

## CHAPTER FIVE

# THE PROMISE AND PRACTICE OF ELECTION DAY REGISTRATION

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### *I. Introduction*

Although advances in technology in recent decades have greatly streamlined the process for adding newly registered voters to the rolls, many states continue to adhere to restrictive preelection registration deadlines that require voters to register up to 30 days before any given election. In many cases, these deadlines may not have changed for 35 years or more.<sup>1</sup> Because of such registration deadlines, eligible citizens may find themselves disfranchised on Election Day because a voter registration application may have gone astray, or elections staff may have erred in entering the registration information, or the voter may have failed to update registration after moving, or the voter simply may have been unaware of the registration deadline.<sup>2</sup>

Election Day Registration (EDR), which allows eligible voters to register and cast a ballot on Election Day, is a reform that reduces the unnecessary disfranchisement of eligible voters that may be caused by arbitrary registration deadlines. For many years, six states (Idaho, Maine, Minnesota, New Hampshire, Wisconsin, and Wyoming)<sup>3</sup> have offered EDR, and since the 2004 presidential election, two additional states—Montana and Iowa—have joined their ranks, while a third, North Carolina, has enacted an analogous measure<sup>4</sup> allowing Same Day Registration<sup>5</sup> at early voting sites. As a result of these recent changes, the 2008 presidential election may see unprecedented use of EDR by American voters.

This chapter provides an overview of the policy and practice of EDR. It first briefly examines the evolution of voter registration deadlines in the United States

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(Part II). It then canvasses how EDR proposals have gained increasing interest in statehouses and in Congress in recent decades, beginning with the adoption of EDR in several states in the 1970s (Part III). The chapter next reviews the evidence on how EDR affects voter participation and turnout, both generally and with respect to specific demographic groups (Part IV). Finally, it assesses the impact of EDR on election administration by reviewing the experience of states that have adopted EDR (Part V). This examination establishes that EDR, when properly implemented, benefits the democratic process by boosting participation, particularly among groups that have had lower propensities to register and vote, and that states with a long history of EDR implementation report positive outcomes for election administration overall.

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## *II. A Short History of Voter Registration in the United States*

Although many Americans take it for granted that advance registration is a requirement for voting, most states had no voter registration requirements prior to the 1870s. Eligibility was determined at the polls on Election Day.<sup>6</sup> As the electorate expanded through immigration and the 15th Amendment's enfranchisement of former slaves, so too did calls for stricter controls on the registration and voting process. The majority of states adopted registration requirements between the 1870s and World War I,<sup>7</sup> and by 1929 all but three states required registration prior to an election.<sup>8</sup>

Historian Alexander Keyssar has described the mixed motives behind the move to preelection registration: "Registration laws . . . emerged in the nineteenth century as a means of keeping track of voters and preventing fraud; they also served—and often were intended to serve—as a means of keeping African American, working-class, immigrant, and poor voters from the polls."<sup>9</sup> States varied widely on the details of their registration requirements such as the deadline for voter registration, the locations at which registration was offered, whether and how often reregistration was required, and how a change in residence affected registration. One state might provide only two days during the year on which voters must appear in person to establish their qualifications to register;<sup>10</sup> another might require citizens to renew their registrations annually;<sup>11</sup> while others might make registration relatively easy by charging the election officials themselves with the primary responsibility of identifying eligible citizens and placing their names on the registry.<sup>12</sup> Often, the new registration requirements applied only to residents of the largest cities in the state, where immigrant and poor populations were concentrated.<sup>13</sup> Legislative choices about these details were shaped by cross-currents involving partisan aims; class, race, and ethnic prejudice; machine politics; and sincere good-government goals,<sup>14</sup> but there is widespread agreement that, what-

ever the motives, the institution of restrictive preelection registration requirements contributed to substantial reductions in voter participation and turnout among eligible voters in the United States.<sup>15</sup>

While state courts addressed a variety of legal challenges to registration laws during the late 19th and early 20th century, and occasionally invalidated them under state constitutional provisions guaranteeing the right of suffrage,<sup>16</sup> the federal courts played little role in such challenges until much later. Rejecting a constitutional challenge to a Maryland law regulating voter registration, the Supreme Court in 1904 declared that “the Federal Constitution does not confer the right of suffrage upon any one, and the conditions under which that right is to be exercised are matters for the states alone to prescribe.”<sup>17</sup> As late as 1965, the Supreme Court summarily affirmed a lower court decision that applied much the same reasoning to uphold another Maryland law that imposed onerous durational residency requirements for voter registration.<sup>18</sup>

Congress, not the federal courts, took the first step to address restrictive registration deadlines. Five years after the landmark Voting Rights Act of 1965,<sup>19</sup> which created powerful federal protections against racial discrimination in registration and voting, Congress turned its attention to the burden imposed by “archaic statutory limitations” such as lengthy registration closing periods.<sup>20</sup> In the Voting Rights Act Amendments of 1970, Congress eliminated durational residency requirements for voting in presidential and vice-presidential elections and required states to allow registration for such elections up to 30 days before the election.<sup>21</sup>

Discussing the justifications for Congress’s action, one court stated:

Thus it is clear that the key to increasing participation in the democratic process lies in making registration available during crucial periods of voter interest on a relatively liberal basis, and that the imposition by states of requirements that bear no reasonable relationship to a compelling legitimate state interest will have the effect of disenfranchising many qualified members of the electorate and denying them the right to vote, which is one of the fundamental and precious rights of a United States citizen.<sup>22</sup>

The Supreme Court upheld Congress’s authority to impose these liberalized registration requirements for federal elections in *Oregon v. Mitchell*.<sup>23</sup>

Two years later, in *Dunn v. Blumstein*,<sup>24</sup> the Supreme Court finally declared that onerous state-law requirements concerning the timing of voter eligibility could violate 14th Amendment guarantees, relying in part on Congress’s findings accompanying the Voting Rights Act Amendments of 1970. *Dunn v. Blumstein* specifically involved a durational residency requirement; Tennessee required a would-be voter to have been a resident of the state for one year and a resident of the county for three months in order to register to vote in state elections. The Court held that durational residency requirements for voting were subject to strict constitutional

scrutiny, and that none of Tennessee's proffered justifications—detering fraud, assuring that voters are knowledgeable about issues, and serving administrative needs—were sufficient to sustain such a lengthy waiting time prior to registration.<sup>25</sup> The Court noted that 30 days appeared to be a sufficient period for carrying out administrative tasks necessary to verify residency, especially in light of the fact that Tennessee allowed general registration up to 30 days prior to an election.<sup>26</sup>

Although *Dunn v. Blumstein* did not directly address the constitutionality of registration closing deadlines, its analysis strongly suggested that the Court would view 30 days as the maximum registration cutoff that could be justified.<sup>27</sup> Nevertheless, in 1973 the Supreme Court upheld 50-day registration closing deadlines in Arizona and Georgia, holding that each state had made an adequate showing that the longer closing dates were required to accommodate specific needs of election administration in those states.<sup>28</sup> Today, many states still close registration up to 30 days before an election,<sup>29</sup> even though, as discussed below, the continuing administrative justifications for such lengthy cutoff periods are tenuous at best. The Supreme Court has not again addressed the constitutionality of registration deadlines in the three and a half decades since its 1973 decisions.

The question of whether lengthy preelection registration deadlines violate the Constitution is, however, separate from the question of whether they reflect sound policy.<sup>30</sup> In the 1970s, a number of states sought to address declining turnout and expand the participation of eligible citizens by easing their registration requirements. These reforms included enactment of EDR in several states.<sup>31</sup> The experience of those states confirms that EDR boosts voter turnout, a matter discussed in more detail in Part IV, *infra*. The next section describes three “waves” of EDR reform since 1970 and where these reform efforts stand today.

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### *III. The Revival of Election Day Registration: From the 1970s to the Present*

Five states adopted EDR in the early to mid-1970s: Maine (1973), Minnesota (1974), Wisconsin (1976), Oregon (1976), and Ohio (1977). The specific motivations for EDR's enactment in Maine, Wisconsin, and Minnesota have variously been attributed to a national Democratic campaign to boost turnout among the party's base voters or, alternatively, to homegrown desires for consistent, statewide voter registration rules and procedures.<sup>32</sup> The administration of EDR on Election Day also differed among these three states. In Minnesota and Wisconsin, EDR was available at all polling sites. In Maine, as in Minnesota and Wisconsin, all voters had the option of registering on Election Day, but the location for registration differed depending on local administrators' discretion. Maine's larger cities required Election Day registrants to present themselves first at the local registrar's office to

register and then proceed to their polling place to vote, while smaller jurisdictions allowed registration directly at the polling place.<sup>33</sup>

EDR was short-lived in Ohio. The legislature adopted EDR in early 1977, but voters subsequently rejected EDR through a constitutional amendment approved in November 1977. The ballot initiative proposing the constitutional amendment was led by a group of disaffected Ohio legislators, who voiced fears of increased voter fraud, and was backed by Secretary of State Ted Brown. The constitutional change required individuals to be registered 30 days prior to an election.<sup>34</sup>

EDR met with a similar fate in Oregon; it was repealed by a 1985 ballot initiative. The impetus for the ballot measure was a political controversy involving Indian guru Bhagwan Shree Rajneesh and the self-styled utopian community that he and his disciples established near the village of Antelope, Oregon, in 1981. The Rajneesh disciples' successful capture of majority control of the local government, the registration of homeless individuals newly arrived from out of state, and fears of expanded political influence sparked a nativist backlash and repeal of Oregon's EDR statute.<sup>35</sup>

The successful enactment of EDR in several states in the 1970s and its positive effect on voter turnout encouraged President Jimmy Carter to propose a national EDR program.<sup>36</sup> Despite White House leadership and large Democratic majorities in both houses of Congress, the resultant legislation was not adopted.<sup>37</sup> Incumbency protection and fear of the unknown new voter apparently outweighed political interest in expanding democratic participation. According to President Carter,

The conservatives, Democrats and Republicans alike, almost to a person opposed this legislation. I was taken aback that many of the liberal and moderate members of the Congress also opposed any increase in voter registration. . . . The key [source of resistance was] "incumbency." Incumbent members of the Congress don't want to see additional unpredictable voters registered. . . . [T]his is the single most important obstacle to increasing participation on election day.<sup>38</sup>

The next generation of EDR enactment would not come for another 15 years, when EDR was adopted in Idaho, New Hampshire, and Wyoming. Providing the occasion for this reform were the political negotiations surrounding congressional consideration of the National Voter Registration Act (NVRA) in 1993. Senate Republican leaders, who historically opposed registration reform, proposed that particular states could avoid NVRA coverage if they quickly enacted EDR.<sup>39</sup> The proposal was accepted by the sponsors of the legislation and incorporated into the text of the statute that was ultimately passed by Congress and signed into law by President Bill Clinton.<sup>40</sup> Wyoming, Idaho, and New Hampshire took advantage of the NVRA exemption, enacting EDR into law in 1993, 1994, and 1995, respectively.<sup>41</sup>

Many states again began seriously considering EDR in the wake of the flawed 2000 presidential election. The intense public scrutiny engendered by the close

contest between Vice President Al Gore and Governor George Bush exposed deep flaws in the administration of U.S. elections. Up to three million Americans were deprived of an opportunity to cast a ballot in 2000 because of voter registration problems and flawed voter registries.<sup>42</sup> Many had believed themselves to be registered to vote, only to find at the polls that their names had not made it to the rolls and that they could not vote. Public policy organizations such as Dēmos began championing EDR as a solution to many of these registration problems.<sup>43</sup> With EDR, qualified voters who on Election Day found that their names were omitted from the voter rolls could readily register and vote at the polls, thus avoiding the vote denial that resulted from wrongful or mistaken voter purges in states such as Florida leading up to November 2000.

In the years following the 2000 election, EDR was proposed in 34 of the 43 states that still barred voting by those not registered in advance of the election.<sup>44</sup> In 2002, EDR advocates organized EDR ballot initiatives in California and Colorado; both measures were rejected by the voters.<sup>45</sup> The Connecticut state legislature voted to approve EDR in 2003, only to see the EDR proposal vetoed by then-Governor John Rowland. The governor cited concerns about voter fraud in his veto message.<sup>46</sup>

It was in Montana that EDR was to see its first post-2000 success. The legislature passed and the governor signed into law an EDR provision in 2005.<sup>47</sup> Although the Montana variant of EDR does not allow for registration at the polls (residents may register and vote at the offices of county election administrators after the close of the voter registration deadline (30 days before election), including on Election Day), it likely contributed to an appreciable increase in voter participation in the landmark 2006 election.<sup>48</sup> Registration gains were most pronounced among young people and in counties with large college student populations. The three counties where registrations spiked most—Missoula, Gallatin, and Yellowstone Counties—are home to University of Montana or Montana State University campuses. Montanans between the ages of 18 and 25 comprised more than a third of the approximately 9,200 individuals who registered to vote under Montana's new statute between October 7, 2006, and November 7, 2006.<sup>49</sup>

Legislative campaigns for EDR gained steam in over a dozen states in 2007.<sup>50</sup> With a confluence of factors (determined political leadership, focused grassroots advocacy, a cohesive lobbying campaign, expert support from national organizations, and the support of state election officials), EDR was enacted in Iowa, and Same Day Registration was enacted in North Carolina.<sup>51</sup> Eligible citizens may now register at early voting site up to three days before an election in North Carolina. Iowa began allowing registration on election day at all polling places in January 2008.

Interest in EDR has also increased at the federal level. Rep. Keith Ellison (D-MN) introduced a national EDR bill in 2007, taking up a concept that previously had been championed by his predecessor, Martin Sabo (D-MN).<sup>52</sup> A hearing on EDR was convened in the House of Representatives on November 9, 2007.<sup>53</sup> Sen.

Hillary Clinton and Rep. Stephanie Tubbs Jones incorporated EDR in their proposed Count Every Vote Act, an omnibus election reform plan for correcting many of the shortcomings witnessed in recent elections.<sup>54</sup> EDR also had been proposed in various forms in previous recent Congresses. These proposals, introduced by Democrats, have failed to move beyond the committee stage of consideration chiefly because of political partisanship and stated Republican concerns about ballot security. Other reservations include fear of inordinately complex election administration with EDR and political risk to incumbent legislators.<sup>55</sup> We assess how EDR affects issues of voting integrity and election administration by examining the experience of existing EDR states in Part V, *infra*, after first turning to a discussion of the impact of EDR on voter participation.

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#### *IV. Election Day Registration and Increased Voter Turnout*

Healthy democracies aspire to high rates of voter participation and turnout, yet even the more optimistic estimates of U.S. voter turnout show that nearly 40 percent of eligible voters failed to vote in the last presidential election.<sup>56</sup> The United States, in addition, typically lags far behind other advanced democracies in turnout among eligible voters.<sup>57</sup> Moreover, those who do participate at high rates in the United States differ significantly from nonparticipants in terms of their socioeconomic profile: they have, on average, higher incomes and more education, and are more likely to be older and white.<sup>58</sup> These persistent disparities challenge the goal of a representative democracy, because they make it difficult to assume that the interests and needs of nonvoters will be adequately reflected in the choices of those who do participate.

There is no single factor that can be assigned exclusive blame for low voter participation,<sup>59</sup> and no silver bullet that will ensure that our nation has consistent high levels of turnout. But, as the evidence assessed below indicates, there is little doubt that restrictive preelection registration deadlines are a deterrent to participation for many voters, and that EDR is a reform that boosts voter turnout.

The role of registration requirements in depressing rates of voter participation after their widespread adoption in the late 19th and early 20th centuries has already been described. But even though some of the most burdensome features of those laws, such as literacy tests, poll taxes, and annual reregistration requirements, have long been eliminated, the requirement of preelection registration itself still plays a role in deterring full participation. Some of the reasons for this are summarized by Wolfinger and Rosenstone:

Registration raises the costs of voting. Citizens must first perform a separate task that lacks the immediate gratification characterizing other forms of political expression (such as voting). Registration is usually more difficult than voting, often

involving more obscure information and a longer journey at a less convenient time, to complete a more complicated procedure. Moreover, it must usually be done before interest in the campaign has reached its peak.<sup>60</sup>

Indeed, polls indicate that the percentage of people giving “quite a lot” of thought to U.S. presidential elections rises dramatically in the final four weeks prior to the election, just at the time when registration no longer is possible in approximately half the states.<sup>61</sup> Moreover, the deterrent effects of registration requirements are compounded in the United States because, unlike in most other democracies, the government does not assume primary responsibility for assuring that eligible citizens are registered, but generally leaves the burden of securing registration on the individual.<sup>62</sup>

Registration requirements may affect participation not only because of their effect on would-be voters, but also because of their effect in structuring the mobilizing efforts of candidates and political parties. Preelection registration deadlines raise the cost of mobilizing those not already registered, because those individuals must first be encouraged to overcome the hurdle of registration weeks before the election and then mobilized to turn out on Election Day. Preelection registration deadlines are thus a disincentive for campaigns to focus on efforts to expand the electorate, especially in the final weeks of an election—precisely the time when less politically engaged citizens might otherwise become interested in the campaign.<sup>63</sup>

All these considerations suggest that EDR should boost voter turnout, and the available evidence bears this out. A typical summary of the social science literature states “[t]he evidence on whether EDR augments the electorate is remarkably clear and consistent. Studies finding positive and significant turnout impacts are too numerous to list.”<sup>64</sup> EDR states as a group have turnout rates that are generally 10 to 12 percentage points higher than states without EDR.<sup>65</sup> Academic studies have concluded that a significant part of this difference is directly attributable to the availability of EDR in these states, with EDR increasing turnout by 3 to 6 percentage points depending on the states included in the study and the models used for isolating the effect of EDR.<sup>66</sup> Studies examining the likely impact of EDR in states such as New York and California that have somewhat different demographic profiles than the earlier EDR states have predicted higher turnout gains of 8.6 and 9.2 percentage points, respectively, if EDR were to be adopted.<sup>67</sup>

A related question is whether the adoption of EDR, in addition to increasing overall turnout, can help to make the electorate more representative of the American population as a whole. That question is more contested among social scientists than the question of whether EDR enhances turnout overall, but there is increasing evidence that some traditionally low-turnout groups benefit disproportionately from EDR. Several studies have found that younger citizens, those who move frequently, and other groups with historically lower turnout are particularly likely to benefit from EDR.<sup>68</sup> State-specific studies also predict larger-than-average turnout



increases among groups with historically lower participation rates. For example, a study analyzing the impact of EDR in New York predicts that overall turnout would rise by 8.6 percentage points, but that turnout would increase 12.3 points among 18-to-25-year-olds, 9.8 points among those with a grade school education or less, 11 points among Latinos, 8.7 points among African Americans, and 10.1 points among those who have lived at their current address for less than six months.<sup>69</sup> A similar study on the impact of EDR in Iowa predicts an overall turnout gain of 4.9 percentage points, but a gain of 10.7 points among 18-to-25-year-olds, 8.8 points for those who have moved in last six months, 9.5 points for Latinos, and 6.6 points for African Americans.<sup>70</sup>

That being said, different studies analyzing how registration reforms such as EDR affect turnout sometimes appear engaged in a debate about whether the glass is half empty or half full. Some emphasize that registration reforms alone are not likely to bring about universal participation nor entirely erase socioeconomic disparities in turnout. They point out that even when registration is easy, those who lack a sense of political engagement and motivation to vote will remain unlikely to participate.<sup>71</sup> Others emphasize instead the measurable increase in turnout attributable to reforms such as EDR, and point out that mobilization campaigns are more likely to spur participation among disaffected groups when registration barriers are minimized.<sup>72</sup>

The authors of this chapter hold with the glass-half-full perspective. Projected turnout gains from adoption of EDR translate into millions of additional voters casting ballots nationwide, an extraordinarily valuable accomplishment regardless of whether it eliminates all causes of depressed turnout among eligible Americans. Moreover, the experience of EDR states shows that adoption of EDR itself can encourage political parties and grassroots organizers to adopt the very mobilization and outreach tactics that may be further prerequisites to expanded participation.<sup>73</sup>

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## *V. Impact of Election Day Registration on Election Administration*

While its proponents trumpet the potential for expanding voter turnout, EDR detractors raise concerns about voter fraud, expense, and the burden of administering registration at the polls on Election Day. A review of the experiences of EDR states and various studies of EDR is illuminating. The data show that EDR can be introduced without threatening the integrity of elections, driving up election costs, or inducing nightmares for voters and poll workers.

### **A. DOES EDR LEAD TO VOTER FRAUD?**

The most extensive data on the extent of voter fraud in EDR states has been compiled by Lorraine Minnite, a political scientist at Barnard College and Senior Fellow

at Dēmos. Her research shows that fears of voter fraud are overstated and unfounded in both EDR and non-EDR states. After an analysis of the incidence of voter fraud from 1992 to 2002 in 12 states that collectively represent about half of the electorate; an extensive Nexis search on reported voter fraud incidents throughout the United States; a survey of academic literature, government documents, congressional testimony and reports, law journal articles, and a wide variety of other sources on election administration; and an in-depth review of some of the highest-profile cases of real or alleged fraud, Minnite concluded that voter fraud was very rare in the 12 states examined.<sup>74</sup>

In a more recent analysis of data from 2002–2005 that focused specifically on states with EDR, Minnite again found very little evidence of voter fraud. Her review of nearly 4,000 news accounts netted one case of confirmed voter impersonation at the polls—a 17-year-old New Hampshire high student who shares his father’s name cast his father’s ballot in the 2004 Republican presidential primary.<sup>75</sup> An aggressive new Justice Department initiative against voter fraud led to prosecutions in only one EDR state, Wisconsin. Of 14 Milwaukee residents charged with double voting or casting ballots while disfranchised for felony convictions, five resulted in convictions (for felon voting).<sup>76</sup> And early returns from a survey of 252 prosecutorial jurisdictions in the EDR states turned up two fraud investigations in Minnesota. Charges against four of the 11 individuals suspected of committing fraud were dismissed; the remaining seven received warning letters.<sup>77</sup>

The report suggests several reasons why EDR does not facilitate voter fraud, and may in fact deter it. First, EDR is conducted in person, under the eyes and authority of election officials.<sup>78</sup> According to Minnesota Secretary of State Mark Ritchie,

EDR is much more secure because you have the person right in front of you—not a postcard in the mail. That is a no-brainer. We [Minnesota] have 33 years of experience with this.<sup>79</sup>

Second, EDR states require registrants to substantiate their residence and identity at the time of registration. A broad range of documents is accepted (only Idaho requires Election Day registrants to produce photo identification).<sup>80</sup> And third, list maintenance and postelection audits adopted by some EDR states add an additional level of identity verification for persons registering at the polls.<sup>81</sup>

Minnite’s findings on the security of EDR elections are corroborated by a 2007 Dēmos survey of 49 elections clerks in six EDR states.<sup>82</sup> The vast majority of respondents rated current fraud-prevention measures sufficient to protect the integrity of elections.<sup>83</sup>

The introduction of computerized statewide registration systems as required by the Help America Vote Act of 2002 (HAVA) also can help reassure policy makers concerned about the security of elections run with EDR. As of January 1, 2006, Congress required that all states implement a centralized, interactive, computerized

statewide registration system.<sup>84</sup> This mandate was intended to improve the accuracy of voter lists and help avoid incidents of duly registered voters being turned away from the polls on Election Day because their names were omitted from voter registries, as documented in the 2000 election.

The integration of county registration databases into one computer file can help safeguard against the possibility, however rare, of multiple registrations and double voting in several jurisdictions. Security is particularly enhanced where election administrators have ready electronic access to computerized state registration lists at the polls on Election Day, and where registration and voting information can be inputted and accessed in “real time.” It should be noted that Idaho, Maine, Minnesota, New Hampshire, Wisconsin, and Wyoming each implemented EDR before the advent of computerized voter registration databases and HAVA mandates. Each has administered secure elections even without the benefit of these technological innovations.

## **B. EDR AND ELECTION ADMINISTRATION**

According to election officials with long-standing experience in administering registration at polling places, EDR can be managed efficiently by application of several commonsense measures.<sup>85</sup> Advance planning, voter education, and staff training are most relevant. A sound estimation of anticipated voter turnout on Election Day allows for adequate deployment of poll workers qualified to process same-day registrations on that day.

Milwaukee, Wisconsin, one of the largest EDR jurisdictions in the nation, assigns registrars to each of its 335 wards in peak election years. It also assigns new registrants to voting areas separate from those assigned to preregistered voters to avoid long lines and voter frustration. When voters arrive at the polls, a “greeter” approaches and directs them to the appropriate area, depending on whether they already are registered or are seeking to register at the polling place. Election officials observe that they have prevented excessive congestion, even in metropolitan locations, by structuring the physical environment of the polling place in this way. New Hampshire and Maine respond to potential staffing problems by assigning an additional election judge to each polling site on Election Day.<sup>86</sup>

Public education is another component of successful EDR systems. Maine and Minnesota make considerable efforts to advise their citizens about the process of voter registration and the mechanics of voting. Milwaukee election officials publicize information on how EDR works on television and radio, and on billboards. They also seek to avoid Election Day confusion through advance notice of lists of identification accepted for voter registration.<sup>87</sup>

Poll worker training is the third element of successful EDR systems. Poll workers, election clerks, and registrars must all be fully versed in state registration and voting regulations. For example, Maine requires that all its clerks and registrars

receive such training every two years.<sup>88</sup> Wyoming provides 1.5 days of training for every poll worker two weeks before each election. And all election workers in Minnesota receive at least two hours of training every two years.<sup>89</sup>

### C. THE IMPACT OF EDR ON REDUCING NEED FOR PROVISIONAL BALLOTS

Another EDR benefit frequently cited by election officials is that it nearly obviates the need for provisional balloting. Under the Help America Vote Act, voters whose names do not appear on the voter rolls on Election Day but who believe themselves to be registered to vote cannot be turned away without being given the opportunity to cast a ballot. They must be issued a provisional ballot.<sup>90</sup> Election authorities thereafter comb their registration records to determine if an error was made and such individuals were indeed duly registered, and whether the provisional ballots should be counted, under prevailing state law, and added to election tallies.<sup>91</sup>

The process of investigating the validity of provisional votes can be laborious and time-consuming. Over 1.9 million provisional ballots were cast in the 2004 general election.<sup>92</sup> Much of this strain on election administrators is avoided with EDR. Individuals who find themselves left off the voter rolls simply reregister at the polls and cast a regular ballot. Questions about an individual's eligibility can be resolved at the time of registration. According to the county clerk in Anoka County, Minnesota,

[Election Day Registration] provides us with the most up-to-date information on the voter. . . . It assures that individuals are voting for offices and districts where they live on Election Day and it eliminates the need for provisional ballots because we can resolve any voter registration issues that day.<sup>93</sup>

Even more importantly, EDR avoids the disappointing results with provisional ballots experienced by many voters since provisional balloting was implemented nationwide in 2004: Over one in three of the nearly 2 million provisional ballots cast were not counted in the 2004 presidential election. Thirteen states each rejected over 10,000 provisional ballots; 23 states each counted less than 50 percent of provisional ballots.<sup>94</sup>

### D. EDR AND ELECTION COSTS

Policy makers frequently ask how EDR affects the overall cost of election administration. Accurate calculation of the incremental expense of registering voters at polling places on Election Day is difficult, given inadequate record keeping and the fact that EDR costs are embedded in state, county, and municipal budgets. Nevertheless, election officials in EDR states do not report substantially higher election administration costs because of EDR.<sup>95</sup>

Where identified by EDR election clerks in Dēmos's 2007 survey,<sup>96</sup> the marginal costs of EDR mainly involved the training and deployment of additional staff—more poll workers or election judges on Election Day, and/or more clerical workers in the postelection period to add the new names and data to the permanent voter rolls.

The deputy clerk of a mid-sized New Hampshire city reported that EDR required one or two extra registrars per polling place (at \$15 an hour or \$125 a day). The clerk of one of Maine's largest jurisdictions figured that Election Day Registration costed \$39,000. In a New Hampshire community of 23,000 people, the city clerk estimated the postelection cost at about \$1,700—or 10 hours a week of service over 14 weeks on the part of a worker earning \$12 an hour. In Idaho, the elections administrator of a county with a population of about 50,000 projected one or two extra persons working full-time for a week and a half. A Wisconsin official in a municipality of about 70,000 spoke of spending about \$5,000 on temporary workers to process EDR registrants after the November 2006 election.<sup>97</sup>

The additional expenses reported in some EDR states may simply replace other costs that would otherwise be incurred if registration were not available on Election Day. In non-EDR states, data entry for new registrations before Election Day often requires hiring temporary workers or paying overtime to in-house staff, particularly when last-minute registrations pour in at the close of preelection deadlines. The same work goes on in EDR states, except that it is undertaken after the election and without the time pressures that can cause data entry errors. A Minnesota election administrator observed that EDR may be the more cost-effective alternative. Election judges who administer voter registration on Election Day are paid less than the in-house staff that handles voter registration throughout the year.<sup>98</sup>

EDR can also lead to more efficient election administration. An Idaho elections director who has worked on elections both before and since EDR was enacted in her state has found voter lists to be more accurate with EDR. Trained elections staff can carefully process voter registration applications submitted on Election Day without the frenzy associated with the close of voter registration periods. Before EDR, her county had to borrow staff from other county offices when a crush of voter registration applications arrived on the registration deadline. The temporary staff's inexperience in inputting voter information showed. Many errors were made in the preparation of voter lists used on Election Day. Eligible voters whose names could not be found there lost their opportunity to cast a ballot.<sup>99</sup>

EDR's reduction of the costs and delays involved in handling provisional ballots should figure in EDR cost assessments. As has been noted, EDR reduces the need for provisional ballots, which require separate and potentially time-consuming examination and handling during the vote counting process. Incremental costs associated with EDR may therefore be offset by the reduced need for provisional ballots in EDR states.

## **E. RESULTS OF 2007 DÉMOS SURVEY OF ELECTION ADMINISTRATORS IN EDR STATES**

Debates about the efficacy of implementing EDR are to be expected when policy makers and election administrators are called on to consider adoption of EDR. In

this context, the experience of local election clerks in the six states with a long track record of administering EDR is particularly instructive. Dēmos initiated a survey of 49 election officials in Idaho, Maine, Minnesota, New Hampshire, Wisconsin, and Wyoming over several months in 2007. The administrators were representative of election leaders across the six states. Targeted jurisdictions ranged in size from 520,000 to fewer than 600 residents; several had significant student populations. The survey addressed EDR's costs, administrative burdens, and security.<sup>100</sup>

Clerks reported that the incidental expense of administering EDR was minimal. Where costs rise, they typically involve the expense of deploying an extra poll worker at each precinct to handle registration, although this may be offset by reduced costs for pre-deadline processing.<sup>101</sup> The elections clerk in Portland, Maine, one of the larger EDR jurisdictions, saw a slight rise in election costs, but found it to be outweighed by the benefits of allowing more city residents to participate in local elections. In her words, "it is a little more expensive, but it's worth it."<sup>102</sup>

The six states also appear to handle registrations on Election Day without disrupting the voting process. Most such registrants are directed to a separate area for processing voter registration applications, and thereafter join all other voters in line to receive a ballot.<sup>103</sup> A minority of those surveyed reported that administering registrations at the polls can complicate Election Day operations. But most were quick to add that these challenges are more than outweighed by the benefit to voters.<sup>104</sup>

Finally, the election clerks confirmed the overall security of EDR elections, consistent with the results documented in voter fraud studies.<sup>105</sup> The vast majority reported that current fraud-prevention measures are sufficient to protect the integrity of their elections. Security measures may include proof of identity and residency requirements for persons registering for the first time on Election Day, address confirmation mailings via nonforwardable postcards to EDR registrants after Election Day, criminal penalties for committing voter fraud, and the use of statewide voter registration databases to prevent multiple registrations.<sup>106</sup> An election administrator in a populous Minnesota jurisdiction noted that he has never seen an organized attempt at mass voter fraud in his 22 years on the job.<sup>107</sup> A Maine legislator attested to her state's record of secure elections at a legislative hearing in Connecticut: As of April 2007, no substantiated case of voter fraud due to EDR had ever been reported in Maine.<sup>108</sup>

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## VI. Conclusion

For proponents of widespread and inclusive voter participation, the 21st century may be a time to go back to the future. Just as the adoption of restrictive preelection registration deadlines constricted the participation of the eligible electorate in the late 19th and early 20th centuries, so may the return to EDR help expand it in our time. EDR is a proven reform that increases participation, reduces many of

the polling-place problems that have plagued the past several election cycles, and has been successfully administered without fraud for over 30 years. Its more widespread adoption may be expected to bring hundreds of thousands of new voters to the polls in future elections. Although no one reform will end the phenomenon of nonvoting, states that wish to make voting as accessible and widespread as possible should embrace EDR as an important step to a more inclusive democracy.

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## Notes

1. Michigan, for example, adopted its 30-day registration deadline in 1973. *See* MICH. COMP. LAWS ANN. §168.497 (historical note). Mississippi has imposed a 30-day deadline since 1972, when a federal court struck down the state's previous four-month preelection registration deadline. *See* *Ferguson v. Williams*, 343 F. Supp. 654 (N.D. Miss. 1972); *see* MISS. CODE ANN. §23-15-11 (setting forth current 30-day deadline). Louisiana's current 30-day advance registration requirement appears to date at least back to 1942, *see* LA. REV. STAT. ANN. §18:135, Op. Att'y Gen. 1942-44, p. 490.

2. Indeed, a study by the Caltech-MIT Voting Technology Project estimates that between 1.5 and 3 million votes were lost in the disputed 2000 presidential election because of problems with the voter registration process. CALTECH-MIT VOTING TECHNOLOGY PROJECT, *VOTING: WHAT IS, WHAT COULD BE* 8 (July 2001). As two former secretaries of state have noted, "Election officials hate having to tell a citizen who has waited for hours on line that he or she is not on the list and cannot vote. On Nov. 7 [2006], this happened over and over again in non-EDR states, but rarely happened in Maine, New Hampshire, Minnesota, Wisconsin, Wyoming, Idaho and Montana." Miles S. Rapoport & Mike Cooney, *Citizens Count with Election Day Registration*, reprinted in *DÉMOS, VOTERS WIN WITH ELECTION DAY REGISTRATION: A SNAPSHOT OF ELECTION 2006* (2007) [hereinafter *VOTERS WIN WITH ELECTION DAY REGISTRATION*], <http://www.demos.org/pubs/voters%20Win.pdf>.

3. IDAHO CODE ANN. §34-408A; 21-A ME. REV. STAT. ANN. tit. 21-A, §122.4; MINN. STAT. §201.061; N.H. REV. STAT. ANN. §654:7-a; WIS. STAT. §6.55; WYO. STAT. ANN. §22-3-103. In addition, Rhode Island allow Connecticut and EDR at the voter's city or town hall solely for elections for president and vice president. CONN. GEN. STAT. §9-158(c) and R.I. GEN. LAWS §17-1-3. Maine's EDR program requires election-day registrations to be accepted at the registrar's office, and does not specifically require registration to be made available at each polling place, *see* ME. REV. STAT. ANN. tit. 21-A §122.4; but in practice, about 80 percent of polling places in Maine allow polling place registration (source: interview with Maine Secretary of State office, Oct. 26, 2007).

States that allow EDR generally maintain a cutoff or closing date for applications from persons other than those registering on Election Day. For example, in Maine, mail-in or third-party applications must be received 21 days before the election in order for the applicant's name to appear on the voter roll for that election; an individual not registered by that date must either register in person at the registrar's office or at the polling place on Election Day. ME. REV. STAT. ANN. tit. 21-A, §121.1-A.

4. IOWA CODE §48A.7A; MONT. CODE ANN. §13-2-304; N.C. GEN. STAT. §163-82.6(c). Montana’s version of EDR does not allow registration at polling places, but instead allows citizens to register and vote at the offices of county election administrators after the close of the voter registration deadline (30 days before the election), including on Election Day.

5. The terms “Election Day Registration” and “Same Day Registration” are sometimes used interchangeably, but there may be differences between the policies. “Same Day Registration” is the broader term because it encompasses systems that allow voters to register and vote on the same day, even if—as in the case of North Carolina—that opportunity is provided only at early voting sites, and not on Election Day itself. Idaho, Iowa, Maine, Minnesota, Montana, Wisconsin, and Wyoming allow voters to register and vote on Election Day itself, and can more accurately be referred to as EDR states. This article generally refers to EDR as the preferred policy option that offers the greatest opportunity for surmounting the barriers posed by preelection registration deadlines.

6. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 151 (2000) [hereafter KEYSSAR]. A few states had begun imposing registration requirements earlier in the 19th century; Massachusetts was the first, with a law enacted in 1801. *Id.* at 152.

7. *Id.*

8. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON’T VOTE* 88 (1988) [hereafter PIVEN & CLOWARD].

9. KEYSSAR, *supra* note 6, at 312. According to one review of the literature, “Historians of voting in the United States generally agree that registration requirements were instituted at least as much ‘to shape the social character of the eligible electorate’ as to control fraud[.]” Stephen Knack & James White, *Election-Day Registration and Turnout Inequality*, 22(1) *POL. BEHAVIOR* 29, 29 (2000) [hereafter KNACK & WHITE] (quoting Paul Kleppner, *Who Voted?* 9(1982)); *see also* J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910* (1974).

10. *See People v. Hoffman*, 116 Ill. 587, 5 N.E. 596, 613 (Ill. 1886) (describing 1885 Illinois voter registration law).

11. *State v. Butts*, 31 Kan. 537 (1884) (describing 1879 Kansas voter registration law).

12. PIVEN & CLOWARD, *supra* note 8, at 90. As Piven and Cloward observe, many of the registration systems initially adopted by states were “nonpersonal” systems that “placed the burden of compiling lists of eligible voters on town or county officials.” *Id.* Such registration laws were far less onerous than the systems of “personal registration” that later became the norm, requiring voters to present themselves at specific times and places for registration. *Id.*

13. *Id.*

14. KEYSSAR, *supra* note 6, at 152–62; PIVEN & CLOWARD, *supra* note 8, at 89–94.

15. *See* KEYSSAR, *supra* note 6, at 158; PIVEN & CLOWARD, *supra* note 8, at 94.

16. One of the earliest such cases was *Dells v. Kennedy*, 49 Wis. 555, 6 N.W. 246 (Wis. 1880). In 1864, Wisconsin enacted a registry law requiring advance voter registration in cities of over 25,000 inhabitants. As described in the dissenting opinion, 6 N.W. at 381, the 1864 law included an exception for eligible voters who could prove by affidavit on election day that they had been unable to appear before the registrar on the day provided for



correcting errors to the published list of voters. An 1879 law eliminated this exception, and barred voting by anyone not on the register, unless the person had first become a resident of the election district after the registration closing date. The Wisconsin Supreme Court struck down the 1879 registry law, holding that the legislature could not deny the right to vote to a citizen otherwise eligible to vote under the qualifications set forth in the Wisconsin Constitution, solely because, through no fault of his own, the voter was unable to appear in person prior to the election to correct the published list. The “vice” of the law, the court said, was that

[T]he law disfranchises a constitutionally qualified elector, without his default or negligence, and makes no exception in his favor, and provides no method, chance or opportunity for him to make proof of his qualifications on the day of election, the only time, perchance, when he could possibly do so. This law undertakes to do what no law can do, and that is to deprive a person of an absolute right without his laches, default, negligence or consent; and, in order to exercise and enjoy it, to require him to accomplish an impossibility.

*Dells v. Kennedy*, 6 N.W. at 247. In effect, the Wisconsin Supreme Court established a state constitutional right for a voter to establish his qualifications on election day, at least if he could present a valid excuse for not establishing his qualifications in the prescribed manner prior to the election. *See also* *State ex rel. Stearns v. Connor*, 22 Neb. 265, 34 N.W. 499 (1887) (Nebraska registry law violated Nebraska Constitution by providing only four days during which voters must appear in person and establish their qualifications to register, and allowing no exception for eligible voters who were unable to appear on one of the four registration days); *Daggett v. Hudson*, 43 Ohio St. 548, 3 N.E. 538 (1885) (Ohio law allowing registration only seven days during the year, and providing no exception for eligible voters unable to appear on those days, violated Ohio Constitution).

17. *Pope v. Williams*, 193 U.S. 621, 633 (1904). The Pope Court acknowledged that the U.S. Constitution prohibited “discrimination . . . between individuals” in state elections, *id.* at 632, and that the right to vote for members of Congress was not derived solely from state law, *id.* at 633, but regarded the details of state registration laws as otherwise outside the purview of the federal courts. The doctrine that the 14th Amendment conferred no direct right to vote in state elections had already been established in cases such as *Minor v. Happersett*, 88 U.S. 162, 21 Wall. 162 (1874), in which the Court held that denial of the vote to women did not violate the 14th Amendment.

18. *Drueding v. Devlin*, 380 U.S. 125 (1965).

19. P.L. No. 89-110, 79 Stat. 445 (codified as amended at 424 S.C. §§ 1971, 1973-1973bb-1).

20. *Bishop v. Lomenzo*, 350 F. Supp. 576, 586 (E.D.N.Y. 1972) (three-judge court) (quoting Sen. Barry Goldwater).

21. 42 U.S.C. § 1973aa-1(c); (d).

22. *Bishop*, 350 F. Supp at 584-85.

23. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

24. *Dunn v. Blumstein*, 405 U.S. 330 (1972).

25. *Id.* at 336-37, 345-58.

26. *Id.* at 342, 347–49.

27. See *Ferguson v. Williams*, 343 F. Supp. 654 (N.D. Miss. 1972) (striking down Mississippi's four-month preelection registration deadline and imposing 30-day deadline as interim measure, citing *Dunn*); cf. *In re Opinion of Justices of Supreme Judicial Court*, 303 A.2d 452 (Me. 1973) (holding that under *Dunn's* analysis even a 30-day residency requirement for voting would violate the 14th Amendment, because Maine did not require 30 days to process registrations).

28. *Marston v. Lewis*, 410 U.S. 679 (1973); *Burns v. Fortson*, 410 U.S. 686 (1973).

29. Last day to register in states that do not allow election-day or same-day registration: Alabama, 11 days before election, ALA. CODE § 17-3-50(a); Alaska, 30 days before election, ALASKA STAT. § 15.07.070; Arizona, 29 days before election, ARIZ. REV. STAT. § 16-120; Arkansas, 30 days before election, ARK. CODE ANN. § 7-5-201; California, 15 days before election, CAL. ELEC. CODE § 2107(a); Colorado, 29 days before election, COLO. REV. STAT. § 1-2-201; Connecticut, 7 days before election, CONN. GEN. STAT. § 9-17(a), but may register on election day to vote for President and Vice-President, CONN. GEN. STAT. § 9-158c; Delaware, 20 days before election, DEL. CODE ANN. tit. 15, § 2011; District of Columbia, 30 days before election, D.C. CODE ANN. § 1-1001.07(g)(1); Florida, 29 days before election, FLA. STAT. ch. 97-109; Georgia, fifth Monday before election, GA. CODE ANN. § 21-2-224(a); Hawaii, 30 days before election, HAW. REV. STAT. §§ 11-16(a), 11-24(a); Illinois, 28 days before election, 10 ILL. COMP. STAT. 5/4-6, 5/5-5, 5/5-17, 5/6-29; Indiana, 29 days before election, IND. CODE §§ 3-7-33-3, 3-7-33-4; Kansas, 15 days before election, KAN. STAT. ANN. § 25-2311; Kentucky, 28 days before election, KY. REV. STAT. ANN. § 116.045(2); Louisiana, 30 days before election, LA. REV. STAT. ANN. § 18:135; Maryland, 21 days before election, MD. CODE ANN., ELEC. LAW § 3-302(a); Massachusetts, 20 days before election, MASS. GEN. LAWS ch. 51, § 26; Michigan, 30 days before election, MICH. COMP. LAWS ANN. § 168.497, 168.500d; Mississippi, 30 days before election, MISS. CODE ANN. §§ 23-15-11, 23-15-47; Missouri, fourth Wednesday before election, MO. REV. STAT. § 115.135(1); Nebraska, second Friday preceding election at office of the election commissioner or county clerk, NEB. REV. STAT. § 32-302, third Friday preceding election for other sources, §§ 32-306, 32-308, 32-321; Nevada, fifth Sunday preceding the election by mail, third Tuesday preceding the election in person, NEV. REV. STAT. § 293.560; New Jersey, 21 days before election, N.J. STAT. ANN. § 19:31-6; New Mexico, 28 days before election, N.M. STAT. ANN. § 1-4-8; New York, 25 days before election, N.Y. ELEC. LAW § 5-210; Ohio, 30 days before election, OHIO REV. CODE ANN. § 3503.01; Oklahoma, 25 days before election, OKLA. STAT. tit. 26, § 4-110.1; Oregon, 21 days before election, OR. REV. STAT. § 247.025; Pennsylvania, 30 days before election, 25 PA. CONS. STAT. § 1326; Rhode Island, 30 days before election, but may register on election day to vote for president and vice president, R.I. GEN. LAWS § 17-1-3; South Carolina, 30 days before election, S.C. CODE ANN. § 7-5-150; South Dakota, postmarked 30 days before election, or received 15 days before election, S.D. CODIFIED LAWS § 12-4-5; Tennessee, 30 days before election, TENN. CODE ANN. § 2-2-109; Texas, 30 days before election, TEX. ELEC. CODE ANN. § 13.143; Utah, 30 days before election to be eligible for early voting (until 14 days before election), 1953 Utah Laws 20A-2-102.5, 15 days before election to be eligible for election-day voting, 1953 Utah Laws 20A-2-201; Vermont, the Wednesday preceding election, VT. STAT. ANN. tit. 17, § 2144; Virginia, 29 days

before election, VA. CODE ANN. §24.2-414; Washington, 30 days before election, WASH. REV. CODE §29A.08.140, or 15 days if applying in person, §29A.08.145; West Virginia, 21 days before election, W. VA. CODE §3-2-6.

As noted above, eight states now allow EDR (Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Wisconsin, and Wyoming), and North Carolina allows same-day registration at early voting sites until three days prior to the election. *See* sources at notes 3 & 4, *supra*. North Dakota does not require registration as a condition of voting. N.D. CENT. CODE §16.1-01-04(1) (list of voter qualifications does not include registration); N.D. CENT. CODE §16.1-01-05.1 (procedure for adding or transferring voter names when voter moves to different precinct “may not be used to require the registration of electors”).

30. In 2004, groups mounted a constitutional challenge to Connecticut’s 14-day pre-election registration deadline, arguing that the burden of lengthy preelection deadlines can no longer be justified by the needs of election administration or as anti-fraud measures. The challenge was unsuccessful, although this was no doubt influenced by Connecticut’s decision to reduce the deadline to seven days, the shortest of any state that required preelection registration, while the case was under litigation. *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119 (D. Conn. 2005). Plaintiffs in Florida have mounted a somewhat narrower challenge to Florida’s 29-day preelection deadline, arguing that Florida’s refusal to allow a grace period for a voter to correct a deficient voter registration application that is rejected after the deadline places an unconstitutional burden on the right to vote. The district court denied the state’s motion to dismiss, observing that “Defendants have not presented this Court with any justification for the state’s legislative judgment that a twenty-nine day cutoff, without a grace period, is necessary to achieve the state’s legitimate goals.” *Diaz v. Cobb*, 475 F. Supp.2d 1270, 1277 (S.D. Fla. 2007). The case remains pending.

31. *See* KEYSSAR, *supra* note 6, at 312.

32. Political scientists Craig Leonard Brians and Bernard Grofman attribute the adoption of EDR by Maine, Minnesota, and Wisconsin within a three-year period in large part to a national Democratic Party campaign for EDR and mail-in voter registration. Democrats aimed to boost turnout voting among people of color, the poor, and urban residents, according to these researchers. Craig Leonard Brians & Bernard Grofman, *When Registration Barriers Fall, Who Votes? An Empirical Test of a Rational Choice Model*, 99 PUB. CHOICE 161, 169 (1999) [hereinafter Brians & Grofman 1999]. In contrast, Joan Growe, who served as Minnesota secretary of state from 1974 to 1998 and sat in the state legislature when EDR legislation was adopted, does not recall any external political push for EDR. She ties EDR’s enactment to a desire among Minnesota policymakers for consistent statewide voter registration procedures. Different Minnesota counties previously had maintained their own unique systems. Preregistration was not required in some smaller jurisdictions; voters merely signed in at the polls on Election Day. Other jurisdictions required that individuals register to vote 30 days before an election. Telephone interview with Joan Growe, former Minnesota Secretary of State, Minneapolis, MN (Oct. 24, 2007). In Maine, after the state’s Supreme Judicial Court held that a proposed 30-day durational residency requirement for voting was unnecessarily lengthy and would be unconstitutional, the legislature responded by establishing EDR. *In re* Opinion of Justices of Supreme Judicial Court, 303 A.2d 452 (Me. 1973); *see*

ELIMINATING BARRIERS TO VOTING: ELECTION DAY REGISTRATION 19 (report on Nov. 30, 2001, conference cosponsored by Brennan Center for Justice at N.Y.U. School of Law & Dēmos) [hereafter ELIMINATING BARRIERS TO VOTING], [http://www.demos.org/pubs/EDR\\_report\\_113001.pdf](http://www.demos.org/pubs/EDR_report_113001.pdf).

33. Stephen Knack, *Election-Day Registration: The Second Wave*, 29(1) AM. POL. Q. 65, 68 (2001) [hereafter Knack 2001]. Currently, about 80 percent of polling places in Maine allow polling place registration, while the remaining jurisdictions still require voters who wish to register on Election Day to do so at the local registrar's office before proceeding to their assigned polling place to cast a ballot. See note 3, *supra*.

34. Knack 2001, *supra* note 33, at 67 n.1; POLICY MATTERS OHIO, ELECTION DAY REGISTRATION: EXPANDING THE OHIO VOTE 5 (July 2003), [http://www.policymattersohio.org/pdf/EDR\\_report.pdf](http://www.policymattersohio.org/pdf/EDR_report.pdf).

35. Knack 2001, *supra* note 33, at 67 n.1.

36. See *infra* Part IV for a discussion of EDR and increased voter turnout.

37. Universal Voter Registration Act of 1977, S. 1072, 95th Cong. (1977), H.R. 5400, 95th Cong. (1977).

38. FRANCES FOX PIVEN & RICHARD A. CLOWARD, WHY AMERICANS STILL DON'T VOTE 188 (2000) (citing Harvard/ABC News Symposium (1984:27)).

39. Telephone interview with Lloyd Leonard, Senior Director, League of Woman Voters, Washington, DC (Oct. 25, 2007). States were variously opposed to the NVRA because of federalism concerns, resistance to offering voter registration at state departments of motor vehicles, and the need to standardize intrastate election administration among counties, towns, and other localities. Telephone interview with Jim Dickson, Vice President, Government Affairs, American Association of People with Disabilities, Washington, DC (Oct. 24, 2007).

40. Pub. L. No. 103-31 (codified at 42 U.S.C §1973gg) 107 Stat. 77. Sec. 4(b)(2) of the NVRA provides that the statute will not apply to states that do not require registration or that allow voters to register to vote at polling places at the time of voting for in a general election for federal office. 42 U.S.C. §§1973gg-2(b). See generally IDAHO CODE ANN. §34-408A; N.H. REV. STAT. ANN. §654:7-a; WYO. STAT. ANN. §22-3-103.

41. IDAHO CODE ANN. §34-408A; N.H. REV. STAT. ANN. §654:7-a; WYO. STAT. ANN. §22-3-103. The impact of EDR on turnout in these states and in others is discussed in Part IV, *infra*.

42. CALTECH-MIT VOTING TECHNOLOGY PROJECT, VOTING: WHAT IS, WHAT COULD BE 8 (July 2001).

43. See, e.g., ELIMINATING BARRIERS TO VOTING, *supra* note 32.

44. Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont and Washington. As noted earlier, six states already allowed EDR as of 2000, while a seventh, North Dakota, had no statewide registration requirement (and still does not). N.D. CENT. CODE §§ 16.1-01-04(1), 16.1-01-05.1.

45. California Election Day Voter Registration Initiative (2002); Colorado Voter Initiative (2002).

46. Letter from Connecticut Governor John G. Rowland to Connecticut Secretary of State Susan Bysiewicz (July 9, 2003) (on file with Dēmos).

47. MONT. CODE ANN. §13-2-304.

48. Turnout among eligible Montana voters increased by more than 8 and 4 percentage points from the previous two midterm elections, respectively (2002, 1998). U.S. Election Project, *2006 Voting-Age and Voting-Eligible Population Estimates; 2002 Voting-Age and Voting-Eligible Population Estimates and Voter Turnout; 1998 Voting Age and Voting Eligible Population Estimates and Voter Turnout*, available at [http://elections.gmu.edu/voter\\_turnout.htm](http://elections.gmu.edu/voter_turnout.htm).

49. E-mails from Bowen Greenwood, Press Secretary, Montana Secretary of State Brad Johnson, to Regina Eaton, Deputy Director, Democracy Program, Dēmos: A Network for Ideas & Action (Sept. 6, 2007, 19:16 PST); e-mail from Bowen Greenwood, Press Secretary, Montana Secretary of State Brad Johnson, to Steve Carbó, Senior program Director, Dēmos: A Network of Ideas & Action (Sept. 17, 2007, 10:27 EXST) (onfile with Dēmos). Montana previously closed voter reistration 30 days before an election. The state now allows continued voter registration throughout most of the 30-day period leading up to an election (voter registration closes from Noon to 5 p.m. on the day before an election) and on election day itself (on file with Dēmos).

50. California, Connecticut, Hawaii, Illinois, Iowa, Massachusetts, Nevada, New Mexico, North Carolina, Oregon, Utah, Vermont, and Washington.

51. IOWA CODE §48A.7A; N.C. GEN. STAT. §163-82.6(c). See Steven Carbó, DĒMOS: A NETWORK FOR IDEAS & ACTION, ANATOMY OF A SUCCESSFUL CAMPAIGN FOR ELECTION DAY REGISTRATION IN IOWA (Winer 2008) at <http://www.demos.org/pubs/iowaanatomy.pdf>; DĒMOS: A NETWORK FOR IDEAS & ACTION, THE ENACTMENT OF SAME DAY REGISTRATION IN NORTH CAROLINA (forthcoming Feb. 2008) for discussions of the enactment of EDR/SDR legislation in those two states.

52. H.R. 2457, 110th Cong. (2007).

53. Oversight Hearing on Election Day Registration and Provisional Voting: Before the Subcommittee on Elections, 110th Cong. (Nov. 9, 2007), available at [http://ch.house.gov/indep.php?option=com\\_content&task=view&id=349](http://ch.house.gov/indep.php?option=com_content&task=view&id=349).

54. S. 804, 110th Cong. (2007); H.R. 1381, 110th Cong. (2007).

55. *Supra* note 53; Veronica Gillespie, Democratic Elections Counsel, Senate Committee on Rules and Administration, Washington, DC (Oct. 23, 2007).

56. U.S. Election Project, *2004 Voting-Age and Voting-Eligible Population Estimates and Voter Turnout*, available at [http://elections.gmu.edu/Voter\\_Turnout\\_2004.htm](http://elections.gmu.edu/Voter_Turnout_2004.htm). Professor Michael McDonald of George Mason University calculates higher U.S. voter turnout rates than those generated by many other sources because he has developed measurements that seek to adjust for noneligible segments of the electorate such as noncitizens and prison populations. See U.S. Election Project, *Presidential Turnout Rates for Voting-Age Population (VAP) and Voting-Eligible Population (VEP)* (graph), available at [http://elections.gmu.edu/turnout\\_rates\\_graph.htm](http://elections.gmu.edu/turnout_rates_graph.htm).

57. PIVEN & CLOWARD, *supra* note 8, at 4–5, KEYSSAR, *supra* note 6, at 320; Robert A. Jackson, Robert D. Brown & Gerald C. Wright, *Registration, Turnout and the Electoral Representativeness of U.S. State Electorates*, 26(3) AM. POL. Q. 259, 260 (1998) [hereafter Jackson, Brown & Wright].

58. *Id.*; see also SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, *VOICE AND INEQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 233, 522–24 (1995).

59. The question of declining voter turnout in the United States is “one of the most intensively studied issues in political science,” Knack 2001, *supra* note 33, at 65. It is of course beyond the scope of this chapter to address this vast literature. Registration barriers are but one piece of the puzzle.

60. RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, *WHO VOTES?* (1980) (footnote omitted).

61. The Gallup Poll, *The Nine Weeks of Election 2000* (cited in *VOTERS WIN WITH ELECTION DAY REGISTRATION*, *supra* note 2, at n.13).

62. PIVEN & CLOWARD, *supra* note 8, at 17–18. For example, in the United Kingdom, “registration officers either send a form to every residential address or conduct a door-to-door canvass.” John Mark Hansen, Task Force on the Federal Election System, *Voter Registration 3*, in *TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS* (Task Force Reports to Accompany the Report of the National Commission on Election Reform) (July 2001), [http://webstorage3.mcpa.virginia.edu/commissions/comm\\_2001\\_taskforce.pdf](http://webstorage3.mcpa.virginia.edu/commissions/comm_2001_taskforce.pdf). The National Voter Registration Act of 1993 (NVRA) took a partial step toward more active government responsibility for registration in the United States by requiring that states must treat an application for a driver’s license as an application for voter registration (unless the applicant declines), 42 U.S.C. § 1973gg-3, and that states must offer voter registration at public assistance offices, offices providing disability services, and other agencies. 42 U.S.C. § 1973gg-5. However, for agencies more likely to be used by low-income persons, such as public assistance agencies, the NVRA did not require the same type of integrated registration as is provided to driver’s license applicants, instead requiring that a mail-in voter registration application be provided along with the public assistance application. *Id.* This seemingly subtle difference has made compliance with voter registration responsibilities at public assistance agencies less reliable, and indeed many states have largely ignored those responsibilities in recent years, hampering the NVRA’s goal of decreasing long-standing socioeconomic disparities in voter registration in the United States. See Brian Kavanaugh, Lucy Mayo, Steve Carbó, and Mike Slater, *TEN YEARS LATER, A PROMISE UNFULFILLED: THE NATIONAL VOTER REGISTRATION ACT IN PUBLIC ASSISTANCE AGENCIES, 1995–2005* (Sept. 2005), available at <http://www.demos.org/pubs/NVRA91305.pdf>.

63. For a detailed discussion of how restrictions on the franchise can shape the strategies of political parties and other political actors in ways that reinforce participation disparities in the electorate, see, e.g., PIVEN & CLOWARD, *supra* note 8, at 17–18, 103–12.

64. Knack & White, *supra* note 9, at 30 (emphasis omitted); see also R. MICHAEL ALVAREZ & JONATHAN NAGLER, *DÉMOS: A NETWORK OF IDEAS & ACTION, ELECTION DAY VOTER REGISTRATION IN IOWA 4* (2007) [hereafter ALVAREZ & NAGLER], <http://demos.org/pubs/iowa.pdf> (“One of the more robust conclusions in the study of turnout for the last 35 years has been that making the registration and voting process easier will increase turnout among eligible voters.”).

65. See, e.g., *VOTERS WIN WITH ELECTION-DAY REGISTRATION*, *supra* note 2, at 1.

66. Knack 2001, *supra* note 33; Knack & White, *supra* note 9; Craig L. Briens & Bernard Grofman, *Election Day Registration’s Effect on U.S. Voter Turnout*, 82(1) *SOC. SCI. Q.* 171 (Mar. 2001); Mark J. Fenster, *The Impact of Allowing Day of Registration Voting on Turnout in U.S. Elections from 1960 to 1992*, 22(1) *AM. POL. Q.* 74 (1994). But see James D. King & Rodney A.

Wambeam, *Impact of Election Day Registration on Voter Turnout: A Quasi-Experimental Analysis*, 14 POL'Y STUD. REV. 263 (1995/96) (finding little turnout increase). King and Wambeam's selection of "control" states (that is, states that did not enact significant registration reforms prior to 1994) to compare with EDR states raises questions. For example, Michigan was paired as a control with Minnesota, although Michigan implemented a "motor-voter" registration program prior to 1990. See Knack 2001, *supra* note 33, at n.7.

67. R. MICHAEL ALVAREZ, JONATHAN NAGLER & CATHERINE H. WILSON, DĒMOS: A NETWORK OF IDEAS & ACTION, MAKING VOTING EASIER: ELECTION DAY REGISTRATION IN NEW YORK 1 (2004) [hereafter ALVAREZ, NAGLER, & WILSON], [http://www.demos.org/pubs/EDR%20-%20NY%20report%20b&w%20\\_%20Aug%202004.pdf](http://www.demos.org/pubs/EDR%20-%20NY%20report%20b&w%20_%20Aug%202004.pdf); R. MICHAEL ALVAREZ & STEPHEN ANSOLABEHRE, DĒMOS: A NETWORK OF IDEAS & ACTION, CALIFORNIA VOTES: THE PROMISE OF ELECTION DAY REGISTRATION 13 (2002), [http://www.demos.org/pubs/california\\_votes.pdf](http://www.demos.org/pubs/california_votes.pdf).

68. R. Michael Alvarez, Stephen Ansolabehere & Catherine Wilson, *Election Day Voter Registration in the United States: How One-Step Voting Can Change the Composition of the American Electorate* 16 (Caltech-MIT Voting Technology Project Working Paper, 2002) [hereafter ALVAREZ, ANSOLABEHRE, & WILSON], available at [http://vote.caltech.edu/media/documents/wps/vtp\\_wp5.pdf](http://vote.caltech.edu/media/documents/wps/vtp_wp5.pdf) (estimating that if EDR had been implemented nationally for the 2000 election, overall turnout would have increased by about 8 percentage points, with traditionally underrepresented groups showing the highest gains in registration); Knack & White, *supra* note 9 (EDR improves turnout for youth and geographically mobile); Jackson, Brown & Wright, *supra* note 57, at 268 ("restrictive registration closing dates present a greater hurdle to the poor than to the rich and, similarly, to the less educated than to the highly educated"); Benjamin Highton, *Easy Registration and Voter Turnout*, 59(2) J. POL. 565 (1997) (states with EDR or with no registration requirement have reduced education-based disparities in turnout compared to states that do not have EDR, although EDR does not eliminate the effect of educational level on turnout); see also Mary Fitzgerald, *Easier Voting Methods Boost Youth Turnout* (Circle Working Paper, 2003) [hereafter Fitzgerald] (EDR increases youth turnout by 14 percentage points in presidential elections; youth are much more likely to be contacted by a political party in EDR states than in non-EDR states), available at <http://www.youngvoterstrategies.org/index.php?tg=fileman&idx=get&inl=1&id=1&gr=Y&path=Research&file=Easy+Voting+Methods+Boost+Youth+Turnout.pdf>; but see Briens & Grofman 1999, *supra* note 32 (EDR benefits middle-income voters more than upper-income or low-income voters); Adam Berinsky, *The Perverse Consequences of Electoral Reform in the United States*, 33 AM. POL. RES. 471 (2005) [hereafter Berinsky], available at <http://apr.sagepub.com/cgi/reprint/33/4/471.pdf> (literature review of studies assessing impact of electoral reforms including EDR, arguing that reforms do not eliminate existing turnout disparities, and some may exacerbate them).

69. ALVAREZ, NAGLER & WILSON, *supra* note 67, at 1.

70. ALVAREZ & NAGLER, *supra* note 64, at 1.

71. Briens & Grofman 1999, *supra* note 32; Berinsky, *supra* note 68.

72. Alvarez, Ansolabehere & Wilson, *supra* note 68; Jackson, Brown & Wright, *supra* note 57; PIVEN & CLOWARD, *supra* note 8, at 18–23.

73. ELIMINATING BARRIERS TO VOTING, *supra* note 32, at 9–10 ("Activists in states with EDR have mounted extremely successful voter mobilization drives among targeted constituencies,

precisely because they could capitalize on the excitement of the last days of the election and draw previously unregistered voters to the polls”; *see also id.* at 15–17); Fitzgerald, *supra* note 68, at 14 (“[Y]oung citizens are more likely to be contacted by a political party in states with election day registration by an estimated 11 percentage points in presidential elections, and by an estimated 18 percentage points in midterm congressional elections.”).

The role of mobilization efforts in maximizing the impact of EDR also makes it difficult to project a clear-cut partisan effect for EDR. Although it is sometimes assumed that any reform that lowers barriers to voting will automatically bring more Democrats to the polls, the reality is more complicated. While the 2006 U.S. Senate election in Montana went to Democrat Jon Tester by 3,500 votes, in an election where approximately 4,000 people registered on election day and turnout increased greatly in college communities, EDR also was responsible for the registration of over 1,400 people on Election Day 2006 in Laramie County, Wyoming, which is home to the Warren Air Force Base and 4,440 base employees, service members, and their families. *See* VOTERS WIN WITH ELECTION DAY REGISTRATION, *supra* note 2, at 6 & n.7; e-mails from Bowen Greenwood, *supra* note 49. Clearly, much depends on which party or candidate campaign decides to adapt its strategies to take advantage of EDR in a given election. Academic studies of EDR also have not projected consistent partisan impacts. *See, e.g.,* Knack & White, *supra* note 9, at 41 (observing that EDR most strongly increases turnout among young and mobile voters, who are not as reliably Democratic as other low-turnout groups).

74. DAVID CALLAHAN & LORRAINE MINNITE, DĒMOS: A NETWORK FOR IDEAS & ACTION, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD (2003), [http://www.demos.org/pubs/EDR\\_-\\_Securing\\_the\\_Vote.pdf](http://www.demos.org/pubs/EDR_-_Securing_the_Vote.pdf); LORRAINE MINNITE, DĒMOS: A NETWORK FOR IDEAS & ACTION, AN ANALYSIS OF VOTER FRAUD IN THE UNITED STATES (Sept. 2007), <http://www.demos.org/pubs/analysis.pdf>.

75. LORRAINE MINNITE, DĒMOS: A NETWORK FOR IDEAS & ACTION, ELECTION DAY REGISTRATION: A STUDY OF VOTER FRAUD ALLEGATIONS AND FINDINGS ON VOTER ROLL SECURITY 2 (2007), <http://www.demos.org/pubs/EDR%20VF.pdf>. Minnite’s research and analysis were derived from her forthcoming book on voter fraud in contemporary American elections.

76. *Id.* at 2.

77. *Id.*

78. *Id.* at 4.

79. *Id.*, citing May 10, 2007, e-mail communication with the author.

80. *Id.* at 4, n. 15.

81. *Id.*

82. DĒMOS: A NETWORK FOR IDEAS & ACTION, ELECTION DAY REGISTRATION: A GROUND LEVEL VIEW (Nov. 2007), <http://www.demos.org/pubs/EDR%20clerks.pdf>. *See infra* Part IV. F. for discussion of election clerks survey.

83. *Id.* Just one of 49 respondents suggested a link between EDR and an increased likelihood of vote fraud. This official—the clerk of a Wisconsin town of fewer than 9,000 people—was also unique in expressing emphatic opposition to EDR. By contrast, the great majority of respondents rated current fraud-prevention measures sufficient to protect the integrity of elections. This was the prevailing view in large and small jurisdictions, and also in college communities, including one Idaho city where, in 2006, some 5,000 out of a total 26,000–27,000 voters used EDR.



84. Help America Vote Act of 2002, Pub. L. No. 107-252, § 303, 42 U.S.C. § 15483.

85. Hearing on H.B. 2415, S.B. 342 before the Joint Committee on Election Laws, 183rd General Court (MA. 2003) (Statement of Dēmos: A Network for Ideas & Action) *available at* [http://www.edmos\\_usa.org/pubs/EDR\\_Massachusetts\\_testimony\\_for\\_July\\_24\\_2003.pdf](http://www.edmos_usa.org/pubs/EDR_Massachusetts_testimony_for_July_24_2003.pdf) (citing remarks by Julie Flynn, Deputy Secretary of State, Maine; Joan Growe, former Minnesota Secretary of State; and Julietta Henry, Executive Director, City of Milwaukee Board of Election, at Dēmos/Brennan Center for Justice conference, “Eliminating Barriers to Voting: Election Day Registration,” New York, NY, Nov. 30, 2001).

86. *Id.* at 5.

87. *Id.*

88. ME. REV. STAT. ANN. tit. 21-A, § 101.9.

89. Telephone interview with Peggy L. Nighswonger, Elections Director, Cheyenne, Wyo. (Oct. 24, 2007); telephone interview with Patty O’Conner, Taxpayer Services Director, Blue Earth County, Minn. (Oct. 25, 2007).

90. Help America Vote Act, *supra* note 84, § 302, 42 U.S.C. § 15482.

91. *Id.*

92. Kimball W. Brace & Dr. Michael P. McDonald, Election Data Services, Inc., 2004 *Election Day Survey* (2005), (submitted to the U.S. Election Assistance Commission), *available at* <http://www.eac.gov/clearinghouse/docs/eds2004/2--4-electionday-survey>).

93. ELECTIONLINE.ORG, ELECTION-DAY REGISTRATION: A CASE STUDY 8 (Feb. 2007) (citing interview with Rachel Smith, Anoka County Clerk), <http://www.electionline.org/Portals/1/Publications/FINAL%20EDR%20pdf.pdf>.

94. SCOTT NOVAKOWSKI, DĒMOS: A NETWORK FOR IDEAS & ACTION, A FALLIBLE “FAIL-SAFE”: AN ANALYSIS OF PROVISIONAL BALLOT PROBLEMS IN THE 2006 ELECTION 4 (Nov. 2007), <http://www.demos.org/pubs/failsafereport.pdf> (citing Kimball W. Brace & Dr. Michael P. McDonald, Election Data Services, Inc., *supra* note 92).

95. ELECTION DAY REGISTRATION: A GROUND LEVEL VIEW, *supra* note 82; Hearing on H.B. 2415 S.B. 342, *supra* note 85.

96. ELECTION DAY REGISTRATION: A GROUND LEVEL VIEW, *supra* note 82.

97. *Id.* at 3.

98. *Id.*

99. Telephone interview with Deedie Beard, Supervisor, Kootenai County Elections Department, Coeur d’Alene, ID (Oct. 26, 2007).

100. *See* ELECTION DAY REGISTRATION: A GROUND LEVEL VIEW, *supra* note 82. Dēmos included jurisdictions with college campuses in its 2007 survey because EDR detractors often raise security concerns about the votes of students who register on Election Day. They question whether students’ campus addresses meet relevant residency requirements.

101. *Id.* at 3.

102. *Id.*

103. *Id.* at 2.

104. *Id.*

105. *See* sources cited in Part V.A., *supra* notes 74, 75.

106. *See, e.g.*, IDAHO CODE ANN. § 34-408A; MINN. STAT. §§ 201.061(3)(a), 201.121(1), 201.121(3), 201.27(3); WIS. STAT. §§ 6.55(2)(6), 6.55(5).

107. *Id.* at 4.

108. Testimony of Maine Rep. Anne Haskell, Connecticut State Joint Committee on Government Administration and Elections, Apr. 16, 2007 (citing Maine Office of the Attorney General's Investigation Division), *available at* [http://www.demos.org/pubs/Election\\_Day\\_registration\\_CT1.pdf](http://www.demos.org/pubs/Election_Day_registration_CT1.pdf).