



NYSBA

Special Committee on Voter Participation Final Report

Approved by the New York State Bar Association
House of Delegates January 25, 2013

NEW YORK STATE BAR ASSOCIATION

SPECIAL COMMITTEE ON VOTER PARTICIPATION



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INTRODUCTION

In both national and local elections voter participation in the State of New York has for over a decade been far below that of most other states. Only 59% of those eligible to vote cast ballots in the 2008 Presidential Election. All told, in the last three elections before 2012 New York ranked 47th among the states in average voter turnout.¹ Only 35.5% of the voting eligible population (i.e., citizens over 18 who are not incarcerated for a felony or on felony parole) voted for the highest office on the ballot in the 2010 general election, putting New York in 48th place among the states, approximately 13% below the national average.² In the 2012 election, only 53.1% of eligible voters in New York cast ballots.³ New York also compares unfavorably to other states in the percentage of its eligible citizens who are registered to vote: in 2010 New York had the sixteenth-worst registration rate of all states. Less than 64 percent of eligible New Yorkers were registered to vote as of 2010. Between 2008 and 2012 the total for voters registered in New York declined.⁴

By comparison with other states it is important that New York's voter participation numbers for presidential elections between 1984 and 2000 were far better than they have become in the last decade. In that earlier period New York's voter participation levels were close to and sometimes better than the national average.⁵ That is especially important because it is in the period since 2000 that many other states—but not New York—have made significant changes to modernize their registration and voting practices. A number of those changes in other states, especially those as to registration, appear to have had a significant impact on the rate of voter participation. Whereas citizens of New York might once have seen themselves as on the cutting edge as to the registration and voting process, that is no longer the case.

¹ See 2008 General Election Turnout Rates, United States Elections Project (March 31, 2012), http://elections.gmu.edu/Turnout_2008G.html (voter participation in 2008); NEW YORK CITY, VOTER ACCESS IN NEW YORK 1 (Dec. 2010), available at http://www.nyc.gov/html/om/pdf/2010/pr492-10_proposal.pdf (ranking in last three federal elections before 2012).

² See 2010 General Election Turnout Rates, United States Elections Project (Dec. 28, 2011), http://elections.gmu.edu/Turnout_2010G.html. This ranking excludes the District of Columbia, which has no voting Congressional representation and thus lower voter participation in midterm elections. *Without Senators, D.C. Residents Look Elsewhere to Vote*, FOX NEWS, Oct. 31, 2010, available at <http://www.foxnews.com/politics/2010/10/31/senators-dc-residents-look-vote/>.

³ See 2012 General Election Turnout Rates, United States Elections Project (Dec. 31, 2012), http://elections.gmu.edu/Turnout_2012G.html.

⁴ See Voting and Registration in the Election of November 2010 – Detailed Tables, Table 4a, United States Census Bureau, available at <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html> (last visited Dec. 1, 2012) (voter registration in 2010); Enrollment by County, New York State Board of Elections, <http://www.elections.ny.gov/EnrollmentCounty.html> (total voter registration in New York).

⁵ See Turnout 1980-2012, United States Elections Project, available at http://elections.gmu.edu/voter_turnout.htm (last visited Dec. 1, 2012).

Recognizing these stark facts and what they mean as to the exercise by citizens of their right to vote and their participation in government, New York State Bar Association President Seymour James has made it a priority of his administration to sponsor the development of recommendations as to changes in the law and administration that would promote greater voter participation in New York. He has in turn formed this Special Committee on Voter Participation to provide such recommendations to the House of Delegates. When the Committee was formed he set out its charge in the following statement:

In the United States, voting is one of our most fundamental rights, ensuring our ability to participate in the electoral process. The rate of voter participation in New York State is frequently ranked among the lowest in the nation. Measures to remove barriers to registration and voting and to encourage participation, while maintaining the integrity of the process, could go a long way to improve citizenship and civic engagement and enhance our democracy. The Special Committee on Voter Participation will consider possible reforms to remove obstacles to registration and voting, such as automatic voter registration and modernization of the registration process, extended cut-off dates for advance registration, increased penalties for voter intimidation and deceptive election practices, genuine early voting (permitting voters to vote on a voting machine in a designated location prior to Election Day), and no-fault absentee balloting (allowing voters to use absentee ballots without meeting defined criteria). The special committee will produce a report and recommendations with regard to reforms that could enhance civic participation in New York State.

Consistent with the President's charge, the Committee has developed the recommendations outlined and discussed in detail below. We believe that, if implemented, the changes we recommend would have a very significant impact on voter participation, bringing New York's rates of registration and voter participation up to levels of which the citizens of the state can and should be proud. Based on statistical analysis and experience in other states and other major democracies in the world that have modernized their registration and voting practices, we believe that moving New York's rate of voter registration and participation at least above 80% within a few years is an attainable goal if the changes we recommend are implemented.

THE COMPOSITION OF THE SPECIAL COMMITTEE

In bringing together the twenty-one lawyers who make up the Special Committee President James took care to assure that the Committee was balanced, especially as to possible perspectives on voting issues. The result is a Committee composed of ten Republicans, ten Democrats and one Independent. The Members are from all parts of New York State, six from New York City, eight from Westchester and Long Island and seven from upstate counties.

The Committee includes a former State Senator, a former Corporation Counsel, a former candidate for Governor, the former Dean of Fordham Law School and President of the New York City Bar, an Executive Committee member of the Republican Party in Westchester County, the Chair of the Republican Committee for the Town of Lewisboro, a recognized expert in election law, both large and small firm practitioners, and six women and minorities. The Committee Co-Chairs are a Republican and a Democrat and the Co-Chairs of the Committee's principal subcommittees are also of opposite parties.

As the Committee has done its work the balance of views expressed has proved to be very useful and, with the exception of one dissent as to the Committee's Recommendation as to adoption of Early In-Person Voting, the Committee's recommendations are the product of a full professional consensus.

THE SPECIAL COMMITTEE'S PROCESS

In doing its work, the Committee has reached out to important, interested and knowledgeable government and private groups and organizations so that it could benefit from their varying perspectives and their expertise. Invitations were extended to more than three hundred private and government organizations, offering those groups and organizations the opportunity to meet with the Committee, as many did, and to provide both pre-existing and new written materials for the Committee's consideration.⁶ The Committee has found the contributions of those groups and organizations to be very helpful.⁷

As part of its process the Committee met on five different days with individuals representing various groups and organizations that responded to its invitations. Those organizations that both submitted comments and met with the Committee were the Brennan Center for Justice, Citizens Union, Common Cause, the Democratic Lawyers Council, DEMOS, the General Counsel for the New York City Board of Elections, the

⁶ A list of those organizations that were invited to participate is set out in the Appendix at p. 53.

⁷ A Glossary of the materials relied upon by the Committee appears in the Appendix at p. 63.

Lawyers' Committee for Civil Rights Under Law, the League of Women Voters New York, the Legal Counsel Division of the New York City Law Department, the NAACP's New York City Chapter, the New York City Bar Association, the New York State Attorney General's Office, the New York State Election Commissioners' Association, the New York Public Interest Research Group (NYPIRG) and Taking Our Seat. Organizations that submitted comments but did not meet with the Committee included the Heritage Foundation and several County Boards of Elections.

Consistent with the President's charge, the Committee initially identified a series of possible changes in the applicable law that should be considered, but not necessarily recommended, and then extended and modified that list as it met with the various groups and organizations and deliberated. The full Committee met to deliberate four times and the Registration and Voting Process Subcommittees each met twice.

The Co-Chairs extend their special thanks to Registration Subcommittee Co-Chairs Andrea Rendo and Fritz Schwarz, Voting Process Subcommittee Co-Chairs John Faso and John Nonna, and to Committee Members Henry Berger, J. R. Drexelius, Jr., Ross Galin, Adriene Holder, Marjorie Lindblom and Andrew Schlichter for their assistance in the drafting of the Committee's Report. Very special thanks go also to Kevin Getnick, the Committee's Administrative Liaison with the State Bar, for an exceptional job in support of the Committee's work.

RECOMMENDATIONS

MODERNIZATION OF REGISTRATION

The Committee's first and primary conclusion is that the State of New York needs to modernize its system for registering voters and that, if implemented, such modernization would result in a significant increase in voter participation. Such a change would also promise increased efficiency and accuracy in the voter rolls and a reduction in cost.

The experience in other states, countries and the Canadian provinces is that increased registration brings with it as a natural corollary increased voter participation. In the United States approximately 90% of registered voters participate in national elections. Consistent with that record, 89.4% of registered New Yorkers voted in the 2008 election.⁸

In order to substantially increase registration and with it voter participation, we strongly recommend that the registration process be modernized so that: (1) voter registration opportunities are affirmatively presented to citizens whenever they engage in a transaction with a state or federal agency, as a seamless and electronic part of that agency's existing process; and (2) voter registration opportunities are also made available online (apart from such transactions with government agencies), just as they are now available by regular mail. As in existing law, to assure the integrity of the process, we recommend that when registering at a state or federal agency all registrants be required to provide appropriate identification to confirm their status as eligible voters and provide a "wet signature" that will be retained as a permanent record. Consistent with current law, at the polls all new online or agency registrants or applicants whose identifying information has not yet been verified, should be required to present an ID that complies with the Help America Vote Act (HAVA)⁹ and a "wet signature" before they are allowed to vote.

Experience in other jurisdictions shows that, after an initial investment, such increased reliance on available technology in the registration process will result in a significant increase in efficiency and accuracy in the voter rolls and a reduction in cost, while making it much easier to deal with voters' post-registration changes in residence. There is also good reason to think that such a system will reduce the potential for registration fraud.

⁸ Voting and Registration in the Election of November 2008 – Detailed Tables, Table 4a, United States Census Bureau, available at <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html> (last visited Dec. 1, 2012).

⁹ 42 U.S.C. § 15301 *et seq.* (2002).

PRE-REGISTRATION OF 16 AND 17 YEAR-OLDS

As a complement to modernization of registration, we also recommend that a program for the voluntary pre-registration of 16 and 17 year-olds be developed. Citizens aged 18 to 24 have the lowest rate of registration in New York, and experience in other states and countries indicates that pre-registration of students before they reach 18 will significantly increase voter participation in that younger age group.

ELECTION DAY AND SAME DAY REGISTRATION

Although it would require a Constitutional Amendment and thus be more difficult, we also recommend that the state take the steps necessary to permit Election Day or, if there is early voting, Same Day Registration (registration at the polls at any time and place when the polls are open). The evidence is that such a practice, which is now used in several other states, will in itself increase registration and with it voter turnout. Also, it would permit those many otherwise frustrated citizens who have moved within New York, but are not yet registered to vote in their new Election District (about one-half of those who are registered but do not vote), to cast their ballots. Just as for the other new forms of registration that we recommend, we urge that appropriate identification and a “wet signature” be required at the point of registration to assure the integrity of the voting process.

Given especially the time it would take for a Constitutional Amendment and the need for further consideration of Election Day or Same Day Registration before it could be adopted, we urge that the other changes in registration practice that the Committee recommends not wait for Election Day or Same Day Registration to be adopted. In the interim, to the extent practicable, we suggest that Same Day or Election Day Registration be considered for adoption at the local level, consistent with the freedom afforded to towns and villages under the Constitution. Such initiatives at the local level could serve as a valuable first step for the rest of the state. We further recommend that in the interim the law be changed to require that registration be allowed up to ten days before an election (the Constitutional minimum) rather than the current twenty-five days.

IMPROVING VOTING PRACTICES

Although the Committee believes that making changes in the law to increase registration is the best way to increase voter participation, we would also recommend changes in the voting process that would improve the attractiveness of that process and

thereby encourage a greater number of eligible voters to cast ballots. For various, often very good reasons many voters complain about the trial of voting on Election Day, and doubtless that is one reason why many stay away. Accordingly, there is reason to believe that making the process significantly more attractive and accommodating will over time increase turnout. But even if it would not actually increase participation in itself, we think that the laws and practices of the state should be fashioned to assure that the voting process is made as accommodating as possible, while recognizing budgetary limits. For citizens exercising their right to vote the process should not be a trial.

EARLY IN-PERSON VOTING

As an important change in the voting process we recommend that a form of In-Person Early Voting be adopted. The practice of affording voters the option of voting in person earlier than Election Day has proved to be extremely popular in other states and we would expect it to be welcomed by those in New York. In-Person Early Voting makes it easier for many voters to get to the polls and, for some, it permits them more time on a non-working day to consider the ballot and then vote more carefully. Depending on how it is managed it can also reduce lines and waiting time. Although some argue that a Constitutional amendment would be necessary before such Early In-Person Voting would be permitted, we do not believe that an amendment would be required.

While we recommend the change we note that the case has not yet been made that early voting in itself actually increases voter turnout significantly. Although many states have adopted it, prior to the 2012 election statistical analysis focused on the states where early voting had been adopted did not show that there had been a meaningful increase in voter turnout as a result of early voting itself. Such an increase came only when it was joined with Same Day Registration.

Some have suggested that early voting serves only to make it more convenient for those who would have voted in any event and others have argued that, because the early voting periods have often been extended over two or more weeks, the customary efforts to mobilize voters and get them to the polls have been diluted, thus offsetting increases in turnout due to greater convenience for voters. Another concern is that spreading voting over weeks (the practice in most early voting states so far) tends to dilute the community spirit that typically attends Election Day, at least for national and statewide elections, and can thereby reduce voter interest. There is too the point frequently made that events very close to Election Day may impact voting decisions after early voters have already cast their ballots.

In addition, it is important in fashioning any Early In-Person Voting Plan that both cost and the need for reasonably accessible locations of poll sites in the early voting

period be considered. Often referred to as “Super Poll Sites” in states that have early voting, pre-Election Day polling places have typically been consolidated, thus increasing the distance voters must travel, as compared with the distance to their usual polling places. While many may vote at times that are for them more convenient, they often will need to travel further.

To deal with these various considerations, we urge that an Early In-Person Voting program be adopted that extends the time for voting back only through the weekend before Election Day and possibly, at the most, up to three additional days into the previous week. Although that would be less of an expansion of the voting period than in most other states that have adopted early voting, it would nevertheless make the voting hours more convenient for most of those who have difficulty voting on a particular Tuesday and it should also be sufficient to allow for the problems of most voters who have varying days off and, especially important, for different days of religious observance. It should also permit sufficient time for those who vote early but encounter specific problems, such as the not infrequent need to prove they are registered. The relatively shorter period would at the same time serve to preserve a community spirit and leave a more concentrated period for mobilization of voters. That could itself permit a greater voter turnout. Of course too the relatively limited expansion of the time for voting would reduce the problem that could arise from late breaking developments that might have an impact on voters’ decisions.

In addition, a relatively shorter early voting period would presumably be less costly than a period extending over weeks. Among other things, we strongly recommend that some of that comparative cost saving be used to increase the number of polling places available to voters for the shorter period, permitting the polls to be more conveniently located. We recommend that decisions as to where the individual polling places should be located be left to local Boards of Election, recognizing, among other things, the great differences as to transportation options among regions in the state. Plainly, where it is a reasonable option, polling places should be near public transportation.

NO-EXCUSE ABSENTEE BALLOTS

Although we recommend adoption of Early In-Person Voting, we are not to the point of recommending use of “No-Excuse Absentee Ballots” or other forms of voting by mail not currently permitted. Instead of voting by mail we believe that the convenience of early voting should be provided by voting in-person. Such in-person voting is less likely to lead to errors and to be compromised by fraud.

As with Early In-Person Voting, the case has not been made that additional absentee voting actually will in itself result in a meaningful increase in voter turnout.

There are also concerns that use of No-Excuse Absentee Ballots can too easily result in citizens losing their votes due to mistakes, and that they can be too easily compromised by those seeking to literally stuff the ballot box. Adoption of No-Excuse Absentee Balloting also would require a Constitutional amendment.

Experience in other states shows a much higher percentage of No-Excuse Absentee Ballots being rejected due to errors than when voting is in person and, in particular, uncertainty as to the outcome of elections resulting from interpretation of handwriting and other disputed issues. While we expect that in actual practice convenience for those voting honestly would outweigh the risk of actual fraud, we see the risks that the voting process could be placed under a cloud by disputed interpretations of written ballots and possible fraud as being too great to move toward voting by mail at this time.

For those who need absentee ballots for the good reasons already set out in the law (such as military service, disabilities, and attendance at school) we see no reason for a change.

Beyond early voting we believe there are three additional important changes that should be implemented to make the voting process more accommodating for voters.

IMPROVED BALLOT DESIGN

First, we urge that the significant efforts already underway to improve ballot design be continued. Largely because ballot design rules were fashioned in a different era for different voting machines, the design of ballots is no longer as clear as it needs to be. We recommend the law's now outdated requirements be changed so that the new paper ballots can become user friendly. Among other changes, we would join the many who favor adoption of a larger minimum font size.

RECRUITING AND TRAINING POLL WORKERS

Second, we urge that the daunting challenge faced for each election in recruiting and training poll workers be addressed. Although the majority of poll workers are effective, pleasant, well-versed and professional, too many simply are not; and that can and does make the voting experience unduly prolonged, inconvenient and unpleasant for many. To address this problem, we have set out below various suggestions, including among others, steps to facilitate the service of state and city employees and students as poll workers, funding to permit expanded and improved training and increased use of the split shift so as to reduce poll worker fatigue.

It is a massive task to recruit and train so many for work at the polls every two years in a national election (36,000 are needed in New York City alone), and affording Boards of Elections that bear that daunting burden more options and resources is necessary. In any effort to increase the attractiveness of the voting process to the citizenry, increasing the professionalism of poll workers as a group is vital.

COMBATING DECEPTIVE PRACTICES

Third, we believe that the not infrequent use of deceptive practices to suppress votes is a very serious problem. Steps to mislead voters so that they do not vote, through the use of very misleading robo-calls for example, can effectively deprive many voters of their right to vote. As set out below, we believe that an increase in the penalties for such conduct (where it is deliberate and clearly misleading) is essential. The applicable law should include an enhanced threat of prison terms and application of necessary penalties for deceptive practices in elections, not just primaries as under existing law. Such increased penalties would parallel the penalties already existing for fraud in connection with the registration of voters.

OTHER INITIATIVES

We would add that in providing our recommendations we do not mean at all to express opposition to other potentially helpful changes in the law or practice. Voters have complained in the last two elections about lack of privacy in filling out and scanning the new paper ballots. Voter education is properly a subject that is receiving significant attention from Boards of Elections and others. There continues to be important focus on assuring that all polling places are disability-compliant. There are concerns about scanners not working as efficiently as they should. Confusion in the allocation of space and signage at polling places and the potential for consolidation of polling places made possible by the greater efficiency of the new voting machines are all matters under study; and we do not mean at all to discourage such efforts or others that may improve the voting process. Nor do we take any position here on such issues as the best date for primaries, campaign finance reform or the working of different branches of government, as they may bear on voter participation.

MODERNIZING THE REGISTRATION PROCESS

The most important step the state can take to increase voter turnout is to modernize the Voter Registration System. As the Attorney General of the United States has said:

“[T]oday, the single biggest barrier to voting in this country is our antiquated registration system. According to the Census Bureau, of the 75 million adult citizens who failed to vote in the last presidential election, 60 million of them are not registered and, therefore, not eligible to cast a ballot.”¹⁰

REGISTRATION AND THE FEDERAL GOVERNMENT

Although many Americans take it for granted that advance registration is a requirement for voting, in the first days of the United States eligibility was determined at the polls on Election Day. In the early 1800s local governments in some areas began initiating procedures to control access to the voting process.¹¹ Most states, however, had no voter registration requirements prior to the 1870s. As the electorate expanded through immigration and the Fifteenth Amendment’s enfranchisement of former slaves, so too did calls for stricter controls on the registration and voting process, and in *Minor v. Happersett*, 88 U.S. 162 (1875), the Supreme Court upheld the power of an individual state to manage the right to vote. The majority of states adopted registration requirements between the 1870s and World War I. By 1929 all but three states required registration prior to an election.¹²

The civil rights era of the mid-20th century led to passage of the Voting Rights Act of 1965, which empowered the federal government to monitor discriminatory practices in designated areas of the country, including much of the South and, ultimately,

¹⁰ Attorney General Eric Holder, Remarks as Prepared for Delivery at the Lyndon Baines Johnson Library & Museum (Dec. 13, 2011).

¹¹ ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

¹² *See id.*

three counties in New York City.¹³ In the South the new law led to an increase in African-American registration to 62% within a few years.¹⁴

Depressed and stagnant registration data in subsequent years led to federal efforts to reform the registration process. In 1993, the National Voter Registration Act (NVRA) was enacted.¹⁵ The NVRA became known widely as the “Motor Voter” Act, as it allowed citizens to register to vote at their local department of motor vehicles (DMV), at all offices that provide public assistance or that are primarily engaged in providing services to persons with disabilities, and by mail.¹⁶ A federal voter registration form was adopted so that it could serve as a substitute for state forms, and safeguards were enacted to protect improper purging of voters already registered. That law also provided that any change of address form submitted in accordance with state law to change an address on a driver’s license would serve as notification of change of address for voter registration for federal elections, unless the voter stated that it was not to serve that function. For voters who register by mail, a state may (with certain exceptions) require people to vote in person if it is the first time they are voting in that jurisdiction.¹⁷

The events of the Bush/Gore election in 2000 that focused national attention on the voting process spurred passage of the Help America Vote Act of 2002 (HAVA).¹⁸ In addition to requiring modernization of voting machinery and technology, that legislation required states to develop a centralized and computerized statewide voter registration list that is to contain the name and registration information for every legally registered voter in the state, with a unique identifier assigned to each person.¹⁹ The list is to be “coordinated with other agency databases within the State,” and all voter registration information obtained by any local election official must be entered into the list “on an expedited basis” at the time the information is provided. HAVA also required that the list be maintained regularly in order to remove ineligible voters. HAVA further provided that states could not accept a voter’s registration for a federal elective office unless the applicant who had been issued a valid driver’s license provided the license number.²⁰ As

¹³ Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973aa-6 (1965). Section 5 of the Voting Rights Act, requiring preclearance, was applied to Bronx, Kings, and New York counties beginning in 1971. See Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT’L BLACK L.J. 201, 207-08 (2004-2005).

¹⁴ See KEYSSAR, *THE RIGHT TO VOTE*, *supra*.

¹⁵ National Voter Registration Act of 1993, 42 U.S.C. § 1973gg (1993).

¹⁶ See *id.* § 1973gg-5 (voter registration agencies).

¹⁷ *Id.* § 1973gg-4.

¹⁸ 42 U.S.C. § 15301 *et seq.* (2002).

¹⁹ See 42 U.S.C. § 15483(a)(1)(A).

²⁰ *Id.* § 303(a)(5).

a result, as have other states, New York has established a computerized statewide list of those registered to vote.

REGISTRATION AND THE NEW YORK CONSTITUTION AND STATUTES

The voter registration system in New York is a creation of the New York Constitution as well as of statute. Article II of the Constitution provides that “[e]very citizen shall be entitled to vote at every election” if he or she is at least 18 years old and has resided in the state, and in the county, city, or village, for 30 days preceding an election.²¹ Article II contains a number of provisions relating to registration and voting, some of which are clearly mandatory. Section 5 requires that laws be made “for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established, and for the registration of voters,” which must be completed at least ten days before each election. Registration is not required for town and village elections, however, except by “express provision of law.”²² Section 7 specifies further that a signature is both necessary and sufficient to identify a voter: it requires the Legislature to “provide for the identification of voters through their signatures in all cases where personal registration is required” and to “provide for the signatures, at the time of voting,” of all voters except those who are illiterate or disabled.²³

Other provisions of Article II that affect registration are written to permit the Legislature to act, with certain restrictions. Section 6 allows (but does not require) the Legislature to provide for “a system or systems of registration whereby, upon personal application, a voter may be registered and his or her registration continued as long as the voter remains qualified to vote from an address within the jurisdiction of the board in which such voter is registered.”²⁴ Section 9 allows the Legislature to permit someone who has been a state resident for 90 days preceding a presidential election to vote solely in that election, even if the voter recently moved within the state.²⁵

²¹ N.Y. CONST. art. II § 1.

²² *Id.* art. II § 5.

²³ *Id.* art. II § 7. Sections 3, 4, and 8 are also written as mandatory provisions. Section 3 deals with those who attempt to or do buy or sell their votes, or who have been convicted of “bribery or of any infamous crime.” Section 4 specifies categories of persons who do not lose their residence for voting purposes even though they may not be physically present (*e.g.*, those in the U.S. armed services). Section 8 requires that all laws regarding boards or officers charged with registration of voters and distribution or counting of ballots provide for equal representation of the two political parties that received the highest number of votes in the preceding general election.

²⁴ *Id.* art. II § 6.

²⁵ Indeed, Section 9 even allows the Legislature to allow voters registered in New York to cast a ballot in a presidential election if they moved from New York within the previous year and are “not able to qualify to vote” in any other state. *Id.* art. II § 9. Section 2, the only other section written using permissive rather than mandatory language, deals with absentee voting. *Id.* art. II § 2.

While the New York Constitution requires that registration be completed no later than ten days before an election, the Legislature has imposed a stricter requirement: citizens must submit their registrations no later than 25 days before an election.²⁶ Over the years the Legislature has imposed numerous and detailed requirements for registration of voters. As a result more than 100 sections of the state's election code, virtually all of which were written before the age of computers and the Internet, address issues relating to registration.

OTHER REGISTRATION MODELS

Democratically elected governmental entities generally approach registration in one of two ways: by placing the burden primarily upon the individual voter to register, or by placing the burden on the state to register each individual.

WITHIN THE UNITED STATES

With the exception of North Dakota, which does not require registration at all, most U.S. states place the burden on the individual to register. New York's requirement that a prospective voter submit his registration not less than 25 days before an election places it at the extreme of advance registration requirements.²⁷ At the same time many other U.S. states are moving to registration systems that make it easier for voters to register, a very clear effort by those states to increase voter participation. Today, twelve states and the District of Columbia allow unregistered voters to register and vote on Election Day and/or during an early voting period prior to Election Day.²⁸

In addition, several states have moved to allow Same Day Registration (SDR) (a combination of Early In-Person Voting with registration on the day of voting) and those states have historically led the nation in voter turnout, with average turnout rates as much as 10 to 12 percentage points higher than non-SDR states. In the 2008 presidential election, SDR states led the nation in turnout by 7 percentage points and by nearly 6 percentage points in the 2010 midterm elections.²⁹ For the 2010 election, turnout among

²⁶ N.Y. ELEC. LAW § 5-210.

²⁷ *Id.*

²⁸ Alaska, Connecticut, Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, North Carolina, Rhode Island, Wisconsin, Wyoming, and Washington, DC. Some of these states allow Election Day or Same Day Registration only for presidential elections.

²⁹ LAURA ROKOFF & EMMA STOKKING, DEMOS, SMALL INVESTMENTS, HIGH YIELDS: A COST STUDY OF SAME DAY REGISTRATION IN IOWA AND NORTH CAROLINA 1 (Feb. 2012), available at <http://www.demos.org/sites/default/files/publications/SDR-CostStudy-Final.pdf>; see also Craig Leonard Brians & Bernard Grofman, *Election Day Registration's Effect on U.S. Voter Turnout*, 82 SOCIAL SCIENCE QUARTERLY 170 (March 2001) (Election Day Registration predicted to increase turnout by 7 percentage points on average); JACOB NEIHEISEL & BARRY BURDEN, UNIVERSITY OF WISCONSIN-MADISON, THE EFFECT OF ELECTION DAY REGISTRATION ON VOTER TURNOUT AND ELECTION OUTCOMES 4 (Oct. 19, (...continued)

the eight states that at the time offered Same Day Registration averaged above 47 percent, compared to the national average of 41 percent.³⁰ Turnout in New York State was 35.5 percent for the 2010 general election.³¹

OTHER COUNTRIES

Other democratic nations use data gathered for other purposes to make sure that their citizens are registered to vote. These efforts have resulted in significantly higher voter participation than in the United States. Various methods are utilized by the governments of these nations to accomplish the goal of expanding the voter registration rolls (as well as making them more accurate) while, at the same time, reducing overall costs associated with the system.

France, for example, requires its citizens to register for selective service at age 18, and it communicates that information to the local voting authorities. Argentina communicates its census information to voting authorities to identify all citizens who have reached age 16 and to place those individuals on the rolls. It also automatically registers prisoners to vote upon completion of their sentences. Australia registers all citizens who have a mailing address, although unlike in the United States, voting is mandatory).

Perhaps the most instructive example from other countries is Canada, which now reports that 93% of eligible citizens are registered. Because of the obvious parallels between Canada's democracy and the make-up of its citizens and ours, it is a very attractive model to consider.

Canadian citizens, like those in the U.S., are highly mobile, with an estimated 15% of citizens changing their addresses annually. The Canadian model utilizes information from its national health program, DMV license and auto registration, postal addresses, tax agency information, citizenship registration and other local agency data to form a national database, as well as provincial registration records. Information is updated automatically when notification of an address change or name change is provided to the post office, tax authorities, or DMV. A significant investment in

(continued....)

2011) (surveying literature indicating that Election Day Registration increases turnout anywhere from 3 to 14 percentage points), available at <https://mywebspace.wisc.edu/bcburden/web/nb2.pdf>.

³⁰ See 2010 General Election Turnout Rates, United States Elections Project (Dec. 28, 2011), http://elections.gmu.edu/Turnout_2010G.html; see also Same-Day Voter Registration, National Conference of State Legislatures (Sept. 24, 2012), available at <http://www.ncsl.org/legislatures-elections/elections/same-day-registration.aspx> (listing states with Same Day Registration, and dates when enacted). The figure for states with Same Day Registration is above 48 percent if North Carolina, which allows Same Day but not Election Day Registration, is excluded. This calculation excludes the District of Columbia. See *supra* n.3.

³¹ 2010 General Election Turnout Rates, United States Elections Project, *supra*.

technology allows Canada to cross check the information, as well as to remove voters from the rolls or change their districts based on new information. Although the state takes on the burden of registering individuals, individual consent remains necessary on registration documents and the individual is still allowed to opt out of registration.

Paralleling its very high rate of voter registration is a relatively high rate of voter participation in its elections.³²

IMPROVING VOTER REGISTRATION IN NEW YORK

WHY REGISTRATION

Evaluation of proposals for improving the registration system in New York should first take into consideration the valid reasons for having a voter registration system. What the provisions regarding registration in the New York Constitution show is an understandable tension between two competing goals: on the one hand, the goal of universal suffrage for all citizens; and on the other, an interest in making sure that only qualified persons are allowed to vote. This latter interest is defined not only in terms of being able to identify the voter, but also by requiring that voters have established a residence in a particular jurisdiction prior to the election, so that they may be deemed to have some real stake in the outcome of that election.

Administratively, voter registration is a useful tool so that polling places can be staffed adequately, enough voting machines can be provided, and voters receive the correct ballot for their locality. Voter registration also can be used to prevent (or prove) voting fraud, and it provides evidentiary information for use in any challenge to an election. Registration information is also needed to provide a basis for prospective candidates to obtain signatures on nominating petitions, and to permit political parties to encourage their supporters to vote.

Because voter registration controls access to the polls, it can also be used as an obstruction to those who are legitimately interested in exercising the franchise. Historically, the requirement to register well in advance of an election has proven difficult for many groups, including young people, low-income populations, African Americans, Latinos, and people who move frequently. Americans who change addresses can easily find themselves unable to vote in their new Election Districts. All too many

³² See JENNIFER S. ROSENBERG & MARGARET CHEN, BRENNAN CENTER FOR JUSTICE, EXPANDING DEMOCRACY: VOTER REGISTRATION AROUND THE WORLD 6-8 (2009), *available at* http://brennan.3cdn.net/3234b49c4234d92bf3_3km6i2ifu.pdf; compare Elections Canada, Estimation of Voter Turnout 3 (April 2012), *available at* http://www.elections.ca/res/rec/part/estim/estimation41_e.pdf (58.5% of adult Canadians voted in 2011) with 2008 General Election Turnout Rates, United States Elections Project (March 31, 2012), http://elections.gmu.edu/Turnout_2008G.html (56.9% of all adults in the United States voted in 2008).

citizens fail to re-register to vote or update their voter registration records in time (at least 25 days before Election Day under current law) to cast their ballots on Election Day. In fact, among those previously registered, recent movers make up about 43 percent of all non-voters. Interest and motivation to vote typically rises dramatically in the final weeks before an election, just at the time when registration is no longer an option in New York.³³

PREVENTING FRAUD AND ERROR

Although New York's outmoded paper-based system appears to be secure, appearances can be deceiving. In fact, having a system that relies on paper forms frequently results in errors when information is put into the statewide computerized list. Relying on people to change their registrations when they move leaves many people on the rolls long after they have moved away from their Election District, which means that some may be tempted to come back to their old residence in order to vote. Those who move to another county or state may well end up registered in more than one district, which at minimum imposes too great a burden to gather petition signatures from those who seek to run for office and also at least opens up the possibility that they or others might seek to vote more than once.

The Pew Center on the States estimates that nationwide our electoral lists contain 24 million flawed registrations, including 1.8 million deceased individuals who are still on the rolls and 12 million records containing inaccurate addresses.³⁴ Not only do flawed voter registration rolls create the potential for duplicate records, fraud, manipulation, and mistakes on Election Day, but errors also lead to problems in election administration, including the disenfranchisement of eligible voters because of human error.

New York's voter rolls are reportedly riddled with errors. A 2004 New York City study found typographical errors in 20 percent of voter registration records.³⁵ Two administrative failures in New York's 2008 election demonstrate how the current paper-reliant system creates the opportunity for error and disenfranchisement. During the Presidential election of 2008, the large number of paper registration forms received just before the voter registration deadline created processing backlogs and required voters to

³³ See, e.g., Christopher Keating, *Republicans, Democrats Clash Over Election Day Voter Registration*, Hartford Courant, May 5, 2012, available at http://articles.courant.com/2012-05-05/news/hc-republicans-democrats-clash-over-election-day-voter-registration-20120505_1_voter-turnout-voter-fraud-new-voters (quoting Connecticut State Senator Gayle Slossberg).

³⁴ PEW CENTER ON THE STATES: INACCURATE, COSTLY AND INEFFICIENT: EVIDENCE THAT AMERICA'S VOTER REGISTRATION SYSTEM NEEDS AN UPGRADE 1, 3 (Feb. 2012), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Upgrading_Voter_Registration.pdf.

³⁵ See Deborah Hastings, *Voter Registration Lists May Foil Voters*, WASH. POST, Oct. 25, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/25/AR2006102501139.html>.

wait in long lines to sign hastily-printed supplemental poll books.³⁶ According to State Board of Elections officials, “60,000 to 70,000 voters [had] to sign supplemental books that were printed recently—a complication that could yield confusion on Election Day.”³⁷

In December 2008, the New York Post reported that the State Board of Elections had shipped 3,552 voter registration forms to the New York City Board of Elections in September, well before the voter registration deadline, but that these paper forms were ignored until November 6, two days after the election.³⁸ “‘They were sitting in a hallway,’ said one source. ‘No one noticed.’”³⁹ Although the city board rushed to enter the registrations into the record before the results were certified, so that affidavit ballots would be properly counted, thousands of residents could have been disenfranchised by the error.

ONLINE REGISTRATION

THE HISTORICAL EXPERIENCE

In New York alone, over two million people move each year; of those, about one-half million move from one New York county to another.⁴⁰ Currently, each of the 57 counties in the state outside of New York City has its own Board of Elections and there is one Board of Elections for New York City. Under Article II, § 6 of the Constitution, every voter who moves to a new county, or to or from New York City, must re-register when they do. Paper forms must be entered individually into the voter registration database, creating a burden on the election officials and introducing the opportunity for error in the election rolls.⁴¹

³⁶ Sewell Chan, *Elections Board Expects High Turnout and Long Lines, and Asks for Patience*, N.Y. TIMES, Oct. 28, 2008, available at http://www.nytimes.com/2008/10/29/nyregion/29ballots.html?_r=1.

³⁷ *Id.*

³⁸ David Seifman, *3,500 Voters ‘Vanished’ in Election Snafu*, N.Y. POST, Dec. 2, 2008, available at http://www.nypost.com/p/news/national/voters_vanished_in_election_snafu_kboMILv8eHxBqHipSulfdL; see also Testimony of Laura Seago before the New York City Council Committee on Governmental Operations 4 (Feb. 9, 2010), available at <http://www.brennancenter.org/page/-/Democracy/NYC%20Governmental%20Ops%20Testimony%2002-09-10.pdf>.

³⁹ *Id.*

⁴⁰ See U.S. Census Bureau, American Factfinder, New York: Selected Social Characteristics in the United States: 2010, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_DP02&prodType=table (reporting that 2,048,967 New Yorkers had lived in their current residences for less than a year, and that of those, 466,420 had moved across county lines within New York in the past year).

⁴¹ See, e.g., N.Y. ELECT. LAW art. 5, tit. II, § 5-202 *et seq.* (Registration And Enrollment).

Election officials routinely report that dealing with address changes is the most time-consuming aspect of voter list maintenance.⁴² Further, many voters who move do not realize until shortly before Election Day that they must change their registration. Some voters who have moved then return to their old polling place to cast a ballot that is invalid but is nevertheless recorded because, in the voter's old district, the county voting rolls have not yet been updated.

GOVERNOR CUOMO'S ONLINE REGISTRATION INITIATIVE

In August 2012, Governor Cuomo announced that online registration, including the ability to designate a party and to change an address, would be available through the "MyDMV" web portal (i.e., a secure portion of the website of the state Department of Motor Vehicles).⁴³ In addition to providing an online option to register, the new system also provides for computerized electronic data entry at each DMV location and, once it is fully implemented, electronic transmission of the registration applications to the county boards of election, thereby eliminating the need for manual data entry. As the Governor's office has explained, the new system is intended "to replace the vast majority of paper forms and allow for the centralization and digital transmission of voter registration applications."⁴⁴

The ability to register online, while a significant step forward, is by no means a total modernization of the registration system. First, voter registration is limited to those persons who have a driver's license or non-driver ID through the Department of Motor Vehicles. The poor, the elderly, and many residents of New York City or other urban areas are unlikely to be able to participate because they do not have or need drivers licenses. One of the organizations that met with the Committee advised that only 64 percent of New York City residents have either form of identification.⁴⁵

Second, since the DMV already asks people who are applying for new licenses, ID cards, or permits whether they want to register to vote, the online process will pick up as new voters only those who did not previously take such an existing opportunity to

⁴² For an example outside of New York, see Maria Matthews, Florida Department of State, "Florida Voter Registration System, Address List Maintenance and Records (Eligibility) Maintenance," PowerPoint slides (Apr. 16, 2009), *available at* http://www.myfloridaelections.org/ew_pages/presentation.matthews.pptaddress_and_records_maintenance_12011.pdf (discussing the many complications concerning address changes).

⁴³ See Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Reforms to Expand Access to Voter Registration (August 16, 2012), *available at* <http://www.governor.ny.gov/press/08162012-voter-registration-reform>; see also MYDMV, <https://my.dmv.ny.gov/crm/> (last visited Dec. 1, 2012).

⁴⁴ See Press Release, Governor Andrew M. Cuomo, *supra*.

⁴⁵ See also FEDERAL HIGHWAY ADMINISTRATION, OUR NATION'S HIGHWAYS: 2011 (May 2010), *available at* <http://www.fhwa.dot.gov/policyinformation/pubs/hf/pl11028/chapter4.cfm> (58 percent of New York state residents are licensed drivers).

register. It will, however, allow changes of address to be entered, which is a notable improvement.

Third, creating an account with “MyDMV” is a prerequisite to registration. Having to go through this process may well discourage some people from using the website.

Fourth, and most important, the State Board of Elections website does not currently offer the option of online registration; nor does it direct people or make any reference to the MyDMV portal.⁴⁶ The closest the BOE website comes to allowing online registration is by providing a form that can be filled in online, which then must be printed, signed, and mailed by hand to the appropriate county Board of Elections. Indeed, as of the date of writing this report, a Google search for “New York voter registration online” leads only to the State BOE website and not to MyDMV, thereby making it even less likely that potential registrants will find the online registration option. Review of the websites of the Boards of Elections of the most populous counties in the state shows that while the New York City BOE and Monroe County BOE (Rochester) websites direct people to the MyDMV website, the counties near New York City and other large upstate counties do not.⁴⁷

Notwithstanding all of these issues, and the short time that the online registration option has been available, the Governor announced at the end of September 2012 that more than 16,000 people, including 6,000 first-time voters, had already used the new service. The new option clearly is, therefore, filling a need and is a welcome first step in providing an alternative means of registering to vote.⁴⁸

THE EXPERIENCE OF OTHER STATES WITH AUTOMATED AND ONLINE REGISTRATION

As of 2010, at least seven states had fully automated their voter registration process through their motor vehicle departments, with the result that their DMV offices collect and transmit voter registrations to election officials electronically so that they may

⁴⁶ See NEW YORK STATE BOARD OF ELECTIONS, <http://www.elections.ny.gov/> (last accessed Dec. 1, 2012).

⁴⁷ See BOARD OF ELECTIONS IN THE CITY OF NEW YORK, <http://vote.nyc.ny.us/html/voters/voters.shtml> (New York City); VOTER REGISTRATION, <http://www2.monroecounty.gov/elections-registration.php> (Monroe County); NASSAU COUNTY BOARD OF ELECTIONS, http://www.nassaucountyny.gov/agencies/BOE/voter_registration.html (Nassau County); REGISTER TO VOTE, <http://www.suffolkvotes.com/register.asp> (Suffolk County); REGISTER TO VOTE, <http://citizenparticipation.westchestergov.com/register-to-vote> (Westchester County); http://www.dutchesselections.com/Voting_Info/Register_to_Vote/index.htm (Dutchess County); VOTER REGISTRATION REQUIREMENTS, <http://www.putnamcountyny.com/index.php/board-of-elections/voter-registration/> (Putnam County); ALBANY COUNTY BOARD OF ELECTIONS, <http://www.albanycounty.com/vote/default.asp?id=217> (Albany County); ONONDAGA COUNTY BOARD OF ELECTIONS, <http://www.ongov.net/elections/voterRegistration.html> (Onondaga County) (all sites last visited Dec. 1, 2012).

⁴⁸ See Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces More Than 16,000 New Yorkers Use New Online Voter Registration Website (September 27, 2012), available at <http://www.governor.ny.gov/press/09272012-16kusemydmv>.

be uploaded directly into their voter registration systems.⁴⁹ Seventeen more states—and eighteen if New York is included—have partially automated systems.⁵⁰

Most of the systems require affirmation that the person is a citizen who is eligible to register to vote and entry of information from the person's driver's license.⁵¹ If an exact match is found to DMV records, the systems prompt the user to enter any additional information needed for registration, such as party preference. The signature is retrieved from the DMV system and supplied on a secure website to the county election officials. Once the county has accepted the registration, a confirmation card is mailed. In Delaware, the applicant is instructed to print, sign, and mail a copy of the form; if she does not, she can still cast a regular ballot on Election Day if she shows identification and signs a form at her polling place.

The states that have implemented paperless registration report that they save money by doing so. Maricopa County, Arizona, for example, reports that it costs an average of only 3 cents to process an electronic registration, but 83 cents to process a paper form. Considering also the savings from not having to print and handle paper forms the savings totaled \$450,000 in 2008.⁵² Similar savings have been reported in other states and in Canada. Savings of 30 million Canadian dollars were reported for each election cycle.⁵³ Online registration has also been found to help keep the rolls more accurate, by allowing voters to update their information. It also reduces the use of provisional ballots (affidavit ballots in New York), which are time-consuming to process and often result in votes not being counted.⁵⁴

In 2012, seven states (Colorado, Delaware, Maryland, Nevada, Utah, Virginia, and Washington) formed the Electronic Registration Information Center (ERIC) as part of their efforts to improve the accuracy of voter registration records.⁵⁵ ERIC is “a non-

⁴⁹ CHRISTOPHER PONOROFF, BRENNAN CENTER FOR JUSTICE: VOTER REGISTRATION IN A DIGITAL AGE 3 (2010) (Arizona, Delaware, Florida, Kansas, Pennsylvania, Rhode Island, and Washington), *available at* http://brennan.3cdn.net/806ab5ea23fde7c261_n1m6b1s4z.pdf.

⁵⁰ *Id.* The Brennan Center reported in 2010 that Arkansas, California, Georgia, Kentucky, Michigan, New Jersey, North Carolina, South Carolina, South Dakota, and Texas had partially automated systems. In December 2011 the League of Women Voters cited the National Conference of State Legislatures as reporting that Colorado, Indiana, Louisiana, Maryland, Nevada, Oregon, and Utah had all passed bills permitting online voter registration. *See* LEAGUE OF WOMEN VOTERS OF NEW YORK STATE, INCREASING VOTER PARTICIPATION: OPPORTUNITIES IN NEW YORK STATE (Dec. 2011), *available at* <http://www.lwvny.org/vote/2011/EarlyVote121311.pdf>.

⁵¹ *See generally* BRENNAN CENTER FOR JUSTICE: VOTER REGISTRATION IN A DIGITAL AGE 8-9, *supra*.

⁵² *Id.* at 12-13.

⁵³ JENNIFER S. ROSENBERG & MARGARET CHEN, BRENNAN CENTER FOR JUSTICE, EXPANDING DEMOCRACY: VOTER REGISTRATION AROUND THE WORLD 8 (2009), *available at* http://brennan.3cdn.net/3234b49c4234d92bf3_3km6i2ifu.pdf.

⁵⁴ *See generally* PROJECT VOTE, PROVISIONAL VOTING (last accessed Dec. 1, 2012), *available at* <http://www.projectvote.org/provisional-voting.html>.

⁵⁵ *See* PEW CENTER ON THE STATES, ELECTRONIC REGISTRATION INFORMATION CENTER (ERIC) (Nov. 2, 2012), <http://www.pewstates.org/research/featured-collections/electronic-registration-information-center-eric-85899426022>.

profit organization with the sole mission of helping states to improve the accuracy of America's voter rolls and increase access to voter registration for all eligible citizens." The ERIC data center "allows states to securely and safely compare voter data, thereby improving the accuracy of their rolls." States that join ERIC gain access to "state-of-the-art technology to compare information on eligible voters from official data sources submitted by the states." Among other benefits, they receive reports "where there is a highly confident match indicating a voter moved or died, or the existence of a duplicate record." Participating states also receive information on unregistered citizens who may be eligible to vote, enabling the states to reach out to those citizens to encourage them to register. The interstate data exchange provided through ERIC does not result in giving up control of the state's own database; nor does it automatically update, add, or remove voter records on the state's lists.⁵⁶

RECOMMENDATION OF ONLINE REGISTRATION FOR NEW YORK

The Committee endorses Governor Cuomo's online registration directive as an important first step in fully implementing online registration in New York. Significant additions and improvements are recommended to expand the program, while maintaining the integrity of the registration system.

The online system that affords voters an easy electronic opportunity to register should be expanded so that it is not limited to those who hold or seek driver's licenses or non-driver IDs at the Department of Motor Vehicles. This should be done in two ways. First, all state or city agencies that are designated as voter registration agencies under HAVA should incorporate voter registration into their data systems. In addition the new Health Benefit Exchange that will be created under the "Obamacare Program" should from inception include voter registration as part of its data system.

Procedures should be set up to transmit individual registration information electronically from those additional agencies to the appropriate Boards of Elections, just as with the MyDMV system. Changes of address, as well as initial registrations, should be incorporated into these systems. These changes should be targeted to occur within a short period of time—the Committee suggests a year—so that they will be available well before the next federal general election. As part of this modernization process the State Board of Elections should consider whether New York should join the group of states participating in the ERIC data exchange. To the extent that any agency does not already have automated systems, we expect that such systems will be developed, given the evident efficiencies.

⁵⁶ See PEW CENTER ON THE STATES, ELECTRONIC REGISTRATION INFORMATION CENTER (ERIC), FREQUENTLY ASKED QUESTIONS (Nov. 2, 2012), <http://www.pewstates.org/research/analysis/electronic-registration-information-center-eric-frequently-asked-questions-85899426025>.

In such updated systems there are various steps that can be taken to assure that the privacy of individuals is protected.

By way of example:

[I]t is easy to institute protocols that limit the information provided from one government agency to another. Such protocols can be laid out in legislation, partnership agreements between agencies, or unilaterally applied by election authorities. For example, although Canada's federal election agency routinely receives data from 40 different government agencies, these agencies share only basic information about each eligible voter: name, sex, date of birth, address, and citizenship information, where available. The election registry does not identify the original source of its voter information, or other demographic or personal information about the voters on its rolls.

Second, data-sharing can be a one-way street. For instance, election officials in Canada and Australia receive information from various government agencies, but they are not authorized to provide information back to their sources. As an additional protection against unauthorized access of voters' information, none of these other government databases are directly "linked" to the national voter database. Instead, information is typically transmitted through a secure FTP server or on hard media like CD-ROM.⁵⁷

In addition to the foregoing changes at agencies of government, a user-initiated online registration system should be created that permits all citizens of the state who are eligible to vote to register and to update their addresses. For those who do not already have signatures on file, the requirement should be that they provide a "wet signature" and bring identification to the polls the first time they vote. If they will not be able to vote in person, they should be required to submit identification and a signed form to the Board of Elections in advance of the election. Such an approach would directly parallel the current practice for those who register by mail.⁵⁸

We recommend too that the State Board of Elections change its website, as should each of the county boards of elections, to direct citizens to the MyDMV website or, after a more comprehensive online registration system is established, to that system.

⁵⁷ JENNIFER S. ROSENBERG & MARGARET CHEN, BRENNAN CENTER FOR JUSTICE, EXPANDING DEMOCRACY: VOTER REGISTRATION AROUND THE WORLD 23 (2009), *available at* http://brennan.3cdn.net/3234b49c4234d92bf3_3km6i2ifu.pdf.

⁵⁸ See NATIONAL VOTER REGISTRATION FORM 1 (last revised March 1, 2006), *available at* http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf (general instructions for registration by mail).

As a further step, the registration system should be tied to other state and, if feasible, federal agencies, beyond those designated as voter registration agencies in HAVA, to pick up additional registrations and changes of address. Such agencies could include, at the state level, the New York Department of Revenue, and at the federal level, the Internal Revenue Service and Medicare.

On balance, the Committee has concluded that because it would result in a greater increase in voter registration, as it has in Canada,⁵⁹ it would be best to have the registration option for voters at the various government agencies be designed so that the voter will be registered unless he chooses to opt out and not be registered. While some Committee members have expressed concern that such an opt-out provision will result in registration of citizens who may not affirmatively want to be registered, those in favor of the opt-out provision have urged that since the effect of the registration is to permit the voter to exercise a right, weighting the system in favor of registration should not be a concern; and the potential voter can exercise discretion and opt-out.⁶⁰

A further suggestion of the Committee is that consideration be given to allowing those registered voters who move within the state, not just those who move within a county as is the current practice, to vote by affidavit ballot and to have their registration confirmed by checking the statewide database as a condition for recording their vote. The argument for that change of practice is that, as required by HAVA, the state now has a statewide database of registered voters that can be checked to confirm registration, while the previous restriction on moves to just those within a county was the product of there historically only being county-wide databases of registered voters.

While the Committee recommends that consideration be given to changing the practice, significant concern has been raised as to whether a voter allowed to cast a ballot in a new Election District after such a check of the statewide database might too easily also vote in his original home district and then again cast a ballot in the new district. The concern is that it will be too difficult to check between counties to determine whether the voter has cast a ballot in the original home district.

We would add that one of the potential benefits of a computerized process with a likely broader reach should be a reduction in opportunities for registration fraud. Such fraud may be perpetrated by those who seek to establish as a residence a location that

⁵⁹ See ROSENBERG & CHEN, *supra*, at 6.

⁶⁰ The Committee also considered whether the National Change of Address System (*see* <http://www.nationalchangeofaddress.com/>) should be used to update voter registrations and concluded that reliance on such changes of address in and of themselves would create too great a chance of voter registrations being changed inadvertently. Use of the NCOA System as simply one element of a process that verifies changes of address could be useful, as shown by the Canadian experience, and the Committee does not intend to discourage such an effort.

does not qualify⁶¹ and others may take steps intended to purportedly register as voters, individuals who do not exist.⁶²

While some of the changes we recommend could be accomplished without enactment of new laws by the Legislature, we believe that it would be best if the full modernization of the system were to result from legislation. The Committee, therefore, recommends that the Governor and the State and County Boards of Elections work together to implement online and automated registration systems to the extent that they can within the next year and that legislation be enacted in the same period to accomplish the modernization of registration overall.

PRE-REGISTRATION OF 16-YEAR-OLDS

In New York and other states, registration of those 18 to 29 years old has traditionally lagged registration for all other age groups.⁶³ To address this problem, several states have adopted the practice of pre-registering those between 16 and 18 so that they are already registered when they reach voting age; and in those states youth turnout has increased.⁶⁴ In those states efforts are made to reach out to students to remind them of what will become their civic duty and to invite them to voluntarily pre-register. Special focus is on the time when they apply for a driver's license after they turn 16 as a time to invite their registration.⁶⁵

Given the experience in other states, we believe that it would be wise for New York to adopt such a pre-registration program. Especially with the registration process already modernized at the Motor Vehicles Bureau, it should be relatively easy to pre-

⁶¹ *People of the State of New York v. John O'Hara*, 96 N.Y.2d 378, 385, 754 N.E.2 155, 158, 729 N.Y.S.2d 396, 400 (2001); *Wit v. Berman*, 306 F.3d 1256 (2002).

⁶² Eric Shawn, *ACORN Pleads Guilty to Voter Registration Fraud in Nevada*, FOX NEWS (Apr. 6, 2011), <http://www.foxnews.com/politics/2011/04/06/acorn-pleads-guilty-voter-registration-fraud-nevada>; Horace Cooper, *Victims of Voter Fraud: Poor and Disadvantaged are Most Likely to Have Their Vote Stolen*, 635 NATIONAL POLICY ANALYSIS (Aug. 2012), available at <http://www.nationalcenter.org/NPA635.html>.

⁶³ ERIN FERNS LEE, PROJECT VOTE, ENFRANCHISING AMERICAN YOUTH (Sept. 2010), available at http://www.whatkidscando.org/youth_on_the_trail_2012/pdf/2010_Policy_Paper-Enfranchising_American_Youth.pdf; see also Stephen Ansolabehere, et al., *Movers, Stayers, and Registration: Why Age is Correlated with Registration in the U.S.*, QUARTERLY JOURNAL OF POLITICAL SCIENCE 333 (Oct. 14, 2011), available at http://www.kellogg.northwestern.edu/research/fordcenter/documents/12.04.12%20Ansolabehere_mobility_model_v6%201.pdf.

⁶⁴ PROJECT VOTE, EXPANDING THE YOUTH ELECTORATE THROUGH PREREGISTRATION (March 2010), available at http://www.whatkidscando.org/youth_on_the_trail_2012/pdf/2010%20Legislative%20Brief%20-%20Preregistration.pdf; MICHAEL McDONALD, GEORGE MASON UNIVERSITY, VOTER PREREGISTRATION PROGRAMS (Nov. 2009), available at http://elections.gmu.edu/Preregistration_Report.pdf. State preregistration statutes include HAW. REV. STAT. § 11-12(b) and OR. REV. STAT. § 247.016.

⁶⁵ *Id.* at 6-8.

register those between 16 and 18 when they first apply for their driver's licenses. Such 16 to 18 year-olds may well also interact with other state and federal agencies and they could be readily included in ongoing efforts to make registration available at those agencies. Such 16-year-olds are also very likely to feel comfortable registering online.

We would add that such an effort could profitably be joined with civic education for high school students that would, among other things, encourage them to exercise their right to vote when they become eligible.

ELECTION DAY AND SAME DAY REGISTRATION

Those states that permit voters to register on Election Day or during an early voting period experience significantly higher voter turnout than in New York. “[F]or the 2008 presidential election, five of the six states with the highest turnout in the country were states with same-day registration.”⁶⁶

Election Day Registration permits eligible voters to both register and vote up until and on Election Day. Same Day Registration applies when there is Early In-Person Voting and permits eligible voters to both register and vote at the polls during the Early Voting period. Studies have demonstrated that implementing EDR or SDR improves voter turnout by approximately 6 to 8 percent.⁶⁷ Regarding EDR, in 2009 Steve Carbó, Senior Program Director at Demos, testified:

In 2004, Demos commissioned two distinguished political scientists to study the potential impact of Election Day Registration in New York were the state to adopt it. Their subsequent report predicted substantial increases in voter turnout, in line with the experience of EDR states. Professors Jonathan Nagler and R. Michael Alvarez forecast an 8.6 percent increase in voter turnout in presidential elections. They went on to predict particularly even better results for citizens who have the greatest difficulty in maintaining an up-to-date voter registration record. Professors Nagler and Alvarez calculated the following:

- A 12.3 percentage point increase in turnout by 18-to-25-year-olds.

⁶⁶ Assistant Attorney General Thomas Perez, Remarks at the George Washington University Law School Symposium (Nov. 16, 2012).

⁶⁷ See *supra* n. 29; see also *infra* n. 68.

- A 9.8 percentage point increase in turnout by those with a grade school education or less.
- An 11 point increase in turnout by Latinos, and an 8.7 percentage point increase in turnout by African Americans.
- A 10.1 percentage point increase in turnout by those who have lived at their current address for less than six months.
- A 12.2 percentage point increase in turnout by naturalized citizens.⁶⁸

Carbó testified that we can reasonably expect similar results, provided that New York adopts Election Day or Same Day Registration as in other states.

It is generally accepted that in the absence of a Constitutional Amendment, EDR and SDR cannot be adopted in New York. That is so because the Constitution explicitly limits registration so that it can be accomplished only up to 10 days before an election.⁶⁹

Given the very likely increase in voter participation that would result, we recommend that the necessary steps be taken to remove that Constitutional barrier to Election or Same Day Registration and adopt Election Day and, with Early Voting, Same Day Registration.

Understanding the difficulties in making such a change and the time it will take, in the interim while a Constitutional amendment is considered, we recommend that the Legislature take the more limited step of amending state law to change the registration deadline to the constitutionally permissible 10 days prior to Election Day, down from the current 25 days. This would allow a larger number of voters to participate and would reduce the problems confronted by those who move within the state but often do not register at their new district as promptly as they could.

We also recommend that pending the adoption of Election Day or Same Day Registration statewide, consideration be given to adopting Election Day or Same Day Registration for local elections in which the stringent constitutional 10-day before election rule does not apply. Such local experiments in towns and villages, which would be consistent with the Constitution,⁷⁰ could provide a valuable first step for the state.

⁶⁸ Testimony of Steven Carbó, Senior Program Director, Demos, Hearing of the New York State Standing Comm. on Elections (April 25, 2009), *available at* <http://www.demos.org/sites/default/files/publications/FINAL%20NY%20Senate%20EDR%20testimony%204-25-09%20FINAL.pdf>.

⁶⁹ N.Y. CONST. art. II § 5.

⁷⁰ *Id.* (“Such registration shall not be required for town and village elections except by express provision of law.”).

THE VOTING PROCESS

In addition to recommending changes in the state's registration process, the Committee also recommends that significant changes be made in the voting process to make that process more accommodating. Voting should not be a trial for voters, as it often is.

EARLY IN-PERSON VOTING

Early In-Person Voting has proved to be very popular in the many states where it has been adopted. Altogether thirty-two states have instituted such Early In-Person Voting, with the voting before Election Day often taking place at either consolidated or temporary poll sights, frequently referred to as "Super-Poll" sights. For such polling places various states use county offices, libraries, clerk's offices, firehouses, schools, churches and even in some cases shopping centers. As set out in a report to the Florida State Senate by its Committee on Ethics and Elections, "[e]arly voting gives busy people or those with special needs a more convenient opportunity to vote. Persons with weekday time limitations such as long distance commuters and hourly wage earners can use the weekend during the early voting period to cast a ballot. Early voting also provides those with disabilities an opportunity to cast a ballot when time and crowds are less of a factor."⁷¹

The practice began in the late 1980s⁷² and, due to its popularity, it has spread through the country. It is, for example, particularly popular in Texas where more than 25% of the total votes have come to be cast in the designated period before Election Day. It is noticeable that in those states that have gone to early voting the percentage of total voters taking advantage of the early voting opportunity has climbed steadily over time.

Of the states that have adopted the practice so far, the average number of days for early voting is 19, and some states have extended that period to over a month.⁷³ They have clearly chosen to do so because of the convenience it brings to voters. However, to

⁷¹ FLORIDA SENATE, COMMITTEE ON ETHICS AND ELECTIONS, THE EFFECT OF EARLY VOTER TURNOUT IN FLORIDA ELECTIONS: 2010 UPDATE, INTERIM REPORT 2011-118 (Oct. 2010), *available at* <http://www.flsenate.gov/Committees/InterimReports/2011/2011-118ee.pdf>.

⁷² BARRY BURDEN ET AL., UNIVERSITY OF WISCONSIN-MADISON, ELECTION LAWS, MOBILIZATION, AND TURNOUT: THE UNANTICIPATED CONSEQUENCES OF ELECTION REFORM 17 (Jan. 5, 2012), *available at* <http://electionadmin.wisc.edu/bcmm12.pdf>; Testimony of John C. Fortier, American Enterprise Institute, *Voting By Mail: An Examination of State and Local Experience*, S. Comm. on Rules and Administration 4 (May 5, 2010), *available at* <http://www.aei.org/files/2010/05/05/FortierTestimony051010.pdf>.

⁷³ NATIONAL CONFERENCE OF STATE LEGISLATURES: ABSENTEE AND EARLY VOTING, *available at* <http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx> (Sept. 4, 2012) ; *see also* LONG DISTANCE VOTER (Nov. 19, 2012), *available at* http://www.longdistancevoter.org/early_voting_rules (describing early voting rules for each state).

reduce cost those states have commonly located polling places so that most voters do have to travel a considerable distance to cast their ballots.

While such Early In-Person Voting has been very popular the record does not establish that there has been a significant increase in voter turnout as a result of the practice alone. Some studies have shown a 1% or possibly a 3% increase in voter participation over time.⁷⁴ Others suggest that there may have in some cases actually been a resulting decrease in voter participation, notwithstanding the popularity of the practice.⁷⁵

Although that is the record when Early In-Person Voting has been adopted alone, it is important that even critics of early voting have acknowledged that the combination of Early In-Person Voting and Same Day Registration has a positive effect on voter turnout.⁷⁶

One study has suggested that a reason why voter turnout has not increased when Early Voting alone is adopted – even though it is evident that many voters find it convenient – is that the convenience that may well bring some voters to the polls is offset by the fact that the extended period has the effect of limiting and diluting the efforts of those who seek to mobilize voters.⁷⁷ Assuming that to be correct, it would appear that the longer the early voting period the more it may limit voter mobilization.

It has been suggested too that the practice may in some elections mean that votes will be cast before significant pre-election events that would otherwise have influenced voters. Also, it has been argued that the greater cost and burden on election officials outweighs the interest of the voters in a convenient process. It has also been urged that by spreading the voting over an extended period the community spirit that typically attends election day—which can stimulate voter interest—is likely to be lost.⁷⁸

⁷⁴ FLORIDA SENATE, COMMITTEE ON ETHICS AND ELECTIONS, THE EFFECT OF EARLY VOTER TURNOUT IN FLORIDA ELECTIONS: 2010 UPDATE, INTERIM REPORT 2011-118 at 5 (Oct. 2010), *available at* <http://www.flsenate.gov/Committees/InterimReports/2011/2011-118ee.pdf> (surveying literature); JAN LEIGHLEY AND JONATHAN NAGLER, PEW CHARITABLE TRUSTS, MAKING VOTING WORK, THE EFFECTS OF NON-PRECINCT VOTING REFORMS ON TURNOUT, 1972-2008 at 16 (Jan. 2010), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewcenteronthestatesorg/Initiatives/MVW/Leighley_Nagler.pdf (calculating a 2.8 percent increase in turnout for 45-day early voting period).

⁷⁵ *See, e.g.,* BURDEN ET AL., ELECTION LAWS, MOBILIZATION, AND TURNOUT, *supra*.

⁷⁶ BARRY BURDEN, ET AL., UNIVERSITY OF WISCONSIN-MADISON, THE EFFECTS AND COSTS OF EARLY VOTING, ELECTION DAY REGISTRATION, AND SAME DAY REGISTRATION IN THE 2008 ELECTIONS 2 (Dec. 21, 2009), *available at* <http://www.pewtrusts.org/uploadedFiles/wwwpewcenteronthestatesorg/Initiatives/MVW/UWisconsin.pdf>.

⁷⁷ *See* BURDEN, ELECTION LAWS, MOBILIZATION, AND TURNOUT: THE UNANTICIPATED CONSEQUENCES OF ELECTION REFORM, *supra*.

⁷⁸ *See, e.g.,* Ann Gerhart, *Election 'Day'? With Early Voting, It's More Like Election Month*, WASH. POST, Nov. 5, 2012, *available at* http://www.washingtonpost.com/politics/decision2012/election-day-with-early-voting-its-more-like-election-month/2012/11/05/5a6a3786-2768-11e2-b2a0-ae18d6159439_story.html.

While we fully respect the foregoing concerns, it is the conclusion of the Committee, with one dissent, that it would be well for New York to adopt Early In-Person Voting as the cornerstone for an overall effort to make the voting experience more accommodating for the voter. To the extent that the voting experience for voters has often been a trial due to long lines or the difficulty of voting on one specific day, early voting may well improve their experience and over time encourage them to vote regularly.

To enhance the likelihood that adopting the practice will increase voter participation, we believe that a shorter period than that adopted in most other states would be best for New York. We believe that such a shorter period, the weekend and Monday before Election Day—and at most the three preceding days of the prior week—would not only limit the cost but more likely preserve the community spirit and interest of voters that can be lost over a longer period. It would also tend to allow for more of the traditional mobilization of voters that might be diluted with a longer period.

We would also strongly recommend that since a shorter period would be less costly than the practice in other states, some of the comparative cost savings be used to establish more convenient polling places during the shorter time. That too would likely encourage voters and could increase turnout.

As to the actual location of polling places we would recommend leaving that to the individual Boards of Election because of the wide variation in transportation options among the various Election Districts throughout the state. While it is evident that, where practical, polling places would best be near public transportation, the possibility of that will vary greatly from one part of the state to another.

Similarly, recognizing the widely varying circumstances in the Election Districts across the state, we would leave to local Boards the choice of best steps to assure that records of those who voted are kept and poll books updated over the Early Voting period.

It will also be important that legislation adopting Early Voting include provision for appropriate funding.

A DISSENT

Special Committee Member John Faso dissents from the Committee's Recommendation of Early In-Person Voting. His reasons for dissent are the following:

“The special committee has undertaken an important task and I applaud the co-chairs for their diligent efforts in preparing this important report. In the main, I am in agreement with most of the proposals contained in the report but disagree with the recommendation in support of early voting in New York State.

Our task was to consider proposals which would increase voter participation in the state. All the evidence which I have reviewed regarding early voting indicates strongly that it does not increase voter participation. While it may increase convenience of some voters who would otherwise vote on Election Day, it does not increase the size of the turnout.

Curtis Gans is the Director of the Center for the Study of the American Electorate. Gans is perhaps the most preeminent student of American voting habits and has conducted numerous studies of the US electorate over the past 35 years. Gans has concluded that early voting is of little benefit and may actually act to reduce voter turnout.⁷⁹ Gans is also dismissive of so-called “convenience voting”, particularly early voting, no-excuse absentee voting and mail voting – arguing that these devices “do not enhance and may hurt turnout”. He also worries that early voting will increase the chance that many voters will have cast a ballot prior to a last minute event such as a terrorist event or candidate health event, which might otherwise affect a vote.⁸⁰

Another expert, in testimony before the US Senate in 2010, summarized his findings regarding early voting as follows:

“In anything but very low turnout local elections, absentee and early voting do not increase turnout. Studies continue to be done, and this is a common finding. Essentially the same people who would go to a polling place to vote on Election Day are motivated to vote by mail or to show up at early voting places. New voters are not attracted to elections because of these processes.”⁸¹

The Committee recognizes that early voting is unlikely to increase voter participation but attempts to “split the baby” with its recommendation that early voting be adopted in the days just prior to the General Election. It does so from a belief that early voting will be more convenient for citizens. Indeed, it may be more convenient for some who would otherwise be showing up on Election Day. However, the recommendation

⁷⁹ Curtis Gans, Committee for Study of the American Electorate, Making it Easier Doesn’t Work – No Excuse Absentee and Early Voting Hurt Voter Turnout; Create Other Problems (September 13, 2004), *available at* http://www1.american.edu/ia/cfer/research/csae_09132004.pdf.

⁸⁰ Curtis Gans, Much-hyped Turnout Record Fails to Materialize/Convenience Voting Fails to Boost Balloting (November 6, 2008), *available at* www.american.edu/spa/cdem/upload/csae2008gpfull.pdf.

⁸¹ Testimony of John C. Fortier, American Enterprise Institute, *Voting By Mail: An Examination of State and Local Experience*, S. Comm. on Rules and Administration 4 (May 5, 2010), *available at* <http://www.aei.org/files/2010/05/05/FortierTestimony051010.pdf>.

ignores the cost to taxpayers. A new law imposing early voting on counties and the City of New York represents yet another unfunded mandate on local governments. Boards of Elections would have to staff multiple early voting sites on additional days prior to the General Election, resulting in additional costs for personnel. The days immediately prior to a General Election are also filled with frenetic activity in the Board of Elections, making it unlikely that they have the resources or staff to conduct early voting at such times.

Fiscal realities in our state at this time make it highly unlikely that state government would pay for such costs. I question whether the convenience for some is worth the ultimate cost to taxpayers, especially when early voters are likely the same people who would otherwise turnout on Election Day.

There are other reasons why I remain troubled by early voting. Early voting reduces the communitarian aspect of Election Day, where our citizens come forth from disparate locations to participate on the same day in a solemn moment to choose their elected representatives. There is a benefit to the vast majority of people, having the same information (or misinformation) casting their ballots on the same day. We should also recognize that reasons why some people do not vote has little to do with burdens of registration or election procedure and more to do with an alienation from the political system or simply a blissful and willful ignorance of the process. While regrettable, I am hard-pressed to think that new voting procedures will alter such opinions.

For the foregoing reasons, I respectfully dissent from the special committee's recommendation on this topic."

John J. Faso

NO-EXCUSE ABSENTEE BALLOTS

As an alternative to traditional voting, No-Excuse Absentee Ballots—which allow voters to cast ballots by mail without going to their designated Election Day poll sites and without any excuse—are another way to make it easier to vote.

In New York, however, absentee voting is significantly curtailed by explicit Constitutional language that permits absentee voting only when a voter is or expects to be absent from his or her county or city of residence on Election Day, or is physically unable to vote. Other states are considerably more lenient—and in fact a majority now permit

some form of No-Excuse Absentee Voting. Because the Committee recognizes that eliminating the current restrictions on absentee balloting could increase voter participation, it has considered whether New York should follow the lead of the numerous other states that have instituted the practice.

ABSENTEE VOTING IN NEW YORK

Under the New York Election Law, pursuant to Article II, Section 2 of the New York Constitution,⁸² absentee voting is authorized in only very specific circumstances, when the voter expects to be:

- (a) absent from the county of his or her residence [or New York City] on election day;
- (b) unable to appear personally at the polling place of the election district in which he or she is a qualified voter because of illness or physical disability or duties related to the primary care of one or more individuals who are ill or physically disabled, or because he or she will be or is a patient in a hospital;
- (c) an inmate or patient of a veteran's administration hospital; or
- (d) absent from his or her voting residence because he or she is detained in jail awaiting action by a grand jury or awaiting trial, or confined in jail or prison after a conviction for an offense other than a felony, provided that he or she is qualified to vote in the election district of his or her residence.⁸³

While these requirements were recently made more permissive—and as of 2010 no longer require that a voter be “unavoidably” absent because of vacation or “duties, occupation, business, or studies require him to be elsewhere”⁸⁴—they nevertheless require that, unless a New York voter is or will be disabled, ill, a primary caregiver, an inmate, or a hospital patient, he or she must be entirely absent from his or her county (or New York City) on Election Day in order to vote via absentee ballot. As a result, typically a relatively small number of New York voters vote absentee. According to a 2010 U.S. Election Assistance Commission survey, approximately 3% of New York

⁸² More specifically, article II, section 2 provides as follows:

The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes.

N.Y. CONST. art. II, § 2.

⁸³ N.Y. ELEC. LAW § 8-400.

⁸⁴ The laws relating to absentee ballots were also altered such that a voter now need only “expect” that he or she will meet one of the statutory criteria. *Id.*

voters voted via absentee ballot in the 2010 election,⁸⁵ compared with estimates that nearly 20% of voters nationally voted absentee.⁸⁶

ABSENTEE VOTING IN OTHER STATES

As of July 2011, twenty-seven states and the District of Columbia permitted No-Excuse Absentee Balloting.⁸⁷ Seven of those states and the District of Columbia, also permitted permanent No-Excuse Absentee Voting, pursuant to which voters automatically receive absentee ballots.⁸⁸ Two states, Oregon and Washington, conduct elections exclusively by mail⁸⁹ – and a very significant number of voters in Arizona, California and Colorado cast their ballots by mail as well.⁹⁰

In the twenty-seven states that permit No-Excuse Absentee Voting, approximately 22% of all votes were submitted by mail. In states where No-Excuse Absentee Voting is not allowed, only approximately 6% of the votes were mailed.⁹¹ According to the 2010 U.S. Election Assistance Commission survey, the states with the highest percentages of absentee ballots cast in the 2010 election—Colorado (69.4%), Arizona (60.9%), California (40.5%)—all allow No-Excuse Absentee Voting.⁹²

Among other things, allowing No-Excuse Absentee Voting can potentially reduce administrative costs by reducing the need for poll workers and poll sites.

⁸⁵ U.S. ELECTION ASSISTANCE COMMISSION, THE 2010 ELECTION ADMINISTRATION AND VOTING SURVEY: A SUMMARY OF KEY FINDINGS 22 (Dec. 2011), *available at* http://www.eac.gov/assets/1/Documents/990-281_EAC_EAVS_508_revised.pdf.

⁸⁶ Adam Liptak, *As More Vote by Mail, Faulty Ballots Could Impact Elections*, N.Y. TIMES (Oct. 6, 2012), *available at* <http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html?pagewanted=all>.

⁸⁷ NATIONAL CONFERENCE OF STATE LEGISLATURES: ABSENTEE AND EARLY VOTING, *available at* <http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx> (Sept. 4, 2012) (listing states).

⁸⁸ *Id.* (listing states). Several other states – including New York – provide permanent absentee ballots to voters who meet certain criteria, such as having permanent disabilities. *Id.*; *see also* N.Y. ELEC. LAW § 8-400(4) (“A voter who claims permanent illness or physical disability may make application for an absentee ballot and the right to receive an absentee ballot for each election thereafter as provided herein without further application, by filing with the Board of Elections an application which shall contain a statement to be executed by the voter.”).

⁸⁹ *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra*.

⁹⁰ *See Voting by Mail*, N.Y. TIMES, Oct. 6, 2012, *available at* <http://www.nytimes.com/interactive/2012/10/07/us/voting-by-mail.html> (estimating that 66% of Colorado voters voted by mail in 2010); MARK DiCAMILLO & MERVIN FIELD, THE FIELD POLL, 3-4 (Nov. 6, 2012), *available at* <http://field.com/fieldpollonline/subscribers/RIs2434.pdf> (estimating that the November 2012 election was the first general election in which more than half of California voters (51%) voted by mail).

⁹¹ Charles Stewart III, *Losing Votes by Mail*, 13 N.Y.U. J. LEG. & PUB. POLICY 573, 582 (2010).

⁹² U.S. ELECTION ASSISTANCE COMMISSION: 2010 ELECTION ADMINISTRATION AND VOTING SURVEY 21 (Dec. 2011), *available at* http://www.eac.gov/assets/1/Documents/990-281_EAC_EAVS_508_revised.pdf. Note, however, that (1) the U.S. Election Assistance Commission survey does not always clearly distinguish between absentee voting and voting by mail, and (2) that survey only reflects voting patterns in those election jurisdictions that responded.

As with Early In-Person Voting the case has not been made that use of No-Excuse Absentee Ballots increases voter participation significantly.⁹³

THE CONSEQUENCES OF EXPANDING ABSENTEE VOTING

At the same time, there are significant concerns about the effects of No-Excuse Absentee Voting. First, there are reports in various states that indicate that a much higher percentage of ballots cast by mail are rejected because of mistakes in their preparation and not infrequent reports of doubts about the reliability of election results due to disputes over whether such ballots have been cast properly. At least one commentator has suggested that there is a failure rate of up to 21% as the result of requested ballots not reaching voters, mailed ballots not reaching election officials, and election officials rejecting submitted absentee ballots.⁹⁴

Also, an important concern is that permitting No-Excuse Absentee Voting provides increased opportunities for fraud, whether by creating opportunities for third parties to improperly assist voters with absentee ballots or collect multiple ballots and submit them, effectively stuffing the ballot box. As one commentator has said:

Ever since absentee balloting first became an option in the early 20th century, the risks of fraud and coercion with this method have been debated. In particular, some critics think that a large expansion of absentee voting would threaten the security of the ballot. Though there is a solid paper trail left behind from this kind of voting and no chance of machine malfunction, this method is seen as being less secure because a voter's identity is not verified in the same ways as in-person voting. There is no way of knowing whether a voter actually filled out a ballot by him or herself, or whether someone (e.g., a caretaker) filled it out for them, had the voter sign the form, and sent it in.⁹⁵

RECOMMENDATION

Although the Committee appreciates the convenience for voters in using No-Excuse Absentee Ballots, we are not to the point of recommending a change in the law favoring such ballots. Our view instead is that Early In-Person Voting is preferable as a

⁹³ But see JAN LEIGHLEY AND JONATHAN NAGLER, PEW CHARITABLE TRUSTS, MAKING VOTING WORK, THE EFFECTS OF NON-PRECINCT VOTING REFORMS ON TURNOUT, 1972-2008 at 16 (Jan. 2010), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewcenteronthestatesorg/Initiatives/MVW/Leighley_Nagler.pdf (finding that “contrary to conventional wisdom, no-fault absentee voting *has* raised turnout”).

⁹⁴ Adam Liptak, *As More Vote by Mail, Faulty Ballots Could Impact Elections*, N.Y. TIMES (Oct. 6, 2012), *available at* <http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html?pagewanted=all>.

⁹⁵ LEAGUE OF WOMEN VOTERS OF NEW YORK STATE, INCREASING VOTER PARTICIPATION: OPPORTUNITIES IN NEW YORK STATE 8 (Dec. 2011), *available at* <http://www.lwvny.org/vote/2011/EarlyVote121311.pdf>.

way to increase voter convenience and that it comes without the attendant problems that have been reported in other states to result from the use of mailed ballots.

The Committee is concerned by the reports of cases where a significantly higher percentage of votes were ultimately rejected because of mistakes made by voters in filling in or signing their ballots and elections that were in doubt because of their dependence on the count of absentee ballots which were subject to interpretation. It is also concerned by reports of and the potential for fraud with such ballots. While we believe that far more honest voters would benefit from the convenience of using No-Excuse Absentee Ballots than the number of those votes that would be fraudulent, there is nevertheless reason to be concerned that instances of fraud could have a significant impact in close elections and could fuel the widespread belief that the voting process is often subject to fraud.

While actual measurable voting fraud does not appear to be significant as it relates to elections overall, a very substantial number of voters believe that fraud is a serious problem and further fueling their doubts does not appear to be worth the added convenience of voters casting their ballots by mail. Better to have early votes cast in person, with the greater security that attends that way of voting.

IMPROVED BALLOT DESIGN

Commencing in 2010, New York voters began casting their ballots on optical scan voting machines using paper ballots. The design of the ballots used in that and in subsequent elections and primaries has engendered criticism.⁹⁶ The result of poor ballot design makes the ballot difficult to read and can lead to voter error and loss of the franchise.⁹⁷ Those concerns appear to have registered and prompted efforts to improve ballot design. We strongly recommend that such efforts be continued.

Ballot design in New York is mandated by Article 7 of the Election Law.⁹⁸ The principal source of the ballot design problems is that the ballot design requirements, principally in Article 7, were originally drafted for the mechanical lever machines that were used in New York for decades. Those requirements resulted in a scanable paper ballot that is not as clear and readable as a ballot should be.

⁹⁶ See, e.g., *Voters Annoyed by Hard-to-Read Ballots*, N.Y. TIMES, Sept. 17, 2012, available at <http://www.nytimes.com/2012/09/18/nyregion/new-york-city-voters-annoyed-by-hard-to-read-ballots.html>.

⁹⁷ LAWRENCE NORDEN AND SUNDEEP IYER, BRENNAN CENTER FOR JUSTICE, DESIGN DEFICIENCIES AND LOST VOTES (2011), available at http://brennan.3cdn.net/6fbbc223d181f475a4_fkm6ixf0v.pdf.

⁹⁸ N.Y. ELECT. LAW art. 7, § 7-100 et al.

Among the specific design mandates of the current Election Law are the following:

- (a) A uniform size type must be used for all candidates' names.⁹⁹
- (b) The names of candidates must be printed in all capital letters.¹⁰⁰
- (c) The space for the name of the candidate shall be 1/4 inch in depth.¹⁰¹

In addition, there are design mandates for ballots on the lever voting machines that are not included in the requirements for scanable paper ballots but are uniformly followed in preparing paper ballots, including the following:

- (a) The party name and a designating letter and number must be included in the box with the candidate's name.¹⁰²
- (b) At the head of each column or row containing the names of each party's candidates must be printed the image of a closed fist with a pointing index finger. In the same space the name of the party, the emblem of the party and a designating letter of the row or column must be included.¹⁰³

The Election Law also mandates the specific language for instructions which must be printed on the ballot in eight separate numbered paragraphs. The law permits the instructions to be printed on the front or back of the ballot or on a separate sheet or card.¹⁰⁴

Perhaps most important the Election Law does not mandate a minimum font size for any information on the ballot including the office for which a vote is cast, the candidates' names or the instructions.

In addition, reflecting limitations of the old mechanical lever machines, the Election Law mandates that "Each office shall occupy as many columns or rows on the machine as the number of candidates to be elected to that office."¹⁰⁵ If more than eight positions are needed for an office, a second column or row is to be used. The use of eight

⁹⁹ N.Y. ELEC. LAW § 7-106(2).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* § 7-106(8).

¹⁰² *Id.* § 7-104(3)(a).

¹⁰³ *Id.* § 7-104(7).

¹⁰⁴ *Id.* § 7-106(6).

¹⁰⁵ *Id.* § 7-104(3)(c).

positions for each column or row has been carried over to the paper ballots currently used resulting, in some cases, in the use of a second row or column for some offices. As a result, on paper ballots it is possible for a person to mistakenly vote for the same candidate twice because she appears on more than one line. The result of such overvoting can be the loss of a person's vote. Mechanical lever machines were designed to prevent overvoting, i.e., voting for more candidates than permitted. Such protection is not provided with paper ballots and, while the ballots contain instructions to avoid overvoting, those instructions are often missed by voters.¹⁰⁶

The result of the statutory mandates is a paper ballot that can be cluttered, confusing, difficult to read and can lead to the loss of one's vote. A confusing ballot and hard-to-understand or difficult-to-locate instructions can result in mismarked ballots and uncounted votes.¹⁰⁷ The failure to mandate a minimum font size challenges the voter's ability to even read the ballot.¹⁰⁸ To the extent that the ballot continues to be off-putting, it will discourage voting.

A change in the law to require application of modern usability principles would produce a more user-friendly ballot and minimize confusion and mistakes reducing the number of lost votes. We recommend that the ballot design mandates of the Election Law be amended to, at a minimum, provide the following:

1. Require a minimum font size—12 point—for all information on the ballot including the title of the office, the candidate's name and the instructions.
2. Eliminate the requirement that the party name and a designating letter and number be included in the box with the candidate's name.
3. Require a more readable format including sans serif type and initial capitalization only of candidates' names and parties.
4. Provide flexibility in the size of the box in which the candidate's name appears, not limiting it to 1/4 inch, provided that the size is uniform on the ballot.
5. Eliminate the requirement that the closed fist symbol be used at the head of each column or row.

¹⁰⁶ See, e.g., LAWRENCE NORDEN AND SUNDEEP IYER, BRENNAN CENTER FOR JUSTICE, DESIGN DEFICIENCIES AND LOST VOTES (2011), available at http://brennan.3cdn.net/6fbbc223d181f475a4_fkm6ixf0v.pdf (describing confusion instructions and insufficient overvote notifications in multiple states).

¹⁰⁷ LAWRENCE NORDEN, ET AL, BRENNAN CENTER FOR JUSTICE, BETTER BALLOTS (2008), available at http://brennan.3cdn.net/d6bd3c56be0d0cc861_hlm6i92v1.pdf.

¹⁰⁸ See *Voters Annoyed by Hard-to-Read Ballots*, N.Y. TIMES, Sept. 17, 2012, available at <http://www.nytimes.com/2012/09/18/nyregion/new-york-city-voters-annoyed-by-hard-to-read-ballots.html>.

6. Simplify the instructions using plain English and mandate that the instructions be at the top of the ballot (and, if the back of the ballot is used for ballot proposals, immediately adjacent to the proposals) and include an illustration of how to properly mark the ballot.
7. Require to the maximum extent possible that all candidates for an office be in a single column or row.
8. Permit the use of shading, coloring and borders to distinguish the parts of a ballot to make it clearer and more understandable.

Ballot design mockups by Drew Davies, Oxide Design Co. / AIGA Design for Democracy for the Brennan Center (set out in the Appendix as Sample Ballot Concept at pp. 50-52) demonstrate that incorporating these recommendations would result in a ballot that is clearer, more readable and easier to use.

Beyond these changes we recommend also a change in the way different languages are treated on the ballot.

The Voting Rights Act of 1965, as amended,¹⁰⁹ requires New York to provide ballots and other voting materials in multiple languages to facilitate the participation of those for whom English is not their first language. Based on census data ballots are to be available in languages other than English spoken by a significant percentage of voters in an area. In complying with that requirement the current practice in many districts is to provide ballots with several languages, not just English and another single language spoken in an area. For Queens, for example, every ballot is printed in five languages, while in Brooklyn and Manhattan three languages are currently on the ballot. Because a ballot with so many languages can be difficult to read and confusing, we recommend that all ballots be printed in English and, at most, one other language. Voters should be provided with the appropriate ballot based on their indication of language preference at the time they register or at the time they vote. Ballots with the languages shown by census data to be spoken by significant numbers of voters in the area should be made available in sufficient quantities in each district. While such a practice will further burden election inspectors, who will have to keep track of multiple ballots and inquire of each voter which ballot they would prefer, it should result in a clearer, simpler ballot, fewer voter mistakes and fewer lost votes.

In addition, we urge the State Board of Elections to provide to each of the Boards of Elections in each county and New York City appropriate samples of usable ballots for the information and guidance of the voters in their areas. In turn the Boards of Elections should make sample ballots more widely available to voters prior to an election through

¹⁰⁹ Voting Rights Act of 1965 § 203, 42 U.S.C. § 1973aa-1a; Voting Rights Act Amendments of 2006, Determinations Under Section 203, 76 Fed. Reg. 63,605 (Oct. 13, 2011), *available at* http://www.justice.gov/crt/about/vot/sec_203/2011_notice.pdf.

newspaper circulations and mailings, as they are currently made available online. Doing so will give voters the opportunity to familiarize themselves with the ballot, including its instructions, and, perhaps, eliminate some of the errors voters may make when faced with a complex ballot at the polling place. The Election Law already permits Boards of Elections to mail sample ballots to voters OR to publish a sample ballot in a newspaper at least once, and we strongly recommend that that be done as a regular practice. In addition the law requires a sample ballot to be sent to each high school for posting at each school.¹¹⁰

POLL WORKER RECRUITMENT AND TRAINING

The quality of a voter's experience can be heavily dependent on the ability of poll workers to manage polling places effectively. While many New York voters' experience at the polls is seamless due to helpful and capable poll workers, other voters report that on Election Day poll workers are too often unable to assist them. It also appears that they not infrequently make mistakes. Common problems include poll workers who are unaware of the procedure to follow when the voter's name does not appear in the registration book, using affidavit ballots when there is a machine malfunction rather than emergency ballots, and not opening polling places on time. Also, there are poll workers who become frustrated by the challenges presented, especially over an extraordinarily long working day, and do not then work well with voters. As a result, voters may decide to leave the poll site and not vote or may be discouraged from voting in subsequent elections.

POLL WORKERS IN NEW YORK

For each election, every county Board of Elections may appoint, and remove, clerks, voting machine technicians, custodians, and other employees, fix their number, prescribe their duties, fix their titles and ranks, and establish their salaries within the amounts appropriated by the local legislative body.¹¹¹

There are four election inspectors in each Election District of the state.¹¹² At every general election in each Election District where two voting machines are used, there are to be two clerks in addition to the four inspectors of election.¹¹³ In an Election District located in a town where one voting machine is used, the town board may direct

¹¹⁰ N.Y. ELEC. LAW, § 7-118.

¹¹¹ *Id.* § 3-300.

¹¹² *Id.* § 3-400(1).

¹¹³ *Id.* § 3-400(2).

the Board of Elections to appoint not more than two clerks in such district if in the discretion of the board, the service of a clerk or clerks is reasonably necessary for the proper conduct of the election.¹¹⁴ In each Election District where paper ballots and more than one voting machine are used, there must be two clerks in addition to the four inspectors of election.¹¹⁵

The appointment of election coordinators, poll clerks and election inspectors must be equally divided between the two major political parties.¹¹⁶ Where two additional poll clerks are appointed in an Election District because of the number of absentee and military ballots mailed out, the statute states that the clerks shall be divided between the major political parties.¹¹⁷

DUTIES AND COMPENSATION OF POLL WORKERS

The Board of Elections of each county and the Board of Elections of the City of New York, may, in their discretion, appoint election coordinators to perform Election Day duties, including directing voters to their proper polling places, assisting election inspectors and poll clerks in the performance of their duties, and such other duties as may be assigned to them by the Board of Elections.¹¹⁸ Election inspectors may be employed to work half-day shifts with adjusted compensation, provided at least one inspector from each of the two major political parties is present at the poll site for the entire time that the polls are open.¹¹⁹ Typically poll workers are expected to work full days, with the working day running from well before 6:00 am on Election Day to well after 9:00 p.m.

Election inspectors, poll clerks, and qualified voters appointed to act in place of an absent inspector or clerk are to be paid for their services on the days of registration and election, by the county where the Election District is located, in an amount fixed by the county legislative body, subject to such limitations as may be prescribed or authorized by statute.¹²⁰ In New York City the amount of compensation is fixed by the mayor at a daily rate which is not less than \$130, and in the case of election coordinators not less than \$200.¹²¹ Such election inspectors, poll clerks, and qualified voters at a general or

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* §§ 3-400(3); 3-401(2).

¹¹⁷ *Id.* § 3-408.

¹¹⁸ *Id.* § 3-401(1).

¹¹⁹ *Id.* § 3-400(7).

¹²⁰ *Id.* § 3-420(1).

¹²¹ *Id.* § 3-420(1).

special village election conducted by the Board of Elections must be paid by such village in an amount fixed by the village Board of Trustees.¹²²

QUALIFICATIONS OF POLL WORKERS

No person may be certified or act as an election coordinator who is not a registered voter and a resident of the county in which he serves, or within New York City, of such city, who holds any elective public office, or who is a candidate for any public office to be voted for by the voters of the district in which he or she is to serve, or who is not able to speak and read the English language and write it legibly.¹²³ Each time she serves, an election commissioner must complete a course of instruction and pass an examination, before being certified.¹²⁴

To be certified or to act as an election inspector or poll clerk, an individual either must be (1) a registered voter and a resident of the county in which she serves, or, within New York City, a resident of that city, or (2) a student of a school in that county or city, who is 17 years of age and has permission from the school district and the consent of his or her parent, guardian or other person in parental relation to serve.¹²⁵ (N.Y. Elec. Law § 3-400(6) makes clear that none of the requirements for being an election inspector includes being enrolled as a member of a political party.) Additional requirements for certification are that an election inspector or poll clerk may not hold elective public office or be a candidate for any elective public office in the district in which he or she is to serve and may not be a spouse, parent, or child of any such candidate.¹²⁶

TRAINING OF POLL WORKERS

Each Board of Elections shall, at least once every year, conduct a mandatory school for the instruction of election inspectors, poll clerks and election coordinators.¹²⁷ Instruction of all poll workers as to the rights of voters, proper identification requirements and like matters is also required.¹²⁸ Each Board of Elections must augment the core curriculum with local procedures, not inconsistent with the core curriculum adopted by the State Board of Elections. These may include procedures relating to proper operation of, and remedying problems with, voting machines or systems in use in that

¹²² *Id.*

¹²³ *Id.* § 3-401(5).

¹²⁴ *Id.* § 3-412(3).

¹²⁵ *Id.* § 3-400(6), 3-400(8); *White v. Ortiz*, 141 A.D.2d 455, 529 N.Y.S.2d 788 (1st Dep't 1988).

¹²⁶ N.Y. ELEC. LAW § 3-400(6).

¹²⁷ *Id.* § 3-412(1).

¹²⁸ *Id.* § 3-412(1-a).

jurisdiction.¹²⁹ The State Board of Elections must supply each Board of Elections with instructional material to be used in the preparation for such examinations and must give each Board of Election uniform directions for the conduct of the examinations, which the Board must follow.¹³⁰ Every Board of Elections may utilize additional materials selected by it in the course of instruction.¹³¹

Prior to certification and at least once every year, election inspectors and poll clerks must complete training and pass an examination established by the State Board of Elections.¹³² A written notice stating the time and place at which such training is to be held will be provided by the Board of Elections.¹³³ The core curriculum for such training must include instruction on the election law, the process for registration, the use of voting machines, disability etiquette and their general duties under the law.¹³⁴ In addition, election inspectors and poll clerks must receive instruction on the following:

- (1) the rights of voters at the polls;
- (2) the obligation of election workers to protect those rights while maintaining the integrity of the franchise, including assisting voters with disabilities or with limited or no proficiency in the English language;
- (3) handling, processing and entitlement to ballots, including affidavit and emergency ballots;
- (4) proper identification requirements;
- (5) procedures to be followed with respect to voters whose names are not on the list of registered voters or whose identities have not been verified;
- (6) electioneering and other violations of the elective franchise;
- (7) solicitation by individuals and groups at the polling place; and
- (8) procedures to be followed after the polls close.¹³⁵

¹²⁹ *Id.*

¹³⁰ *Id.* § 3-412(3).

¹³¹ *Id.*

¹³² *Id.* § 3-412(1).

¹³³ *Id.*

¹³⁴ *Id.* § 3-412(2).

¹³⁵ *Id.* § 3-412(1-a).

Although that is the requirement, it has been reported frequently that poll workers do not attend training and nevertheless still serve at the polls.

RECOMMENDATIONS

The Committee recommends that funding for recruitment and compensation of poll workers be increased, that training be standardized, and extended training be provided, all to alleviate the difficulties voters too often face at their polling places due to poll worker problems.

Specifically, we believe first, that providing more funding to provide for the training of poll workers and the professionalization of the training process could materially improve poll worker performance. As a corollary to that, we would urge that consolidated training on a statewide basis be considered as a way to improve and regularize the training process. Existing technology makes that possible and it would likely improve the curriculum and reduce the need for trainers. It is especially important that steps be taken to assure that poll workers attend training and that they not be assigned as poll workers if they have not.¹³⁶ To provide an incentive for attendance at training, providing direct compensation for the training should be considered where such compensation is not already in place.¹³⁷

Second, we would urge that efforts be made at the state and local level to provide appropriate incentives and to assure flexibility that would permit state, county and city workers to participate as poll workers. Their likely reliability and understanding of government could prove to be very helpful. There are various practical ways to get that done and to thereby increase the pool of potential poll workers.

Third, we would also join those who have suggested that a more concerted effort be made to recruit students to serve as poll workers.¹³⁸ Involving a younger cadre of workers would not only increase the potential pool of candidates but also work as good training in civic responsibility.

Fourth, we would urge that significant efforts be made to take advantage of the option to assign poll workers for one-half day shifts, rather than the current full day running from before 6:00 a.m. to well past 9:00 p.m. The exceptional length of the day

¹³⁶ See *Improving the Laws and Regulations Governing Casting a Ballot and Conditions at the Polls: Hearing Before the New York State Senate Comm. on Elections* 6 (May 11, 2009) (statement of Russ Haven, New York Public Interest Research Group) (“Currently, thousands of poll workers fail to attend training[.]”).

¹³⁷ See New York City Board of Elections, Meeting of the Commissioners of Elections, Minutes 3-7 (July 20, 2011), available at <http://www.vote.nyc.ny.us/downloads/pdf/documents/boe/minutes/2011/072011meet.pdf> (training stipend of \$100 for a six-hour session).

¹³⁸ See AIMEE ALLAUD ET AL., LEAGUE OF WOMEN VOTERS OF NEW YORK STATE, 2010 ELECTION SURVEY REPORT 9 (Dec. 13, 2010), available at http://lwvny.org/advocacy/ElectionSurveyReport_121310.pdf.

for which poll workers currently serve has an immediate limiting effect on the number of those who can serve. Someone with even one other limited commitment during the day cannot participate, even though he or she might be willing to serve for a one-half day shift and be effective. Also, the fatigue that can set in for even the best poll workers over the current very long working day obviously can lead to both errors and an increased likelihood of their becoming personally less effective in dealing with voters.

We appreciate that there are risks in committing to the active use of split shifts, especially as to the possibility that the afternoon shift workers will not appear, but we believe that the overall performance of the workers and the ability to recruit workers is worth the risk. A practical solution might be to take on some split shift workers in the next election to see how the management of those who agree to split shifts may best be handled, with broader adoption of the practice in subsequent elections once there is more experience with it.

DECEPTIVE PRACTICES

In addition to recommending the changes outlined above, the Committee believes that it is time for New York law to be strengthened to provide more severe and comprehensive penalties for deceptive practices that are used election after election to suppress votes. It is evident that those who engage in such practices believe that they can do so without suffering any consequences, either because the law does not apply to their conduct or because the penalties are insufficient to deter them. There is also the unfortunate practical reality that prosecutors are often not as intent as they might be on the need to prosecute in such cases.

As an example, among the deceptive practices that have been reported to the Lawyers Committee for Civil Rights Under Law's Election Protection hotline¹³⁹ are a report that, in November 2008, voters in Shirley, New York received automated phone calls advising that due to the anticipated high voter turnout on Election Day, Democratic and Liberal voters should cast their ballots on Wednesday, November 5, the day following Election Day. On these calls, it was possible to press "0" to speak to a live person who reiterated the same false statements. Similar deceptive information was printed on flyers and distributed in lower income areas near Riverhead, New York. In Manhattan, it was reported that a sign was posted near a legitimate polling place that

¹³⁹ COMMON CAUSE & LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, DECEPTIVE ELECTION PRACTICES AND VOTER INTIMIDATION: THE NEED FOR VOTER PROTECTION (June 2012), *available at* <http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/DECEPTIVEPRACTICESREPORTJULY2012FINALPDF.PDF>.

misdirected voters to a fictional polling place allegedly because the legitimate polling place was overcrowded. In 2006, voters in New York reported receiving harassing phone calls, or “robo calls,” sometimes in the middle of the night, claiming to be from one candidate, when in fact the calls were traced to the candidate’s opponent. In 2004, a caller to the Election Protection hotline reported that Spanish-speaking residents of Port Chester, New York were being told that they could not vote unless they owned property.

Reflecting the spread and seriousness of such practices, the Justice Department Manual defines “voter suppression” as:

. . . schemes [] designed to ensure the election of a favored candidate by blocking or impeding voters believed to oppose that candidate from getting to the polls to cast their ballots.

Examples include providing false information to the public – or a particular segment of the public – regarding the qualifications to vote, the consequences of voting in connection with citizenship status, the dates or qualifications for absentee voting, the date of an election, the hours for voting, or the correct voting precinct.¹⁴⁰

Consistent with the Manual, federal law has been used to prosecute certain of these activities.¹⁴¹

The extent of the problem was addressed in a 2008 Report published by the Century Foundation, Common Cause and the Lawyers Committee for Civil Rights Under Law:

In the last several election cycles, “deceptive practices” have been perpetrated in order to suppress voting and skew election results. Usually targeted at minorities and in minority neighborhoods, *deceptive practices are the intentional dissemination of false or misleading information about the voting process with the intent to prevent an eligible voter from casting a ballot.* It is an insidious form of vote suppression that often goes unaddressed by authorities and the perpetrators are virtually never caught. Historically, deceptive practices have taken the form of flyers distributed in a particular neighborhood; more recently, with the advent of new technology “robocalls” have been employed to spread misinformation.

¹⁴⁰ CRAIG C. DONSANTO AND NANCY L. SIMMONS, U.S. DEPARTMENT OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 61 (May 2007), available at <http://www.justice.gov/criminal/pin/docs/electbook-0507.pdf>.

¹⁴¹ *Id.*

Now, the fear is deceptive practices 2.0: false information disseminated via the internet, email and other new media.¹⁴²

Article 17 of the New York Election Law includes various provisions that address aspects of the voter suppression concerns outlined in the reports. These include:

- Section 17-102 which makes it a misdemeanor to “fraudulently or wrongfully” do “any act tending to affect the result of any primary election, caucus or convention” or “do or offer to do, anything to hinder or delay any elector from taking part in or voting at a primary election or caucus”;
- Section 17-130 which makes it a misdemeanor to willfully and unlawfully obstruct, hinder or delay, or aid or assist in obstructing or delaying any elector on his way to a polling place;
- Section 17-150 which makes it a misdemeanor for any person or corporation to directly or indirectly use or threaten to use any force, violence or restraint, in order to induce or compel any person to refrain from voting;
- Section 17-152 which makes it a misdemeanor for any two or more persons to conspire to promote or prevent the election of any person to public office by unlawful means.

New York law does not, however, make it a crime to intentionally disseminate false or misleading information about the voting process with the intent to prevent an eligible voter from casting a ballot. Although the language of Section 17-102 of the Election Law may be broad enough to cover this type of activity, the section only applies to a primary election, caucus or convention and does not apply to a general election.

We strongly recommend that the law be changed to provide for criminal penalties applicable to deceptive practices that suppress votes in elections, not just primaries (an obvious gap in the law), and to assure that such conduct will be subject to penalties at least as serious as those currently applicable to conduct that includes fraud in the registration process.¹⁴³ That would mean making such an offense a class E felony, which would bring a penalty of up to 4 years of imprisonment.¹⁴⁴

We would recommend further that the New York Attorney General be given concurrent jurisdiction with local district attorneys to enforce the law and be encouraged

¹⁴² CENTURY FOUNDATION, ET AL., *DECEPTIVE PRACTICES 2.0: LEGAL AND POLICY RESPONSES 1* (2008), *available at* <http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/DECEPTIVEPRACTICESREPORTJULY2012FINALPDF.PDF> (emphasis added).

¹⁴³ N.Y. ELECT. LAW § 17-104 (registration fraud); *see* N.Y. PENAL LAW § 55.10(1)(b) (Class E felony).

¹⁴⁴ N.Y. PENAL LAW § 70.00(2)(e).

to engage in an active enforcement program that will deter those who may now think they can act with impunity.

SAMPLE BALLOT CONCEPT

On the following two pages are the front and back of a model sample ballot designed by Drew Davies, Oxide Design Co. / AIGA Design for Democracy, and provided to the Committee by the Brennan Center for Justice.

Instructions



Mark the oval to the left of the name of your choice.

The number of choices is listed for each contest. Do not mark the ballot for more choices than allowed. You do not have to vote in every contest. If you make a mistake, or want to change your vote, ask a poll worker for a new ballot.

To vote for a candidate whose name is not printed on the ballot, print the name clearly under the words "Write-in," staying within the box.

1 / 1

Official Ballot for the General Election

12th Assembly District, County of Broome

City of Binghamton, Election District 26

November 2nd, 2011 State of New York Ballot ID: 1026

	Governor and Lieutenant Governor Vote once	Comptroller Vote for 1	Attorney General Vote for 1	U.S. Senator (6-year term) Vote for 1	U.S. Senator (2-year unexpired term) Vote for 1	Representative in Congress 2nd District Vote for 1	State Senator 52nd District Vote for 1	Member of Assembly Vote for 1	Surrogate Court Judge Vote for 1	County Judge Vote for 1	Sheriff Vote for 1	County Legislator 1st District Vote for 1
Democratic	☐ Andrew M Cuomo and Robert J Duffy	☐ Thomas P DiNapoli Democratic	☐ Eric T Schneiderman Democratic	☐ Charles E Schumer Democratic	☐ Kirsten E Gilliland Democratic	☐ Maurice D Hinchey Democratic	☐ John P Oziel Democratic	☐ Donna A Lapardo Democratic			☐ Gary F O'Neill Democratic	☐ Mark Whalen Democratic
Republican	☐ Carl P Paladino and Gregory J Edwards Republican	☐ Harry Wilson Republican	☐ Dan Donovan Republican	☐ Jay Byrnes Republican	☐ Joseph J DiGenardi Republican	☐ George K Phillips Republican	☐ Thomas W Udonis Republican	☐ Arthur Garrison Republican	☐ David H Gorman Republican	☐ Martin E Smith Republican	☐ David E Harder Republican	☐ David E Harder Republican
Independence	☐ Andrew M Cuomo and Robert J Duffy Independence	☐ Harry Wilson Independence	☐ Eric T Schneiderman Independence	☐ Charles E Schumer Independence	☐ Kirsten E Gilliland Independence	☐ Maurice D Hinchey Independence	☐ Thomas W Udonis Independence	☐ Arthur Garrison Independence			☐ David E Harder Independence	
Conservative	☐ Carl P Paladino and Gregory J Edwards Conservative	☐ Harry Wilson Conservative	☐ Dan Donovan Conservative	☐ Jay Byrnes Conservative	☐ Joseph J DiGenardi Conservative	☐ George K Phillips Conservative	☐ Thomas W Udonis Conservative	☐ Arthur Garrison Conservative			☐ David E Harder Conservative	
Working Families	☐ Andrew M Cuomo and Robert J Duffy Working Families	☐ Thomas P DiNapoli Working Families	☐ Eric T Schneiderman Working Families	☐ Charles E Schumer Working Families	☐ Kirsten E Gilliland Working Families	☐ Maurice D Hinchey Working Families		☐ Donna A Lapardo Working Families		☐ Martin E Smith Working Families	☐ TR Roberts Working Families	
Green	☐ Heidi Hawkins and Gloria Madiera Green	☐ Julia A Wilkstrand Green	☐ Colin Clark Green		☐ Cecilia A Lawrence Green			☐ Joseph T Stokes Our Funding Future				
Real to 2 Damn High	☐ Jimmy McMillan Real to 2 Damn High				☐ Joseph Hart Real to 2 Damn High							
Libertarian Freedom	☐ Warren Redlich and Allen Link Libertarian	☐ John Gaspari Libertarian	☐ Carl E Person Libertarian	☐ Randy A Credica Libertarian	☐ John Cillon Libertarian							
Taxpayers Antirehabilitation	☐ Carl P Paladino and Gregory J Edwards Taxpayers Antirehabilitation		☐ Ramon J Jimenez Taxpayers		☐ Wita Morgan Antirehabilitation	☐ Bruce Blackman Taxpayers						
Write-in	Write-in:	Write-in:	Write-in:	Write-in:	Write-in:	Write-in:	Write-in:	Write-in:	Write-in:	Write-in:	Write-in:	Write-in:

Turn ballot over →

Official Ballot for the General Election
64th Assembly District, County of New York
City of New York, Election Districts 1 & 7
 November 2nd, 2011 State of New York Ballot ID: 0001



To vote on a question or proposal, mark the oval to the left of your choice.

Para votar en una pregunta o propuesta, marque el óvalo a la izquierda de su preferencia.

Instructions for Voting for Questions and Proposals
 Instrucciones para Votar en Preguntas y Propuestas

If you make a mistake, or want to change your vote, ask a poll worker for a new ballot.
 Si comete un error o desea cambiar su voto, pida una papeleta nueva a un trabajador electoral.

Proposal Number One: Question - Term Limits Propuesta Numero Uno: Pregunta - Limites del Periodo	Proposal Number Two: Question - Elections and Government Administration Propuesta Numero Uno: Pregunta - Elecciones y del gobierno
The proposal would amend the City Charter to: • Reduce from three to two the maximum number of consecutive full terms that can be served by elected city officials; and • Make this change in term limits applicable only to those city officials who were first elected at or after the 2010 general election; and • Prohibit the City Council from altering the term limits of elected city officials then serving in office. Shall this proposal be adopted? ☐ Yes / Si ☐ No / No	The proposal would amend the City Charter to: • Disclosure of Independent Campaign Spending: Require public disclosure of expenditures made by entities and individuals independent from candidates to influence the outcome of a city election or referendum; • Ballot Access: Generally reduce the number of petition signatures needed by candidates for city elective office to appear on a ballot; • Voter Assistance and Campaign Finance Board: Merge voter assistance functions, including a reconstituted Voter Assistance Advisory Committee, into the Campaign Finance Board, and change when Campaign Finance Board member terms begin; • Conflicts of Interest Law: Require all public servants to receive conflicts of interest training, raise the maximum fine for a public servant who violates the City's conflicts of interest law, and allow the City to recover any benefits obtained from such violations; • City Administrative Tribunal: Authorize the Mayor to direct the merger of administrative tribunals and adjudications into the Office of Administrative Trials and Hearings and permit the Department of Consumer Affairs to adjudicate all violations issued by that department; • City Reporting Requirements and Advisory Bodies: Create a commission to review requirements for reports and advisory bodies and waive the requirements, subject to City Council review, where the commission finds they are not of continuing value; and • Map for Facility Siting: Include in the City's facilities siting map those transportation and waste management facilities operated by or for governmental entities, or by private entities that provide comparable services. Shall this proposal be adopted? ☐ Yes / Si ☐ No / No

Turn ballot over →

ORGANIZATIONS INVITED TO COMMENT BY THE COMMITTEE

Advancement Project

Albany County Bar Association

Albany County Board of Elections Democratic Commissioner

Albany County Board of Elections Republican Commissioner

Allegany County Bar Association

Allegany County Board of Elections Democratic Commissioner

Allegany County Board of Elections Republican Commissioner

American Association of Jews from the Former USSR

American Bar Association - Standing Committee on Election Law

Asian American Legal Defense and Education Fund

Bar Association of Erie County

Bar Association of the City of Middletown

Bar Association of the Tonawandas

Bay Ridge Lawyers Association

Brennan Center for Justice at NYU School of Law

Bronx County Bar Association

Bronx County Board of Elections Democratic Commissioner

Bronx County Board of Elections Republican Commissioner

Bronx Independent Living Services

Brooklyn Bar Association

Broome County Bar Association

Broome County Board of Elections Democratic Commissioner

Broome County Board of Elections Republican Commissioner

Cattaraugus County Bar Association

Cattaraugus County Board of Elections Democratic Commissioner

Cattaraugus County Board of Elections Republican Commissioner

Cayuga County Board of Elections Democratic Commissioner
Cayuga County Board of Elections Republican Commissioner
Chautauqua County Board of Elections Democratic Commissioner
Chautauqua County Board of Elections Republican Commissioner
Chemung County Bar Association
Chemung County Board of Elections Democratic Commissioner
Chemung County Board of Elections Republican Commissioner
Chenango County Bar Association
Chenango County Board of Elections Democratic Commissioner
Chenango County Board of Elections Republican Commissioner
Citizens Union of the City of New York
Clinton County Bar Association
Clinton County Board of Elections Democratic Commissioner
Clinton County Board of Elections Republican Commissioner
Columbia County Bar Association
Columbia County Board of Elections Democratic Commissioner
Columbia County Board of Elections Republican Commissioner
Common Cause New York
Corning City Bar Association
Cortland County Bar Association
Cortland County Board of Elections Democratic Commissioner
Cortland County Board of Elections Republican Commissioner
Delaware County Bar Association
Delaware County Board of Elections Democratic Commissioner
Delaware County Board of Elections Republican Commissioner
DEMOS
Disabilities Network of New York City
District Attorneys Association of the State of New York

Dutchess County Bar Association

Dutchess County Board of Elections Democratic Commissioner

Dutchess County Board of Elections Republican Commissioner

Empire Justice Center

Erie County Board of Elections Democratic Commissioner

Erie County Board of Elections Republican Commissioner

Essex County Bar Association

Essex County Board of Elections Democratic Commissioner

Essex County Board of Elections Republican Commissioner

Franklin County Bar Association

Franklin County Board of Elections Democratic Commissioner

Franklin County Board of Elections Republican Commissioner

Fulton County Bar Association

Fulton County Board of Elections Democratic Commissioner

Fulton County Board of Elections Republican Commissioner

Genesee County Bar Association

Genesee County Board of Elections Democratic Commissioner

Genesee County Board of Elections Republican Commissioner

Great Neck Lawyers Association

Greene County Bar Association

Greene County Board of Elections Democratic Commissioner

Greene County Board of Elections Republican Commissioner

Hamilton County Board of Elections Democratic Commissioner

Hamilton County Board of Elections Republican Commissioner

The Heritage Foundation

Herkimer County Bar Association

Herkimer County Board of Elections Democratic Commissioner

Herkimer County Board of Elections Republican Commissioner

Jamestown Bar Association

Jefferson County Bar Association

Jefferson County Board of Elections Democratic Commissioner

Jefferson County Board of Elections Republican Commissioner

Kings County Board of Elections Democratic Commissioner

Kings County Board of Elections Republican Commissioner

Latino Justice

Lawyers' Committee for Civil Rights Under Law

League of Women Voters of New York State

Lewis County Bar Association

Lewis County Board of Elections Democratic Commissioner

Lewis County Board of Elections Republican Commissioner

Livingston County Bar Association

Livingston County Board of Elections Democratic Commissioner

Livingston County Board of Elections Republican Commissioner

Long Beach Lawyers Association

Madison County Bar Association

Madison County Board of Elections Democratic Commissioner

Madison County Board of Elections Republican Commissioner

Mamaroneck-Harrison-Larchmont Bar Association

Metropolitan Black Bar Association

Monroe County Bar Association

Monroe County Board of Elections Democratic Commissioner

Monroe County Board of Elections Republican Commissioner

Montgomery County Bar Association

Montgomery County Board of Elections Democratic Commissioner

Montgomery County Board of Elections Republican Commissioner

Mount Vernon Bar Association

NAACP Legal Defense and Educational Fund

Nassau County Bar Association

Nassau County Board of Elections Democratic Commissioner

Nassau County Board of Elections Republican Commissioner

Nassau Lawyers' Association of Long Island

National Nonpartisan Voter Education Campaign

National Voting Rights Institute

New Immigrant Community Empowerment

New York City Bar Association

New York City Campaign Finance Board

New York City Mayor's Office

New York Civil Liberties Union

New York County Board of Elections Democratic Commissioner

New York County Board of Elections Republican Commissioner

New York County Lawyers' Association

New York County Lawyers' Association Foundation

New York Democratic Lawyers Council

New York Immigration Coalition

New York Lawyers for the Public Interest

NAACP New York

New York Public Interest Research Group

New York State Bar Association - Vice Presidents 1st District

New York State Bar Association - Vice President 2nd District

New York State Bar Association - Vice President 3rd District

New York State Bar Association - Vice President 4th District

New York State Bar Association - Vice President 5th District

New York State Bar Association - Vice President 6th District

New York State Bar Association - Vice President 7th District

New York State Bar Association - Vice President 8th District
New York State Bar Association - Vice President 9th District
New York State Bar Association - Vice President 10th District
New York State Bar Association - Vice President 11th District
New York State Bar Association - Vice President 12th District
New York State Bar Association - Vice President 13th District
New York State Board of Elections
New York Statewide Senior Action Council
New Yorkers for Verified Voting
Niagara County Board of Elections Democratic Commissioner
Niagara County Board of Elections Republican Commissioner
Northern Chautauqua County Bar Association
Oneida County Bar Association
Oneida County Board of Elections Democratic Commissioner
Oneida County Board of Elections Republican Commissioner
Onondaga County Bar Association
Onondaga County Board of Elections Democratic Commissioner
Onondaga County Board of Elections Republican Commissioner
Ontario County Bar Association
Ontario County Board of Elections Democratic Commissioner
Ontario County Board of Elections Republican Commissioner
Orange County Bar Association
Orange County Board of Elections Democratic Commissioner
Orange County Board of Elections Republican Commissioner
Orleans County Bar Association
Orleans County Board of Elections Democratic Commissioner
Orleans County Board of Elections Republican Commissioner
Ossining Bar Association

Oswego County Bar Association

Oswego County Board of Elections Democratic Commissioner

Oswego County Board of Elections Republican Commissioner

Otsego County Board of Elections Democratic Commissioner

Otsego County Board of Elections Republican Commissioner

Peekskill/Cortland Bar Association

People for the American Way

Port Chester-Rye Bar Association

Putnam County Bar Association

Putnam County Board of Elections Democratic Commissioner

Putnam County Board of Elections Republican Commissioner

Queens County Bar Association

Queens District Attorney's Office

Rensselaer County Bar Association

Rensselaer County Board of Elections Democratic Commissioner

Rensselaer County Board of Elections Republican Commissioner

Richmond County Bar Association

Richmond County Board of Elections Democratic Commissioner

Richmond County Board of Elections Republican Commissioner

Rock the Vote

Rockland County Bar Association

Rockland County Board of Elections Democratic Commissioner

Rockland County Board of Elections Republican Commissioner

Rome Bar Association

Saratoga County Bar Association

Saratoga County Board of Elections Democratic Commissioner

Saratoga County Board of Elections Republican Commissioner

Schenectady County Bar Association

Schenectady County Board of Elections Democratic Commissioner
Schenectady County Board of Elections Republican Commissioner
Schoharie County Bar Association
Schoharie County Board of Elections Democratic Commissioner
Schoharie County Board of Elections Republican Commissioner
Schuyler County Bar Association
Schuyler County Board of Elections Democratic Commissioner
Schuyler County Board of Elections Republican Commissioner
Seneca County Bar Association
Seneca County Board of Elections Democratic Commissioner
Seneca County Board of Elections Republican Commissioner
St. Lawrence County Bar Association
St. Lawrence County Board of Elections Democratic Commissioner
St. Lawrence County Board of Elections Republican Commissioner
Steuben County Bar Association
Steuben County Board of Elections Democratic Commissioner
Steuben County Board of Elections Republican Commissioner
Suffolk County Bar Association
Suffolk County Board of Elections Democratic Commissioner
Suffolk County Board of Elections Republican Commissioner
Sullivan County Bar Association
Sullivan County Board of Elections Democratic Commissioner
Sullivan County Board of Elections Republican Commissioner
Tioga County Bar Association
Tioga County Board of Elections Democratic Commissioner
Tioga County Board of Elections Republican Commissioner
Tompkins County Bar Association
Tompkins County Board of Elections Democratic Commissioner

Tompkins County Board of Elections Republican Commissioner
True the Vote
Ulster County Bar Association
Ulster County Board of Elections Democratic Commissioner
Ulster County Board of Elections Republican Commissioner
The Voter Participation Center
Warren County Bar Association
Warren County Board of Elections Democratic Commissioner
Warren County Board of Elections Republican Commissioner
Washington County Bar Association
Washington County Board of Elections Democratic Commissioner
Washington County Board of Elections Republican Commissioner
Wayne County Board of Elections Democratic Commissioner
Wayne County Board of Elections Republican Commissioner
Westchester County Bar Association
Westchester County Board of Elections Democratic Commissioner
Westchester County Board of Elections Republican Commissioner
White Plains Bar Association
Women's Bar Association of the State of New York
Women's City Club of New York
Wyoming County Bar Association
Wyoming County Board of Elections Democratic Commissioner
Wyoming County Board of Elections Republican Commissioner
Yates County Bar Association
Yates County Board of Elections Democratic Commissioner
Yates County Board of Elections Republican Commissioner
Yonkers Lawyers Association

The Special Committee also reached out to the more than 80 ethnic, specialty and special purpose bar associations known to NYSBA through each of the 13 Judicial Districts.

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