

NOTES

Poverty, Place and Voter Participation: Bridging the Gap

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In West Virginia, Florida, Wisconsin, and Pennsylvania, there is a correlation between poverty, place, and lower voter participation. In the 2016 presidential election, the five poorest counties in four of these states exhibited average voter participation rates that were appreciably lower than their five wealthiest counties. The fifth state discussed here—Oregon—features the opposite trend.

This Note briefly explores a sampling of election laws in each state, with a particular emphasis on voter identification laws and the availability of mail ballots. It then considers several proposed pieces of federal legislation designed to expand the franchise. It also considers some of the salient concerns about voting during the coronavirus (COVID-19) pandemic and litigation surrounding the 2020 election. Drawing upon various pieces of legislation, the Note then offers a federal legislative proposal that ties federal dollars to the parity of voter participation between the poorest and wealthiest census tracts. All of this is possible with unified Democratic government willing to reform the filibuster. The reactions of state and federal leaders to the challenge of voting during the COVID-19 crisis only underscores the need for broad reform. Legislation like this Note's "Equal Voter Participation Act of 2021" could survive under several constitutional theories. The disparity in participation between rich and poor voters will likely only grow wider with more restrictive state laws and the lack of a federal response. The time to act is now.

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I. INTRODUCTION: THE STATE OF PLAY IN AMERICA

All eligible voters do not vote in the United States. Only 55.7% of the voting-age population actually voted in 2016.¹ Per data collected by the Organization for Economic Cooperation and Development, that percentage puts the U.S. ahead of just five of thirty-five peer nations.² Theorists posit a number of rationales for this,

1. Drew DeSilver, *In Past Elections, U.S. Trailed Most Developed Countries in Voter Turnout*, PEW RSCH. CTR.: FACT TANK (Nov. 3, 2020), <https://www.pewresearch.org/fact-tank/2020/11/03/in-past-elections-u-s-trailed-most-developed-countries-in-voter-turnout/>.

2. *Id.*

including education levels and racial divides.³ For all the salient talk surrounding political candidates, who has what political base, and which voters might be persuadable,⁴ the correlation between poverty, place, and voter participation deserves closer scrutiny. Do voters in poor areas vote like those who live in rich ones? Might disparities arise out of differing state laws? Can the law decouple zip codes and poverty rates from higher or lower rates of voter participation?

Part II of this Note uses election data from West Virginia, Florida, Wisconsin, Pennsylvania, and Oregon to describe how poverty and place are correlated to differences in voter turnout by county. The Note examines West Virginia because of its shift from being a strong Democratic state to “Trump country”;⁵ Florida because of its diversity and history of razor thin election margins;⁶ Wisconsin because of its undemocratic division of power, where a minority of voters select a majority of the legislature;⁷ Pennsylvania because of its (nearly) keystone status in the 2020 presidential election;⁸ and Oregon because of its well-renowned mail voting system.⁹ This Note uses data from the U.S. Census Bureau¹⁰ to determine the five counties with the highest and lowest poverty rates in each state, then compares voter registration data with actual total turnout in each county in order to determine voter participation rates. The counties vary widely: some contain densely populated urban areas, while other areas are rural. Notably, the four states with higher turnout disparities between wealthier and poorer counties had voter identification (ID) laws, issues with selectively closed polling places, and other restrictions that made voting harder for poor people.

3. See, e.g., David E. Campbell, *What is Education's Impact on Civic and Social Engagement?* ORG. FOR ECON. COOP. AND DEV., 25, 27 (2006), <http://www.oecd.org/education/innovation-education/37425694.pdf> (“Education is widely recogni[z]ed as having a strong correlation with multiple forms of civic and social engagement . . .”); Rashawn Ray & Mark Whitlock, *Setting the Record Straight on Black Voter Turnout*, BROOKINGS (Sept. 12, 2019), <https://www.brookings.edu/blog/up-front/2019/09/12/setting-the-record-straight-on-black-voter-turnout/>.

4. See Robert Creamer, *Why 2020 Is a Turnout Election*, THE AM. PROSPECT (Mar. 5, 2020), <https://prospect.org/politics/why-2020-is-a-turnout-election/>.

5. Dante Chinni & Matt Rivera, *West Virginia: How the Bluest State Became the Reddest*, NBC NEWS (Dec. 18, 2016, 5:16 PM), <https://www.nbcnews.com/meet-the-press/west-virginia-how-bluest-state-became-reddest-n697491>.

6. *Florida, 270 TO WIN*, <https://www.270towin.com/states/Florida> (last visited May 5, 2021).

7. Jay Willis, *Republican Gerrymandering Has Basically Destroyed Representative Democracy in Wisconsin*, GQ (Dec. 5, 2018), <https://www.gq.com/story/republican-gerrymandering-wisconsin>.

8. Nathaniel Rakich, *Why Pennsylvania Could Decide the 2020 Election*, FIVETHIRTYEIGHT (Sept. 15, 2020, 6:00 AM), <https://fivethirtyeight.com/features/why-pennsylvania-could-decide-the-2020-election/>; Jonathan Lai, *Philly Isn't Why Biden Won Pennsylvania. And Pennsylvania Probably Isn't Why Biden Won the White House*, PHILA. INQ. (Nov. 10, 2020), <https://www.inquirer.com/politics/election/philadelphia-pennsylvania-2020-election-tipping-point-state-20201110.html> (a cheeky analysis of Pennsylvania voting just a hair to the left of Wisconsin, the tipping point state that decided the election. The networks calling Pennsylvania for Biden is nevertheless what put him over the top in their projections.).

9. Jen Kirby, *Oregon Already Votes by Mail. Here's What It Can Teach Us in 2020.*, VOX (Sept. 28, 2020, 10:30 AM), <https://www.vox.com/21401321/oregon-vote-by-mail-2020-presidential-election>.

10. See *Small Area Income and Poverty Estimates* (hereinafter *SAIPE*), U.S. CENSUS BUREAU, https://www.census.gov/data-tools/demo/saipe/#/?map_geoSelector=aa_c&s_state=54 (last visited May 5, 2021) (The SAIPE tool is referenced extensively throughout this Section. It is an interactive tool that requires the user to input information in order to retrieve data).

Voter ID laws feature prominently throughout this Note as a villain because they disproportionately impact low-income voters.¹¹ The American Civil Liberties Union estimates that as many as 11% of all Americans—twenty-one million people—lack photo identification.¹² Obtaining a photo ID can present a major financial challenge to people living in poverty, when the average cost of “document fees, travel expenses and waiting time are estimated to range from \$75 to \$175.”¹³ The significant travel that can be involved for people living in rural areas looking to obtain a photo ID poses additional issues, like finding an accessible and affordable means of conveyance.¹⁴ These laws also have racist undertones, given that as many as “25% of African-American citizens of voting age lack government-issued photo ID, compared to only 8% of whites.”¹⁵ These unfortunate realities underlie much of the discussion in Part II. The laws discussed there are almost exclusively of Republican provenance, and this Note does not shy away from recognizing the partisan reality of voting rights legislation.

Part III explores legislative solutions. Some of the issues mentioned throughout this Note are symptoms of deep structural racism that will not go away with even the best legislation. This Note does not presume to solve them. But some aspects of voter participation disparities between rich and poor counties boil down to access and oversight. To better understand what they might look like, Part III explores existing legislative proposals, including the restoration of the Voting Rights Act, a national vote by mail system, and a law that would set national standards for voting during a pandemic or other natural disaster. COVID-19 scrambled elections all across the country and Part III discusses the impact of the pandemic on primary elections and legal challenges in the lead up to the 2020 election. With reference to prior legislative efforts, Part III proposes a law that would address the disparities identified in Part II by tying federal election funding to the achievement of greater parity in voter participation between rich and poor areas. This section also traces the series of Democratic victories that had to occur in 2020 and early 2021—and will likely need to occur in the future—to achieve passage. Part IV defends the constitutionality of this solution, exploring the contours of relevant U.S. Supreme Court jurisprudence. Part V concludes with a summation of the data, the law, and a call to action.

This Note considers poverty and place with limited reference to race. This is partially to narrow the scope of the inquiry by isolating a single correlative effect between the poverty rate of a county and voter participation, allowing for a straightforward comparison of radically different places. This choice is also rooted in a recognition that capturing the vast human, geographic, and historical diversity of the places surveyed here would go beyond the scope of a single Note. No discussion of voter suppression deserves to be taken seriously, however, if it avoids speaking a fundamental truth: that it is a tool of white supremacy. This Note encourages the reader to investigate that history and reality further, to call it what

11. *Oppose Voter ID Legislation - Fact Sheet*, AM. CIV. LIBERTIES UNION, (last visited May 5, 2021), <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet>.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

it is, and to work for racial justice at the ballot box and in all other aspects of American life.

II. VOTING WHILE POOR: RATES OF VOTER PARTICIPATION IN THE FIVE POOREST AND FIVE RICHEST COUNTIES OF FIVE (VERY DIFFERENT) STATES

Making use of voter registration data, county-wide poverty rates from the Census Bureau, and 2016 presidential election results, this section compares voter participation rates in the five poorest and wealthiest counties in West Virginia, Florida, Wisconsin, Pennsylvania, and Oregon. The discrepancy was greatest in West Virginia, where voter participation in the five counties with the lowest poverty rates exceeded the five counties with the highest poverty rates by an average of 10.02%.¹⁶ In Florida, the average discrepancy was 6.47%, again favoring the wealthier counties.¹⁷ In Wisconsin, the wealthiest five counties outvoted the five poorest counties by an average of 8.01%.¹⁸ Pennsylvania exhibited the lowest average discrepancy in favor of the wealthiest counties, coming in at 5.35%.¹⁹ Oregon flipped the pattern on its head: the five poorest counties there actually voted at a greater rate than the five wealthiest by an average of 3.43%.²⁰ This is no accident: the four states where wealthier counties outpaced poorer counties have all featured unified Republican control of government at some point during the last decade, governments which have exercised their power to make voting more difficult, particularly for low-income voters.²¹ As discussed in more detail below, these efforts included offering fewer polling places and passing more restrictive voter ID laws, among others. Notably, low-income voters tend to prefer Democratic candidates on the national level: among voters making less than \$30,000 per year, Hillary Clinton took 53% to Donald Trump's 41% of overall votes.²² This Part concludes with Oregon's electoral data, which uses universal mail voting and where voters in the poorest counties outvote those in wealthier ones.

A. West Virginia

Over the last two decades, West Virginia underwent enormous political transformation. In 2000, two days before President George W. Bush shocked political observers by narrowly carrying the state against Vice President Al Gore, the New York Times published an article with a lede that would baffle readers today: "In politics, West Virginia is synonymous with Democrats."²³ Bush's

16. *See infra*, Part II-A.

17. *See infra*, Part II-B.

18. *See infra*, Part II-C.

19. *See infra*, Part II-D.

20. *See infra*, Part II-E.

21. *See infra*, Part II-A–II-D.

22. Jeremy Slevin, *Stop Blaming Low-Income Voters for Donald Trump's Victory*, TALK POVERTY (Nov. 16, 2016), <https://talkpoverty.org/2016/11/16/stop-blaming-low-income-voters-donald-trumps-victory/>.

23. Janet Battaile, *The 2000 Campaign: West Virginia; Gore Is Trying to Catch Up in Democrat-Dominated State*, N.Y. TIMES (Nov. 5, 2000), <https://www.nytimes.com/2000/11/05/us/2000-campaign->

victory marked a turning point for voters and the way the state votes for president. Just sixteen years later, Trump would carry the state by nearly forty-two points—a swing in the Republican presidential candidate’s favor of more than thirty-five points.²⁴

Elections to state office lagged behind the trendline of presidential politics, but they have caught up in recent years. With the exception of a brief interruption by Republican Governor Cecil Underwood from 1997 to 2001, Democrats controlled both chambers of the state legislature and the governor’s mansion from 1992 through 2014.²⁵ Since Republican Governor Jim Justice’s much-publicized decision to switch parties in 2017,²⁶ however, Republicans have maintained a trifecta.²⁷ The transformation in party loyalty was complete.

The state’s newfound preference for Republicans ushered in a new era of voting laws. Effective January 1, 2018, the state began requiring voters to present a valid identification document in order to cast a ballot.²⁸ Remarkably, despite the impacts discussed in Part I of this Note, the Office of the Secretary of State issued a press release claiming that “the Secretary has heard nothing but positive remarks regarding the new law.”²⁹

West Virginia is characterized by its picturesque mountains and small, rural communities. The tables below show exceptionally high poverty rates in some of these rural places; travel to obtain a photo ID poses an arduous challenge for many, despite the Secretary’s claim. Take McDowell County, which featured both the highest poverty rate and lowest rate of voter participation in the state in 2016. A would-be voter living below the poverty line in Wyoming City would have to take a forty-five-minute car ride to Welch, the county seat, in order to obtain a driver’s license.³⁰ Just getting there—let alone fulfilling other requirements—would not be easy, belying the Secretary’s remarks.

In recent years, West Virginia also began to reduce the number of available polling places.³¹ In 2013, lawmakers slashed the number of precincts in McDowell

west-virginia-gore-trying-catch-up-democrat-dominated-state.html; *West Virginia*, 270 TO WIN, https://www.270towin.com/states/West_Virginia (last visited Mar. 23, 2021).

24. *West Virginia Results*, N.Y. TIMES (June 15, 2018, 11:40 AM), <https://www.nytimes.com/elections/2016/results/west-virginia>; by comparison, Bush defeated Gore by just over six points. *The 2000 Election*, N.Y. TIMES (Dec. 7, 2000), <https://archive.nytimes.com/www.nytimes.com/specials/election2000/results-pres.html>.

25. *Party Control of West Virginia State Government*, BALLOTPEdia, https://ballotpedia.org/Party_control_of_West_Virginia_state_government (last visited Mar. 23, 2021).

26. Mathew Nussbaum et al., *West Virginia Democratic Governor Switches to GOP*, POLITICO (Aug. 3, 2017, 7:57 PM), <https://www.politico.com/story/2017/08/03/jim-justice-party-change-republican-241300>.

27. *Party Control of West Virginia State Government*, *supra* note 25.

28. See W. VA. CODE § 3-1-34 (2020).

29. Press Release, Andrew “Mac” Warner, Sec’y of State, W. Va., Citizens Supportive of West Virginia’s New Voter Identification Law (Sept. 21, 2018) <https://sos.wv.gov/news/Pages/09-21-2018-A.aspx>.

30. Driving Directions from Wyoming City, W. Va., to Welch, W. Va., GOOGLE MAPS, <http://maps.google.com> (follow “Directions” hyperlink; then search starting point field for “Wyoming City, WV” and search destination field for “Welch, WV”).

31. Rob Arthur & Allison McCann, *How the Gutting of the Voting Rights Act Led to Hundreds of Closed Polls*, VICE NEWS (Oct. 16, 2018), https://news.vice.com/en_us/article/kz58qx/how-the-gutting-of-the-voting-rights-act-led-to-closed-polls.

County, the poorest county in the state, from forty-three to thirty-seven.³² Fewer precincts means a longer drive (and perhaps longer lines) to cast a ballot. These reductions were made pursuant to West Virginia Code Section 3-1-5, which, in addition to defining precincts and the criteria for setting their boundaries, sets a floor of 300 registered voters in urban areas and 200 registered voters in rural areas before precincts must be consolidated.³³ In 2014, the legislature amended the law to allow county clerks broad discretion to consolidate any precincts within one mile of each another, with a maximum allowable population of 3,000 registered voters in urban areas and 1,500 registered voters in rural areas.³⁴ The discretion to merge precincts is only limited by the mandate “[t]hat no precincts may be consolidated pursuant to this section if the consolidation would create a geographical barrier or path of travel . . . that would create an undue hardship to voters of any current precinct.”³⁵ However, the law does not define “undue hardship.” Leaving that determination up to the subjective perception of an elected judge or local lawmaker invites the fox into the henhouse.³⁶

This background is critical when considering the trend that emerged in election data from 2016. West Virginia’s poorest counties voted at much lower rates than its richest ones:

32. Greg Jordan, *McDowell County to Reduce Number of Voting Precincts*, BLUEFIELD DAILY TEL. (Mar. 7, 2013), https://www.bdtonline.com/news/local_news/mcdowell-county-to-reduce-number-of-voting-precincts/article_d6080564-641f-566e-bd83-e4e70ecd859d.html (“It would not be something we would want to do, but we’re required to do it under state law,” County Clerk Don Hicks said of the precincts reduction.”).

33. *See* W. VA. CODE § 3-1-5 (2020).

34. *See id.*

35. *Id.*

36. All judges are elected in West Virginia. *See West Virginia Judicial Elections*, BALLOTPEdia, https://ballotpedia.org/West_Virginia_judicial_elections (last visited May 5, 2021).

Poorest Counties in West Virginia

County	Poverty Rate (%) ³⁷	Number of Registered Voters ³⁸	Total Number of Votes Cast ³⁹	Rate of Voter Participation (%) ⁴⁰
McDowell	36.3	17,463	6,179	35.38
Webster	30.0	5,606	2,955	52.71
Clay	29.0	5,903	2,958	50.11
Mingo	28.2	20,424	9,469	46.36
Gilmer	27.1	4,661	2,528	54.24
Average	30.12	-	-	47.76

Wealthiest Counties in West Virginia

County	Poverty Rate (%) ⁴¹	Number of Registered Voters ⁴²	Total Number of Votes Cast ⁴³	Rate of Voter Participation (%) ⁴⁴
Hancock	13.2	24,996	12,642	50.58
Berkeley	12.9	77,930	42,770	54.88
Morgan	11.9	13,101	7,635	58.28
Putnam	10.8	39,105	24,443	62.51
Jefferson	10.1	38,331	24,007	62.63
Average	11.78	-	-	57.78

37. See SAIPE, *supra* note 10.

38. See *Voter Registration Totals as of November 30, 2016*, OFF. OF THE SEC'Y OF STATE, <https://sos.wv.gov/elections/Documents/VoterRegistrationTotals/2016/Nov2016.pdf> (last accessed Mar. 23, 2021).

39. This and subsequent presidential election results from Politico is comprised of the four to seven principal vote-getters in the state. It may exclude a statistically insignificant number of minor party and write in votes. See *2016 West Virginia Presidential Election Results*, POLITICO (Dec. 13, 2016 1:57PM), <https://www.politico.com/2016-election/results/map/president/west-virginia/>.

40. This rate is a product of dividing the total number of votes cast by the number of registered voters and multiplying by one hundred.

41. See SAIPE, *supra* note 10.

42. See *Voter Registration Totals as of November 30, 2016*, *supra* note 38.

43. See *2016 West Virginia Presidential Election Results*, *supra* note 39.

44. This rate is a product of dividing the total number of votes cast by the number of registered voters and multiplying by one hundred.

The state's five poorest counties lagged behind the five wealthiest by more than ten percent in voter turnout. Lower voter participation rates may also reflect a feeling of political abandonment. When asked why she does not vote consistently, one voter in McDowell County reported feeling "disconnected from the world," and added "I mean, we've just kind of been washed off the map."⁴⁵ Furthermore, closing down polling places and adding voter ID requirements are not likely to inspire civic engagement—especially in communities where every dollar counts.

B. Florida

Few states' elections garner greater attention than Florida's.⁴⁶ The state plays a critical role in both primary and general elections due to its large, diverse population.⁴⁷ Despite the razor-thin margins that characterize Florida's national politics and recent marquee races,⁴⁸ the Republican party has controlled the entire state government for more than twenty years.⁴⁹

Voting restrictions have sprouted up from the fertile ground of unified Republican control. Though the state has required some form of voter identification since 1977,⁵⁰ it now requires *photo* identification and proof of signature.⁵¹ There is no stated exemption for people who cannot afford the costs of obtaining such identification.⁵² Polling places have also been subject to restrictions. In one particularly egregious example from 2018, a public polling location was relocated inside a gated community, where private security attempted to refuse entry to would-be voters.⁵³ One of those voters, who had to argue with the security guards to gain entry, expressed concern about the invasion of her privacy: "Who are they? And what are they doing with my information?"⁵⁴ As troubling as these developments are, some voters face an even steeper climb to the ballot box.

This Note works with 2016 data, the last presidential cycle before Florida took a giant step forward regarding voting rights, only to slide back. In 2018, Florida

45. Don Gonyea, *What Some West Virginia Residents Have To Say On Why They Don't Vote*, NPR (Sept. 10, 2020 5:39PM), <https://www.npr.org/2018/09/10/646422511/what-some-west-virginia-residents-have-to-say-on-why-they-dont-vote>.

46. Florida has hosted numerous, high profile elections decided by slim margins. No presidential election has been decided by a double-digit margin since 1988. See *Division of Elections*, FLA. DEP'T. OF STATE, <https://results.elections.myflorida.com/Index.asp?ElectionDate=11/8/1988&DATAMODE=> (last visited May 5, 2021).

47. See generally *Quick Facts: Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/FL> (last visited Mar. 23, 2021).

48. The 2000 presidential election famously hung on just a few hundred Florida ballots. See *Division of Elections*, *supra* note 46.

49. *Party Control of Florida State Government*, BALLOTPEdia, https://ballotpedia.org/Party_control_of_Florida_state_government (last visited May 5, 2021).

50. FLA. DIV. OF ELECTIONS, FLORIDA HISTORY: VOTER ID AT THE POLLS, (2016), https://soe.dos.state.fl.us/pdf/DE_Guide_0006-Florida_History-Voter_ID_at_the_polls.pdf.

51. FLA. STAT. § 101.043 (2020).

52. *Id.* See also *Oppose Voter ID Legislation*, *supra* note 11.

53. Avery Anapol, *Florida Voters Say They Were Blocked from Polling Site Inside Gated Community*, THE HILL (Nov. 6, 2018 5:01PM), <https://thehill.com/homenews/campaign/415296-florida-voters-blocked-from-accessing-polling-site-inside-gated-community>.

54. *Id.*

voters overwhelmingly approved an amendment to the state constitution—Amendment 4, Voting Rights Restoration for Felons Initiative—allowing people convicted of most felonies to regain their voting rights.⁵⁵ One of the leaders of the effort to sell voters on the measure, Demetrius Jifunza, framed the issue in unifying terms: “This is not a political issue, it’s a moral issue because it’s affecting everyone. It should be a moral right for a person who has completed all their obligations—it’s a moral right that they should have their rights back.”⁵⁶

Nevertheless, several state officials have done their level best to keep these potential voters from casting a ballot. Rather than considering the Amendment self-implementing and simply allowing people convicted of felonies to register to vote, Republican legislators passed Senate Bill 7066, an implementing act, which made completion of a sentence for the purposes of the Amendment include the payment of all outstanding fines, fees, and restitution upon becoming law.⁵⁷ Despite initially upholding a preliminary injunction against the payment requirement, the Eleventh Circuit ultimately gave its imprimatur to the de facto poll tax.⁵⁸ This poses an enormous financial challenge for people convicted of felonies with below-poverty incomes who want to restore their right to vote. Fees and restitution notwithstanding, certain drug crimes can carry fines of up to \$200,000.⁵⁹ In 2019, people convicted of felonies in Broward County owed over half a billion dollars in fines.⁶⁰

Prior to turning to the data, it is important to note that despite the controversy surrounding Amendment 4, federal courts do have a history of granting relief to numerous plaintiffs seeking to defend their right to vote in Florida. For example, in *Florida Democratic Party v. Scott*, a federal judge granted a temporary restraining order extending the voter registration window in the aftermath of

55. Amending the Florida Constitution by ballot initiative requires that 60% of voters vote in favor of the change. The Amendment was supposed to restore voting rights to people convicted of all felonies except sex offenses and murder once they completed their sentences. *Florida Amendment 4, Voting Rights Restoration for Felons Initiative (2018)*, BALLOTPEdia, [https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_\(2018\)](https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_(2018)) (last visited May 5, 2021). Before the initiative passed, the restoration of voting rights to people convicted of felonies depended upon the whims of an Executive Clemency Board, which so abused its discretion that a federal judge disapprovingly noted that “Partisan officials have extraordinary authority to grant or withhold the right to vote from hundreds of thousands of people without any constraints, guidelines, or standards.” Matthew S. Schwartz *Old Florida Clemency System Was Unconstitutional, Racially Biased*, NPR (Jan. 8, 2019 7:30AM), <https://www.npr.org/2019/01/08/683141728/old-florida-clemency-system-was-unconstitutional-racially-biased>.

56. Zac Anderson, *Manatee County Man Becomes Leading Advocate for Restoring Felons’ Voting Rights*, SARASOTA HERALD TRIB. (Oct. 20, 2018 10:30AM), <https://www.heraldtribune.com/news/20181020/manatee-county-man-becomes-leading-advocate-for-restoring-felons-voting-rights>.

57. FLA. STAT. § 98.0751 (2020); *SB 7066: Election Administration*, FLA. SEN. (Jul. 1, 2019), <https://www.flsenate.gov/Session/Bill/2019/07066>.

58. See Lauren Lantry, *Over 1 Million Former Felons Still Face Hurdles after Being Given Right to Vote*, ABC NEWS (Mar. 8, 2020 5:17AM), <https://abcnews.go.com/Politics/felons-florida-vote-million-face-hurdles-fees/story?id=69060375>; *Jones v. Governor of Florida*, 975 F.3d 1016, 1025 (11th Cir. 2020).

59. Dan Sweeney, *South Florida Felons Owe A Billion Dollars in Fines—And That Will Affect Their Ability To Vote*, S. FLA. SUN SENTINEL (May 31, 2019), <https://www.sun-sentinel.com/news/politics/fl-ne-felony-fines-broward-palm-beach-20190531-5hxf7mveyree5cjhk4xr7b73v4-story.html>.

60. *Id.*

Hurricane Matthew.⁶¹ Just two years later, in *League of Women Voters of Florida, Inc. v. Detzner*, a federal court again intervened in the state's electoral affairs, declaring unconstitutional a guidance document issued by the Secretary of State which “*categorically prohibited*” the establishment of early voting sites on college campuses.⁶² Fewer days to cast a ballot—and fewer places at which to do it—hamper the exercise of that right for poor people. These lawsuits underscore the critical supervisory role that federal courts can play in state elections.

While one might argue that these restrictions cause only a marginal difference in voting, margins are everything in Florida. Current Governor Ron DeSantis, who supports the litigation and legislation designed to restrict voting, won his race in 2018 by less than thirty-three thousand votes out of millions.⁶³ Rick Scott, the previous Governor behind the earlier attacks on the franchise, made it to the Senate by a margin just a hair over ten thousand votes.⁶⁴

What were the results in Florida's 2016 presidential contest, prior to the Amendment 4 controversy but well within the era of restricted voting? In a state where Republican action has led to fewer polling places and stricter voter ID laws, in the counties where poverty is concentrated, there were lower average rates of electoral participation than among voters in its wealthiest counties. Voter participation was on average over six percent lower in Florida's five poorest counties than its five richest.

61. See *Florida Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1258-59 (N.D. Fla. 2016) (“It has been suggested that the issue of extending the voter registration deadline is about politics. Poppycock. This case is about the right of aspiring eligible voters to register and to have their votes counted. Nothing could be more fundamental to our democracy.”).

62. *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1216–17 (N.D. Fla. 2018).

63. *Florida Gubernatorial & Lieutenant Gubernatorial Election, 2018*, BALLOTPEdia, https://ballotpedia.org/Florida_gubernatorial_and_lieutenant_gubernatorial_election_2018 (last visited May 5, 2021).

64. *Florida Elections, 2018*, BALLOTPEdia, https://ballotpedia.org/Florida_elections_2018 (last visited May 5, 2021).

Poorest Counties in Florida

County	Poverty Rate (%) ⁶⁵	Number of Registered Voters ⁶⁶	Total Number of Votes Cast ⁶⁷	Rate of Voter Participation (%) ⁶⁸
Madison	31.9	11,667	8,503	72.88
Hamilton	28.9	8,101	5,451	67.29
DeSoto	28.6	15,999	10,761	67.26
Dixie	25.4	9,992	7,202	72.10
Hendry	25.1	17,585	11,106	63.16
Average	28.0	-	-	68.54

Wealthiest Counties in Florida

County	Poverty Rate (%) ⁶⁹	Number of Registered Voters ⁷⁰	Total Number of Votes Cast ⁷¹	Rate of Voter Participation (%) ⁷²
Santa Rosa	10.6	131,878	87,432	66.30
Sumter	10.5	92,527	76,649	82.84
Nassau	10.3	61,464	46,537	75.71
Clay	9.6	147,749	106,363	71.99
St. Johns	7.7	174,440	136,392	78.19
Average	9.74	-	-	75.01

65. See SAIPE, *supra* note 10.

66. See VOTER REGISTRATION MONTHLY REPORT NOVEMBER 2016, FLA. DEP'T. OF STATE, DIV. OF ELECTIONS (March 31, 2021) <https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reportsxlsx/> (data can be downloaded by clicking the link marked with the desired date midway down the page under "Archived Monthly Reports.").

67. See 2016 Florida Presidential Election Results, POLITICO (Dec. 13, 2016 1:57PM), <https://www.politico.com/2016-election/results/map/president/florida/>. This result is comprised of the six principle vote-getters in the state. It may exclude a statistically insignificant number of minor party and write in votes.

68. This rate is the product of dividing the total number of votes cast by the number of registered voters and multiplying by one hundred.

69. See SAIPE, *supra* note 10.

70. See VOTER REGISTRATION MONTHLY REPORT NOVEMBER 2016, *supra* note 66.

71. See 2016 Florida Presidential Election Results, *supra* note 67.

72. This rate is the product of dividing the total number of votes cast by the number of registered voters and multiplying by one hundred.

C. Wisconsin

Wisconsin shocked casual political observers when it voted for President Trump in 2016 by a margin of one percent.⁷³ But for those who paid attention to the state's political drift over the previous eight years, President Trump's victory matched an electoral trend. Democrats have not held a majority in either chamber of the Wisconsin legislature since 2010.⁷⁴ Republicans maintained a trifecta for the eight years that followed, led by former Governor Scott Walker.⁷⁵ Despite a tumultuous start featuring an ill-fated recall effort against him,⁷⁶ Walker and his allies in the legislature maintained their vice grip on power until 2018 and took action thereafter to keep formerly executive functions in Republican legislative hands.⁷⁷

Voting laws were no exception. In 2011, lawmakers altered the requirements for casting a ballot.⁷⁸ Up until that time, would-be voters were required to state their full name and address so that a poll worker could verify them on the poll list.⁷⁹ Under Wisconsin Statute § 6.79(2)(a), however, voters must state their full name and address and “present to the officials proof of identification.”⁸⁰ Poll workers are then tasked with matching the name on the identification to that on the poll list and with verifying that the photo on the document “reasonably resembles the elector.”⁸¹ The voter is then required to sign the poll list.⁸² The scheme survived challenges on multiple constitutional grounds in both state and federal courts.⁸³

Political scientists have documented the effects of voter ID laws like Wisconsin's on turnout. In 2014, the Government Accountability Office released a study indicating that voter ID laws may reduce turnout in some states by as much as three percent.⁸⁴ In Wisconsin specifically, researchers from the University of Wisconsin concluded that as many as 23,252 voters in two counties were

73. *2016 Presidential Election Results*, POLITICO (Dec. 13, 2016 1:57PM), <https://www.politico.com/2016-election/results/map/president/>.

74. *Party Control of Wisconsin State Government*, BALLOTPEDIA (2020), https://ballotpedia.org/Party_control_of_Wisconsin_state_government (last visited May 5, 2021).

75. *Id.*

76. Monica Davey & Jeff Zeleny, *Walker Survives Wisconsin Recall Vote*, N.Y. TIMES (June 5, 2012), <https://www.nytimes.com/2012/06/06/us/politics/walker-survives-wisconsin-recall-effort.html>.

77. *Wisconsin Governor Election Results 2018*, POLITICO <https://www.politico.com/election-results/2018/wisconsin/governor/> (last updated May 5, 9:20PM). Even after Walker lost to now-Governor Tony Evers, Republicans in the legislature quickly snatched away executive powers for themselves, making it difficult for Evers to alter the status quo. See Mitch Smith, *Last Minute Laws Took Democrats' Power. Court Says That's Fine.*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/us/wisconsin-lame-duck-laws-upheld.html>.

78. They cited voter fraud as their chief concern. See Cameron Smith, *Wisconsin's Voter ID Law Has Created Confusion and Hurdles*, WISCONTEXT (Oct. 1, 2018 12:00PM), <https://www.wiscontext.org/wisconsins-voter-id-law-has-created-confusion-and-hurdles>.

79. WIS. STAT. ANN. § 6.79(2)(a) (West 2011) (amended June 9, 2011).

80. WIS. STAT. ANN. § 6.79(2)(a) (West 2020).

81. *Id.*

82. *Id.*

83. See generally *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014); *League of Women Voters of Wis. v. Walker*, 851 N.W.2d 302 (Wis. 2014); *Milwaukee Branch of the NAACP v. Walker*, 851 N.W.2d 262 (Wis. 2014).

84. U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-634, ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 48 (2014).

prevented from casting their votes due to the voter ID law in 2016.⁸⁵ The same study also concluded that: “[t]he burdens of voter ID fell disproportionately on low-income and minority populations”, and specifically, “[a]mong low-income registrants (household income under \$25,000), 21.1% were deterred, compared to 7.2% for those making over \$25,000,” and “[a]mong high-income registrants (over \$100,000 household income), 2.7% were deterred.”⁸⁶ The study links the disproportionate rates of deterrence to “a lack of effective efforts educating eligible voters of the requirements of the law.”⁸⁷

Voter ID laws are not the only mechanisms employed to suppress votes in Wisconsin. The state was one of many that closed polling locations prior to the 2016 election.⁸⁸ Additionally, conservative litigants are currently appealing an intermediate court’s decision to hit pause on the purging of hundreds of thousands of names from the state’s voter rolls.⁸⁹

Turnout in 2016’s presidential election varied significantly along socioeconomic lines. In line with the pattern previously described in Florida and West Virginia, Wisconsinites from the five poorest counties in the state cast ballots at a lower average rate than voters in the five wealthiest counties. Voters in Wisconsin’s five poorest counties had an average rate of voter participation over eight percentage points lower than that of voters in the state’s five wealthiest counties.

85. Press Release, Kenneth R. Mayer, Professor of Pol. Sci., Univ. of Wis. Madison, & Scott McDonnell, Dane Cnty. Clerk, Voter ID Study Shows Turnout Effects in 2016 Wisconsin Presidential Election (Sept. 25, 2017 7:00PM), <https://elections.wisc.edu/wp-content/uploads/sites/483/2018/02/Voter-ID-Study-Release.pdf>.

86. *Id.*

87. *Id.*

88. Matt Vasilogambros Stateline, *States Have Shut Down an ‘Alarming’ Number of Polling Places in Minority Areas*, WIS. GAZETTE (Sept. 10, 2018), https://www.wisconsin Gazette.com/news/national/states-have-shut-down-an-alarming-number-of-polling-places/article_82109418-b53f-11e8-9c63-97972a91a2fc.html.

89. *See generally* Wisconsin *ex rel.* Zignego v. Wis. Elections Comm’n, 941 N.W.2d 284 (Wis. Ct. App. 2020); Scott Bauer, *Wisconsin Voter Purge Case Appealed to State Supreme Court*, ASSOCIATED PRESS (Mar. 11, 2020), <https://apnews.com/f07a6407a419b7a3b1420ab41387bfd7>.

Five Poorest Counties in Wisconsin

County	Poverty Rate (%) ⁹⁰	Number of Registered Voters ⁹¹	Total Number of Votes Cast ⁹²	Rate of Voter Participation (%) ⁹³
Menominee	27.2	1911	1,279	66.93
Milwaukee	19.8	561,965	434,970	77.40
Grant	16.7	29,547	24,051	81.40
Vernon	16.5	16,913	14,193	83.92
Forest	15.9	5,730	4507	78.66
Average	19.22	-	-	77.66

Five Wealthiest Counties in Wisconsin

County	Poverty Rate (%) ⁹⁴	Number of Registered Voters ⁹⁵	Total Number of Votes Cast ⁹⁶	Rate of Voter Participation (%) ⁹⁷
Calumet	5.0	30,495	26,429	86.67
Waukesha	5.2	274,401	236,269	86.10
Ozaukee	5.4	63,515	53,368	84.02
St. Croix	5.6	55,099	46,819	84.97
Washington	5.6	88,038	76,246	86.61
Average	5.36	-	-	85.67

90. See SAIPE, *supra* note 10.

91. See *November 2, 2016 Voter Registration Statistics*, WIS. ELECTIONS COMM'N (Nov. 1, 2016 7:00PM), <https://elections.wi.gov/publications/statistics/registered-voters-2016-november-2>.

92. See *2016 Wisconsin Presidential Election Results*, POLITICO (Dec. 13, 2016 1:57PM), <https://www.politico.com/2016-election/results/map/president/wisconsin/>. This result is comprised of the seven principle vote-getters in the state. It may exclude a statistically insignificant number of minor party and write in votes.

93. This rate is a product of dividing the total number of votes cast by the number of registered voters and multiplying by one hundred.

94. See SAIPE, *supra* note 10.

95. See *November 2, 2016 Voter Registration Statistics*, *supra* note 91.

96. See *2016 Wisconsin Presidential Election Results*, *supra* note 92.

97. This rate is a product of dividing the total number of votes cast by the number of registered voters and multiplying by one hundred.

D. Pennsylvania

Like Wisconsin, Pennsylvania delivered an upset in the 2016 presidential election, delivering its twenty electoral votes to President Trump by a margin of just 1.2%.⁹⁸ Also like Wisconsin, though to a somewhat lesser degree, the state began a rightward drift after the 2010 midterm election, when Republicans gained control over both houses of the legislature and the governor's mansion.⁹⁹ During the four years of full Republican control in Pennsylvania,¹⁰⁰ voting rights came under attack. For example, in 2012, the Republican-led legislature passed Act 18, which required photo ID in the form of a driver's license, or an identification card issued by the state Department of Transportation.¹⁰¹ The vote to pass the measure broke down strictly along party lines.¹⁰²

The measure did not survive judicial scrutiny. The Commonwealth Court (one of two intermediate courts in Pennsylvania) declared the law unconstitutional on numerous grounds in 2014.¹⁰³ The court explained that the law failed, among other reasons, because it did not ensure a "legal, non-burdensome provision of a compliant photo ID to all qualified electors."¹⁰⁴ The court went on to state that "[t]here is little dispute that the burdens the Voter ID Law imposes weigh most heavily on the most vulnerable members of society."¹⁰⁵ It enumerated these persons as "the elderly, disabled members of [the] community, and the financially disadvantaged" but simultaneously found the record insufficient for a finding of disparate impact, rejecting an Equal Protection argument.¹⁰⁶

While some courts might leave doubt as to the purpose and effect of the voter ID laws, their proponents dispelled any lingering uncertainty. For example, shortly after the voter ID law was passed, the Republican Speaker of the Pennsylvania House did not try to hide his hopes at a party committee meeting: "Voter ID, which is gonna allow Governor Romney to win the state of Pennsylvania, done."¹⁰⁷ Controversy continues, but state leaders have found some areas of compromise. In 2019, the governor reached a deal to expand absentee voting, registration periods, and much-needed funding for election security, at the cost of a Republican

98.: See *2016 Presidential Election Results*, *supra* note 73.

99. See *Party Control of Pennsylvania State Government*, BALLOTPEdia, https://ballotpedia.org/Party_control_of_Pennsylvania_state_government (last visited May 5, 2021).

100.: Democrat Tom Wolf succeeded in breaking the GOP trifecta in 2014 by ousting the deeply unpopular Republican governor, Tom Corbett. See *Tom Corbett*, BALLOTPEdia, https://ballotpedia.org/Tom_Corbett (last visited May 5, 2021).

101. Act of Mar. 14, 2012, P.L. 195, No. 18, sec. 3, § 1210(a)(1), 2012 Pa. Legis. Serv. Act 2012-18, available at <https://www.legis.state.pa.us/WU01/LI/LI/US/HTM/2012/0/0018..HTM>.

102. Aaron Blake, *Everything You Need to Know About the Pennsylvania Voter ID Fight*, WASH. POST (Oct. 2, 2012, 1:01 PM), <https://www.washingtonpost.com/news/the-fix/wp/2012/10/02/the-pennsylvania-voter-id-fight-explained/>.

103. See generally *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *1-27 (Pa. Commw. Ct. Jan. 17, 2014).

104. *Id.* at *18.

105. *Id.* at *25.

106. *Id.* (quoting *Applewhite v. Commonwealth*, 54 A.3d 1, 4 (Pa. 2012)).

107. Mackenzie Weinger, *Pa. Pol: Voter ID Helps GOP Win State*, POLITICO (June 25, 2012, 4:26 PM), <https://www.politico.com/story/2012/06/pa-pol-voter-id-helps-gop-win-state-077811>.

provision to eliminate straight-ticket voting.¹⁰⁸ Much analysis on the impact of these changes in the 2020 election has yet to be written. During their baseless effort to contest the 2020 presidential election results, many in the Pennsylvania Republican Party came to repudiate the very compromise they supported.¹⁰⁹

Pennsylvania also hosted some of the most visible attempts by Republican-supported litigators to lower the number of ballots counted in the 2020 presidential election. Court watchers were shocked at the four-to-four United States Supreme Court decision that affirmed the Pennsylvania Supreme Court's holding allowing the counting of mail ballots postmarked by but received after Election Day in place—but also revealed a willingness among the four most conservative justices to upend federalism in order to intervene at the GOP's behest.¹¹⁰ Had the 2020 Pennsylvania results or the election as a whole been closer, the confirmation of Justice Amy Coney Barrett might conceivably have changed the math.¹¹¹ Other litigation was even more brazenly anti-democratic: GOP Representative Mike Kelly unsuccessfully sued the state, requesting that the 2019 statute establishing mail voting procedures be deemed unconstitutional and that all mail ballots cast pursuant to that law be invalidated.¹¹² Invalidating millions of votes would certainly impact the data set for 2020!

Because the more restrictive legislative measures did not survive challenges in the courts, it is not surprising that the gulf in turnout in 2016 between the five richest and five poorest counties in Pennsylvania is not as wide as in the three other states previously examined. That said, the tables below illustrate the gap in voter participation between the poorest and wealthiest counties in 2016, where voters in Pennsylvania's five poorest counties had an average rate of voter participation over five percentage points lower than that of voters in the state's five wealthiest counties.

108. See Jonathan Lai, *Pa.'s Election System is on the Verge of the Largest Changes in Decades – in Time for the 2020 Elections*, PHILA. INQUIRER (Oct. 23, 2019), <https://www.inquirer.com/politics/pennsylvania/pa-election-reform-deal-20191023.html>.

109. See Katie Meyer, *Facing Pressure from Trump & Constituents, Pa. GOP Aims to Limit Expanded Voting*, WHYY (Jan. 4, 2021), <https://whyy.org/articles/facing-pressure-from-trump-and-constituents-pa-gop-aims-to-limit-expanded-voting/>

110. See Adam Liptak, *Supreme Court Tie Gives Pennsylvania More Time to Tally Some Votes*, N.Y. TIMES, <https://www.nytimes.com/2020/10/19/us/supreme-court-pennsylvania-voting.html> (last updated Nov. 4, 2020).

111. There were approximately ten thousand ballots that arrived within three days after Election Day. Jonathan Lai, *Only 10,000 Pa. Mail Ballots Arrived After Election Day – Far Too Few to Change the Result if Thrown Out*, PHILA. INQUIRER (Nov. 11 2020.), <https://www.inquirer.com/politics/election/pennsylvania-mail-ballots-counted-deadline-supreme-court-20201111.html>. President Biden carried the state by more than eighty thousand votes. *2020 Presidential Election*, PA. DEP'T OF STATE, <https://www.electionreturns.pa.gov> (last visited May 5, 2021).

112. *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020).

Five Poorest Counties in Pennsylvania

County	Poverty Rate (%) ¹¹³	Number of Registered Voters ¹¹⁴	Total Number of Votes Cast ¹¹⁵	Rate of Voter Participation (%) ¹¹⁶
Philadelphia	25.3	1,102,560	680,227	61.70
Forest	24.6	3,330	2,398	72.01
Indiana	20.0	51,853	37,728	72.76
Clinton	17.8	22,303	14,839	66.53
Fayette	17.5	83,852	53,426	63.71
Average	21.04	-	-	67.34

Five Wealthiest Counties in Pennsylvania

County	Poverty Rate (%) ¹¹⁷	Number of Registered Voters ¹¹⁸	Total Number of Votes Cast ¹¹⁹	Rate of Voter Participation (%) ¹²⁰
Montgomery	6.2	577,418	427,489	74.03
Bucks	6.6	460,832	342,572	74.34
Chester	7.0	354,459	266,637	75.22
Butler	7.3	129,728	92,027	70.94
Cumberland	7.9	166,965	115,068	68.92
Average	7.0	-	-	72.69

113. *SAIPE*, *supra* note 10.

114. *Commonwealth of Pennsylvania 2016 Voter Registration Statistics-Official*, PA. DEP'T OF STATE, DIV. OF VOTER REGISTRATION (Nov. 8, 2016), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/2016%20Election%20VR%20Stats.pdf>.

115. *2016 Pennsylvania Presidential Election Results*, POLITICO (Dec. 13, 2016, 1:57 PM), <https://www.politico.com/2016-election/results/map/president/pennsylvania/>. This result is comprised of the five principle vote-getters in the state. It may exclude a statistically insignificant number of minor party and write in votes.

116. This rate is a product of dividing the total number of votes cast by the number of registered voters and multiplying by one hundred.

117. *SAIPE*, *supra* note 10.

118. *Commonwealth of Pennsylvania 2016 Voter Registration Statistics* *supra* note 114.

119. *2016 Pennsylvania Presidential Election Results*, *supra* note 115.

120. This rate is a product of dividing the total number of votes cast by the number of registered voters and multiplying by one hundred.

E. Oregon

Oregon's electoral history varies significantly from the other four states in this survey. Democrats have had control of both houses of the state legislature and the governorship since 2007.¹²¹ The state has not elected a Republican governor since 1982.¹²² It has not voted for a Republican presidential candidate since it voted to reelect Ronald Reagan in 1984.¹²³ In 2016, Hillary Clinton carried the state by over ten points.¹²⁴

The manner in which the state administers its elections also varies significantly from that of the other states surveyed here. Oregon statute § 254.465 mandates the following: “County clerks shall conduct all elections in this state by mail.”¹²⁵ That statute proceeds to grant the Secretary of State rulemaking power to govern procedures and ensure uniformity.¹²⁶ In practice, would-be voters can register online or be automatically registered whenever they obtain a driver's license or state ID card.¹²⁷ All registered voters receive ballots via mail approximately two to three weeks before an election.¹²⁸ This period is supposed to give them time to “research issues and candidates.”¹²⁹ After filling out their ballot, voters sign the envelope and mail it back or deposit it at an official drop box.¹³⁰

This streamlined system—no requirement of voter ID, no shifting polling places, multiple days to cast a ballot—leads to impressive results. At 68.3% statewide turnout¹³¹—some thirteen points above the national average¹³²—Oregon had the eighth highest rate of voter participation in the nation in 2016.¹³³

What of poverty and place? Oregon breaks the pattern established by the other four states featured in this survey. In fact, voters turned out at higher rates in Oregon's five poorest counties than in its five richest. What's more, the county with the highest poverty rate in the state, Malheur, actually saw higher turnout than the county with the lowest poverty rate, Clackamas. The tables below illustrate this distinct trend:

121. *Party Control of Oregon State Government*, BALLOTPEdia, https://ballotpedia.org/Party_control_of_Oregon_state_government (last visited May 5, 2021).

122. *See Former Oregon Governors*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/former-governors/oregon/> (last visited May 5, 2021).

123. *Presidential voting trends in Oregon*, BALLOTPEdia, https://ballotpedia.org/Presidential_voting_trends_in_Oregon (last visited May 5, 2021).

124. *2016 Presidential Election Results*, *supra* note 73.

125. OR. REV. STAT. § 254.465 (2020).

126. *Id.*

127. Kristin Eberhard, *Oregon Tops the Charts for Voter Turnout in 2018*, SIGHTLINE INST. (Dec. 13, 2018, 12:17 PM), <https://www.sightline.org/2018/12/13/voter-turnout-oregon-tops-charts-2018-midterms/>.

128. *Voting in Oregon*, OR SEC'Y OF STATE SHEMA FAGAN, <https://sos.oregon.gov/voting/Pages/voteinor.aspx> (last visited May 5, 2021).

129. *Id.*

130. *Id.*

131. George Pillsbury & Julian Johannesen, *America Goes to the Polls*, NONPROFIT VOTE 10 (2016), <https://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf>.

132. *See* DeSilver, *supra* note 1.

133. PILLSBURY AND JOHANNESSEN, *supra* note 131.

Five Poorest Counties in Oregon

County	Poverty Rate (%) ¹³⁴	Number of Registered Voters ¹³⁵	Total Number of Votes Cast ¹³⁶	Rate of Voter Participation (%) ¹³⁷
Malheur	22.9	14, 165	9, 950	70.24
Lincoln	19.6	32,103	24,035	74.87
Wheeler	19.6	986	792	80.32
Klamath	19.0	39, 802	29, 240	73.46
Benton	18.4	58, 361	45, 577	78.10
Average	19.9	-	-	75.40

Five Wealthiest Counties in Oregon

County	Poverty Rate (%) ¹³⁸	Number of Registered Voters ¹³⁹	Total Number of Votes Cast ¹⁴⁰	Rate of Voter Participation (%) ¹⁴¹
Clackamas	8.7	268,787	182,136	67.76
Washington	9.0	340,657	232,034	68.11
Deschutes	9.4	122,210	90,584	74.12
Hood River	10.7	13,553	10,383	76.61
Columbia	11.0	34,244	25,077	73.23
Average	9.76	-	-	71.97

134. See *SAIPE*, *supra* note 10.

135. See SEC'Y OF STATE OF OR., STATISTICAL SUMMARY: NOVEMBER 8, 2016 GENERAL ELECTION 5, <http://records.sos.state.or.us/ORSOSWebDrawer/RecordView/6873778> (last accessed May 5, 2021).

136. *2016 Oregon Presidential Election Results*, POLITICO, <https://www.politico.com/2016-election/results/map/president/oregon/> (last updated Dec. 13, 2016 1:57PM). This result is comprised of the four principle vote-getters in the state. It may exclude a statistically insignificant number of minor party and write in votes.

137. See SEC'Y OF STATE OF OR., *supra* note 135. This rate is a product of dividing the total number of votes cast by the number of registered voters and multiplying by one hundred.

138. See *SAIPE*, *supra* note 10.

139. SEC'Y OF STATE OF OR., *supra* note 135.

140. See *2016 Oregon Presidential Election Results*, *supra* note 136.

141. See SEC'Y OF STATE OF OR., *supra* note 135. This rate is a product of dividing the total number of votes cast by the number of registered voters and multiplying by one hundred.

Voters in Oregon's five poorest counties voted at an average rate that was actually over three percentage points *higher* than those in the state's five wealthiest counties. This is a significant achievement, but some of the credit must go to what Oregon does not do: require voter ID or onerous trips to a dwindling number of polling places. Universal mail voting correlates with increased voter participation amongst low-income people in Oregon.

III. HOW TO CLOSE THE GAP

The data above illustrate that voters in poor counties are not voting at the same rates as voters in wealthy counties in many states. The states might have collectively recognized this disparity and sought out solutions that would make voting easier for the disadvantaged. Instead, Republican leadership and litigators in many states have enacted laws or promoted interpretations of laws, such as voter ID requirements, or taken executive actions, like the closing of polling places, which make voting harder. These measures impact the poor most of all.¹⁴² But what can be done to change this situation? Efforts at both the national and state levels provide the roadmap toward a solution.

A. Current Proposals

Though they hardly stand alone, three pieces of legislation proposed in the 116th Congress exemplify a cross section of unique approaches to either encouraging voting by mail in states or adopting it at the national level. The Note will discuss each of them in turn. A brief discussion of federal and state efforts to expand mail balloting in the midst of the pandemic follows. Federal lawmakers unsuccessfully tried to put forward a uniform electoral response to COVID-19 rather than relying upon state responses, as the primary election in Wisconsin serves to illustrate. Finally, this Note proposes a plan based on national and state efforts designed to increase the vote in the poorest areas and outlines what passage of that plan might entail.

1. Expanding Access and Ensuring Uniformity for Absentee Votes: H.R. 1275

The late Representative John Lewis introduced H.R. 1275 in February of 2019.¹⁴³ Entitled "The Voter Empowerment Act of 2019," it is a wide-ranging piece of legislation with a dual purpose.¹⁴⁴ First, it states as a national policy that "all eligible citizens of the United States should access and exercise their constitutional right to vote in a free, fair, and timely manner."¹⁴⁵ Second, "the integrity, security, and accountability of the voting process must be vigilantly protected, maintained, and enhanced in order to protect and preserve electoral and participatory democracy in the United States."¹⁴⁶ In part, the Act seeks to implement its purpose by creating federal protections for voting by mail.

142. See, e.g., Mayer & McDonnell, *supra* note 85.

143. H.R. 1275, 116th Cong. (2019).

144. *Id.* § 1.

145. *Id.*

146. *Id.*

The relevant section of the law to this Note limits the ability of states to curtail absentee voting. With a handful of exceptions, when an individual is eligible to cast an absentee vote for federal office, the state may not impose additional restrictions.¹⁴⁷ State and local officials would still retain the authority to set the date by which voting materials must be requested and returned.¹⁴⁸ In elections to federal office, individuals should receive requested election materials two weeks prior to the election, though a shorter window would be possible if a state allowed people to request absentee ballots closer to the election.¹⁴⁹ The state could not decline to count ballots postmarked on or before election day on grounds of timeliness.¹⁵⁰ As an identity verification measure, no ballot would be counted with respect to federal office unless the signature on the ballot matched that on the state rolls.¹⁵¹

Representative Lewis recognized that disabled citizens often face challenges in casting a ballot, such as polling places located upstairs without wheelchair accessibility or a lack of accessible voting machines.¹⁵² In West Virginia, for instance, just 46% voters with disabilities participated in the 2016 election.¹⁵³ “It’s surprising how many people [with disabilities] don’t think they have the right to vote,” said one West Virginia disability rights advocate.¹⁵⁴ Though the proposed law does not state the means by which to accomplish this, it does state that “the State shall ensure that all absentee ballots and related voting materials in elections for Federal office are accessible to individuals with disabilities in a manner that provides the same opportunity for access and participation (including with privacy and independence) as for other voters.”¹⁵⁵ Ensuring this protection is critical to ensuring that disability status, which correlates with significantly higher rates of poverty, does not hinder voting.¹⁵⁶

In addition to voters with disabilities, the Voter Empowerment Act also accommodates non-English speakers and those who struggle with literacy. It directs the National Science Foundation to issue grants to at least three entities to “study, test, and develop accessible paper ballot voting, verification, and casting mechanisms.”¹⁵⁷ It also mandates that poll workers receive training on how to assist such voters “in a manner which preserves the dignity of such individuals.”¹⁵⁸ The emphasis on dignity is critical. The 1975 Amendment to the Voting Rights Act prohibited English-only election materials as a discriminatory election

147. *Id.* § 307(a).

148. *Id.*

149. *Id.* § 307(c).

150. *Id.* § 307(e).

151. *Id.* § 307(b).

152. See, e.g., Matt Vasilogambros, *How Voters with Disabilities Are Blocked from the Ballot Box*, PEW (Feb. 1, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/02/01/how-voters-with-disabilities-are-blocked-from-the-ballot-box>.

153. *Id.*

154. *Id.*

155. H.R. 1275 § 307(d).

156. See Rebecca Vallas & Shawn Fremstad, *Disability is a Cause and Consequence of Poverty*, CTR. FOR AM. PROGRESS (Sept. 19, 2014), <https://talkpoverty.org/2014/09/19/disability-cause-consequence-poverty/>.

157. H.R. 1275 § 247(a).

158. *Id.* § 1103(b)(3).

device,¹⁵⁹ but as in so many areas of American life, laws do not guarantee sensitivity.

The protections for absentee voting are only a small section of the late Representative Lewis's larger resolution. His proposal does not displace traditional voting, but instead defines certain boundaries of state action that impact absentee voters. Defining these boundaries is of enormous importance—had such a law existed prior to the 2020 election, thousands of voters would not have had their ballots rejected by the twenty nine states that currently require ballots be *received* by Election Day.¹⁶⁰ Moreover, by specifically addressing the challenges of voters with disabilities and voters who do not speak English as a first language, the bill also addresses more important facets of ensuring that all voters who wishes to cast a ballot can do so. The Voter Empowerment Act of 2019 is a strong piece of legislation that contains many of the necessary ingredients to remedy the disparities addressed in Part II.

2. Preclearance and Voting by Mail: H.R. 4, The Voting Rights Advancement Act of 2019

The Voting Rights Advancement Act of 2019 sought to restore federal oversight of changes in state election law.¹⁶¹ Its chief sponsor was Representative Terri Sewell,¹⁶² the sole Democrat in Alabama's congressional delegation.¹⁶³ The House passed the bill in December 2019.¹⁶⁴ It was one of the Democratic-controlled House's signature pieces of legislation¹⁶⁵ but it was doomed to die in the GOP Senate's "legislative graveyard."¹⁶⁶ It aimed at restoring and modifying the Voting Rights Act of 1965,¹⁶⁷ which was gutted by the Supreme Court in 2013.¹⁶⁸ More on this in Part IV-A, Constitutional Hurdles, below.¹⁶⁹

Similar to the original Voting Rights Act, the law would subject changes to election laws by state or their political subdivisions to federal preclearance for ten years, if there were fifteen or more voting rights violations in the previous twenty

159. H.R. 6219, 94th Cong. (1975).

160. Jiachuan Wu & Elliott Ramos, *Map: The States that Accept Mailed Ballots After Election Day*, NBC NEWS (Nov. 3, 2020, 3:44 PM), <https://www.nbcnews.com/politics/2020-election/map-states-accept-mailed-ballots-after-election-day-n1246044>.

161. *See generally* H.R. 4, 116th Cong. (2019).

162. *Id.*

163. *United States Congressional Delegations from Alabama*, BALLOTPEDIA (2020), https://ballotpedia.org/United_States_congressional_delegations_from_Alabama (last visited May 5, 2021).

164. *H.R. 4 - Voting Rights Advancement Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/4/actions> (last visited Mar. 23, 2021).

165. *See* Ella Nilsen, *The House Has Passed a Bill to Restore Key Parts of the Voting Rights Act*, VOX (Dec. 6, 2019, 1:30 PM), <https://www.vox.com/2019/12/6/20998953/house-bill-voting-rights-advancement-act>.

166. Leading Democrats employed the phrase as part of a rhetorical effort to shed light on the erstwhile Republican Senate's refusal to consider multiple bills passed in the House. *See, e.g.*, Jordain Carney, *Tensions Rise in Senate's Legislative 'Graveyard'*, THE HILL (Nov. 20, 2019, 6:00 AM), <https://thehill.com/homenews/senate/471215-tensions-rise-in-senates-legislative-graveyard>.

167. *See* H.R. 4, 116th Cong. (2019).

168. *See* Shelby Cnty., Alabama. v. Holder, 570 U.S. 529, 556–57 (2013).

169. *See infra* Part IV-A.

five years, or ten such violations in the previous twenty five years where one of the ten violations was committed by the state itself.¹⁷⁰ These violations might include the passage of a new voter ID law in Representative Sewell’s home state of Alabama after the old preclearance formula was struck down in 2013.¹⁷¹ 1.4% of White voters lack a suitable photo ID, but that proportion jumps to 2.4% of Black voters and 2.3% of Hispanic voters.¹⁷² This is precisely the sort of discriminatory impact that the law seeks to remedy.

The Voting Rights Advancement Act, like the Voter Empowerment Act, sought to ensure greater protections for absentee voters against state incursion, but it did not seek to wholly replace the current regime. In short, the law would subject any state action that “reduces, consolidates, or relocates voting locations, including early, absentee, and election-day voting locations” to federal preclearance.¹⁷³ Proper federal oversight might be able to prevent the implementation of many of the state measures described above. Voter ID laws, polling place closures, and many more changes might be caught in this net. This could be a boon to poor voters left out in the cold by restrictive state measures.

3. National Vote by Mail: S. 26 & H.R. 92

To date, the most expansive piece of legislation concerning voting by mail is the “Vote by Mail Act of 2019.”¹⁷⁴ The Act’s chief sponsors are both Oregonians: Senator Ron Wyden¹⁷⁵ and Representative Earl Blumenauer.¹⁷⁶ The bill vastly expands mail voting, though it does not foreclose other methods.¹⁷⁷

The bill opens with an extensive set of findings on the troubling state of access to voting in the U.S. It cites the 2012 presidential election, in which “30% of voters with disabilities had difficulty voting, and more than 5,000,000 voters waited more than an hour to vote.”¹⁷⁸ It underscores that elections conducted by mail provide voters with more time to consider their choices.¹⁷⁹ Moreover, the bill explains that switching elections to vote-by-mail saved Oregon money, dropping the cost of elections from \$3.07 per voter to \$2.21 per voter.¹⁸⁰ Addressing the seemingly ever-present fear of voter fraud, the findings section explains that “[t]he signature verification process, the tracking system for each ballot, and postal service cooperation in preventing ballots from being delivered to names not recognized as receiving mail at an address nearly eliminate the potential for fraud.”¹⁸¹ In a similar

170. H.R. 4 § 3(b)(1).

171. Maggie Astor, *Seven Ways Alabama Has Made It Harder to Vote*, N.Y. TIMES (June 23, 2018), <https://www.nytimes.com/2018/06/23/us/politics/voting-rights-alabama.html>.

172. *Id.*

173. H.R. 4, § 4A(b)(6) 11th Cong. (2019).

174. *See* S. 26, 116th Cong. (2019); H.R. 92, 116th Cong. (2019).

175. S. 26, 116th Cong. (2019). Senator Wyden is the chief sponsor of the Senate version of the bill. S. 26.

176. H.R. 92, 116th Cong. (2019). Representative Blumenauer is the chief sponsor of the House version of the bill. H.R. 92.

177. *See Id.* at § 4, 5 (2019).

178. *Id.* at § 2.

179. *Id.*

180. *Id.*

181. *Id.* at § 2(9) (2019).

vein, “[e]vidence of undue influence or voter coercion after vote-by-mail implementation in Oregon has been nonexistent to minimal.”¹⁸²

The language of the section of the Vote by Mail Act which concerns itself with the mail-in elections procedures is similar to that of the Voter Empowerment Act, described above. Aside from deadlines to return ballots, it provides that states may not “impose any additional conditions or requirements on the eligibility” of any citizen to vote, provided that they be “eligible to cast a vote in an election for Federal office.”¹⁸³ The law would require all jurisdictions to mail elections materials to voters at least two weeks before the date of the election.¹⁸⁴ The law would not, however, prevent states from opening “polling places at which individuals cast ballots.”¹⁸⁵

The Vote by Mail Act also includes several provisions that would help close the gap between the rich and the poor at the ballot box. In language highly similar to that of the Voter Empowerment Act, the law mandates that ballots be accessible to people with disabilities in a manner that “provides the same opportunity for access and participation.”¹⁸⁶ Additionally, all ballots “shall be carried expeditiously and free of postage.”¹⁸⁷

The Act provides a mechanism to maximize the number of people who are registered to vote. It calls for automatic registration by the following method: a state resident provides their name, age, residence, citizenship status, and electronic signature to the state transportation authority.¹⁸⁸ Then, the state transportation authority “shall securely transmit the identifying information to the appropriate state election official.”¹⁸⁹ Should the state election authority determine that the individual is not a registered voter, it must contact that individual and provide them with a twenty-one day period in which to opt out of registration and a description of how to do so, and if the individual declines to do so, “the individual’s records and signature will constitute a completed registration.”¹⁹⁰ Automatic registration, in stark contrast with efforts to purge voters,¹⁹¹ would also mark a strong step toward increasing voting rates among the most vulnerable people.

These three laws each feature different tools, but all of them seek to make voting easier. By use of federal standards and funding, preclearance, the promotion of mail voting, or some combination thereof, any one of these laws would do a great deal to protect the votes of low-income people.

182. *Id.*

183. *Id.* at § 3(a).

184. *Id.* at § 3(b).

185. *Id.* at § 3(d).

186. *Id.* at § 3(c).

187. *Id.* at § 3.

188. *Id.* at § 4.

189. *Id.*

190. *Id.*

191. *See, e.g.,* Zignego, *supra* note 89.

B. Responding to the COVID-19

COVID-19 has chaotically reordered the daily realities of billions of people. Jobs disappeared by the millions,¹⁹² schools closed their doors,¹⁹³ and medical infrastructure buckled.¹⁹⁴ It stands to reason, then, that traditional forms of voting are under threat. Vote-by-mail systems gained added attention in the midst of the calamity brought on by COVID-19.¹⁹⁵ Numerous states opted to postpone their primaries or adapt how they were conducted¹⁹⁶ and federal lawmakers have prepared a proposal to address voting during the crisis.¹⁹⁷

1. A Federal Response to the Coronavirus: The Resilient Elections During Quarantines & Nature Disasters Act (S. 3440)

Democratic lawmakers in Congress introduced multiple pieces of legislation to address voting during the pandemic.¹⁹⁸ Among them is the “Resilient Elections During Quarantines and Natural Disasters Act of 2020,” which aimed “[t]o require States to adopt contingency plans to prevent the disruption of Federal elections from the COVID–19 (*sic*) virus, and for other purposes.”¹⁹⁹ The law supported the weight of a new electoral system with three chief pillars: speed, uniformity, and cost effectiveness.

The Act contained an aggressive implementation timeline. Within thirty days of the Act’s passage, “each State and jurisdiction shall establish and make publicly available a contingency plan to enable individuals to vote in elections for Federal office” wherever there is a governmentally imposed quarantine order or quarantine “recommended by a government official or public health expert in response to COVID-19.”²⁰⁰ The Act required that the states’ contingency plans “permit all individuals who are registered to vote to—submit an online request for an absentee ballot; and cast a vote in Federal elections by mail.”²⁰¹ The plans were also required to “provide for the extension of vote-by-mail deadlines if postal service is

192. Giles Clarke, *COVID–19: Impact Could Cause Equivalent of 195 Million Job Losses, Says ILO Chief*, U.N. NEWS (Apr. 8, 2020), <https://news.un.org/en/story/2020/04/1061322>.

193. *COVID-19 Education: From Disruption to Recovery*, UNESCO <https://en.unesco.org/covid19/educationresponse> (last visited May 5, 2021).

194. See Dylan Scott, *Coronavirus is Exposing All of the Weaknesses in the US Health System*, VOX (Mar. 16, 2020 7:30AM), <https://www.vox.com/policy-and-politics/2020/3/16/21173766/coronavirus-covid-19-us-cases-health-care-system>.

195. See, e.g., Morton Kondracke, *COVID-19 Crisis Makes Reformers All in for Vote-by-Mail*, REALCLEARPOLITICS (Mar. 30, 2020), https://www.realclearpolitics.com/articles/2020/03/30/covid-19_crisis_makes_reformers_all_in_for_vote-by-mail_142808.html.

196. See, e.g., Kate Sullivan, Adam Levy & Liz Stark, *Here Are the States that Postponed Their Primaries Due to Coronavirus*, CNN POLITICS, <https://www.cnn.com/2020/03/16/politics/state-primaries-postponed-coronavirus/index.html> (last updated June 4, 2020 2:52PM).

197. See S. 3440, 116th Cong. (2020).

198. There are several notable pieces of legislation, including Senator Amy Klobuchar’s Natural Disaster and Emergency Ballot Act of 2020. S. 3529, 116th Cong. (2020). Then-Senator Kamala Harris, House Majority Whip James Clyburn, and Representative Marcia Fudge also teamed up to introduce the VoteSafe Act. Press Release, Sen. Kamala D. Harris, Harris, Clyburn, Fudge Partner to Introduce VoteSafe Act (May 12, 2020).

199. S. 3440, 116th Cong. pmb. (2020).

200. *Id.* § 2(a).

201. *Id.* § 2(b)(1).

disrupted as a result of COVID-19.”²⁰² If “25 percent of States have declared an emergency . . . with respect to any single natural disaster or infectious disease,” then the thirty-day period would commence.²⁰³ Governors would also be permitted to declare an “emergency voting period” which would allow a lengthier time frame to register voters and carry out an absentee election.²⁰⁴

Under the current law, a number of states only permit voters to request an absentee ballot if they satisfy certain criteria, which vary significantly by jurisdiction.²⁰⁵ Under the proposed Act, no voter would be required to submit a valid “excuse” in order to receive an absentee ballot.²⁰⁶ Voters everywhere would be permitted to request an absentee ballot “on or before the day that is 1 day before the date of an election for Federal office.”²⁰⁷ The Act would require states to send out ballots by mail for all such requests received five or more days before the election.²⁰⁸ Later requesters would receive an electronic ballot to print out and return.²⁰⁹ These measures would provide an efficient dose of uniformity to the multifarious web of state laws concerning absentee balloting procedures.

The law contains provisions designed to defray the cost to both states and individuals. For individuals, “any voter registration application, absentee ballot application, or blank absentee ballot sent by mail” would include a “self-sealing return envelope with prepaid postage.”²¹⁰ Eliminating the need to seek out and purchase stamps stands to benefit those with the fewest resources.²¹¹ Those with access to a computer and a mailing address can order stamps online.²¹² But people without these amenities must risk additional COVID-19 exposure for themselves and others by going to a post office in person to buy them—that is, if they have a post office nearby and they have the money to spend. For the states, the Act would set aside \$500 million federal dollars to reimburse the costs incurred under the Act’s requirements.²¹³

202. *Id.* §2(b)(2). This concern grows increasingly urgent. Among other issues, the U.S. Postal Service is facing major budgetary problems. *See, e.g.,* Grace Panetta, *Trump Reportedly Rejected Approving a Bailout Package That Would Rescue the US Postal Service, and It Could Be a Disaster for States Trying to Expand Voting by Mail*, BUS. INSIDER (Apr. 12, 2020, 12:30 PM), <https://www.businessinsider.com/postal-service-funding-crisis-could-harm-voting-by-mail-coronavirus-2020-4>.

203. S. 3440, 116th Cong. § 3(a) (2020).

204. *Id.*

205. *Absentee Ballot Rules*, VOTE.ORG, <https://www.vote.org/absentee-voting-rules/> (last visited May 5, 2021).

206. S. 3440, 116th Cong. § 3(a) (2020).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* § 4(a)(2).

211. Arizona, California, Delaware, Hawaii, Idaho, Iowa, Maryland, Minnesota, Missouri, Nevada, New Mexico, Oregon, Pennsylvania, Rhode Island, Virginia, Washington, West Virginia, and Wisconsin already prepay the postage for return of mail ballots. Sophia Waterfield, *Will I Have to Pay for Mail-in Voting? These States Will Cover Your Postage*, NEWSWEEK (Aug. 24, 2020, 12:11 PM), <https://www.newsweek.com/mailin-voting-postage-voting-election-1527231>.

212. *Postal Store*, USPS, https://store.usps.com/store/results/stamps/_/N-9y931v?_requestid=2070837 (last visited May 5, 2021).

213. S. 3440, 116th Cong. § 5(a) (2020).

2. State Responses to the Coronavirus: A Spotlight on Wisconsin

When it comes to election administration, the rubber meets the road in the states. The April 2020 election in Wisconsin illustrates the desperate need for a national framework to address the inequalities present in American elections generally and in times of crisis. This Note does not contend that Wisconsin's spring electoral COVID-19 response was necessarily representative of state responses across the country; indeed, leaders as diverse as Governors Andrew Cuomo of New York and Pete Ricketts of Nebraska encouraged residents of their respective states to vote by mail.²¹⁴ But Wisconsin's experience illustrates what can go horribly wrong when electoral systems that favor the wealthy face added external pressures from conservative policymakers without meaningful federal oversight.

On Tuesday, April 7, 2020 Wisconsinites went to the polls.²¹⁵ Though the marquee race was the Democratic primary between then-former Vice President Joe Biden and Senator Bernie Sanders, voters across the state were also set to decide a hotly contested race for a seat on the Wisconsin Supreme Court.²¹⁶ It was not clear in the leadup to the election whether voters would cast a ballot in person, how much time they would have to return absentee ballots, or what the rules governing absentee ballots would be.²¹⁷

After multiple nearby states, including Ohio, postponed their spring elections, it seemed possible that Wisconsin would follow suit.²¹⁸ For weeks, Governor Evers disclaimed constitutional authority to make such a decision unilaterally.²¹⁹ Citing fears over COVID-19, however, he attempted to do so the day before in-person voting was set to take place.²²⁰ The conservative Wisconsin Supreme Court ruled

214. Kate Riga, *Under Siege From COVID, Cuomo Expands Absentee Voting for June Election*, TALKING POINTS MEMO (Apr. 8, 2020, 3:40 PM), <https://talkingpointsmemo.com/news/cuomo-absentee-ballot-new-york>; Don Walton, *Ricketts Encourages Vote by Mail, Eyes Gradual Easing of COVID-19 Restrictions Possibly in May*, LINCOLN J. STAR (Apr. 8, 2020), https://journalstar.com/news/state-and-regional/govt-and-politics/ricketts-encourages-vote-by-mail-eyes-gradual-easing-of-covid-19-restrictions-possibly-in-may/article_2770d931-fa51-591f-b04b-d5e516a72888.html. Of course, statements to this effect by Republican governors have been suffocated by President Trump's lies about mail-in voting. See, e.g., Nicholas Riccardi, *Here's the Reality Behind Trump's Claims About Mail Voting*, ASSOCIATED PRESS (Sept. 30, 2020), <https://apnews.com/article/virus-outbreak-joe-biden-election-2020-donald-trump-elections-3e8170c3348ce3719d4bc7182146b582>. This story is bigger than any one politician, even the President—that is why he is not quoted here. It takes a lot more than one man to undermine confidence in an election.

215. See *Democratic Party Primaries in Wisconsin, 2020*, BALLOTPEdia https://ballotpedia.org/Democratic_Party_primaries_in_Wisconsin,_2020 (last visited May 5, 2021).

216. See *Live: Wisconsin Supreme Court and Statewide Election Results*, N.Y. TIMES (Jun. 29, 2020), <https://www.nytimes.com/interactive/2020/04/07/us/elections/results-wisconsin-spring-elections.html>.

217. See, e.g., Logan Rude, *There's a Lot of Confusion Around Wisconsin's Spring Election. Here's What You Need to Know About Voting*, CHANNEL3000 (Apr. 7, 2020, 5:59PM), <https://www.channel3000.com/theres-a-lot-of-confusion-around-wisconsins-spring-election-heres-what-you-need-to-know-about-voting/>.

218. See, e.g., Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Their Primaries Because of Coronavirus. Here's a List.*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html>.

219. See Nick Corasaniti, Reid Epstein & Lisa Lerer, *Wisconsin Is Set to Vote on Tuesday After Court Overrules Governor's Postponement*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/wisconsin-primary-election-postponed-coronavirus.html>.

220. *Id.*

that he lacked the authority following a challenge by the Republican legislature.²²¹ In a separate suit brought by state and national Democratic officials, a federal judge ruled that the COVID-19 crisis justified the counting of absentee ballots received six days after the usual deadline, 8:00 p.m. on election day.²²² The district court also suspended the requirement that absentee voters provide a witness certification with their ballot.²²³ But the Supreme Court of the United States intervened the day before the election, reversing the district court's order that ballots postmarked after election day be counted.²²⁴ This rendered the votes of those who received their ballots too late or who relied on the earlier decision meaningless.²²⁵ And so the election went on.

As the courts jumbled the absentee voting process, in-person voting was also swept up into a whirlwind of controversy. The number of polling locations were slashed all across the state because of a shortage of poll workers caused by concerns about the virus.²²⁶ But the slashing was anything but equitable. The 30,495 registered voters in Calumet County, the wealthiest in the state, had twenty-two polling stations.²²⁷ Milwaukee County, which has the second highest poverty rate in the state and *over half a million registered voters*—more than fifteen times as many as Calumet County—had just sixty.²²⁸ The City of Milwaukee, which accounts for well over half the population of Milwaukee County,²²⁹ had just five.²³⁰ New York Times Columnist Reid Epstein put the entire debacle into context writing: “Tuesday’s mess of an election in Wisconsin is the culmination of a decade of efforts by state Republicans to make voting harder, redraw legislative boundaries and dilute the power of voters in the state’s urban centers.”²³¹

In a surprise result, perhaps driven by the simultaneous Democratic presidential primary or frustration at the conservative insistence on holding the

221. *Id.*

222. Democratic Nat’l Comm. v. Bostelmann, 451 F.Supp. 3d 952, 976 (W.D. Wisc. 2020).

223. *Id.* at 959.

224. Republican Nat’l Comm. v. Democratic Nat’l Comm, 140 S. Ct. 1205, 1206 (2020).

225. See Adam Liptak, *Rulings on Wisconsin Election Raise Questions About Judicial Partisanship*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-elections-supreme-court.html>.

226. Gabrilla Rusk, *Long Lines Forming at Milwaukee, Green Bay Polling Locations*, NBC15 (Apr. 7, 2020 10:01AM), <https://www.nbc15.com/content/news/Long-lines-forming-at-Milwaukee-polling-locations-569436971.html>.

227. *Calumet County Polling Locations*, CALUMET CTY. (Apr. 7, 2020), <https://www.co.calumet.wi.us/DocumentCenter/View/6600/Type-D-4-20>.

228. Christopher Kuhagen, *Voting Sites Changed Because of a Lack of Poll Workers. Here’s Where You Can Vote in-Person in Wisconsin’s Spring Election*, MILWAUKEE J. SENTINEL (Apr. 3, 2020 5:08PM), <https://www.jsonline.com/story/communities/2020/04/03/coronavirus-wisconsin-where-vote-polling-places-milwaukee/2941649001/>.

229. See Milwaukee County, Wisconsin, U.S. CENSUS BUR. <https://www.census.gov/quickfacts/fact/table/milwaukeecountywisconsin/PST045219#> (last accessed Mar. 23, 2021); Milwaukee City, Wisconsin, U.S. CENSUS BUR., <https://www.census.gov/quickfacts/milwaukeecitywisconsin> (last accessed Mar. 17, 2021).

230. Katelyn Burns, *Wisconsin Voters Are Waiting in 5-hour Lines in the Middle of a Deadly Pandemic*, VOX (Apr. 7, 2020, 2:18 PM), <https://www.vox.com/policy-and-politics/2020/4/7/21211879/wisconsin-voters-lines-election-primary>.

231. Reid Epstein, *Why Wisconsin Republicans Insisted on an Election in a Pandemic*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-pandemic-primary-republicans.html>.

election, the liberal candidate for the state supreme court seat won her race handily.²³²

C. A Proposal to Make Voting More Accessible

The data in Part I show that there are lower rates of voter participation in both urban and rural counties with high rates of poverty. Moreover, changing state election systems are uneven at best and ill-intended at worst. Whether it be in West Virginia, Florida, Wisconsin, Pennsylvania, Oregon, or some other state, a more uniform guarantee is necessary to attack the socioeconomic disparity in voter participation, especially given the present crisis. Any statute must be well-crafted and targeted, given the power of political appointees, such as former Postmaster General Louis DeJoy, to alter rules or physically destroy machines that enable expeditious vote counting.²³³ This Note therefore proposes the following piece of original legislation, drawing upon the multitude of legislative efforts described in Part II, above:

The Equal Voter Participation Act of 2021

Section 1: Guaranteeing the Right to Vote by Mail

- (a) “In General.—If an individual in a state is eligible to cast a vote in an election for federal office, the State may not impose any additional conditions or requirements on the eligibility of the individual to cast the vote in such election by mail, except to the extent that the State imposes a deadline for returning the ballot to the appropriate State or local election official.”²³⁴
- (b) “Provision of Ballot Materials.—Not later than two weeks before the date of any election for federal office, each State shall mail ballots to individuals who are registered to vote in such election.”²³⁵
- a. For individuals with a lawful permanent address who become registered during the two-week period before an election, and after each state mails ballots to individuals, the state shall mail a paper ballot to the individual if they become registered one week before the election or earlier, or electronically if they become registered at 12:00 a.m. on the day one week before an election, or at a later time. As long as these ballots are postmarked on or before Election

232. *Wisconsin Supreme Court and Statewide Election Results*, N.Y. TIMES <https://www.nytimes.com/interactive/2020/04/07/us/elections/results-wisconsin-spring-elections.html> (last visited May 25, 2021).

233. The topic of political interference at the USPS in the runup to the 2020 election was worthy of, and will surely receive, much longer treatment from scholars in Administrative Law. For a brief discussion of what one might deem summer 2020’s Great Postal Crisis, see Adam Clark Estes, *What’s Wrong With the Mail*, VOX (Aug. 18, 2020, 2:21 PM), <https://www.vox.com/recode/2020/8/7/21358946/postal-service-mail-delays-election-trump-mail-in-ballots>. Public outcry led to a reversal of many changes. *Postal Service Agrees to Reverse Service Changes*, POLITICO (Oct. 14, 2020, 11:55 PM), <https://www.politico.com/news/2020/10/14/postal-service-agrees-to-reverse-service-changes-429550>.

234. S. 26 116th Cong. § 3, (2019).

235. *Id.*

Day, or electronically received on or before Election Day, they shall be counted.

- (c) “Rule of Construction.—Nothing in this section shall be construed to affect the authority of states to conduct elections for federal office through the use of polling places at which individuals cast ballots.”²³⁶

Section 2: Financing the Vote

- (a) The Federal Election Commission shall produce a quadrennial best practices manual that provides States with quality standards in balloting, tabulation, equipment, and software.
- (b) The Federal Election Commission shall provide the States with all funds necessary to print, mail, process, and tabulate ballots sent and received by mail, including for the cost of any machinery or software needed in these tasks, in accordance with the Best Practices Manual.
- (c) States are not precluded from opening polling places, but the cost thereof, in addition to all other costs incurred by the state in the administration of elections for federal office, will only be reimbursable with federal funds according to the following formula, where “top quintile” refers to the 20% of Census tracts²³⁷ with the lowest rates of poverty and “bottom quintile” refers to the 20% of Census tracts with the highest rates of poverty:
- a. Federal funds to match 100% of cost if rates of voter participation between the top quintile and bottom quintile of Census tracts were within 2% in the last biennial general election for federal office.
 - b. Federal funds to match 50% of cost if rates of voter participation between the top quintile and bottom quintile of Census tracts were within 3% in the last biennial general election for federal office.
 - c. Federal funds to match 25% of cost if rates of voter participation between the top and bottom quintile of Census tracts were within 4% in the last biennial general election for federal office.
 - d. If the rate of voter participation in the top and bottom quintiles differed by greater than 4% in the last biennial general election for federal office, the federal government shall not reimburse the cost of any in-person voting.
 - e. Notwithstanding subsections a. through d., if voters in the “bottom quintile” participate in elections at a greater rate than voters in the “top quintile,” states shall receive a full reimbursement.

Section 3: Ensuring the Vote

- (a) “Accessibility for Individuals With Disabilities.—All ballots provided under this [Act] shall be accessible to individuals with disabilities in a manner that provides the same opportunity for access and participation (including for privacy and independence) as for other voters.”²³⁸
- (b) Accessibility for Individuals Experiencing Homelessness or Lacking a Permanent Address:

236. *Id.*

237. The author used county-by-county data because it is readily available. Use of Census tracts would allow for greater precision in pinpointing where poorer voters live and how frequently they vote.

238. S. 26 116th Cong. § 3, (2019).

- a. The States shall allow registered voters to designate a Post Office or public benefits office as the address to which the state must send their ballot, which such individuals may retrieve by stating their name and providing identification, which shall include any document issued by the federal government or any State, local, or tribal government bearing their name.
- b. The federal government shall provide the States with ballot receptacles to be placed in all Post Offices and public benefits offices.
- (c) All ballots shall be mailed with a return envelope and prepaid postage.
- (d) All mail ballots postmarked by Election Day shall be counted.

Section 4: Registering Voters.²³⁹

This proposal provides states with a positive incentive to erase the disparity in rates of voter participation between rich and poor. It also seeks to address the challenges that people living with disabilities or experiencing homelessness face when casting a ballot. For reasons discussed in Section IV, the proposal's requirements would be likely circumscribed to federal elections, leaving a great deal more work to be done concerning elections to state office. This proposal is distinct from all four of the proposed laws discussed above, in that it ties the disbursement of funds directly to the achievement of greater parity in voter participation between wealthier and poorer places. But it draws upon their commitment to assisting people with disabilities to cast ballots, their attention to registration schemes, the preservation of state autonomy to conduct in-person voting in addition to absentee voting, and their overall choice to involve the federal

239. This portion of the law would exactly mirror Senator Wyden's S. 26, discussed *infra* Section III-A: "(1) REGISTRATION.—Upon the expiration of the 21-calendar-day period which begins on the date the appropriate State election official issues a notification to an individual under subsection (b)(2)(A), the official shall ensure that the individual is registered to vote in elections for Federal office held in the State unless—

(A) the official later determines that the individual does not meet the eligibility requirements for registering to vote in such elections; or

(B) prior to the expiration of such 21-calendar-day period, the individual notifies the official that the individual declines to be registered to vote in such elections.

(2) CHANGE OF ADDRESS.—Upon the expiration of the 21-calendar-day period which begins on the date the appropriate State election official issues a notification to an individual under subsection (b)(2)(B), the official shall ensure that the individual is registered to vote in elections for Federal office at the address provided in the identifying information unless—

(A) the official later determines that the individual does not meet the eligibility requirements for registering to vote in such elections; or

(B) prior to the expiration of such 21-calendar-day period, the individual notifies the official that the individual declines a change of address for voter registration purposes."

government in an area of law traditionally left up to the states. Each of those proposed laws is thorough and carefully crafted—this proposal is intended only to supplement them by addressing the relationship between poverty, place, and voter participation.

D. Finding A Politically Feasible Path

The Equal Voter Participation Act would mark a bold, sweeping change to how Americans vote for federal offices. Passage of this law would likely require unified Democratic control of government—and a little wiggle room.

During his campaign, President Biden made access to the vote a central issue. Shortly after he declared his candidacy, he wrote an op-ed in a South Carolina newspaper declaring that under his administration, “The Department of Justice will once again protect the fundamental right to vote. And I’ll lead the fight to restore the Voting Rights Act and pass laws that *make it easier for people to exercise their rights.*”²⁴⁰ COVID-19 led the former Vice President to go even further, as evidenced in his statement that: “We should be looking to all mail ballots across the board.”²⁴¹

This Note’s original proposal—and the other proposed laws discussed here—would stand little to no chance in a Republican-led or closely divided Senate. That is why the most critical step to ensure the passage of this measure or any measure even remotely resembling it requires retaining or expanding the current Democratic majority in the House of Representatives and *expanding* the Democratic Senate majority.²⁴² Why is the current Democratic Senate majority of fifty plus Vice President Harris²⁴³ insufficient? Because under prevailing Senate rules,²⁴⁴ a voting rights measure would need sixty votes to overcome an expected Republican filibuster. Alternatively, a simple majority of the Senate could amend

240. Joe Biden, *A Biden Administration Will Work Tirelessly to Protect the Voting Rights of Americans*, THE STATE (Dec. 22, 2019, 5:35 AM) (emphasis added), <https://www.thestate.com/opinion/article238618648.html>.

241. @MeetThePress, TWITTER (Mar. 29, 2020, 9:52 AM), <https://twitter.com/MeetThePress/status/1244261049735548930>.

242. Embedded here is an enormous presumption: the abolition of the filibuster. Many of Democrats’ enumerated priorities could never get past a cloture vote, and the odds of either party gaining a supermajority in the near future are practically nonexistent. With partisan rancor as it is, Republican senators will have little incentive to cross over to support Democratic priorities—especially if they hope to survive their next primary. At the same time, pressure on a Democratic trifecta to pass a progressive agenda would be enormous. Failure to do so would carry the potential to expose many senators and representatives to a challenge from the left. Putting the wisdom of such an action to the side—and there is good reason to consider it unwise—political reality could well lead to the filibuster’s demise. Alternatively, senators from red states may resist pressure from the left, wishing to burnish their moderate credentials by preserving the filibuster. For a good summary of this topic, see Molly E. Reynolds, *What Is the Senate Filibuster, and What Would It Take to Eliminate It?*, BROOKINGS (Oct. 15, 2019), <https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it/>.

243. *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> (last visited May 5, 2021).

244. *About Filibusters and Cloture*, U.S. SENATE https://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm (last visited May 5, 2021).

its rules to abolish the filibuster, but moderate Democratic Senators Joe Manchin and Kyrsten Sinema have already voiced strong opposition to that strategy.²⁴⁵

Voting rights have not always been such a controversial issue. Indeed, the Voting Rights Act was reauthorized without a single senator voting in opposition in 2006.²⁴⁶ A broad array of Democratic senators and representatives of both geographic and ideological diversity currently support a series of bills, including those discussed above, aimed at expanding access to voting.²⁴⁷ This Note employs explicitly partisan language because of the clear partisanship evident throughout the discussion of state laws in Part II. Furthermore, only one of the major parties is currently peddling conspiracies about nefarious but fictitious “voter fraud” in an attempt to bypass the will of the people in the most recent election, however unsuccessfully.²⁴⁸ Decoupling conservative politics from the promotion of measures that make voting harder is profoundly important to the health and long-term legitimacy of democratic government. Suppressing the votes of poor voters, voters with disabilities, African American, Hispanic, or Native American voters, or *any* group of voters for *any* reason is not a good faith electoral strategy. Many of the counties included in the analysis above voted heavily Republican, and those votes are just as sacred. Poor counties in four of the five states surveyed here voted less than wealthy counties in 2016: that must become an aberration, a problem for lawmakers to solve, rather than the inevitable result of the laws themselves. There is a deep need for bipartisan understanding that more citizens voting is a good thing, an understanding that would serve as a refuge in the hyper-partisan storm.

IV. A CONSTITUTIONAL DEFENSE

Part IV lays out some of the main constitutional challenges for federal election reform in Supreme Court jurisprudence. Subpart A grapples with three challenging precedents: *Shelby County, Alabama v. Holder*, followed by *Oregon v. Mitchell* and *Crawford v. Marion County Election Board*. Subpart B then turns to constitutional justifications for a proposal which ties federal funds for elections to lower disparities in voter participation between wealthier and poorer places, seeking to find a constitutional avenue to expand the Equal Voter Participation Act beyond federal elections. It begins with Congress’s Spending Power, turns to the Commerce Clause, and concludes with the Equal Protection Clause of the Fourteenth Amendment.

245. Burgess Everett, *Manchin Emphatic He ‘Will Not Vote’ to Kill the Filibuster*, POLITICO (Jan. 25, 2021, 5:38 PM), <https://www.politico.com/news/2021/01/25/joe-manchin-filibuster-462364>.

246. *Case: Voting Rights Act Reauthorization 2006*, NAACP LEGAL DEF. & EDUC. FUND, INC., <https://www.naacpldf.org/case-issue/voting-rights-act-reauthorization-2006/> (last visited May 5, 2021).

247. *See generally* Part III.

248. *See Texas v. Pennsylvania*, No. 155, 2020 WL 7296814 at *1 (U.S. Dec. 11, 2020) (denying Texas’ suit to delay certification of election results in closely contested states because of pandemic-related changes to state election administration). Long after the resolution of the election and the Inauguration, prominent Republicans continue to lie about election fraud. *See* Press Release, Statement by Donald J. Trump, (Mar. 16, 2021) (“We are seeking to find and reveal the large-scale election fraud which took place in Georgia.”).

A. Constitutional Hurdles

A measure designed to limit the disparity in voter participation between geographic areas with high rates of poverty and those with low poverty rates could pass constitutional muster. However, passing and upholding such a law will not be easy.²⁴⁹ The Supreme Court has taken a markedly hostile turn away from federal intervention in the way that states hold elections in recent years.²⁵⁰ The majority opinion in *Shelby County, Alabama v. Holder* captures this hostility.²⁵¹ *Shelby County* dealt primarily with Section Four of the reauthorized Voting Rights Act, which provided a mechanism to prevent states and localities from discriminating between voters because of their race.²⁵² That section provided the coverage formula by which certain jurisdictions, primarily in the south, were subjected to federal preclearance for any changes in electoral procedures.²⁵³ In short, a jurisdiction satisfied the formula if it exhibited two dismal features: “tests or devices” limiting voter registration and participation as of November 1, 1964, and a registration rate of all voting age persons of less than 50% on November 1, 1964, or voter participation rates below 50% in the November 1, 1964 election.²⁵⁴ The Court balked at the use of “40-year-old-data, when today’s statistics tell an entirely different story.”²⁵⁵ Congress could pass a new formula with new data, but the old one represented too great a “departure from the traditional course of relations between the States and the Federal Government.”²⁵⁶

The formula used to disburse federal funds to cover the costs of election administration in the proposed Equal Voter Participation Act in Part IV escapes from *Shelby County*’s dangerous shadow in two ways. First, the proposed law would apply universally. All states would receive federal money for costs directly related to mail-in voting; federal funding for other costs would be contingent upon the same measure everywhere, without reference to any particular measures the state may have implemented by a given date.²⁵⁷ Moreover, as part (c) of Section II of the proposed law says, the data that determine the amount of funding that a state could receive would update every two years, insulating the proposal from *Shelby*-like charges of anachronism.²⁵⁸

Shelby County is hardly the only hurdle to clear. The Supreme Court has restricted Congress’s ability to alter voting procedures and requirements to

249. To begin with, Congress has provided funds designed to modernize and streamline state elections before, with the Help America Vote Act of 2002. See 52 U.S.C.A. § 20901 (West, Westlaw through Pub. L. No. 116-193) et seq. Several of the proposed pieces of legislation described above amend or build upon this Act in some form.

250. See generally *Shelby Cnty., Alabama v. Holder*, 570 U.S. 529 (2013).

251. *Id.*

252. *Id.* at 529.

253. *Id.* at 550 (“The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout) and tailored the remedy (preclearance) to those jurisdictions exhibiting both.”).

254. *About Section 5 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE <https://www.justice.gov/crt/about-section-5-voting-rights-act> (last updated Sept. 11, 2020).

255. *Shelby Cnty.*, 570 U.S. at 556 (referring to statistics cited by the Court showing improved voter registration and participation rates throughout the South).

256. *Id.* at 557 (quoting *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491, 500–01 (1992)).

257. The author does not suggest replacing the poll taxes and literacy tests of Section Four of the Voting Rights Act with voter ID laws.

258. Part III-C, *supra*; see *Shelby Cnty.*, 570 U.S. at 556.

national (or, as the legislation above refers to them, federal) elections.²⁵⁹ The Court held in *Oregon v. Mitchell* that it was within Congress's power to set the voting age in "national elections, such as congressional, senatorial, vice-presidential and presidential elections," but not in elections to state and local office.²⁶⁰ For this reason, the proposed plan is circumscribed to federal elections and takes all of its measurements with reference to them. This is a serious limitation, as the power of individual voters to influence outcomes is intuitively greater in state and local elections where fewer ballots are cast. Indeed, some of the most egregious efforts to suppress votes have functioned—and still do function—exclusively in elections to state office.²⁶¹ This proposal could incentivize the prevention or the dilution of low-income votes for state and local office where these elections overlap with elections to federal office, as they commonly do.²⁶² But it is admittedly only a single leg of a longer journey, and much work would remain in state capitols and town halls.

Equal Protection precedent lays another trap. In *Crawford v. Marion County Election Board*, the Court recognized that even "rational restrictions on the right to vote" might constitute invidious discrimination and run afoul of the Constitution "if they are unrelated to voter qualifications."²⁶³ But it interpreted the implications of this standard narrowly. Per *Crawford*, "evenhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious and satisfy the standard set forth in *Harper*."²⁶⁴ In determining whether a restriction is a valid one, "a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands."²⁶⁵ The Court then utilized this standard to deem the state interest in "detering and detecting voter fraud" as a valid state justification for the purge of voter rolls and requirement of photo ID to cast a ballot.²⁶⁶

Crawford came out the wrong way. As this Note demonstrates, federal legislation has the capacity to undo the inequities present in the laws impacting how people vote in states all across the country. By a generous reading, the *Crawford* majority willfully averted its eyes from the reality that voter ID laws, voter roll purges, and the like disproportionately impact poor voters and voters of color. Moreover, because fraud is so rare, these measures are a "solution in search of a problem."²⁶⁷ It would be far wiser to subject state voting restrictions to a higher

259. *Oregon v. Mitchell*, 400 U.S. 112, 117–18 (1970).

260. *Id.*

261. For instance, Mississippi voters rejected an 1890 law by ballot initiative this year requiring a candidate for statewide office win a majority of State House Districts. Past efforts by the DOJ to challenge the law came up short. See Becca Andrews, *Mississippians Overwhelmingly Voted Down a Jim Crow-Era Election Provision*, MOTHER JONES (Nov. 4, 2020), <https://www.motherjones.com/2020-elections/2020/11/mississippi-measure-2-statewide-election-provision-jim-crow/>.

262. BEN LEUBSDORF, CONG. RSCH. SERV., R46413, ELECTION DAY: FREQUENTLY ASKED QUESTIONS 3 (2020).

263. *Crawford v. Marion Cnty. Election Bd.*, 533 U.S. 181, 189 (2008).

264. *Id.* at 189–90 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n. 9 (1983)).

265. *Id.* at 190.

266. *Id.* at 191, 194.

267. *Oppose Voter ID Legislation—Fact Sheet*, *supra* note 11.

constitutional standard than rational basis and provide a federal floor of protections to erase inequities.

B. Constitutional Avenues

Article I, Section Four of the Constitution states that “Congress may at any time by law make or alter” laws regarding the election of federal officials.²⁶⁸ This language provides the basis for tying an electoral incentive system to poverty rates, place, and voter participation in federal elections, and, as explained above, the Supreme Court has construed it strictly. Different constitutional arguments would be needed to make such a law applicable to state elections as well. First, reliance upon Congress’ power to tax and spend would offer the surest constitutional path for a law such as the one proposed here. Second, the Commerce Clause could empower Congress to demand that states adopt mail-in voting, but the logic of the argument would likely face fierce headwinds in conservative courts. Third, Justice Douglas’ reading of the Fourteenth Amendment would provide the broadest path to guaranteeing the vote. An embrace of such a perspective, however, would require a monumental shift from the Supreme Court.

1. The Spending Power

Article I declares that “The Congress shall have Power to lay and collect Taxes . . . to pay the Debts and provide for the Common Defense and general Welfare of the United States.”²⁶⁹ In other words, “[i]ncident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power ‘to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.’”²⁷⁰

There are certain limitations upon this power. First, expenditures must be aimed at the “pursuit of ‘the general welfare.’”²⁷¹ Courts must defer “substantially” to Congress on this score.²⁷² Second, conditions placed on any federal funds must be “unambiguous.”²⁷³ Third, conditions must be related “to the federal interest in particular national projects or programs.”²⁷⁴ Fourth, expenditures must clear any “independent bar” set by “other constitutional provisions.”²⁷⁵ Fifth and finally, “the financial inducement offered by Congress [must not] be so coercive as to pass the point at which ‘pressure turns into compulsion.’”²⁷⁶

The Equal Voter Participation Act (plus applicability to the states) would pass the constitutional test for valid exercise of the Spending Power. The findings

268. U.S. CONST. art. I, § 4

269. U.S. CONST. art. I, § 8, cl. 1.

270. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)).

271. *Id.* at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937)).

272. *Id.*

273. *Id.* at 207 (citing *Pennhurst St. Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

274. *Id.* at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

275. *Id.* at 208.

276. *Id.* at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

described in Section Two of the Vote by Mail Act of 2019²⁷⁷ offer a glimpse of numerous avenues to assert that mail voting would advance the general welfare. The conditions for receiving the funds—lowering the discrepancy that exists between rich and poor counties when it comes to voter participation rates below certain numerically expressed levels—are unambiguous. Congress already has the power to regulate federal elections;²⁷⁸ combined with the spending power, it could go further and regulate the states. No separate constitutional provision bars this particular exercise of that power. There is nothing coercive about the proposal; it only promises new money to states if they reach its goals. Congress's spending power provides the safest constitutional path for the sort of positive incentive structure imagined here.

2. The Commerce Power

The second basis of power for passing a version of the law proposed here that *also* applies to state elections is the Commerce Clause. Article I of the Constitution grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²⁷⁹ As Chief Justice Marshall explained nearly two centuries ago, this power is plenary, limited only by the express terms of the Constitution.²⁸⁰ Thus, it offers the means to regulating a great variety of activities. Congress based the provision of the Civil Rights Act of 1964, which prohibited racial discrimination in public accommodations, on this power, leaving behind a record “replete with evidence of the burdens that discrimination by race or color places upon interstate commerce.”²⁸¹ Congress's reliance was proper, because “the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce.”²⁸² Later opinions expressed reservations about the use of the Commerce Clause to permit federal regulation of intra-jurisdictional matters, limiting Congress to the regulation of activities that “*substantially* affect interstate commerce.”²⁸³

Congress could enact a federal law requiring states to implement the elements of the author's proposal in both state and federal elections by resorting to their power under the Commerce Clause. Part I of this Note shows how voter participation can break along socioeconomic lines. Aggressive state laws implementing voter ID and similar requirements for voters only exacerbate the chasm. Ensuring the participation of voters from a more representative economic sampling would better inform state, local, and federal economic policy. How could Congress adequately regulate Commerce when certain socioeconomic strata go relatively unheard? State governments concerned principally with the counties that vote in greater proportion might enact laws which benefit those constituencies at

277. S. 26, 116th Cong. (2019).

278. *Oregon v. Mitchell*, 400 U.S. 112, 117–18 (1970).

279. U.S. CONST. art. I, § 8 cl. 3.

280. *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824).

281. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252 (1964).

282. *Id.* at 258.

283. *United States v. Lopez*, 514 U.S. 549, 559 (1995) (emphasis added).

the expense of interstate commerce. Such inequity invites inefficiency, which ought to spur Congress to exercise “the power . . . to prescribe the rule by which commerce is to be governed.”²⁸⁴ Securing more equal rates of participation among rich and poor areas would certainly better inform national economic policy. Justice Douglas identifies the importance of securing such equality in his list of the “sole restraints” which prevent Congress from abusing its discretion: “[t]he wisdom and the discretion of Congress, their identity with the people, and *the influence which their constituents possess at elections.*”²⁸⁵

3. The Equal Protection Clause

A third possible constitutional justification for the proposal rests upon the Equal Protection Clause of the Fourteenth Amendment. A state may not “deny to any person within its jurisdiction the equal protection of the laws.”²⁸⁶ This is where the majority opinion in *Mitchell* errs. Congress should have the power to regulate both federal *and* state elections. Justice Douglas concluded as much in his concurrence in *Mitchell*, where he concurred that Congress acted within its authority to lower the voting age in federal elections but dissented from the majority’s view that it could not do so for state elections.²⁸⁷ He conceded that the text of Article I, Section Four of the Constitution “gave Congress only the power to regulate the ‘[m]anner of holding Elections.’”²⁸⁸ However, “the Civil War Amendments . . . made vast in-roads on the power of the States. Equal Protection became a standard for state action and Congress was given authority to ‘enforce’ it.”²⁸⁹ He explained that Section Five of the Fourteenth Amendment (its enforcement clause) granted Congress “the same broad powers expressed in the Necessary and Proper Clause.”²⁹⁰ After all, as the Court had concluded just four years earlier, Section Five “is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”²⁹¹

Justice Douglas went on to cite numerous cases in which the Court had previously found that “election inequalities created by state laws and based on factors other than race may violate the Equal Protection Clause.”²⁹² For instance, in *Harper v. Virginia State Board of Elections*, the Court explained that states often violate the Fourteenth Amendment prohibition on “voter qualifications which invidiously discriminate.”²⁹³ Invidious discrimination, which violates the Equal Protection Clause of the Fourteenth Amendment, arises where “the law lies an unequal hand” on similarly situated people.²⁹⁴ This standard underlies the Court’s

284. *Gibbons*, 22 U.S. at 196.

285. *Id.* at 197 (emphasis added).

286. U.S. CONST. amend. XIV § 1.

287. *Oregon v. Mitchell*, 400 U.S. 112, 135 (1970) (Douglas, J., concurring).

288. *Id.* at 143.

289. *Id.*

290. *Id.* at 141 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966)).

291. *Katzenbach*, 384 U.S. at 651.

292. *Mitchell*, 400 U.S. at 143 (listing authorities in the appendix to the opinion).

293. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966).

294. *See, e.g., Skinner v. Okl. Ex. Rel. Williamson*, 316 U.S. 535, 541 (1942); *Reynolds v. Sims*, 377 U.S. 533, 561 (1964).

justification for invalidating poll taxes, which “makes the affluence of the voter or payment of any fee an electoral standard.”²⁹⁵

Inequality in electoral participation demonstrably exists between those who live in rich and poor counties. These differences are particularly acute in the states surveyed that have enacted more restrictive voting measures, with the exception of Oregon, which has a mail voting system. A broad reading of the Enforcement Clause of the Fourteenth Amendment like Justice Douglas’s would permit Congress to address this inequality head on in state and federal elections, be it with a proposal like that found in this Note, barring restrictive voter ID laws, or some other measure.²⁹⁶

V. CONCLUSION

A correlation exists between poverty and place and voter participation. In four of the five states surveyed here—West Virginia, Florida, Pennsylvania, and Wisconsin—voters in the five poorest counties exhibited average rates of voter participation anywhere from five to ten percent lower than voters in the five richest counties. The one state that turned this trend on its head was Oregon, which largely votes by mail. There, voters in poorer counties actually had a higher average rate of voter participation than those in wealthier ones.

Democratic members of Congress have noted this disparity. Diverse members in both chambers have introduced a series of laws that strengthen the ability of voters to cast ballots by mail. Drawing upon these proposals, this Note proposes a piece of vote-by-mail legislation, the Equal Voter Participation Act, which explicitly seeks to afford better ballot access to those living in places with high poverty rates by providing federal funds to states to guarantee mail voting for every federal election. It seeks to safeguard the vote of individuals with disabilities and people experiencing homelessness. It also provides further funding for in-person voting and miscellaneous costs of election administration if states successfully counteract the trend of depressed turnout in poor counties. Finally, it includes Senator Wyden and Representative Blumenauer’s bold proposal to maximize voter registration.

All of this is possible with unified Democratic government willing to reform the filibuster. The reactions of state and federal leaders to the challenge of voting during this crisis only underscores the need for broad reform. Legislation like this Note’s “Equal Voter Participation Act of 2021” could survive as written because the Constitution explicitly grants Congress regulatory power over federal elections.²⁹⁷ A version that applies to both federal and state elections could potentially survive as a valid exercise of Congress’s power to spend. The

295. *Harper*, 400 U.S. at 666.

296. Of course, the Court has been particularly stingy with the Equal Protection Clause insofar as it might concern the poor. *See, e.g., Dandridge v. Williams*, 397 U.S. 471 (1970) (holding that a Maryland regulation establishing a maximum cash assistance grant amount regardless of family size did not violate the Equal Protection Clause); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that reliance upon property taxes to fund public schools did not violate the Equal Protection Clause despite widely disparate contribution levels between communities).

297. U.S. CONST. art. I, § 4.

Commerce Clause and Fourteenth Amendment could offer two bolder avenues for action related to both federal and state elections.

To vote is to flex power; to deny the vote is to oppress. The disparity in participation between rich and poor voters will likely only grow wider with more restrictive state laws and the lack of a federal response. The time to act is now.