

# What Happened to HAVA? The Help America Vote Act Twenty Years On and Lessons for the Future

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*Election administration is back. The field—which lay dormant until the meltdown of the 2000 election produced *Bush v. Gore*—has drawn steadily more interest over the past two decades. And in 2020, it took center stage, returning to the forefront of the public conscience in dramatic fashion. Now, with states around the country introducing new rules governing election administration in the wake of the 2020 election, it is a particularly important time to take stock of what we know and what we don't about how election administration measures function in practice. Yet the political conversation, so far, has proceeded in a manner divorced from the social science that is the hallmark of election administration scholarship. This Article addresses that gap.*

*Though it is in many ways forgotten today, twenty years ago, Congress passed a comprehensive election administration reform bill, the Help America Vote Act (HAVA), to make it “easier to vote and harder to cheat” in U.S. elections. The law, which passed with overwhelming bipartisan support, provided technical upgrades to election machinery, improvements to voter registration, and new voter identification requirements—three reforms that remain flashpoints in the election law debate. Nevertheless, HAVA has been conspicuously absent from recent election law discourse. This Article resurrects HAVA’s story, explaining how the law failed and extracting five lessons from its shortcomings. It then applies those lessons to recent election administration reform efforts to see if Congress has learned from HAVA’s lessons. As we will see, HAVA still has much to teach.*

## INTRODUCTION

Once overlooked by election law scholars, the field of election administration has moved toward the limelight in the years since *Bush v. Gore*.<sup>1</sup> In 2020, it took center stage.<sup>2</sup> Election administration may be a nascent field of academic study, but its poles—access and integrity—are partisan and familiar.<sup>3</sup> For Democrats, the loadstar of election

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<sup>1</sup> See Daniel P. Tokaji, *Teaching Election Administration*, 56 ST. LOUIS U. L.J. 675, 675–77 (2012).

<sup>2</sup> See e.g., Deanna Paul, *Election 2020: Trump Campaign Lawsuits, Explained*, WALL ST. J. (Nov. 18, 2020, 3:45 PM), <https://www.wsj.com/articles/election-2020-trump-campaign-lawsuits-explained-11605205969>.

<sup>3</sup> See Tokaji, *supra* note 1, at 682, 684.

administration is access, and the Party appears prepared to maximize election participation at all costs.<sup>4</sup> For Republicans, election integrity is the cornerstone of election administration, and Republicans seem willing to sacrifice participation in exchange for probity.<sup>5</sup> This debate reached a fever pitch in the 2020 presidential election, with Democrats working to expand mail-in voting to increase voter participation in the throes of a pandemic while Republicans decried these measures for inviting fraud.<sup>6</sup>

For those old enough to remember, this debate struck strikingly similar cords to the fallout surrounding George Bush's 2000 presidential election. There too, Democrats believed access to the ballot was unduly denied while Republicans feared election integrity was at risk.<sup>7</sup> What many may not remember, however, is that Congress responded to that debate, passing the Help America Vote Act (HAVA) in 2002 to expand access to, and fortify the integrity of, federal elections.<sup>8</sup> That law, it seems, should have been front and center in the debate and litigation surrounding the 2020 election. Instead, in the hundreds of lawsuits related to the 2020 election, HAVA was invoked in only nine.<sup>9</sup>

What happened to HAVA? Why was a law, once heralded by civil rights groups as the “first true civil rights legislation of the twenty-first century,”<sup>10</sup>

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<sup>4</sup> See e.g., DEMOCRATIC NAT'L CONVENTION, 2020 DEMOCRATIC PARTY PLATFORM 55 (2020); *The For the People Act: Hearing on S. 1 Before the S. Comm. on Rules & Admin.*, 117th Cong. (2021) [hereinafter *For the People Act Senate Hearing*] (statement of Sen. Amy Klobuchar, Chairwoman, S. Comm. on Rules & Admin.).

<sup>5</sup> See e.g., Tal Axelrod, *RNC Launches 'Committee on Election Integrity'*, HILL (Feb. 17, 2021, 3:45 PM), <https://thehill.com/homenews/campaign/539271-rnc-launches-committee-on-election-integrity>; *For the People Act Senate Hearing*, supra note 4 (statement of Sen. Roy Blunt, Ranking Member, S. Comm. on Rules & Admin.) (suggesting S. 1 will harm election integrity).

<sup>6</sup> See e.g., Dan Merica, *Coronavirus Pandemic Intensifies Democrats' Vote-by-mail Push and Ignites Longstanding Fight over Voting Rights*, CNN (Apr. 3, 2020, 7:08 AM), <https://www.cnn.com/2020/04/03/politics/vote-by-mail-coronavirus/index.html> [<https://perma.cc/366P-2887>]; Catherine Kim, *Poll: 70 Percent of Republicans Don't Think the Election Was Free and Fair*, POLITICO (Nov. 9, 2020, 5:00 PM), <https://www.politico.com/news/2020/11/09/republicans-free-fair-elections-435488> [<https://perma.cc/J8P3-KSKY>].

<sup>7</sup> See Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1207 (2005) [hereinafter Tokaji, *Early Returns*].

<sup>8</sup> See *id.* at 1206–07.

<sup>9</sup> See *Voting Rights Litigation Tracker 2020*, BRENNAN CTR. FOR JUST. (July 8, 2021), <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020> [<https://perma.cc/K54U-A6TG>].

<sup>10</sup> Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL'Y REV. 353, 380 (2003) (quoting Letter to Speaker of the House, Leadership Conference on Civil Rights (July 26, 2002), <https://web.archive.org/web/20030413225306/http://www.aapd.com:80/dvpmain/elreform/leaderconferencecivilright.html>).

so notably absent in the 2020 election and the years leading up to it? What lessons can we learn from the effective demise of this legislation? And has Congress learned its lesson?

This Article seeks to answer those questions. It focuses on HAVA not only because it provides a salient case study of failed election administration legislation but also because of the nature of the bipartisan compromise that enabled the bill to become law.<sup>11</sup> As passed, HAVA addresses three central pillars of election administration: technology, access, and integrity.<sup>12</sup> In doing so, it contains “something for everyone to love and . . . hate.”<sup>13</sup> HAVA’s unique assembly of disparate partisan priorities makes it particularly fruitful for technocratic study: whatever one’s position on what the substantive goals of election administration reform *should* be, HAVA has something to say about how to accomplish them more effectively.

The Article develops HAVA’s story over three parts. Part I recounts the promise of HAVA, describing the Act’s objectives and the solutions it implemented to achieve them. Part II argues that HAVA has failed to accomplish its goals—with respect to technology, access, and integrity. Part III reflects on this history and extracts five lessons that future election administration legislation can draw upon to avoid HAVA’s pitfalls. It also examines whether Congress has learned these lessons by applying HAVA’s takeaways to recent legislative efforts to reform election administration, namely the For the People Act of 2021 and the Freedom to Vote Act, which were introduced in Congress in 2021.<sup>14</sup> As we will see, Congress still has much to learn.

## I. HAVA’S SOLUTIONS

Hanging chads, butterfly ballots, the Brooks Brothers riot.<sup>15</sup> These terms might never have entered the national lexicon in the aftermath of the 2000 presidential election if the election had been administered more effectively. Had the “nuts-and-bolts”<sup>16</sup> of Florida’s election machinery

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<sup>11</sup> See Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 960 (2005).

<sup>12</sup> Help America Vote Act of 2002, 52 U.S.C. §§ 20901–20112.

<sup>13</sup> See Charles Stewart III, *What Hath HAVA Wrought? Consequences, Intended and Not, of the Post-Bush v. Gore Reforms* 14 (Caltech/MIT Voting Tech. Project, Working Paper No. 102, 2011), <https://dspace.mit.edu/handle/1721.1/96632> [<https://perma.cc/HGX7-Y8GS>].

<sup>14</sup> H.R. 1, 117th Cong. (2021); S. 2747, 117th Cong. (2021).

<sup>15</sup> See David Margolick, Evgenia Peretz & Michael Shnayerson, *The Path to Florida*, VANITY FAIR (Oct. 2004), <https://archive.vanityfair.com/article/2004/10/the-path-to-florida>.

<sup>16</sup> Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. STATE U. L. REV. 377, 377 (2001).

functioned properly, that is, the country might have avoided altogether what Professor Rick Hasen has termed an “election meltdown.”<sup>17</sup> Instead, the 2000 election became one of the most disputed in American history, ending with the Supreme Court’s controversial decision in *Bush v. Gore*.

Congress passed HAVA in response to that meltdown.<sup>18</sup> Although everyone agreed something had to be done in response to the 2000 election, there was widespread disagreement about what that something was.<sup>19</sup> There was a general consensus that the country’s election machinery needed a twenty-first-century overhaul, but the parties disagreed on whether the bill should improve election access or integrity.<sup>20</sup> Ultimately, Congress landed on a compromise.<sup>21</sup> To satisfy both parties, the final version of HAVA was designed to both “make it easier to vote and harder to cheat.”<sup>22</sup> This Part discusses the election technology, access, and integrity solutions the HAVA compromise produced.

#### A. TECHNOLOGY

The enduring legacy of the 2000 election was Florida’s failure to fulfill the most basic of election administration functions: accurately “registering the will of voters.”<sup>23</sup> Florida’s election infrastructure “meltdown” generated an entire field of academic research organized around a basic question: what happened?<sup>24</sup> The two most prominent studies produced in response to the 2000 election came from the “Carter–Ford Commission,” chaired by former Presidents Jimmy Carter and Gerald Ford, and the Caltech/MIT Voting Technology Project, conducted by researchers at the two schools.<sup>25</sup> These reports—which became the “basic ingredients” of the bill that would ultimately become HAVA—identified the source of the meltdown as a systemic failure of the state’s election equipment, particularly its punch card ballots.<sup>26</sup>

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<sup>17</sup> See generally RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012) (discussing the possibility of the next election meltdown).

<sup>18</sup> Tokaji, *supra* note 1, at 678.

<sup>19</sup> Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 *ELECTION L.J.* 424, 428 (2004).

<sup>20</sup> Stewart, *supra* note 13, at 14, 18; Tokaji, *Early Returns*, *supra* note 7.

<sup>21</sup> Shambon, *supra* note 19.

<sup>22</sup> Doug Chapin, Edward Foley, Heather Gerkin & Richard L. Hasen, Forum, *HAVA @ 10: Closing Roundtable*, 12 *ELECTION L.J.* 218, 223 (2013).

<sup>23</sup> Paul M. Schwartz, *Voting Technology and Democracy*, 77 *N.Y.U. L. REV.* 625, 629 (2002).

<sup>24</sup> See Tokaji, *Early Returns*, *supra* note 7, at 1209–11.

<sup>25</sup> See *id.* at 1211; Tokaji, *supra* note 1, at 679.

<sup>26</sup> Tokaji, *Early Returns*, *supra* note 7, at 1213; see, e.g., CALTECH/MIT VOTING TECH. PROJECT, *VOTING: WHAT IS, WHAT COULD BE* 6 (2001) [hereinafter *WHAT IS, WHAT COULD BE*].

Caltech and MIT's research would prove particularly groundbreaking in developing a method for evaluating election infrastructure. To understand the performance of election technology, Caltech and MIT pioneered a new metric for measuring the relative accuracy of voting machines: the "residual vote rate."<sup>27</sup> The residual vote rate is the percentage of total ballots cast that do not submit a recordable vote for a particular office—whether because the voter decided not to vote, "over-voted" by selecting multiple candidates for the same office, or recorded their vote in an uncountable manner.<sup>28</sup>

Comparing residual vote rates between voting machines enables election officials to determine how different voting machines perform "relative" to one another.<sup>29</sup> To illustrate, if 1% of all voters intentionally omit a presidential vote from their ballots, and the residual vote rate on one type of machine is 1.5% and another is 2%, it signals that the second machine generated twice as many inaccuracies as the first machine.<sup>30</sup> The lower the residual vote rate, the better the election technology is performing.<sup>31</sup>

Florida's residual vote rate in the 2000 election was alarming. The nationwide residual vote rate in 2000 was 2%.<sup>32</sup> But the rate in Florida was 2.93%.<sup>33</sup> So in a state where 537 votes decided the presidential race, nearly 180,000 ballots did not record a vote for President.<sup>34</sup> On the notorious punch card voting machines—on which 3.7 million Floridians cast their votes—the residual vote rate was 3.93%, accounting for more than 145,000 of the state's residual votes.<sup>35</sup> On the state's optical scan machines, meanwhile, the rate was 0.83%.<sup>36</sup> This discrepancy was a microcosm of a nationwide trend: optical scan machines wildly outperformed punch card machines

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<sup>27</sup> Charles Stewart III, *What's a Residual Vote, and What's It Doing in the Elections Performance Index?*, MIT ELECTION LAB (Aug. 29, 2018), <https://medium.com/mit-election-lab/whats-a-residual-vote-and-what-s-it-doing-in-the-elections-performance-index-e455289acb30> [<https://perma.cc/WPQ2-6BEK>]. The study introducing the methodology is CALTECH/MIT VOTING TECH. PROJECT, *Residual Votes Attributable to Technology: An Assessment of the Reliability of Existing Voting Technologies* (Working Paper No. 2, 2001) [hereinafter *Residual Votes*].

<sup>28</sup> Stewart, *supra* note 27.

<sup>29</sup> Schwartz, *supra* note 23, at 632; *Residual Votes*, *supra* note 27, at 6–7, 11–12.

<sup>30</sup> To see why this rate reflects twice as many inaccuracies, consider an example. If 200 votes were cast on each of these hypothetical machines, there would be three residual votes on the first machine and four on the second machine. Two votes on each would be willful abstention, leaving the first machine with one error and the second with two errors—double the inaccuracies.

<sup>31</sup> Schwartz, *supra* note 23, at 632.

<sup>32</sup> *E.g.*, *Residual Votes*, *supra* note 27, at 11.

<sup>33</sup> Schwartz, *supra* note 23, at 633.

<sup>34</sup> *Id.* at 625–26, 633.

<sup>35</sup> *Id.* at 633. This residual vote total is over 71,000 more residual ballots than a 2% residual vote rate would have returned. *See id.*

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

across the country.<sup>37</sup> Nationally, optical scan machines produced a residual vote rate of 1.2% compared to 3% on punch card machines.<sup>38</sup>

Congress noticed. HAVA's first order of business was to modernize failing election technology. It did so with both a carrot and a stick. The carrot was \$650 million in funding for states that chose to voluntarily upgrade their election machines.<sup>39</sup> Half of that money was expressly reserved for replacing punch card ballots.<sup>40</sup> States that opted in to the program were required to eliminate punch card ballots prior to the November 2004 election, less than twenty-four months after HAVA was passed, with the deadline extendable for good cause until January 2006.<sup>41</sup> Thirty states would ultimately apply for voluntary funding, with twenty-six requesting the waiver.<sup>42</sup>

HAVA's stick came in the form of national minimum requirements for voting technology. HAVA requires voting machines to give voters an opportunity to verify and correct their selections before transmitting ballots.<sup>43</sup> The standard also mandates that voting machines notify voters who select multiple candidates in a particular race and permit them to correct their ballots before submitting them.<sup>44</sup> HAVA gave states until January 2006—three years—to meet these requirements and appropriated \$3 billion over that period to help them do so.<sup>45</sup> With this carrot and stick working in tandem, HAVA sought to reduce the residual vote rate and usher election technology into the twenty-first century.<sup>46</sup>

#### B. ACCESS

Hanging chads may be the prevailing symbol of the 2000 election meltdown, but this legacy, cemented by the *Bush v. Gore* litigation, clouds

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<sup>37</sup> See Stewart, *supra* note 13, at 20.

<sup>38</sup> E.g., *Residual Votes*, *supra* note 27, at 11.

<sup>39</sup> Shambon, *supra* note 19.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Tokaji, *Early Returns*, *supra* note 7, at 1215.

<sup>43</sup> Shambon, *supra* note 19, at 429. The law does not, however, require states to *use* voting machines; paper ballots remain acceptable and may comply with this provision through voter education programs. *Id.*

<sup>44</sup> *Id.* The law also requires voting equipment to be equally accessible for voters with disabilities. *Id.* That requirement, however, deserves special attention that it cannot be given here. It is therefore outside the scope of this Article.

<sup>45</sup> Tokaji, *Early Returns*, *supra* note 7, at 1214, 1216.

<sup>46</sup> 147 CONG. REC. H9264-02 (daily ed. Dec. 12, 2001) (statement of Rep. Steny H. Hoyer) (“In complying with the Minimum Standard, the Committee on House Administration expects states and jurisdictions to buy voting machines that detect errors of the kind described in the letter, commonly referred to as ‘overvotes,’ ‘undervotes,’ and ‘residual votes.’”).

an even more robust election administration failure in the same election: voter registration error.<sup>47</sup> Problems with the voter registration process produced between 1.5 and 3 million lost votes in the 2000 election—more than any other source.<sup>48</sup> To this day, “[n]o facet of election administration affects who votes or doesn’t vote as much as voter registration.”<sup>49</sup> Why?

Managing voter registration is an “enormous” administrative responsibility.<sup>50</sup> To begin with, the sheer number of registered voters makes maintaining voting rolls a daunting task: over 150 million Americans were registered to vote in the 2000 election.<sup>51</sup> Database management on that scale would be challenging enough, but to complicate matters, voter registration in 2000 was managed primarily at the local level.<sup>52</sup> Localities lacked the means for interjurisdictional coordination: if a voter moved from one county to another, there was no way for the old county to automatically update the voter’s registration when the voter registered in the new county.<sup>53</sup> Adding to interjurisdictional dysfunction, intra-jurisdictional breakdowns plagued the 2000 election as well. The 3,000 local jurisdictions that controlled registration in 2000 oversaw 200,000 polling places—an administrative impossibility.<sup>54</sup> These central election administrators became inundated with Election Day support requests they were unequipped to handle.<sup>55</sup>

HAVA implemented two principal access-oriented solutions to target problems with voter registration: statewide voter registration databases and provisional voting.<sup>56</sup> Recognizing that the hyper-localization of managing voter registration databases was a leading cause of lost votes, HAVA shifts the responsibility of voter registration management up one unit of

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<sup>47</sup> Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 470 (2008) [hereinafter Tokaji, *Voter Registration and Election Reform*].

<sup>48</sup> WHAT IS, WHAT COULD BE, *supra* note 26, at 8–9.

<sup>49</sup> Daniel P. Tokaji, *Voter Registration in a Pandemic*, 2020 U. CHI. L. REV. ONLINE 35, 35 (2020).

<sup>50</sup> WHAT IS, WHAT COULD BE, *supra* note 26, at 8.

<sup>51</sup> *Id.* at 28.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

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

<sup>55</sup> *Id.*

<sup>56</sup> Another one of HAVA’s critical access-oriented provisions is its subsection requiring “[a]ccessibility for individuals with disabilities.” Help America Vote Act of 2002, 52 U.S.C. § 21081(a)(3). This solution—and its failures—are worthy of more in-depth study and specific treatment than is possible here. For excellent analysis that does precisely that, see Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 STAN. L. REV. 1491 (2004) and Christina J. Weis, Note, *Why the Help America Vote Act Fails to Help Disabled Americans Vote*, 8 N.Y.U. J. LEGIS. & PUB. POL’Y 421 (2005). For more on the application of the Americans with Disabilities Act to voters with disabilities, see Orion de Nevers, Note, “No Voting About Us Without Us”: *The Iowa Caucuses and the Americans with Disabilities Act*, 26 TEX. J. ON C.L. & C.R. 75 (2021).

aggregation from local to state governments.<sup>57</sup> Under HAVA, all states that require voter registration must maintain a “computerized statewide voter registration list.”<sup>58</sup> The law makes this list, referred to as the “statewide registration database,”<sup>59</sup> the official source of voter registration data for each state.<sup>60</sup> Crucially, the law targets both interjurisdictional and intra-jurisdictional problems. It addresses interjurisdictional issues by aggregating data at the state, rather than the local, level and by requiring the new systems to be coordinated with other state agency databases.<sup>61</sup> It then provides an intra-jurisdictional solution by mandating that the database be immediately accessible to “any local election official.”<sup>62</sup> These measures target the interplay of statewide and site-specific problems that plagued the 2000 election.

Realizing these databases would be no cure-all, HAVA supplements the registration list requirement with a provisional voting “fail-safe.”<sup>63</sup> Under this section, a voter who arrives at a polling place only to be told they are not on the site’s voter roll is entitled to cast a provisional ballot.<sup>64</sup> The state must then verify the voter’s eligibility and, if the state determines the voter is in fact “eligible under State law,” count the vote.<sup>65</sup> This measure responds to the votes that were lost in the 2000 election when poll workers erroneously turned away voters from polling places due to inaccurate voter registration information.<sup>66</sup> Caltech and MIT projected that the “aggressive use of provisional ballots” could reduce the number of votes lost to registration errors by half, saving “roughly 1.5 million lost votes.”<sup>67</sup> In adopting this recommendation, HAVA sounds in the Carter-Ford Commission goal that “[n]o American qualified to vote anywhere in her or his state should be turned away from a polling place in that state.”<sup>68</sup>

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<sup>57</sup> § 21083(a)(1)(A); see JUSTIN LEVITT, WENDY R. WEISER & ANA MUÑOZ, MAKING THE LIST: DATABASE MATCHING AND VERIFICATION PROCESSES FOR VOTER REGISTRATION 1 (2006); Tokaji, *Voter Registration and Election Reform*, *supra* note 47, at 471; THE NAT’L COMM’N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 30–31 (2001) [hereinafter TO ASSURE PRIDE AND CONFIDENCE].

<sup>58</sup> § 21083(a)(1)(A).

<sup>59</sup> Tokaji, *Voter Registration and Election Reform*, *supra* note 47, at 471 (quoting Tokaji, *Early Returns*, *supra* note 7, at 1216).

<sup>60</sup> Shambon, *supra* note 19, at 430.

<sup>61</sup> § 21083(a)(1)(A)(iv).

<sup>62</sup> § 21083(a)(1)(A)(v).

<sup>63</sup> See § 21082(a); TO ASSURE PRIDE AND CONFIDENCE, *supra* note 57, at 34.

<sup>64</sup> § 21082(a).

<sup>65</sup> § 21082(a)(3)–(4).

<sup>66</sup> TO ASSURE PRIDE AND CONFIDENCE, *supra* note 57, at 36.

<sup>67</sup> WHAT IS, WHAT COULD BE, *supra* note 26, at 30.

<sup>68</sup> TO ASSURE PRIDE AND CONFIDENCE, *supra* note 57, at 34.



## C. INTEGRITY

While Democrats learned the lessons of 2000 in the register of access, for Republicans, the meltdown was an indictment of election integrity.<sup>69</sup> Whereas Democrats believed voter registration errors made the election underinclusive, Republicans feared voter registration pitfalls created a problem of over-inclusiveness.<sup>70</sup> The study conducted by Caltech and MIT provided salient evidence: Georgia's voter rolls listed the names of 15,000 deceased voters, Michigan's contained 1 million redundant registrations, and in Los Angeles County, 25% of all registrations were duplicates.<sup>71</sup>

Republicans were not only concerned with voter fraud itself; they also feared that the appearance of impropriety in U.S. elections would make legitimate voters feel that fraud was “discounting or ‘canceling’ out the value of *their* legally cast vote[s].”<sup>72</sup> This concern was rooted in the foundational proposition that an effective democracy depends upon the electorate's confidence in the electoral system.<sup>73</sup> Republicans were, therefore, just as concerned with voter registration as Democrats, but for distinctly different reasons and with distinctly different goals.

HAVA includes two integrity-oriented measures to reduce voter fraud and increase public confidence in elections. First, states must conduct maintenance of the newly created statewide registration databases.<sup>74</sup> This provision requires that states remove the names of “not registered,” “not eligible,” and duplicate voters from the rolls.<sup>75</sup> To facilitate this, the law instructs election administrators to match voter registration information in the HAVA database with information recorded by other state agencies, for example, the Department of Motor Vehicles.<sup>76</sup> Second, HAVA includes a voter identification provision that requires first-time voters who register by mail to provide either photo identification or proof of name and address when they cast their votes.<sup>77</sup> President George W. Bush touted these measures when he signed the bill into law, proclaiming that “[t]he

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<sup>69</sup> See, e.g., *Help America Vote Act of 2001: Hearing on H.R. 3295 Before the H. Comm. on the Judiciary*, 107th Cong. 2 (2001) [hereinafter *Hearing on H.R. 3295*] (statement of Rep. F. James Sensbrenner, Jr., Chairman, H. Comm. on the Judiciary).

<sup>70</sup> See *id.* at 1.

<sup>71</sup> WHAT IS, WHAT COULD BE, *supra* note 26, at 28.

<sup>72</sup> *Hearing on H.R. 3295*, *supra* note 69, at 3.

<sup>73</sup> See, e.g., TO ASSURE PRIDE AND CONFIDENCE, *supra* note 57, at 46; Brennan Center Live, *Election Meltdown*, BRENNAN CTR. FOR JUST., at 03:53 (May 27, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/podcasts/election-meltdown>.

<sup>74</sup> Help America Vote Act of 2002, 52 U.S.C. § 21083(a)(2)(A).

<sup>75</sup> § 21083(a)(2)(B)(ii)–(iii).

<sup>76</sup> Pamela S. Karlan, *Lessons Learned: Voting Rights and the Bush Administration*, 4 DUKE J. CONST. L. & PUB. POL'Y 17, 20 (2009).

<sup>77</sup> § 21083(b)(2)(A).

legislation I sign today will add to the nation's confidence" in elections by holding states to standards that make it "easier to detect fraud."<sup>78</sup>

Ultimately, the election administration solution President Bush signed into law on October 29, 2002, stood on three pillars: technology, access, and integrity. With an understanding of these solutions in hand, the next Part assesses how they have performed in the twenty years since HAVA's passage.

## II. HAVA'S FAILURES

Once heralded as the "first true civil rights legislation of the twenty-first century," HAVA now seems largely forgotten.<sup>79</sup> Twenty years after *Bush v. Gore*, the 2020 election became the most litigated in United States history.<sup>80</sup> Yet disputes surrounding the election sounded in familiar notes. Two decades after HAVA, Democrats continued to argue that access to the ballot is too limited, while Republicans asserted that voter fraud undermined the integrity of the election.<sup>81</sup> Why didn't HAVA prevent all this? Because, as this Part argues, HAVA's election administration reforms have failed.

### A. TECHNOLOGY

Most scholars agree that HAVA's funding for improved voting technology was its greatest success.<sup>82</sup> And indeed, HAVA did succeed in "getting rid of the very worst voting machines."<sup>83</sup> Within four years, most states adopted HAVA-compliant technology.<sup>84</sup> This immediately reduced the nationwide residual vote rate, with the rate falling from 2% in 2000 to

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<sup>78</sup> Remarks on Signing the Help America Vote Act of 2002, 2 PUB. PAPERS 1926 (Oct. 29, 2002).

<sup>79</sup> Waterstone, *supra* note 10 (quoting Letter to Speaker of the House, Leadership Conference on Civil Rights (July 26, 2002), <https://web.archive.org/web/20030413225306/http://www.aapd.com/dvpmain/elreform/leaderconferencivilright.html>).

<sup>80</sup> John Kruzal, *Most Highly Litigated Election in US History Enters Final Stage*, HILL (Nov. 3, 2020, 6:00 AM), <https://thehill.com/regulation/court-battles/524102-most-highly-litigated-election-in-us-history-enters-final-stage> [<https://perma.cc/GNA3-765P>].

<sup>81</sup> See, e.g., Paul Waldman, Opinion, *Republicans Are Serious About Voter Suppression. Here's How to Stop Them.*, WASH. POST (May 18, 2020), <https://www.washingtonpost.com/opinions/2020/05/18/republicans-are-serious-about-voter-suppression-heres-how-stop-them/>; Kim, *supra* note 6.

<sup>82</sup> See, e.g., Chapin et al., *supra* note 22, at 220.

<sup>83</sup> *Id.*

<sup>84</sup> Matthew M. Damschroder, *Of Money, Machines, and Management: Election Administration from an Administrator's Perspective*, 12 ELECTION L.J. 195, 197–98 (2013).

just above 1% in 2004.<sup>85</sup> With 122 million votes cast in the 2004 election, this works out to over 1 million saved votes.<sup>86</sup> Much, though not all, of this improvement was driven by migration from punch card ballots to electronic voting machines.<sup>87</sup> The national residual vote rate has continued to fluctuate over time, but it has never returned to its pre-HAVA levels, remaining below 1.5% in every election since.<sup>88</sup> This suggests that HAVA succeeded in achieving its principal long-term goal.

That understanding, however, is incomplete. Focusing on the residual vote rate alone overlooks some of the unintended consequences of HAVA's voting machine reform. HAVA's funding mechanism for requirements upgrades came in the form of a \$3 billion, one-time cash infusion for states to quickly upgrade voting technology in response to the 2000 election.<sup>89</sup> The qualifiers are important: implementation had to be *quick* and funding was *one-time*.<sup>90</sup> These features of the law generated unintended

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<sup>85</sup> Charles Stewart III, R. Michael Alvarez, Stephen S. Pettigrew & Cameron Wimpy, *Abstention, Protest, and Residual Votes in the 2016 Election*, SOC. SCI. Q. 925, 927–28 (2020).

<sup>86</sup> Charles Stewart III, *Residual Vote in the 2004 Election*, 5 ELECTION L.J. 158 & n.2 (2006).

<sup>87</sup> *Id.* at 163.

<sup>88</sup> Stewart et al., *supra* note 85, at 925. This data extends through the 2016 presidential election. *See id.* at 927 fig.1. 2020 election data are available in some states but are not yet available on a national scale.

<sup>89</sup> *See* NAT'L CONF. OF STATE LEGISLATURES, THE PRICE OF DEMOCRACY: SPLITTING THE BILL FOR ELECTIONS 11 (2018) [https://www.ncsl.org/Portals/1/Documents/Elections/Final\\_Costs\\_Report-Splitting\\_the\\_Bill\\_for\\_Elections\\_32084.pdf](https://www.ncsl.org/Portals/1/Documents/Elections/Final_Costs_Report-Splitting_the_Bill_for_Elections_32084.pdf) [<https://perma.cc/6GK5-E4XG>]; Shambon, *supra* note 19, at 429. HAVA's Title II funds, known as "requirements" or "251" funds, were appropriated over three years and compliance had to be achieved in the same period. *Id.* HAVA required that states accepting the voluntary funding provided in Title I upgrade their machines by 2004 with a waiver available through 2006 for good cause. *See* Tokaji, *Early Returns*, *supra* note 7, at 1215. Twenty-four of the thirty states that accepted Title I funding applied for the waiver. *Id.*

<sup>90</sup> Congress appropriated limited, additional requirements funds each year between 2008 and 2010, but the funding amounted to less than \$300 million over the course of the three years. U.S. ELECTION ASSISTANCE COMM'N, STRENGTHENING THE ELECTORAL SYSTEM ONE GRANT AT A TIME: A RETROSPECTIVE OF GRANTS AWARDED BY EAC APRIL 2003 – DECEMBER 2010, at 14 (2010.) [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/FY2010\\_Grants\\_Report\\_FINAL.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/FY2010_Grants_Report_FINAL.pdf) [<https://perma.cc/94RT-XTJR>]. Congress has not appropriated requirements funds since. *See* U.S. ELECTION ASSISTANCE COMM'N, ANNUAL GRANT EXPENDITURE REPORT FISCAL YEAR 2019, at 2 (2020) [https://www.eac.gov/sites/default/files/paymentgrants/expenditures/2019\\_EAC\\_Annual\\_Grant\\_Expenditure\\_Report.pdf](https://www.eac.gov/sites/default/files/paymentgrants/expenditures/2019_EAC_Annual_Grant_Expenditure_Report.pdf) [<https://perma.cc/T94L-H3GS>]. Congress did, however, appropriate roughly \$800 million in 2018 and 2020 on election security funding under HAVA. *Election Security Funds*, U.S. ELECTION ASSISTANCE COMM'N, <https://www.eac.gov/payments-and-grants/election-security-funds> [<https://perma.cc/7LRE-VLKT>] (last visited Apr. 27, 2021). And in 2020, the CARES Act added \$400 million to assist states with administering elections during the pandemic. *2020 CARES Act Grants*, U.S. ELECTION ASSISTANCE COMM'N, <https://www.eac.gov/payments-and-grants/2020-cares-act-grants> [<https://perma.cc/8CZ2-DEBK>] (last visited Apr. 27, 2021).

consequences. In the short run, HAVA's timeline created chaos in administering elections; in the long run, its funding cliff poses a threat to the enduring success of the machinery upgrades it facilitated.

HAVA's short-term effect was to pinch election administrators in a race to implement the law's mandates. The results were, for several reasons and in many cases, disastrous. For one, HAVA's timeline presented a massive challenge for training administrators and poll workers on using new machines. For example, one Maryland election official who was unfamiliar with the new technology failed to provide precincts with the activator cards necessary to turn on the new machines, which sat silent and unused as distraught voters scribbled their votes on scrap paper.<sup>91</sup> Moreover, HAVA, by design, required using unproven technology. Election administrators in Ohio and New York flatly refused to meet HAVA's implementation deadlines because of their concerns with the security and audit capacities of the new machines.<sup>92</sup> Their concerns would shortly be vindicated. In one North Carolina race, the number of votes cast exceeded the memory limits of the new electronic machines, leaving thousands of ballots uncounted.<sup>93</sup> Even more dramatically, a Florida congressional race conducted on similar technology, and decided by 373 votes, returned 18,000 undervotes—a result so astonishing that the state banned the new equipment, bought out the just-purchased machines, and switched to paper-based optical-scan machines instead: its second election infrastructure overhaul in less than a decade.<sup>94</sup> These mishaps illustrate that although HAVA has reduced residual votes overall, there was a real short-term cost for achieving this outcome.

HAVA's long-term success is also not so clear-cut. Recall the point-in-time nature of HAVA's funding provisions.<sup>95</sup> These disbursements covered the fixed costs of purchasing new voting machines to replace punch card models.<sup>96</sup> Unlike the old systems, however, which could last decades without significant additional costs, the new systems require expensive maintenance and software licensing fees—expenses HAVA did not cover.<sup>97</sup> In many jurisdictions, technology “is the single greatest driver of costs” in

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<sup>91</sup> PEW CTRS. FOR THE STATES, *THE HELP AMERICA VOTE ACT AT 5*, at 15 (2007) [hereinafter *THE HELP AMERICA VOTE ACT AT 5*] [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs\\_assets/2007/havaat5pdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2007/havaat5pdf.pdf) [https://perma.cc/3KAG-HF3M].

<sup>92</sup> Tokaji, *Early Returns*, *supra* note 7, at 1223–24; Edward Szczesniak, *Implementing the Help America Vote Act of 2002 in New York State*, 18 ALB. L.J. SCI. & TECH. 673, 678 (2008).

<sup>93</sup> *THE HELP AMERICA VOTE ACT AT 5*, *supra* note 91.

<sup>94</sup> *Id.* at 15–21; Heather K. Gerken, *Getting from Here to There in Election Reform*, 34 OKLA. CITY U. L. REV. 33, 34–35 (2009). These results were not an anomaly; similar problems arose in a number of other states. *See, e.g., id.* at 35.

<sup>95</sup> *See supra* note 89 and accompanying text.

<sup>96</sup> Damschroder, *supra* note 84, at 198.

<sup>97</sup> *Id.*

elections,<sup>98</sup> with states and local governments facing increasing financial “stress” as the costs of upgrading election equipment mount in the absence of renewed federal funding.<sup>99</sup> These spiraling costs reached a crescendo in the 2020 presidential election: met with the unprecedented expense of administering an election amid a global pandemic, local officials were forced to turn to private donors, most prominently Mark Zuckerberg, to fund election operations.<sup>100</sup>

As local election officials try to cope with the rising costs of election administration, many have scaled back the number of polling places they operate.<sup>101</sup> These reductions contributed to a 17% decrease in the number of polling places per county between 2000 and 2008.<sup>102</sup> Consolidation, in turn, reduces voter turnout.<sup>103</sup> Indeed, turnout declined by nearly a full percentage point in jurisdictions that consolidated polling places between 2000 and 2008 relative to those that did not.<sup>104</sup>

Focusing only on the residual vote rate fails to capture this phenomenon: if a voter never makes it to the voting booth, they have no way of casting a vote, residual or not. The benefits of residual vote rate reduction must therefore be weighed against continuing voter turnout costs. With HAVA’s funding well run dry and the cost of maintaining HAVA-compliant machines ongoing, election administrators face the persistent question of

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<sup>98</sup> MARTHA KROPF & DAVID C. KIMBALL, *HELPING AMERICA VOTE: THE LIMITS OF ELECTION REFORM* 64 (2012).

<sup>99</sup> See IND. FISCAL POL’Y INST., *VOTE CENTERS AND ELECTION COSTS: A STUDY OF THE FISCAL IMPACT OF VOTE CENTERS IN INDIANA* 6 (2010) [https://www.in.gov/sos/elections/voter-information/files/Full\\_Report.pdf](https://www.in.gov/sos/elections/voter-information/files/Full_Report.pdf) [<https://perma.cc/57X7-7WLB>]; see, e.g., Jeff Pillets, *Replacing NJ’s Old Voting Machines Will Come with Big Price Tag. How big? Who Knows*, NJ SPOTLIGHT NEWS (Dec. 21, 2020), <https://www.njspotlight.com/2020/12/replacing-nj-voting-machines-costly-complicated-closed-market-few-companies-hidden-costs-security-hacking/> [<https://perma.cc/N2TT-97AQ>]; Stephen Fowler, *Here’s What Vendors Say It Would Cost to Replace Georgia’s Voting System*, GA. PUB. BROAD.: GPB NEWS (Mar. 18, 2019, 1:37 PM), <https://www.gpb.org/news/2019/03/18/heres-what-vendors-say-it-would-cost-replace-georgias-voting-system> [<https://perma.cc/CT3F-RT7A>].

<sup>100</sup> Jesse McKinley & Luis Ferré-Sadurní, *N.Y. Voting Officials Need Money. They Were Told to Go to Zuckerberg.*, N.Y. TIMES (Oct. 2, 2020), <https://www.nytimes.com/2020/10/02/nyregion/voting-absentee-ballots-ny.html>.

<sup>101</sup> Administrators have “reduce[d] overall election costs by reducing the number of voting precincts and thereby the number of corresponding voting machines needed for the election.” KROPF & KIMBALL, *supra* note 98.

<sup>102</sup> *Id.* at 66. This is not to say that expense, and specifically expense imposed by HAVA, is solely responsible for these closures. But Kropf and Kimball’s survey of election administrators suggests it was a substantial factor. *Id.* at 64–65.

<sup>103</sup> *Id.* at 66–68; Henry E. Brady & John E. McNulty, *Turning Out to Vote: The Costs of Finding and Getting to the Polling Place*, 105 AM. POL. SCI. REV. 115, 128 (2011).

<sup>104</sup> KROPF & KIMBALL, *supra* note 98, at 67–68.

how to manage the cost of elections, casting the long-term success of HAVA's technology improvements into doubt.<sup>105</sup>

#### B. ACCESS

Improving voting machinery only matters to the extent voters have access to it. As Part I explains, HAVA was designed to increase access in two ways. First, the law moved registration database management from the local to the state level. Second, the law required that voters who do not appear on their precincts' registration lists be able to cast "fail-safe" provisional ballots. These efforts, however, have not achieved their full potential.

The clearest indicator that HAVA's access-oriented measures have not achieved their goals comes from data collected in the Voting and Registration Supplement to the U.S. Census Bureau's Current Population Survey (CPS), which election scholars regard as the gold standard in measuring voter registration and turnout.<sup>106</sup> The CPS surveys voters after each election to understand why registered voters failed to vote.<sup>107</sup> It was using this data that Caltech and MIT determined that as many as 3 million votes were lost due to registration errors in the 2000 election.<sup>108</sup> The survey asks registered voters who did not vote in a particular election why they failed to vote. In 2000, that number was 7.4%.<sup>109</sup> In 2020, it was still nearly 5%.<sup>110</sup> And most of this marginal gain occurred well over a decade after HAVA was passed, suggesting the law may have had little to do with the decline. Either way, this improvement is a far cry from achieving HAVA's aspirations. The remainder of this Part discusses problems with the statewide registration databases and provisional-voting requirements that HAVA mandated and explains why they failed to successfully produce the results Congress expected.

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<sup>105</sup> Damschroder, *supra* note 84, at 198; Szczesniak, *supra* note 92, at 677.

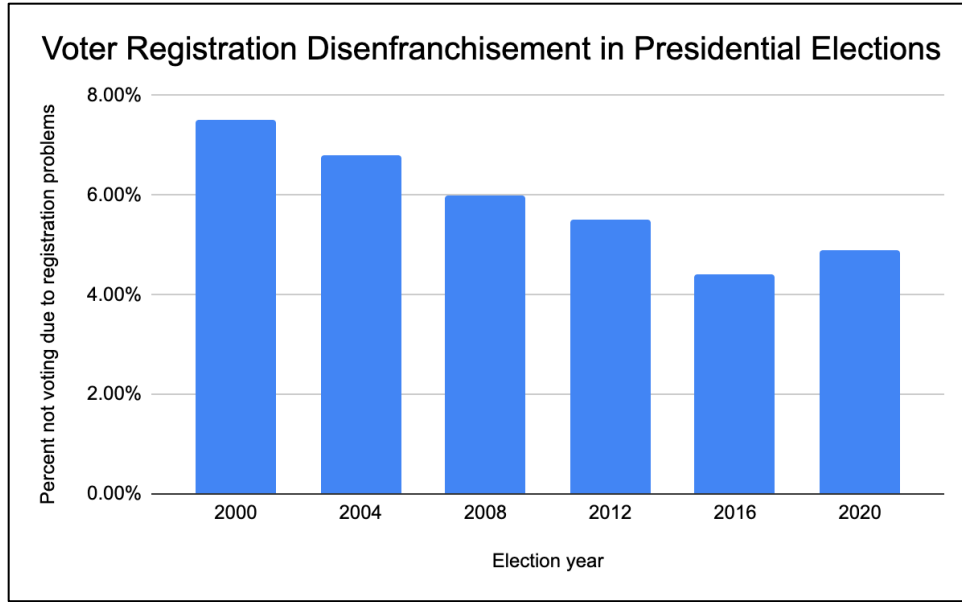
<sup>106</sup> See generally Jack Williams, *Exploring Voter Registration in 2018*, MIT ELECTION DATA & SCI. LAB: ELECTION PERFORMANCE INDEX (Mar. 2, 2020), <https://elections-blog.mit.edu/articles/exploring-voter-registration-2018> [https://perma.cc/Z932-GWP8] (discussing voter registration dates leading up to the 2018 election).

<sup>107</sup> Jack Williams, *A Closer Look at Registration & Voting Issues*, MIT ELECTION DATA & SCI. LAB: ELECTION PERFORMANCE INDEX (Mar. 3, 2020), <https://elections-blog.mit.edu/articles/closer-look-registration-voting-issues-0> [https://perma.cc/XXM5-5HJW].

<sup>108</sup> WHAT IS, WHAT COULD BE, *supra* note 26, at 8.

<sup>109</sup> *Id.*

<sup>110</sup> Orion de Nevers, *U.S. Presidential Election Voter Registration Data*, [https://docs.google.com/spreadsheets/d/1Gn8FXTYL3\\_OCslp7qi1xAjCtxV6zOFm8xby\\_FVx2RIw/](https://docs.google.com/spreadsheets/d/1Gn8FXTYL3_OCslp7qi1xAjCtxV6zOFm8xby_FVx2RIw/) [https://perma.cc/E76Y-E3X7] (last updated Nov. 11, 2021) (analyzing registration data from the U.S. Census).



## 1. Statewide Registration Databases

HAVA adopted the Carter-Ford Commission’s recommendation of aggregating voter registration lists at the state level.<sup>111</sup> This reorchestration has, however, proven problematic. Two principal problems plague HAVA’s statewide registration databases. First, HAVA did not explain *how* states should meet the requirements HAVA imposed, particularly in light of competing priorities within the statute. Second, HAVA’s statewide aggregation may have helped eliminate intercounty discrepancies, but it did nothing to address the movement of voters between states.

### *a. Competing Priorities*

Even within HAVA’s registration database provision, there are competing access and integrity priorities that exist in tension with one another. To advance its access goals, HAVA requires states to ensure that “each registered voter appears” in its database and instructs states to implement “[s]afeguards to ensure that eligible voters are not removed in error.”<sup>112</sup> But to protect integrity, it also mandates that no ineligible or duplicate voters be included in the database, and it promotes this result by requiring states to conduct regular list maintenance to “remove the names of ineligible voters.”<sup>113</sup> In short, HAVA requires perfect registration lists.

<sup>111</sup> See Help America Vote Act of 2002, 52 U.S.C. § 21083(a)(1)(A); TO ASSURE PRIDE AND CONFIDENCE, *supra* note 57, at 31.

<sup>112</sup> § 21083(a)(2)(B)(i), (a)(4)(B).

<sup>113</sup> § 21083(a)(2)(A).

But it is silent on how states should balance these requirements to obtain that result.

This confusion has generated a kaleidoscope of list maintenance practices and priorities that can errantly remove voters from the rolls, undermining HAVA's goals.<sup>114</sup> Under HAVA's mandate, states have removed an increasing number of names from voter rolls over the years, eliminating 4 million more names during the period between 2014 and 2016 than they did in the period between 2006 and 2008.<sup>115</sup> Problems with approaches to list-matching, however, mean that states continue to mistakenly remove voters from the rolls. HAVA requires states to "match" information from newly registered voters with data kept in the states' motor vehicle and death records.<sup>116</sup> But HAVA provides no insight on how states should design their matching protocols to reduce administrative errors and offers no input on how states should prioritize their completeness and accuracy mandates.

*b. Interstate Discrepancies*

In addition to inviting list-maintenance errors, HAVA failed to solve the issue of database coordination between jurisdictions. Instead of solving the problem altogether, HAVA simply shifts the challenge of tracking interjurisdictional voter movement from an intercounty problem to an interstate one. States may, under HAVA, be better positioned to remove duplicate names when a voter moves within a state, but HAVA offers no solution when a voter leaves the state.

In HAVA's first few years, states typically relied on U.S. Postal Service data to solve this problem.<sup>117</sup> But in the years that followed, two new solutions emerged to fill the gap. The first was the Kansas-based Crosscheck, and the second was the Electronic Registration Information Center (ERIC), a system launched by Pew Charitable Trusts.<sup>118</sup> By 2016, 28 states were providing data to Crosscheck, and the service was responsible for examining and organizing 98 million voter records.<sup>119</sup> States began leaving the program, however, when investigative reporting exposed security vulnerabilities, and an outside audit found the program had

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<sup>114</sup> See LEVITT ET AL., *supra* note 57, at ii.

<sup>115</sup> JONATHAN BRATER, KEVIN MORRIS, MYRNA PÉREZ & CHRISTOPHER DELUZIO, BRENNAN CTR. FOR JUST., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1 (2018).

<sup>116</sup> § 21083(a)(5)(B), (a)(2)(A)(ii)(II).

<sup>117</sup> BRATER ET AL., *supra* note 115, at 7.

<sup>118</sup> *Id.* at 6.

<sup>119</sup> Rep. Keith Esau, Kan. State Leg., *Interstate Voter Registration Crosscheck Program* (June 15, 2017), [https://www.ncsl.org/Portals/1/Documents/Elections/Kansas\\_VR\\_Crosscheck\\_Program.pdf](https://www.ncsl.org/Portals/1/Documents/Elections/Kansas_VR_Crosscheck_Program.pdf) [<https://perma.cc/DD5D-WQSP>].



removed 300 legal votes “for every double vote prevented.”<sup>120</sup> These issues culminated with a federal lawsuit, and in 2019 the program was suspended indefinitely as part of a settlement.<sup>121</sup> ERIC, on the other hand, collects more extensive data from its thirty-one state participants and has fared better.<sup>122</sup> Still, the system remains imprecise, creating problems for local election administrators that have caused thousands of legal voters to be mistakenly removed from state databases.<sup>123</sup> All told, then, HAVA’s statewide registration databases have not cured the database management problem Caltech and MIT identified as so pressing twenty years ago, and the loss of votes to registration errors persists.

## 2. Provisional Ballots

HAVA’s provisional ballot “fail-safe” was designed to mitigate the errors endemic to list maintenance by providing improperly removed voters with a backup voting option. Indeed, Caltech and MIT estimated that effective provisional ballots could save 1.5 million lost ballots per election.<sup>124</sup> But provisional ballots have failed to achieve their potential as well.

Data on provisional ballots are captured in reports produced by the U.S. Election Assistance Commission (EAC) after each election and indicate how HAVA’s provisional voting requirement is working. Most studies assessing the bottom-line answer to this question have looked at the total number of provisional ballots cast in the elections following HAVA’s implementation.<sup>125</sup> But this obscures the results: twenty-eight states and Washington, D.C. had fail-safe ballot measures resembling HAVA’s *before*

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<sup>120</sup> Sharad Goel, Marc Meredith, Michael Morse, David Rothschild & Houshmand Shirani-Mehr, *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections*, 114 AM. POL. SCI. REV. 456, 467 (2020); Christopher Ingraham, *This Anti-Voter-Fraud Program Gets It Wrong Over 99 Percent of the Time. The GOP Wants to Take It Nationwide.*, WASH. POST (July 20, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/07/20/this-anti-voter-fraud-program-gets-it-wrong-over-99-of-the-time-the-gop-wants-to-take-it-nationwide/>.

<sup>121</sup> Roxana Hegeman, *Multistate Voter Database Suspended in Lawsuit Settlement*, AP NEWS (Dec. 10, 2019), <https://apnews.com/article/2c82eb782e578bbb81c121ec453fbee8> [<https://perma.cc/4A6P-BNXN>].

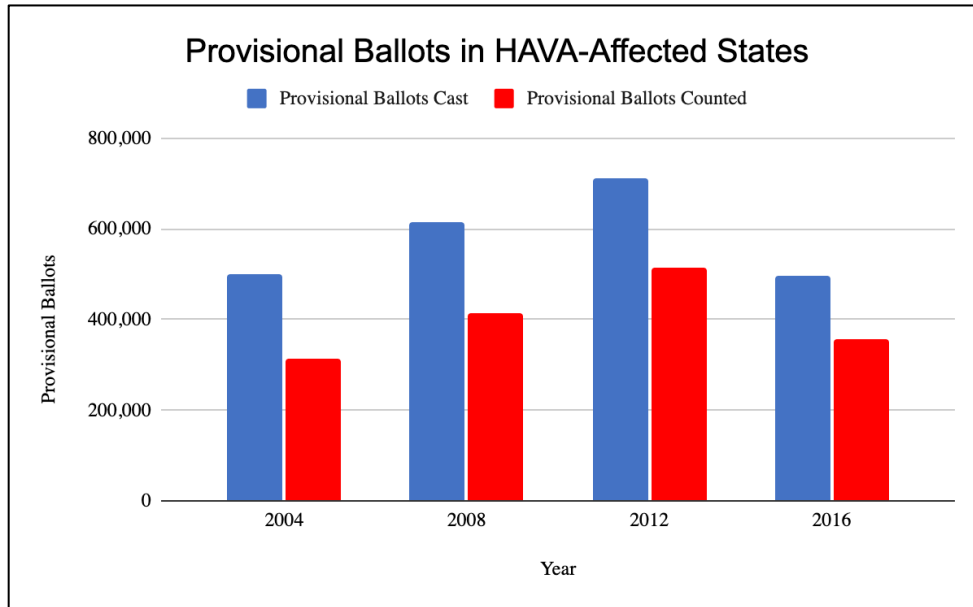
<sup>122</sup> See BRATER ET AL., *supra* note 115, at 8–9; *FAQ’S*, ERIC, <https://ericstates.org/> [<https://perma.cc/3TYV-3E8S>] (last visited Oct. 27, 2021) (showing as of October 2021, 31 states plus D.C. are members of ERIC).

<sup>123</sup> BRATER ET AL., *supra* note 115, at 8–9.

<sup>124</sup> WHAT IS, WHAT COULD BE, *supra* note 26, at 30.

<sup>125</sup> See, e.g., SCOTT NOVAKOWSKI, DÉMOS, *A FALLIBLE ‘FAIL-SAFE’* (2007) (looking at the 2006 election); WENDY R. WEISER, *ARE HAVA’S PROVISIONAL BALLOTS WORKING?* 2 (2006) (looking at the 2004 election).

the law was passed.<sup>126</sup> To understand HAVA's impact, it is critical to look at the increase in provisional ballots in states that did not offer provisional ballots before HAVA. The following chart is the first to report on how provisional ballots have evolved in presidential elections in the twenty-two states HAVA affected.<sup>127</sup>



<sup>126</sup> ELECTION ONLINE, ELECTION REFORM: WHAT'S CHANGED, WHAT HASN'T AND WHY 2000–2006, at 34 (2006). Provisional balloting measures were not uniform across states prior to 2000. *See id.* Using Election Online's data, I categorized states with provisional balloting, affidavit balloting, and where fail-safe voting was non-applicable as being unchanged by HAVA because the law did not increase standards in those states. *See id.* I categorized the eighteen states with no "provisional ballot system in place" and the four states with "limited provisional ballots" as being affected by HAVA because those were the twenty-two states in which HAVA changed the minimum standard. *See id.*

<sup>127</sup> For the underlying data and calculations, see Orion de Nevers, *EAVS Provisional Ballot Data*, <https://docs.google.com/spreadsheets/d/11ArluLgs7N3XpMMEoFeUkqKIMAA5VYIB/> [<https://perma.cc/9B4Y-L3AU>] (last updated Apr. 30, 2021). To produce this chart, I first aggregated the EAC's Election Administration and Voting Survey responses from each presidential election following HAVA. *Surveys and Data*, U.S. ELECTION ASSISTANCE COMM'N, <https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys> [<https://perma.cc/MNZ5-FWCV>] (last visited Nov. 6, 2021) (providing data for 2012 to the present); *Archives – Surveys and Data*, U.S. ELECTION ASSISTANCE COMM'N, <https://www.eac.gov/research-and-data/archives-surveys-and-data> [<https://perma.cc/C9XL-9XSX>] (last visited Nov. 6, 2021) (providing data for 2004 and 2008). 2020 data are not yet available. Next, I isolated the data for HAVA-affected states, which I coded using the methodology described in *supra* note 126. I totaled the results for these states in each election to produce the final result. In calculating provisional ballot totals, I included both fully and partially counted provisional ballots. I did this because a partially counted provisional ballot is more likely to count a presidential election vote, where the voter's registration jurisdiction within a state is not germane to eligibility, than votes for other offices where it is.

As this chart reveals, HAVA has fallen well short of its goal of saving 1.5 million votes per election. Even as voter turnout has increased by over 30 million votes since the 2000 election,<sup>128</sup> the HAVA-affected states have never produced more than 515,000 counted provisional ballots.<sup>129</sup> This is in part because states reject roughly 25% of the provisional ballots cast in each presidential election.<sup>130</sup>

This rejection rate is driven by voters who cast provisional ballots in the wrong location,<sup>131</sup> which, due to a drafting ambiguity in HAVA, states are not required to count. HAVA's text requires states to count provisional ballots only if an election official "determines that the individual is eligible under State law to vote."<sup>132</sup> A strict interpretation of that language leaves states free to amend state law to invalidate provisional ballots in certain circumstances, including ballots cast by voters in the wrong precinct. Indeed, nearly every court to consider the question has determined that HAVA creates a right to *cast* a provisional ballot—but not to have it *counted*.<sup>133</sup> States may therefore invalidate provisional ballots cast in the wrong precinct, among other reasons, and states that disfavor provisional voting have done just that.<sup>134</sup>

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<sup>128</sup> *Voter Turnout in Presidential Elections*, UC SANTA BARBARA, <https://www.presidency.ucsb.edu/statistics/data/voter-turnout-in-presidential-elections> [<https://perma.cc/64DT-LFUK>] (last visited Apr. 26, 2021).

<sup>129</sup> de Nevers, *supra* note 127. It is also important to keep in mind that not all increases in provisional ballots necessarily signal that HAVA is achieving its goals. As discussed above, voter registration hurdles correspond with increases in provisional ballots. Thus, if a state mistakenly removed 100,000 voters from the rolls, each of these voters cast a provisional ballot, and 75% of those ballots were counted (as is the average, discussed below), the state would have mistakenly disenfranchised 25,000 voters, but the provisional ballot number would increase by 75,000. The provisional ballot number should therefore be understood as a directional indicator of HAVA's performance only.

<sup>130</sup> *See id.*

<sup>131</sup> ELECTION ADMIN. COMM'N, 2012 ELECTION ADMINISTRATION AND VOTING SURVEY 13 (2013). The 2016 report does not include this data.

<sup>132</sup> Help America Vote Act of 2002, 52 U.S.C. § 21082(a)(4).

<sup>133</sup> Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 ELECTION L.J. 111, 207 (2013); *see Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 576 (6th Cir. 2004); *Isabel v. Reagan*, 394 F. Supp. 3d 966, 979 (D. Ariz. 2019), *aff'd on other grounds*, 987 F.3d 1220 (9th Cir. 2021); *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004); *Colo. Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485, at \*11 (Colo. Dist. Ct. Oct. 18, 2004). *But cf.* *Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 433 (E.D. Mich. 2004) (holding that under state law a ballot cast in the right jurisdiction but wrong precinct must be counted).

<sup>134</sup> Thirty states and Washington, D.C. do not permit counting provisional ballots cast in the wrong precinct. PEW CTR. FOR THE STATES, PROVISIONAL BALLOTS: AN IMPERFECT SOLUTION 4 (2009). For more on this problem, see Orion de Nevers, *The Dangerous Part of Georgia's Voter Suppression Law That No One Is Talking About*, SLATE (Apr. 30, 2021, 2:44 PM), <https://slate.com/news-and-politics/2021/04/georgia-voter-suppression-provisional-ballots-2000-election.html> [<https://perma.cc/PD8T-3FYG>].

## C. INTEGRITY

HAVA was designed not only to expand access but also to enhance election integrity. As Caltech and MIT reported, state voter-registration lists contained millions of dead or duplicate voters.<sup>135</sup> Republican lawmakers believed that, in light of this report, it was incumbent upon Congress to “seriously examine allegations of voter fraud” and prosecute perpetrators “to the fullest extent of the law.”<sup>136</sup> They also feared that the appearance of impropriety would undermine public confidence in U.S. elections.<sup>137</sup> To promote election integrity, HAVA implemented new list maintenance and voter ID requirements, two measures that were designed to prevent fraud and increase public confidence.<sup>138</sup> Although reducing fraud and improving confidence were twin goals, to understand their success, they must be discussed separately.<sup>139</sup>

## 1. Voter Fraud

HAVA’s bottom-line election integrity agenda was making it “harder to cheat” in U.S. elections.<sup>140</sup> There was, however, only a limited amount of voter fraud for HAVA to address. The Caltech and MIT study reported that state voter rolls contained substantial inaccuracies, but it also concluded that there was “little evidence that such duplicate registrations have led to widespread duplicate voting.”<sup>141</sup> The Carter-Baker Commission agreed, finding “no evidence of extensive fraud in U.S. elections.”<sup>142</sup> Most scholars confirm this assessment: A typical U.S. election contains isolated incidents

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<sup>135</sup> WHAT IS, WHAT COULD BE, *supra* note 26, at 28.

<sup>136</sup> *Hearing on H.R. 3295*, *supra* note 69.

<sup>137</sup> *Id.* at 41; TO ASSURE PRIDE AND CONFIDENCE, *supra* note 57, at 46.

<sup>138</sup> Help America Vote Act of 2002, 52 U.S.C. § 21083(a)(2)(B)(ii)–(iii), (b)(2)(A).

<sup>139</sup> TO ASSURE PRIDE AND CONFIDENCE, *supra* note 57, at 29 (discussing statewide registration systems and voter identification as related measures).

<sup>140</sup> Representative Steny Hoyer’s canonical description of HAVA was that it would make it “easier to vote . . . and harder to cheat.” Tokaji, *Early Returns*, *supra* note 7, at 1213 (quoting David Nather, *Election Overhaul May Have to Wait in Line Behind Other ‘Crisis’ Issues*, CQ WKLY., July 27, 2002, at 2034).

<sup>141</sup> WHAT IS, WHAT COULD BE, *supra* note 26, at 28.

<sup>142</sup> COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 18 (2005).

of voter fraud but not widespread voter fraud.<sup>143</sup> That remains true today.<sup>144</sup> This makes assessing HAVA's impact on voter fraud difficult: the scarcity of voter fraud prior to HAVA imposed a low ceiling on HAVA's fraud-reduction potential.<sup>145</sup>

Still, HAVA's election integrity measures seem unlikely to have addressed even the modicum of voter fraud that did exist in 2000 and that persists today. HAVA's primary election integrity measure was a voter ID

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<sup>143</sup> See e.g., Michael D. Gilbert, *The Problem of Voter Fraud*, 115 COLUM. L. REV. 739, 745–46 (2015); Richard L. Hasen, *Keynote Address of Prof. Richard L. Hasen Given to The Voting Wars Symposium, March 23, 2013*, 28 J.L. & POL. 417, 426–27 (2013) [hereinafter Hasen, *Voting Wars Symposium*]; Heather K. Gerken, *The Invisible Election: Making Policy in a World Without Data*, 35 OHIO N.U. L. REV. 1013, 1015 (2009); JUSTIN LEVITT, BRENNAN CTR. FOR JUST., *THE TRUTH ABOUT VOTER FRAUD 3* (2007), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Truth-About-Voter-Fraud.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf) [<https://perma.cc/D22W-3K4G>]. The Heritage Foundation maintains a database of “recent proven instances of election fraud” which corroborates this characterization; the database contains around 1,300 instances of voter fraud over all U.S. elections in the last 20 years, or about 65 per year. See *A Sampling of Recent Election Fraud Cases from Across the United States*, HERITAGE FOUND., <https://www.heritage.org/voterfraud> [<https://perma.cc/X7FJ-Z64H>] (last visited Apr. 26, 2021).

<sup>144</sup> E.g., Andrew C. Eggers, Haritz Garro & Justin Grimmer, *No Evidence for Systematic Voter Fraud: A Guide to Statistical Claims About the 2020 Election*, 118 PROC. NAT'L ACAD. SCI. 1, 1 (2021), <https://www.pnas.org/content/pnas/118/45/e2103619118.full.pdf> [<https://perma.cc/ADA3-ENYD>]; Hope Yen, Ali Swenson & Amanda Seitz, *AP Fact Check: Trump's Claims of Vote Rigging Are All Wrong*, AP NEWS (Dec. 3, 2020), <https://apnews.com/article/election-2020-ap-fact-check-joe-biden-donald-trump-technology-49a24edd6d10888dbad61689c24b05a5> [<https://perma.cc/XA6E-BUEV>]. The Department of Homeland Security under President Trump characterized the 2020 election as “the most secure in American history.” Press Release, Election Infrastructure Gov't Coordinating Council Exec. Comm. (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election> [<https://perma.cc/VT5B-RWSU>]. The Heritage Foundation's non-exhaustive election fraud database has documented two instances of voter fraud in the 2020 general election. *A Sampling of Recent Election Fraud Cases from Across the United States*, *supra* note 143 (describing cases of Jan Cumber and Paula Parana). North Carolina's Ninth Congressional District race in 2018 is one of the rare, modern examples of fraud affecting the outcome of an election. Zoe Chace, *The Improvement Association: Chapter One: 'The Big Shadoo'*, N.Y. TIMES (Apr. 13, 2021), <https://the-improvement-association.simplecast.com/episodes/episode-1>. This involved vote tampering by political candidates and their operatives, however, not fraud by individual voters, so is not appropriately classified as an example of voter fraud. See Richard L. Hasen, *California's Ballot Harvesting Law: A Crop of Trouble?*, L.A. LAW., July/Aug. 2020, at 15–16 [hereinafter Hasen, *A Crop of Trouble?*]. The impropriety there also involved absentee ballots; as discussed below, HAVA's election integrity measures did not address absentee ballot fraud (which, unlike vote tampering, is a form of voter fraud).

<sup>145</sup> HAVA may deserve some credit for keeping voter fraud to a minimum, but even this is unlikely. As discussed below, HAVA's voter ID requirement targets only voter impersonation fraud, which is the least likely form of voter fraud to occur. See e.g., Gilbert, *supra* note 143, at 745–46; Hasen, *Voting Wars Symposium*, *supra* note 143, at 426–31.

requirement.<sup>146</sup> Voter ID laws target only a single type of voter fraud: voter impersonation fraud.<sup>147</sup> Voter impersonation fraud, however, is the rarest form of voter fraud.<sup>148</sup> One of the most comprehensive studies of voter fraud to date concluded that voter impersonation fraud makes up only 0.5% of all voter fraud allegations.<sup>149</sup> In fact, it is absentee ballot fraud, which voter ID requirements do not address, that is the most common source of voter fraud.<sup>150</sup> Thus, HAVA's voter ID requirement is unlikely to have prevented any noticeable amount of fraud.

HAVA's second election integrity measure, which requires maintenance of statewide voter registration databases, has likely prevented even less fraud than HAVA's voter ID requirement.<sup>151</sup> For the reasons discussed above, this requirement has not been successfully implemented.<sup>152</sup> But even if it had been, it would not have been likely to reduce voter fraud. Unlike HAVA's voter ID requirement, which at least directly addresses one form of voter fraud, registration list maintenance does not directly target voter fraud at all. Instead, it reduces the *opportunity* for three forms of possible voter fraud: voter impersonation fraud, voter registration fraud, and duplicate voting.

Like the ID requirement, this addresses a narrow subset of a small problem; and like voter ID, that subset is the smallest category of voter fraud cases. Take the three voter fraud opportunities list maintenance improvements address in turn. First, voter impersonation is among the rarest forms of voter fraud.<sup>153</sup> Second, there is almost no evidence that voter registration fraud translates into actual voter fraud.<sup>154</sup> Third, studies of

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<sup>146</sup> Help America Vote Act of 2002, 52 U.S.C. § 21083(b)(2)(A).

<sup>147</sup> Gilbert, *supra* note 143, at 745 (2015); Hasen, *Voting Wars Symposium*, *supra* note 143, at 428–29. Other forms of voter fraud include registration fraud, duplicate voting, absentee ballot fraud, vote buying, poll intimidation, and ineligible voting. *Heritage Explains: Voter Fraud*, HERITAGE FOUND., <https://www.heritage.org/election-integrity/heritage-explains/voter-fraud> [<https://perma.cc/EU5G-28LS>] (last visited Apr. 30, 2021).

<sup>148</sup> See Hasen, *Voting Wars Symposium*, *supra* note 143, at 428–29; see also Gilbert, *supra* note 143, at 745 (quoting LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* 6 (2010)) (“[A]lmost no one knowingly and willfully casts an illegal vote in the United States today . . .”).

<sup>149</sup> Hasen, *Voting Wars Symposium*, *supra* note 143, at 428.

<sup>150</sup> Hasen, *A Crop of Trouble?*, *supra* note 144, at 15; Hasen, *Voting Wars Symposium*, *supra* note 143, at 429–30. Professor Hasen goes on to explain, “For those who study elections and election law, these statistics make sense . . . [A]bsentee balloting does raise the risk of fraud because ballots are outside the control of election officials . . .” Hasen, *A Crop of Trouble?*, *supra* note 144, at 15.

<sup>151</sup> Help America Vote Act of 2002, 52 U.S.C. § 21083(a)(2)(A).

<sup>152</sup> See *supra* Section II.B.

<sup>153</sup> See *supra* note 148 and accompanying text.

<sup>154</sup> Richard L. Hasen, *Fraud Reform?: How Efforts to ID Voting Problems Have Become a Partisan Mess*, SLATE (Feb. 22, 2006, 2:11 PM), <https://slate.com/news-and-politics/2006/02/fraud-reform.html> [<https://perma.cc/BA2VYU8A>]. It is true that some

double voting indicate that it, too, is nearly non-existent.<sup>155</sup> Improvements to list maintenance, even if successfully implemented, were therefore always unlikely to reduce actual voter fraud.

## 2. Public Confidence in Elections

HAVA's subsidiary election integrity goal was to restore public confidence in elections following a contest in which many voters lost faith in the veracity of the electoral outcome.<sup>156</sup> In 2000, only 70% of voters were confident each "vote was counted as intended."<sup>157</sup> So unlike combatting voter fraud, there did seem to be an opportunity for HAVA to improve the public's faith in the electoral process.<sup>158</sup>

If HAVA's goal was to improve nationwide confidence in U.S. elections, it failed badly. Overall confidence in U.S. elections has been lower in every election following the enactment of HAVA than it was in 2000.<sup>159</sup> This is reflected in the chart below.<sup>160</sup> As the chart shows, confidence in elections is highly correlated with who wins the election: in every election on record, voters belonging to the political party whose candidate won the election were more likely to be confident in the accuracy of the result.

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registration fraud, like registering Mickey Mouse to vote, exists; there is no evidence that registration fraud translates into actual voter impersonation fraud—Mickey rarely shows up on Election Day. *Id.*

<sup>155</sup> Goel et al., *supra* note 120; LEVITT, *supra* note 143, at 12.

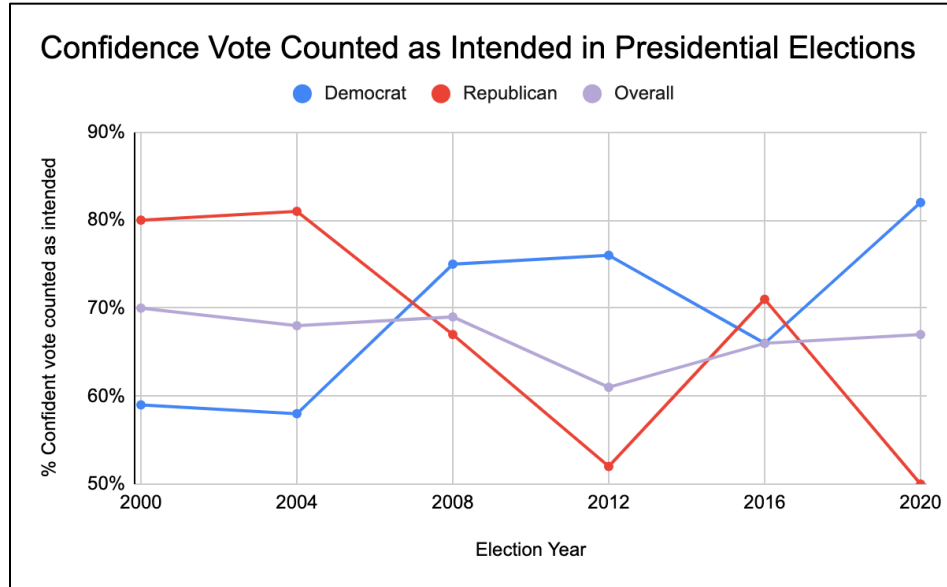
<sup>156</sup> TO ASSURE PRIDE AND CONFIDENCE, *supra* note 57, at 81 (reporting confidence in the "election system at a low ebb").

<sup>157</sup> *Voter Confidence*, MIT ELECTION LAB (Apr. 2, 2021), <https://electionlab.mit.edu/research/voter-confidence> [<https://perma.cc/4TYD-3TM9>].

<sup>158</sup> See TO ASSURE PRIDE AND CONFIDENCE, *supra* note 57, at 78–81 (calling on Congress to implement new legislation to address frustration and lack of confidence in the voting system).

<sup>159</sup> *Voter Confidence*, *supra* note 157.

<sup>160</sup> For the underlying data, see Orion de Nevers, *Voter Confidence in U.S. Presidential Elections*, [https://docs.google.com/spreadsheets/d/1gRRIIYIRamOUSmKnV41QJyj6HE1U51pDKgOi-Q\\_nVkQ/](https://docs.google.com/spreadsheets/d/1gRRIIYIRamOUSmKnV41QJyj6HE1U51pDKgOi-Q_nVkQ/) [<https://perma.cc/E9EP-TJ2N>] (last updated Nov. 11, 2021). The original data is drawn from *Voter Confidence*, *supra* note 157.



Partisan biases, public discourse, and the unique characteristics of individual elections make it impossible to evaluate HAVA's success solely on the basis of this data. HAVA may not have generated an increase in overall confidence in elections, but this conclusion merely raises the counterfactual: Would public confidence have declined even further in HAVA's absence? Research isolating the effects of election administration on voter confidence, as distinct from political outcomes, sheds light on how HAVA may have influenced voter confidence.

The literature in this area suggests that election administration measures cannot overcome individual factors, like partisanship, in affecting public confidence in elections, but they can still have statistically significant effects.<sup>161</sup> This suggests that HAVA is not to blame for the significant fluctuations in and the overall decline of confidence in elections. But it also reveals that implementing the right solutions had the potential to prevent some decline in confidence rates. The studies identify three specific factors that can improve voter confidence: technology, poll workers, and election officials themselves.<sup>162</sup>

<sup>161</sup> Although election administration can improve voter confidence, "individual-level factors," like partisanship, are far more impactful. SHAUN BOWLER, THOMAS BRUNELL, TODD DONOVAN & PAUL GRONKE, *Election Administration and Perceptions of Fair Elections*, 38 ELECTORAL STUD. 1, 7 (2015).

<sup>162</sup> Thad E. Hall, J. Quin Monson & Kelly D. Patterson, *The Human Dimension of Elections: How Poll Workers Shape Public Confidence in Elections*, 62 POL. RSCH. Q. 507, 519–20 (2009) (poll workers); R. Michael Alvarez, Thad E. Hall & Morgan H. Llewellyn, *Are Americans Confident Their Ballots Are Counted?*, 70 J. POL. 754, 764–65 (2008) [hereinafter Alvarez et al., *Are Americans Confident?*] (technology); Lonna Rae Atkeson & Kyle L. Saunders, *The Effect of Election Administration on Voter Confidence: A Local Matter?*, 40 POL. SCI. & POL. 655, 658–59 (2003) (technology, poll workers, and election



First, election technology that permits a verifiable result increases voter confidence.<sup>163</sup> Second, the more competent poll workers are on Election Day, the more confident voters will be in the accuracy of election results.<sup>164</sup> Third, non-partisan election officials increase public perceptions of election integrity.<sup>165</sup>

Neither of HAVA's two election integrity measures, voter ID and voter roll maintenance, are among the factors identified as improving public confidence in elections. Congress believed that the voter ID requirement, in particular, would improve election perceptions of fairness,<sup>166</sup> a view the Supreme Court later shared in its first decision upholding the constitutionality of a voter ID law.<sup>167</sup> Because of the prominence of this assumption in American law, scholars have repeatedly examined whether voter ID laws do, indeed, improve public confidence in elections. Each time, the answer has been no.<sup>168</sup>

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officials); see R. Michael Alvarez, Jian Cao & Yimeng Li, *Voting Experiences, Perceptions of Fraud, and Voter Confidence*, 102 SOC. SCI. Q. 1225, 1226–27 (2021) [hereinafter Alvarez et al., *Voting Experiences*] (technology and poll place experience); BOWLER et al., *supra* note 161, at 8 (“administrative quality”).

<sup>163</sup> Alvarez et al., *Are Americans Confident?*, *supra* note 162; Atkeson & Saunders, *supra* note 162, at 659.

<sup>164</sup> Atkeson & Saunders, *supra* note 162; Hall et al., *supra* note 162, at 519; see Alvarez et al., *Voting Experiences*, *supra* note 162, at 1234 (Election Day experience increases confidence.).

<sup>165</sup> See Atkeson & Saunders, *supra* note 162, at 659; *Voter Confidence*, *supra* note 157; R. MICHAEL ALVAREZ & THAD E. HALL, UNIV. OF UTAH CTR. FOR PUB. POL'Y & ADMIN. & CALTECH/MIT VOTING TECH. PROJECT, PUBLIC ATTITUDES ABOUT ELECTION GOVERNANCE (2005), [https://gardner.utah.edu/\\_documents/publications/elections/election-governance-report.pdf](https://gardner.utah.edu/_documents/publications/elections/election-governance-report.pdf) [<https://perma.cc/3EMS-5KNH>]; Hasen, *Voting Wars Symposium*, *supra* note 143, at 433; see also Hasen, *supra* note 11, at 974 (suggesting this is true as a matter of “common-sense”).

<sup>166</sup> See *Hearing on H.R. 3295*, *supra* note 69; *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (“[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.”).

<sup>167</sup> The Supreme Court provided no citation supporting its assertion. It did go on to reference a passage in the Carter-Baker report about the importance of voter confidence, but that section of the report referred to “safeguards” generally, not voter ID specifically, and in any case did not provide any empirical support for its conclusion that safeguards “inspire public confidence.” See *id.* at 197.

<sup>168</sup> See, e.g., Charles Stewart III, Stephen Ansolabehere & Nathaniel Persily, *Revisiting Public Opinion on Voter Identification and Voter Fraud in an Era of Increasing Partisan Polarization*, 68 STAN. L. REV. 1455 (2016); BOWLER et al., *supra* note 161, at 8; Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1740, 1751–52, 1758–60 (2008). These studies speak only to the effect of voter ID laws on public confidence, not as to whether voter ID laws effectively prevent fraud.

HAVA's voter roll requirement does not fare much better. There is no evidence that voter roll deadwood<sup>169</sup> undermines public confidence in elections.<sup>170</sup> Even if it did, HAVA would not have improved matters because the law has failed to produce accurate lists. Studies in the years since HAVA have consistently estimated that at least 10% of the names on voter registration lists remain deadwood.<sup>171</sup> So, although Congress successfully identified a pressing voter confidence problem, the two solutions it responded with have failed to improve public confidence.

Together, HAVA's election integrity measures were intended to achieve what Congress believed were two corresponding goals: reducing voter fraud and increasing public confidence in elections. In both cases, HAVA's policy solutions failed to target the actual problems Congress sought to redress. As a result, HAVA has neither eliminated fraud nor accomplished the Carter-Ford Commission's eponymic goal of assuring pride and confidence in the electoral process.<sup>172</sup>

As this Part has shown, HAVA's technological improvements have had unintended adverse consequences that cast its long-term success in doubt. What's more, HAVA has not made it significantly "easier to vote" or "harder to cheat."<sup>173</sup> HAVA has, this Part has argued, largely failed. But if we learn from our failures, HAVA should provide valuable lessons for future election administration reform. The next Part discusses those lessons.

### III. HAVA'S LESSONS

What can we learn from HAVA's failures? And has Congress internalized those lessons? This Part extracts five key learnings from HAVA's missteps. It also looks at recent legislative efforts at election administration reform, specifically the For the People Act of 2021 and the Freedom to Vote Act, to gauge whether Congress has learned HAVA's lessons.<sup>174</sup> It concludes that although Congress appears to have remedied some of HAVA's failures, it has not internalized many of HAVA's most important teachings.

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<sup>169</sup> Deadwood refers to "people who have died or moved out of state." *Voter Registration*, MIT ELECTION DATA & SCI. LAB, <https://electionlab.mit.edu/research/voter-registration> [<https://perma.cc/3Y9W-H353>] (last visited Nov. 20, 2021).

<sup>170</sup> See *supra* note 161 and accompanying text.

<sup>171</sup> See, e.g., PEW CTR. ON THE STATES, INACCURATE, COSTLY, AND INEFFICIENT EVIDENCE THAT AMERICA'S VOTER REGISTRATION SYSTEM NEEDS AN UPGRADE 1 (2012), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2012/pewupgradingvoterregistrationpdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2012/pewupgradingvoterregistrationpdf.pdf) [<https://perma.cc/3BHG-78C2>].

<sup>172</sup> TO ASSURE PRIDE AND CONFIDENCE, *supra* note 57, at 46.

<sup>173</sup> Shambon, *supra* note 19 (quoting 60 CQ WKLY. 2034 (July 27, 2002)).

<sup>174</sup> For the People Act of 2021, H.R. 1, 117th Cong. (2021); Freedom to Vote Act, S. 2747, 117th Cong. (2021).

## A. LESSON ONE: TIMELINES MATTER

In the field of election administration, timelines matter.<sup>175</sup> Election administration is a massive statewide effort that requires coordination from a state's top election official down through county administrators and out to the millions of poll workers who volunteer their time on Election Day.<sup>176</sup> When Congress imposes new requirements on states, the legislation itself is only the beginning of the reform effort. Many state legislatures must first pass new bills to enable implementation within the state, and new state funding and delegations of authority may be necessary.<sup>177</sup> States also must decide how to reconcile conflicts or competing priorities between federal legislation and relevant state election laws.<sup>178</sup> Once the legislature sorts through these questions, state election officials can begin implementation efforts.<sup>179</sup> As Florida, Maryland, New York, North Carolina, Ohio, and others discovered in the wake of HAVA, executing this chain of events is no easy task, and mistakes can lead to botched elections.<sup>180</sup> Whatever the urgency of election reform, measures must account for the on-the-ground realities of our localized election administration regime.

This lesson, it appears, is not one Congress has appreciated. Both the For the People Act and the Freedom to Vote Act include an important subtitle dealing with election machinery.<sup>181</sup> That provision requires states to eliminate paperless voting machines to promote cybersecurity.<sup>182</sup> This would be a substantial change: millions of voters used paperless ballots in 2020, and paperless voting is the principal form of election machinery in jurisdictions in at least eight states.<sup>183</sup> Nevertheless, both bills would require these changes to be made by the 2022 election cycle—less than one year of implementation runway.<sup>184</sup> This is far less than the three years HAVA offered. If experience is any guide, this requirement, if passed, could throw the 2022 midterm elections in at least eight states into chaos.

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<sup>175</sup> See *supra* Section II.A.

<sup>176</sup> See WHAT IS, WHAT COULD BE, *supra* note 26, at 12–13.

<sup>177</sup> See Szczesniak, *supra* note 92, at 675–76.

<sup>178</sup> See *id.*

<sup>179</sup> Brandon Fail, Comment, *HAVA's Unintended Consequences: A Lesson for Next Time*, 116 YALE L.J. 493, 496 n.24 (2006).

<sup>180</sup> See *supra* notes 91–94 and accompanying text.

<sup>181</sup> H.R. 1, 117th Cong. §§ 1501–1507 (2021); S. 2747, 117th Cong. §§ 3901–3911 (2021).

<sup>182</sup> H.R. 1 § 1502; S. 2747 § 3902.

<sup>183</sup> See Andrea Córdova McCadney, Elizabeth Howard & Lawrence Norden, *Voting Machine Security: Where We Stand Six Months Before the New Hampshire Primary*, BRENNAN CTR. FOR JUST. (Aug. 13, 2019), [https://www.brennancenter.org/our-work/analysis-opinion/voting-machine-security-where-we-stand-six-months-new-hampshire-primary#\\_edn11](https://www.brennancenter.org/our-work/analysis-opinion/voting-machine-security-where-we-stand-six-months-new-hampshire-primary#_edn11) [<https://perma.cc/DJX6-D94Y>]; *Election Security: Hearing Before the H. Comm. on H. Admin.*, 116th Cong. (2019) [hereinafter *Election Security*] (statement of Lawrence D. Norden, Deputy Dir., Brennan Ctr.'s Democracy Program).

<sup>184</sup> H.R. 1 § 1507; S. 2747 § 3907.

## B. LESSON TWO: YOU GET WHAT YOU PAY FOR

Timelines can create problems in the short term but failing to fund state compliance efforts can have more lasting consequences. Election administration is predominantly a state-run operation. The federal government hands down guardrails through HAVA, the Voting Rights Act, and other legislation, but local governments provide the manpower to execute state election schemes.<sup>185</sup> Funding these efforts mostly falls to states or local governments, with the exception of HAVA's one-time appropriations.<sup>186</sup> When states run out of money, sacrifices of some kind are inevitable.<sup>187</sup> It seems critical, then, that federal election administration laws provide sufficient and *ongoing* funding to ensure states comply with federal law—and that they do so without having to redirect state funds from other important election activities.<sup>188</sup>

Congress seems not to have learned this lesson either. As just discussed, the For the People Act requires states to make considerable changes to election machinery. Yet the Act provides *no* funding for states to transition to paperless voting.<sup>189</sup> This is the kind of expensive burden-shifting that could prompt states to, among other things, consolidate polling places.<sup>190</sup> Indeed, a 2018 survey found that at least twenty states needed to replace their election technology before the 2020 election—but did not have the funding to do so.<sup>191</sup>

The Freedom to Vote Act fixes this mistake with respect to election machinery but repeats it in other areas. The Freedom to Vote Act appropriates \$2.4 billion to fund upgrades to voting machines.<sup>192</sup> This is a much-needed solution to the funding hole in the For the People Act and an improvement upon HAVA's shortcomings. Yet the bill leaves many other expensive mandates unfunded.<sup>193</sup> For example, the Freedom to Vote Act

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<sup>185</sup> Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 750, 779 (2016); WHAT IS, WHAT COULD BE, *supra* note 26, at 12.

<sup>186</sup> Weinstein-Tull, *supra* note 185, at 779.

<sup>187</sup> See, e.g., Szczesniak, *supra* note 92, at 675, 678.

<sup>188</sup> See *supra* Section II.A.

<sup>189</sup> See H.R. 1, 117th Cong. §§ 1501–1507 (2021). According to the Brennan Center, completely shifting off paperless voting in the United States would cost over \$300 million. *Estimate for the Cost of Replacing Paperless, Computerized Voting Machines*, BRENNAN CTR. FOR JUST., [https://www.brennancenter.org/sites/default/files/analysis/New\\_Machines\\_Cost\\_Across\\_Paperless\\_Jurisdictions%20%282%29.pdf](https://www.brennancenter.org/sites/default/files/analysis/New_Machines_Cost_Across_Paperless_Jurisdictions%20%282%29.pdf) [https://perma.cc/R5FG-CLQT] (last visited Nov. 7, 2021).

<sup>190</sup> See *supra* notes 101–04 and accompanying text.

<sup>191</sup> See *Election Security*, *supra* note 183.

<sup>192</sup> S. 2747, 117th Cong. § 3908 (2021).

<sup>193</sup> The For the People Act includes similar voter registration requirements and leaves them unfunded as well. H.R. 1 §§ 1001–1008, 1031, 1041.

would impose substantial new voter registration requirements on states.<sup>194</sup> Although it provides funding to support some of these measures, many substantial provisions, including the bill's online voter registration requirement, same-day voter registration requirement, and requirements for interstate crosschecks, are unfunded,<sup>195</sup> despite concrete evidence showing the cost of implementing these measures in states that have already adopted similar programs. In most states, for instance, implementing online voter registration costs around \$250,000<sup>196</sup> and, in some places, as much as \$1 million.<sup>197</sup>

By going long on requirements and short on funding, the For the People Act and Freedom to Vote Act invite non-compliance, poll place consolidation, and other long-term unintended consequences in states without the funding to comply with the pertinent standards. And because the bill's new mandates are far more ambitious than those set forth in HAVA twenty years ago, the consequences may be correspondingly more severe.

### C. LESSON THREE: CHOOSE WORDS WISELY

One of HAVA's most basic flaws was a semantic one. HAVA's text requires states to permit voters to "cast" provisional ballots.<sup>198</sup> According to the courts, however, this language does not require states to *count* those ballots.<sup>199</sup> One of the most heavily litigated iterations of this problem has played out in states that reject provisional ballots cast in the wrong precinct.<sup>200</sup> Every court to consider the question has interpreted HAVA to permit states to reject these ballots.<sup>201</sup> As a result, roughly half of states reject provisional ballots cast in the wrong precinct as a matter of state

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<sup>194</sup> *Id.* §§ 1000–1008.

<sup>195</sup> *See id.* The bill does permit the use of HAVA's "requirements funds" to comply with these new requirements. *See* S. 2747, 117th Cong. § 1051 (2021). Congress, however, has not appropriated new HAVA "requirements payments" since 2011. *HAVA 251 Funds*, U.S. ELECTION ASSISTANCE COMM'N, <https://www.eac.gov/payments-and-grants/hava-251-funds> [<https://perma.cc/7RFG-PSY7>] (last visited Apr. 3, 2021). Additionally, most of the original requirement payment funding has been spent. *See* U.S. ELECTION ASSISTANCE COMM'N, ANNUAL GRANT EXPENDITURE REPORT: FISCAL YEAR 2019 3, 10–11 (2020).

<sup>196</sup> *Online Voter Registration*, PEW CHARITABLE TR., May 2014, at 4, [https://www.pewtrusts.org/-/media/assets/2015/05/ovr\\_2015\\_brief.pdf](https://www.pewtrusts.org/-/media/assets/2015/05/ovr_2015_brief.pdf) [<https://perma.cc/KBQ3-C4C7>] (last visited Nov. 21, 2021).

<sup>197</sup> Wendy Underhill, *More States Are Offering Voters the Convenience of Registering Online Because It's Cheap, Easy and Increasingly Secure*, NAT'L CONF. OF STATE LEGISLATURES (May 2013), <https://www.ncsl.org/research/elections-and-campaigns/no-lines-online.aspx> [<https://perma.cc/T24G-LPGE>].

<sup>198</sup> Help America Vote Act of 2002, 52 U.S.C. § 21082(a)(4) (emphasis added).

<sup>199</sup> *See supra* notes 132–34 and accompanying text.

<sup>200</sup> Tokaji, *supra* note 133.

<sup>201</sup> *See supra* note 132 and accompanying text.

law,<sup>202</sup> and this practice has become a leading source of provisional ballot rejections.<sup>203</sup> All told, despite HAVA's provisional ballot mandate, nearly 25% of provisional ballots are still rejected nationwide and acceptance rates vary dramatically across states.<sup>204</sup>

Recent legislative efforts learn this lesson, too specifically. The two recent bills require states to “*count* each vote” cast on a provisional ballot by an eligible voter “notwithstanding the precinct or polling place at which a provisional ballot is cast.”<sup>205</sup> This appears to fix HAVA's pedantic failure. But Congress's application of this lesson seems to have ended there. In a separate provision, the bills require states to permit Election Day registration and allow eligible voters who register on election day to “*cast*” a vote in the state's election.<sup>206</sup> But the bills are silent on when states are required to *count* those votes.<sup>207</sup> So although the law may remedy HAVA's provisional ballot miscue, it seems vulnerable to replacing one interpretive mishap with another.

#### D. LESSON FOUR: FILL UP THE DETAILS

Though HAVA was a deliberately tapered compromise, the provisions it does contain are in many ways aspirational. Modern technology, widespread voter access, election integrity. Three ambitious goals enshrined in a single bill. Unfortunately, however, HAVA offers almost no guidance on *how* states are to realize these ideals.<sup>208</sup> Congress might have provided guidance in two ways. The law itself could have been written more prescriptively to instruct states on how to best comply with its mandates. Or it could have delegated to the EAC the task of “fill[ing] up the details.”<sup>209</sup> But it did neither. HAVA contains no details for states to follow to comply with the law, and the EAC “was designed to have as little regulatory power as possible.”<sup>210</sup> As a result, there is a vacuum of authority governing how states should resolve HAVA's competing priorities.

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<sup>202</sup> U.S. ELECTION ASSISTANCE COMM'N, ELECTION ADMINISTRATION AND VOTING SURVEY 2018 COMPREHENSIVE REPORT 130 (2019).

<sup>203</sup> U.S. ELECTION ASSISTANCE COMM'N, 2012 ELECTION ADMINISTRATION AND VOTING SURVEY 13 (2013).

<sup>204</sup> de Nevers, *supra* note 134.

<sup>205</sup> H.R. 1, 117th Cong. § 1601 (2021) (emphasis added); S. 2747, 117th Cong. § 3911 (2021) (emphasis added).

<sup>206</sup> H.R. 1 § 304(a)(1)(B) (emphasis added); S. 2747 § 304 (a)(1)(B) (emphasis added).

<sup>207</sup> *See* For the People Act of 2021, H.R. 1, 117th Cong. (2021); Freedom to Vote Act, S. 2747, 117th Cong. (2021).

<sup>208</sup> *See supra* Section III.A.

<sup>209</sup> *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

<sup>210</sup> Shambon, *supra* note 19.

Congress's recent election administration reform proposals are more detailed than HAVA<sup>211</sup> but leave the EAC a toothless agency. This is problematic both because a statute itself will never contain all the necessary details and because regulatory agencies offer much more flexibility. Although the increased level of detail in the bill should help to a degree, it will not cure (and may in some cases backfire because of) the absence of a regulatory agency authorized to promulgate rules under the law.

#### E. LESSON FIVE: TARGET THE RIGHT PROBLEM

HAVA is a case study in the importance of correctly identifying the policy problem a particular piece of legislation is designed to solve and crafting a solution tailored to that specific problem. Republican supporters of HAVA were concerned with election integrity.<sup>212</sup> These lawmakers wanted to reduce fraud and increase public confidence in elections.<sup>213</sup> But HAVA was not written to solve either of these problems. Instead, the Act contained a photo ID requirement and a registration list maintenance requirement.<sup>214</sup> As discussed in Section II.C, *supra*, neither of these solutions targets either stated problem.

Recent election administration reform efforts suffer from a related but slightly different iteration of this problem. Whereas HAVA implemented solutions that were *misaligned* with the problems it attempted to solve, the For the People Act and Freedom to Vote Act *overestimate* the impact each bill will have on the problems they identify.<sup>215</sup>

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<sup>211</sup> See H.R. 1, 117th Cong. §§ 1921–25 (2021); S. 2747, 117th Cong. §§ 1611–13 (2021).

<sup>212</sup> See *supra* note 6 and accompanying text.

<sup>213</sup> See *supra* note 78 and accompanying text.

<sup>214</sup> Help America Vote Act of 2002, 52 U.S.C. § 21083(a)(2)(A), (b)(2)(A).

<sup>215</sup> For a sampling of proponents' expectations of the For the People Act, see, for example, Press Release, Sen. Amy Klobuchar, Klobuchar, Merkley, Schumer Introduce For the People Act to Strengthen Democracy and Put Power Back in the Hands of the American People (Mar. 18, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/2021/3/klobuchar-merkley-schumer-introduce-for-the-people-act-to-strengthen-democracy-and-put-power-back-in-the-hands-of-the-american-people> [https://perma.cc/KT94-XVFL]; Press Release, Sen. Chuck Schumer, Majority Leader Schumer Floor Remarks on the Introduction of S.1., The For the People Act, In the Senate to Combat Voter Suppression Efforts and Re-invigorate American Democracy (Mar. 17, 2021), <https://www.democrats.senate.gov/news/press-releases/majority-leader-schumer-floor-remarks-on-the-introduction-of-s1-the-for-the-people-act-in-the-senate-to-combat-voter-suppression-efforts-and-re-invigorate-american-democracy> [https://perma.cc/S6GU-PKBN]. For a sampling of proponents' expectations of the Freedom to Vote Act, see, for example, Press Release, Sen. Amy Klobuchar, Klobuchar, Colleagues Introduce Legislation to Protect Freedom to Vote and Strengthen our Democracy (Sept. 14, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/2021/9/klobuchar-colleagues-introduce-legislation-to-protect-freedom-to-vote-and-strengthen-our-democracy> [https://perma.cc/NJ4C-MPRR]; Press Release, Majority Leader Schumer Floor Remarks in Advance of Today's Cloture Vote on the Motion to Proceed to the Freedom to Vote Act (Oct. 20, 2021),

The election administration measures in each bill are primarily concerned with increasing democratic participation by expanding voter access.<sup>216</sup> To do this, they implement a series of provisions concerning voter registration, early voting, and vote-by-mail.<sup>217</sup> According to most empirical studies, these policies do increase turnout.<sup>218</sup> But the evidence also suggests they do so much more modestly than proponents may believe.<sup>219</sup> This is a serious concern. The next generation of election administration reforms, like HAVA, will produce unintended consequences, including but not limited to those discussed above. If proponents of reform overestimate its benefits, they cannot appropriately weigh those benefits against its costs, skewing their cost-benefit analysis of the law's merits. For the law to achieve everything proponents hope that it will, its sponsors must properly understand the precise effects the law will have on the problems they hope to solve.

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<https://www.democrats.senate.gov/news/press-releases/majority-leader-schumer-floor-remarks-in-advance-of-todays-cloture-vote-on-the-motion-to-proceed-to-the-freedom-to-vote-act> [<https://perma.cc/RW2U-8GRS>].

<sup>216</sup> The caption to each bill begins, “To expand Americans’ access to the ballot box.” See H.R. 1, 117th Cong. (2021); S. 2747, 117th Cong. (2021).

<sup>217</sup> H.R. 1, 117th Cong. §§ 1001–1031, 1611, 1621–24 (2021); S. 2747, 117th Cong. §§ 1001–1305 (2021).

<sup>218</sup> See Nathaniel Rakich, *What Happened When 2.2 Million People Were Automatically Registered to Vote*, FIVETHIRTYEIGHT (Oct. 10, 2019), <https://fivethirtyeight.com/features/what-happened-when-2-2-million-people-were-automatically-registered-to-vote/> (discussing automatic voter registration); Ketaki Gujar, *Zooming Past Motor-Voter: An Analysis of How Automatic Voter Registration Policies Impact Voter Turnout in the United States*, U. PENN. COLL. UNDERGRADUATE RSCH. ELEC. J. 4 (2020) (discussing automatic voter registration); Craig Leonard Brians & Bernard Grofman, *Election Day Registration’s Effect on U.S. Voter Turnout*, 82 SOC. SCI. Q. 170, 170 (2001) (discussing Election Day registration); *Voting by Mail and Absentee Voting*, MIT ELECTION LAB, <https://electionlab.mit.edu/research/voting-mail-and-absentee-voting> [<https://perma.cc/BRB8-EJHS>] (last visited Mar. 16, 2021) (discussing vote-by-mail); Daniel M. Thompson, Jennifer A. Wu, Jesse Yoder & Andrew B. Hall, *Universal Vote-by-mail Has No Impact on Partisan Turnout or Vote Share*, PROC. NAT’L ACAD. SCIS., June 2020, at 14052 (discussing vote-by-mail); Paul Gronke, Eva Galanes-Rosenbaum & Peter A. Miller, *Early Voting and Turnout*, 40 POL. SCI. & POL. 639, 643 (2007) (discussing early voting); Ethan Kaplan & Haishan Yuan, *Early Voting Laws, Voter Turnout, and Partisan Vote Composition: Evidence from Ohio*, 12 AM ECON. J. APPLIED ECON. 32, 43 (2020) (discussing early voting).

<sup>219</sup> See Gujar, *supra* note 218 (finding that automatic voter registration “has a small but positive effect on voter turnout”); see also Brians & Grofman, *supra* note 218, at 178 (finding that Election Day registration provided a “modest and enduring turnout boost . . .”); *Voting by Mail and Absentee Voting*, *supra* note 218 (“The safest conclusion to draw is that [vote-by-mail] options increases turnout modestly . . .”); Gronke et al., *supra* note 218, at 643–44 (concluding that early voting has a “modest impact” on turnout and therefore there may be “good reasons to adopt early voting . . . but boosting turnout is not one of them.”).



## CONCLUSION

This Article remembers a forgotten law. It asks why, twenty years later, a bill once heralded as the “first true civil rights legislation of the twenty-first century” has been absent from the most animated election administration debate in two decades.<sup>220</sup> After discussing what HAVA set out to do, the Article argues that HAVA has failed to achieve its goals. The Article renders no opinion on the normative value of HAVA’s efforts or what the goals of the legislation should have been. It merely contends that HAVA has failed to fully accomplish the objectives the 107th Congress believed it would achieve.

The Article then asks what we can learn from HAVA and whether Congress has internalized its lessons. In doing so, it identifies five key lessons from HAVA’s first two decades: timelines matter; you get what you pay for; choose words wisely; fill up the details; and target the right problem. It then looks at recent reform efforts to see whether these lessons have been applied. The study concludes that Congress has failed to grasp the most important lessons HAVA taught. Recent reform efforts provide insufficient funding for many of their central mandates, impose unrealistic timelines on state election administrators, repeat HAVA’s semantic mistakes, leave a regulatory void for administering new laws, and overestimate the impact ballot access measures are likely to have.

Whichever bill ushers in the next era of election administration reform, before passing it, Congress would be wise to remember what happened to HAVA and to avoid repeating its mistakes.

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<sup>220</sup> Waterstone, *supra* note 10.