision not to intervene.³³⁶ Moreover, the relief sought in the case was not politically neutral. Given the demographics of Norfolk, Richmond, and Virginia Beach, the relief plainly favored the Democratic Party.³³⁷ Perhaps unsurprisingly, the case did not result in a judicial victory.

332 *Crawford*, 128 S. Ct. at 1614. This suit was consolidated with a second suit filed by two elected officials and several nonprofit organizations representing the elderly, disabled, poor, and minorities. *Id.*

333 It is worth noting that the *Crawford* plaintiffs lost by close votes in the Seventh Circuit, 472 F.3d 949 (7th Cir. 2007) (ruling in favor of defendants two-to-one), and the Supreme Court, 128 S. Ct. 1610 (2008) (ruling in favor of defendants with three justices dissenting).

334 Complaint at 3, *Va. State Conference of NAACP v. Kaine*, No. 2:08-cv-508 (E.D. Va. dismissed Nov. 18, 2008).

335 See *supra* note 262 and accompanying text.

336 See discussion *supra* Part IV.A.

337 In Norfolk, Richmond, and Virginia Beach combined, 91,545 more ballots were cast in favor of Barack Obama than John McCain in the 2008 general election. See VA. STATE BOARD OF ELECTIONS, STATEWIDE RESULTS BY LOCALITY 25, 27 (2008), http://www.sbe.virginia.gov/cms/documents/ElectionResults/State-wide_Results_by_Locality.pdf.

League of Women Voters of Ohio v. Brunner,³³⁸ another voter access case, highlights the importance of seeking narrow relief even where the relief sought does not have an overt political bias. Filed four years ago, the plaintiffs have sought systemic reforms including uniform standards for the processing of all voter registration and absentee ballots; an adequate number of functioning voting machines at each precinct on Election Day; guaranteed access to the polls for disabled voters; timely and adequate recruiting, hiring, and training of poll workers; and “uniform standards and processes to ensure that all registered voters in a precinct are able to vote without unreasonable delay or hardship on election day.”³³⁹ Since the case was filed, the district court considered and granted in part and denied in part several motions to dismiss filed by the defendants Governor and Secretary of State.³⁴⁰ On February 10, 2006, the district court granted defendants leave to take an interlocutory appeal on the central issue in the case: “whether [the] plaintiffs’ constitutional claims are cognizable.”³⁴¹ More than three years later, after two federal election cycles passed, the Court of Appeals for the Sixth Circuit finally concluded that “[i]f true, [the plaintiffs’] allegations could establish that Ohio’s voting system deprives its citizens of the right to vote or severely burdens the exercise of that right depending on where they live in violation of the Equal Protection Clause.”³⁴² The case was returned to the district court until a final settlement was reached on June 16, 2009.³⁴³

Many factors have contributed to the slow pace of *Brunner*, including defendants’ four motions to dismiss and the Sixth Circuit’s delay in issuing a decision on the interlocutory appeal. Among these factors certainly is the striking breadth of the relief sought by the plaintiffs. Any court would be cautious about requiring a complete overhaul of a state’s voting system. The parties’ final settlement of the matter allowed the court to sidestep direct involvement in these issues.

338 548 F.3d 463 (6th Cir. 2008).

339 Complaint at 61, *League of Women Voters v. Blackwell*, 432 F. Supp. 2d 723 (N.D. Ohio 2005) (No. 3:05-cv-7309), *leave to appeal granted in part* by No. 3:05-cv-7309 (N.D. Ohio Feb. 10, 2006), *aff’d in part, rev’d in part sub nom.*, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008).

340 *League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d 723 (N.D. Ohio 2005) [hereinafter *Blackwell I*]; *League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d 734 (N.D. Ohio 2006) [hereinafter *Blackwell II*]; *League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d 742 (N.D. Ohio 2006) [hereinafter *Blackwell III*].

341 *League of Women Voters of Ohio v. Blackwell*, No. 3:05-cv-7309, 2006 U.S. Dist. LEXIS 8432, at *9 (N.D. Ohio Feb. 10, 2006).

342 *Brunner*, 548 F.3d at 478.

343 Order Enforcing Settlement Agreement at 2, *League of Women Voters*, No. 3:05-cv-7309 (N.D. Ohio June 19, 2009) [hereinafter Settlement Agreement].

Finally, any discussion of seeking politically neutral relief from the federal judiciary in election cases would not be complete without at least a mention of *Bush v. Gore*. Partisan considerations motivated the case, as then–Vice President Al Gore sought a manual recount in four counties—Volusia, Palm Beach, Broward, and Miami-Dade³⁴⁴—guaranteed to favor him. Whether or not the Supreme Court was influenced by partisan bias in *Bush v. Gore*, it surely did not help matters that Gore did not seek politically neutral relief.

V. BEYOND THE COURTS

A judicial victory should not be the endgame. In considering how to guarantee access to the franchise, voters must rely on the courts only as a last resort and achieve as much change as possible through the political process. If courts are used in the project of voter enfranchisement, they should be relied upon minimally, as one facet of a political strategy.³⁴⁵

Throughout our history, the most important advances in expanding and guaranteeing access to the franchise have been the result of political victories: the Fifteenth Amendment, the Seventeenth Amendment, the Nineteenth Amendment, the Twenty-Third Amendment, the Twenty-Fourth Amendment, and the Twenty-Sixth Amendment. As Akhil Amar has noted, “[n]o amendment has ever cut back on prior voting rights or rights of equal inclusion.”³⁴⁶ The same trend in expanding and guaranteeing access to the franchise is reflected in federal legislation: the Voting Rights Act of 1965,³⁴⁷ the National Voter Registration Act of 1993,³⁴⁸ and the Help America Vote Act of 2002.³⁴⁹

The federal judiciary has played an important role in interpreting some of these political achievements. Among the best examples of the federal judiciary guaranteeing access to the franchise are cases like *Harman*,³⁵⁰ *Harper*,³⁵¹ *O’Brien*,³⁵² *South Carolina v. Katzenbach*,³⁵³ and

344 *Bush v. Gore*, 531 U.S. 98, 101 (2000) (per curiam).

345 Cf. Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 966–67 (2006) (suggesting that state legislatures “are doing constitutional work within election statutes” and that “[c]ourts are aptly situated to tweak statutory and administrative systems as a way of promoting given constitutional norms, without appropriating the system outright”).

346 AKHIL REED AMAR, *AMERICA’S CONSTITUTION* 19 (2005).

347 42 U.S.C. §§ 1971, 1973–1973bb-1 (2006).

348 42 U.S.C. §§ 1973gg to 1973gg-10 (2006).

349 Pub. L. No. 89-110, 116 Stat. 1666 (codified as amended in scattered sections of 5 U.S.C., 10 U.S.C., 36 U.S.C., and 42 U.S.C.).

350 *Harman v. Forssenius*, 380 U.S. 528 (1965); see discussion *supra* Part III.D.

Katzenbach v. Morgan.³⁵⁴ Yet in each of these cases, the judiciary's role in guaranteeing access to the franchise is at the margins, in a sense, because it is not the source of these achievements.³⁵⁵ The federal judiciary's record on voting rights, moreover, is far from unblemished. In cases such as *Minor v. Happersets*,³⁵⁶ *Breedlove*,³⁵⁷ *Giles v. Harris*,³⁵⁸ *Lassiter v. Northampton County Board of Elections*,³⁵⁹ and *Oregon v. Mitchell*,³⁶⁰ the Court has not allowed citizens to vote. This history suggests that the federal judiciary is not a reliable ally in the struggle to ensure access to the franchise. Given the primacy of the political process in expanding and guaranteeing voter enfranchisement, we should consider how the time tax can be mitigated through legislation and politics.

On a state-by-state basis, a number of measures are worth advocating. At a typical polling site, long lines tend to occur disproportionately in the early morning and evening hours on Election Day, at the tail ends of the typical workday.³⁶¹ At these and other peak times, lines accumulate, in part, because a polling site is generally set up to accommodate an evenly distributed stream of voters. Regardless of whether three-hundred voters are waiting or only three, the same limited number of voting machines are generally available—an organizational structure that exacerbates lines. A relatively low-cost measure to change the organizational structure of a typical polling site is to imple-

351 *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); see discussion *supra* Part III.A.

352 *O'Brien v. Skinner*, 414 U.S. 524 (1974); see discussion *supra* Part III.A.

353 383 U.S. 301, 334 (1966) (upholding the Voting Rights Act's suspension of literacy tests as a legitimate response to violations of the Fifteenth Amendment).

354 384 U.S. 641, 653–56 (1966) (upholding the Voting Rights Act's suspension of English tests).

355 Cf. Ackerman & Nou, *supra* note 137, at 148 (recognizing the Warren Court as “one—but only one—of the actors in this great drama” of the “civil rights revolution”).

356 88 U.S. 162, 178 (1874) (refusing to guarantee women's right to vote), *superseded by* U.S. CONST. amend. XIX.

357 302 U.S. 277, 283 (1937) (refusing to strike down state poll tax), *overruled by* *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668–69 (1966).

358 189 U.S. 475, 488 (1903) (refusing to hold unconstitutional the disenfranchisement of thousands of black citizens).

359 360 U.S. 45, 50–54 (1959) (refusing to strike down literacy tests as unconstitutional).

360 400 U.S. 112, 134–35 (1970) (refusing to extend the franchise to eighteen-year-olds in state and local elections), *superseded by* U.S. CONST. amend. XXVI.

361 See, e.g., NAACP State Conference of Pa. v. Cortés, 591 F. Supp. 2d 757, 760 (E.D. Pa. 2008); Stuart Eskenazi, *Crowds Flock to Polls*, SEATTLE TIMES, Nov. 5, 2008, at A2.

ment a policy requiring poll workers to provide a paper ballot to any voter who cannot wait in line to cast a vote.³⁶² This policy would help guarantee that no voter is turned away from the polls because she cannot afford to wait. Implementing the policy would require simply printing extra paper ballots and safeguarding them with other types of paper ballots, such as absentee and overseas ballots, which is a relatively easy process because poll workers already are familiar with handling such ballots.³⁶³

In Ohio, Secretary of State Jennifer Brunner implemented this type of policy before the 2008 primary: any voter assigned to a precinct that relied on DRE machines was given the choice to use a paper ballot.³⁶⁴ Lines at each precinct are divided, one for DRE machines and another for paper ballots.³⁶⁵ According to Brunner, paper ballots “now provide an orderly and efficient alternative means of voting in the event of long lines on Election Day.”³⁶⁶ The paper ballots also provide a more general “safety valve” for other problems afflicting polling places.³⁶⁷ Secretary Brunner has explained in no uncertain terms the importance of the paper ballot option:

Back-up paper ballots have already proven vital in the March presidential primary. While voters and election officials faced ice storms, flood, blackouts and bomb threats, back-up paper ballots allowed voting to continue. Our back-up paper ballot directive ensured that Ohioans could exercise their right to vote without unnecessary delays despite these emergencies—and will assure that right again in the November general election.³⁶⁸

362 If a voter cannot wait in line to even sign in at her precinct, she still should be given the option of voting by a provisional ballot. See *infra* notes 393–94 and accompanying text.

363 See *Cortés*, 591 F. Supp. 2d at 762–63; see also 42 U.S.C. § 15482(a) (2006) (requiring provisional ballots to be made available to voters under certain circumstances).

364 See Memorandum from Jennifer Brunner, Ohio Sec’y of State, to Ohio County Boards of Elections (July 25, 2008), <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-59.pdf> [hereinafter Memorandum].

365 See *Ohio Voters Opt for Backup Paper Ballots*, THE PUB. REC., Nov. 4, 2008, <http://pubrecord.org/nation/448/ohio-voters-opt-for-backup-paper-ballots/>.

366 See Memorandum, *supra* note 364.

367 *Id.*

368 *Id.*

Fully funded by the federal government, Ohio's paper ballot program has been "praised by Republicans and Democrats alike in Congress."³⁶⁹

Voters relied on paper ballots in significant numbers in Ohio on Election Day.³⁷⁰ In Montgomery County, for example, about thirteen percent of voters chose paper ballots over electronic ones.³⁷¹ State-wide, as of the morning of Election Day, the maximum wait time in most large precincts was no longer than an hour, as the option of voting by paper ballot kept lines moving.³⁷² It appears that the paper ballot option made voting in 2008 much easier than in 2004, when many voters were turned away because of long lines.³⁷³ Ohio's success in implementing a paper ballot option offers a model for other states to follow.³⁷⁴ Indeed, Ohio's paper ballot option proved to be such a success that the final settlement in *Brunner* ensures the ongoing availability of paper ballots in Ohio elections through at least the November 2014 election.³⁷⁵

In terms of lobbying for a paper ballot option, the Ohio model and *Cortés* may prove to be invaluable tools. The Ohio model proves that a state can and should voluntarily and successfully implement a paper ballot system. *Cortés* demonstrates the consequences of policy-makers' failures to mitigate the time tax on their own: intervention by

369 *Id.*; see also Press Release, Jennifer Brunner, Ohio Sec'y of State, Brunner Reimburses Counties for Back-up Paper Ballots (Jan. 1, 2009), <http://www.sos.state.oh.us/PressReleases/2009/2009-01-09.aspx> (noting the bipartisan praise).

370 Press Release, Jennifer Brunner, *supra* note 369.

371 See Lynn Hulsey, *Counties Partially Reimbursed for Cost of Paper Ballots*, DAYTON DAILY NEWS, Jan. 13, 2009, at A5.

372 See *Ohio Voters Opt For Backup Paper Ballots*, *supra* note 365; Press Release, Jennifer Brunner, Ohio Sec'y of State, Secretary Brunner Issues Mid-Morning Election Update, Resources for Election Day (Nov. 4, 2008), http://www.sos.state.oh.us/Press-Releases/2008%20Press%20Releases/2008-1104_11amupdates.aspx.

373 See VOTING RIGHTS INST., *supra* note 112; Adam Cohen, Editorial, *No One Should Have to Stand in Line for 10 Hours to Vote*, N.Y. TIMES, Aug. 25, 2008, at A18.

374 For further discussion on the benefits of the Ohio paper ballot option and its potential drawbacks, see LAWRENCE NORDEN & JESSIE ALLEN, OHIO ELECTIONS SUMMIT, FINAL REPORT: 2008–2009 OHIO ELECTION SUMMIT AND CONFERENCE 20–21, 69–70 (2009), available at http://brennan.3cdn.net/9ccb57cb5de1711173_nkm6bqc3y.pdf.

375 Settlement Agreement, *supra* note 343, ex. B at 1 ("In order to ensure that Ohio voters are not denied equal protection of the law nor substantive due process by virtue of having to wait an unreasonably long period of time in order to exercise the franchise on Election Day, in statewide general elections in November of even-numbered years and in presidential primary elections, the Ohio Secretary of State . . . shall issue instructions to all county Boards of Elections . . . for the distribution of paper ballots in the event of long lines.").

the federal judiciary in the form of a permanent injunction requiring the distribution of emergency paper ballots to reduce long lines.

In addition to offering paper ballots, more far-reaching “convenience voting” methods are already being implemented across the country, such as early voting, absentee voting, and vote-by-mail.³⁷⁶ As of the 2008 election, thirty-two states allowed for no-excuse pre-Election Day in-person voting, either on a voting machine or in-person absentee voting.³⁷⁷ That year, as in years past, elections in Oregon and most of Washington were conducted by mail.³⁷⁸ At that time, Maryland voters overwhelmingly approved a constitutional amendment that makes no-excuse early voting available in the state starting in 2010.³⁷⁹ Currently, Rhode Island is the only state that does not allow for early voting and requires an excuse for absentee voting.³⁸⁰

Convenience voting options are becoming increasingly popular: the percentage of voters who cast ballots before Election Day increased from fifteen percent in 2000 to twenty percent in 2004 to close to thirty percent in 2008.³⁸¹ On Election Day 2008, lines were shorter in battleground states that allowed no-excuses early voting.³⁸² It is likely that convenience-voting options reduce the possibility that voters will leave long lines without casting ballots or refuse to show up at the polls in the first place. Yet even with the advent of convenience voting, in states that allow for in-person voting on Election Day, long lines that turn away voters are still a significant problem, and potentially one of constitutional dimensions, depending on how great the risk of disenfranchisement is.³⁸³

Convenience voting becomes a viable option in a state when a sufficient number of policymakers become convinced of its benefits.

376 See LOWENSTEIN ET AL., *supra* note 128, at 345.

377 Early Voting Information Center at Reed College, Absentee and Early Voting Laws, <http://earlyvoting.net/states/abslaws.php> [hereinafter Absentee and Early Voting Laws] (last visited Oct. 25, 2009).

378 Richard Wolf, *Election Gives Early-Balloting Initiatives a Boost*, USA TODAY, Nov. 7, 2008, at 8A.

379 See *Maryland General Assembly 2009: Early Voting Passes*, HERALD-MAIL, Apr. 14, 2009, http://www.herald-mail.com/?cmd=displaystory&story_id=220972&format=html (noting that the constitutional amendment passed with about seventy-one percent of the vote).

380 Absentee and Early Voting Laws, *supra* note 377.

381 *Id.*

382 *Id.*

383 See generally discussion *supra* Part III (explaining that it remains to be seen whether federal courts will find that the availability of no-excuses absentee voting affects the constitutional analysis of long wait times violating voters' rights).

To bring about convenience voting, political pressure is necessary. As part of that pressure, those in support of early voting opportunities may wish to litigate. While it is beyond the scope of this Article to draw any causal relationship between litigation that seeks to guarantee access to the polls and the enactment of convenience voting policies, two developments are worth noting. As discussed in Part IV, neither *Brunner* nor *Kaine* immediately succeeded in achieving federal court intervention to guarantee access to the franchise. Nevertheless, in the year after *Brunner* was filed, Ohio expanded the ease with which citizens could vote by permitting no-excuses early voting thirty-five days before an election.³⁸⁴ Likewise, earlier this year, in the months after *Kaine* was filed, Governor Tim Kaine announced legislation that would permit in-person, no-excuses early voting during Virginia's forty-five-day absentee voting period.³⁸⁵ The Governor's Office explained that the proposed legislation was a response to the time tax, i.e., "crowding on Election Day," and that "[l]ong lines on election day drive down participation and increase the likelihood of problems at polling places."³⁸⁶ "By allowing all voters to cast an absentee ballot in person, we can remove some of the practical barriers that prevent people from participating in the democratic process," said Governor Kaine.³⁸⁷ These developments suggest that litigation against the time tax, even if unsuccessful in court, might add to political pressure to reduce the time tax.

Another approach to reducing the time tax for workers may be to advocate for state laws that require employers to provide flex time or paid time off on Election Day so that workers may vote without giving up their wages.³⁸⁸ According to a recent survey, thirty states already require employers to provide time off for employees to vote on Election Day, but most do not require that the time be paid.³⁸⁹ Reducing the economic consequences of waiting in line for workers may go a long way to mitigate the time tax for those who are paid hourly wages by employers willing to comply with this type of law.

384 Editorial, *Voting Made Easy*, THE COLUMBUS DISPATCH, Mar. 29, 2006, at 12A.

385 Press Release, Office of the Va. Governor, Governor Kaine Announces Legislation to Expand Absentee Voting (Jan. 7, 2009), <http://www.governor.virginia.gov/mediarelations/NewsReleases/viewRelease.cfm?id=847>.

386 *Id.*

387 *Id.*

388 Of course, the loss of wages is not the touchstone of whether or not waiting in line amounts to a constitutional violation.

389 See The Word on Employment Law With John Phillips, <http://employment-lawpost.com/theword/> (Oct. 15, 2008, 12:33 EST).

Historically, the federal government's role in administering elections has been limited.³⁹⁰ For this reason, the political process on a state-by-state basis may be a more palatable avenue for mitigating the time tax than a federal approach. But there also is a potential federal fix for the problem of voter disenfranchisement due to long lines on Election Day. The Help America Vote Act (HAVA)³⁹¹ already requires provisional ballots to be made available to voters who appear at the polls and find that their names are not on the voter rolls and to voters who appear at the polls without required identification.³⁹² These requirements prevent voters from being turned away without being able to cast a ballot due to an administrative error.

HAVA should be amended in two respects: First, *paper* ballots should be made available to those who report to the polls on Election Day, find their names on the voter rolls, and have the required identification, but cannot wait in a long line to cast a ballot by the mechanism otherwise provided in the jurisdiction. Paper ballots cast in this manner should be counted in accordance with the same procedures and at the same time as regular ballots cast in the jurisdiction.

Second, *provisional* ballots should be made available to those who report to the polls on Election Day, but cannot wait to even check their names on the voter rolls or provide the required identification.³⁹³ The provisional ballots cast by those affected by long lines should be counted just as other provisional ballots under HAVA: "If the appropriate State or local election official . . . determines that the individual is eligible under State law to vote, the individual's provi-

390 See Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 ELECTION L.J. 118, 121–23 (2007) (reviewing ROY G. SALTMAN, *THE HISTORY AND POLITICS OF VOTING TECHNOLOGY* (2006)).

391 42 U.S.C. §§ 15301–15545 (2006).

392 *Id.* §§ 15482(a), 15483(b)(2)(B)(i).

393 In terms of legislative amendments, this change could be effectuated just by adding a simple phrase, as set forth in italics below, to the operative provision of HAVA:

If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote [*or if an individual declares that the line to vote in his or her jurisdiction is too long for such individual to vote by the mechanism otherwise provided by the jurisdiction*] such individual shall be permitted to cast a provisional ballot

See 42 U.S.C. § 15482(a).

sional ballot shall be counted as a vote in that election in accordance with State law.”³⁹⁴

Providing voters nationwide with these paper and provisional ballot options will help to ensure that hundreds of thousands of votes are not lost due to long lines. While these options may not be a perfect solution, some voters are likely to welcome these options.³⁹⁵ Many voters who make it to the polls prefer voting by paper ballot or provisional ballot to not voting at all, as evidenced by success of Ohio’s paper ballot option and the millions of provisional ballots cast in recent elections.³⁹⁶ On the ground, these amendments would be relatively easy to implement, as poll workers nationwide already know how to handle provisional ballots and would need training only on the paper ballots.

Other federal fixes for the time tax are being considered. In just the last two years, from 2007 to 2009, no fewer than eleven bills were introduced in Congress to facilitate or require early voting in all states.³⁹⁷ In adding an early voting requirement to one such bill, Senator Dianne Feinstein expressed concern about the time tax: “In this day and age, with lines growing at the polling places and people having increasingly complicated work schedules, I believe every state should allow its voters to vote early and vote absentee with no ‘excuse’ requirement.”³⁹⁸

394 42 U.S.C. § 15482(a)(4). For discussion on the ambiguities underlying this standard, see Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 GEO. WASH. L. REV. 1193, 1196–1202 (2005).

395 See NORDEN & ALLEN, *supra* note 374, at 70.

396 In the 2004 general election, for example, nearly two million provisional ballots were cast. U.S. ELECTION ASSISTANCE COMM’N, 2004 SURVEY, *supra* note 95, at 6-5. The number of provisional ballots cast in 2008 are still unknown, but reports indicate that 800,000 provisionals were cast in just fourteen states. *Voter Registration: Assessing Current Problems: Hearing Before the S. Comm. on Rules and Administration*, 111th Cong. 14 (2009) (statement of Nathaniel Persily, Professor of Law and Political Science, Columbia Law School).

397 Critical Election Infrastructure Act of 2009, H.R. 253, 111th Cong. § 3(b) (2009); Voting Opportunity and Technology Enhancement Rights Act of 2009, H.R. 105, 111th Cong. § 107 (2009); Critical Election Infrastructure Act of 2008, H.R. 7281, 110th Cong. § 3(b) (2008); Poll Tape Transparency Act of 2008, H.R. 7246, 110th Cong. § 2(a) (2008); Vote Tabulation Audit Act of 2008, H.R. 7247, 110th Cong. § 2(a) (2008); Voting Opportunities and Integrity in the Conduct of Elections Act of 2008, S. 3100, 110th Cong. §§ 101–102 (2008); H.R. 6077, 110th Cong. § I (2008); Ballot Integrity Act of 2007, S. 1487, 110th Cong. § 308 (2007); Count Every Vote Act of 2007, S. 804, 110th Cong. § 352 (2007); Count Every Vote Act of 2007, H.R. 1381, 110th Cong. § 352 (2007); Voting Opportunity and Technology Enhancement Rights Act of 2007, S. 730, 110th Cong. § 9 (2007).

398 Wolf, *supra* note 378 (internal quotation marks omitted).

Given the unprecedented interest in voting in the 2008 election,³⁹⁹ now is the moment to persuade policymakers to mitigate the time tax on the federal and state levels.

CONCLUSION

In opining on the relatively low voter participation rates in the United States, a leading casebook has asked: “Given the elimination of poll taxes, how can so many people not find voting worth the minimal expenditure of time and effort required?”⁴⁰⁰ The question assumes that voting requires only a “minimal expenditure of time and effort.”⁴⁰¹ Part of this Article’s project has been to expose and undermine that premise. For hundreds of thousands of voters, casting a ballot costs more time than they can afford. In presidential elections, long lines at the polls routinely disenfranchise citizens who wish to participate in our democracy but cannot due to pressing work responsibilities, family obligations, health constraints, and other commitments.

Political officials, judges, litigators, academics, and voters themselves should recognize that disenfranchisement due to long lines at the polls has no place in American democracy. This Article explores how the courts have been used and can be used to strike at the time tax, and also suggests political advocacy options beyond the courts. Although there is much work to be done to ensure that the time tax, like the poll tax before it, does not deny or abridge the right of citizens to vote, this Article helps to begin that project.

399 See Press Release, U.S. Census Bureau, Voter Turnout Increases by 5 Million in 2008 Presidential Election (July 20, 2009), available at <http://www.census.gov/Press-Release/www/releases/archives/voting/013995.html>.

400 LOWENSTEIN ET AL., *supra* note 128, at 334.

401 See *id.*