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## One Person, One Vote, One Application: District Court Decision in Ray v. Texas Upholds Texas Absentee Voting Law That Disenfranchises Elderly and Disabled Voters.

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**ONE PERSON, ONE VOTE, ONE APPLICATION: DISTRICT COURT  
DECISION IN RAY V. TEXAS UPHOLDS TEXAS ABSENTEE  
VOTING LAW THAT DISENFRANCHISES ELDERLY AND  
DISABLED VOTERS**

**SEAN FLYNN\***

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## I. INTRODUCTION

Gloria Meeks, a sixty-nine year old African-American woman, screamed after stepping out of her bath one evening in her home in Fort Worth, Texas.<sup>1</sup> She spied two men peeking through her window.<sup>2</sup> Gloria later learned that these two men were from the Office of the Attorney General of Texas and that she was under investigation for voter fraud.<sup>3</sup> Gloria ran a phone bank that helped homebound elderly and disabled people vote by mail.<sup>4</sup> In Texarkana, Texas, another sixty-nine year old African-American woman, Willie Ray, was prosecuted for violating election laws in connection with her efforts to deliver ballots for homebound voters.<sup>5</sup> For their attempts to assist elderly and disabled Texarkana voters, criminal charges were filed against both Willie Ray and her grand-

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1. Steven Rosenfeld, *Vote by Mail, Go to Jail*, TEX. OBSERVER, Apr. 18, 2008, at 6, available at <http://www.texasobserver.org/article.php?aid=2738> (recounting the events that would lead to *Ray v. Texas*). “Meeks is in a nursing home after having a stroke, prompted in part, her friends say, by state police who investigated her—including spying on Meeks while she bathed—and then questioned her about helping McDonald and others vote.” *Id.*

2. Ralph Blumenthal, *Texas Democrats File Suit Against Voting Fraud Law*, N.Y. TIMES, Sept. 23, 2006, at A12, available at [http://www.nytimes.com/2006/09/23/us/politics/23suppress.html?\\_1&oref=slogin](http://www.nytimes.com/2006/09/23/us/politics/23suppress.html?_1&oref=slogin) (telling the stories of the plaintiffs in *Ray v. Texas* before the case went to the appellate court). “Gloria Meeks . . . provided a sworn statement saying two state investigators ‘peeped into my bathroom window not once but twice while I was in my bathroom drying off from my bath.’” *Id.* Meeks was being investigated for assisting disabled and elderly voters turn in ballots. *Id.*

3. Steven Rosenfeld, *Vote by Mail, Go to Jail*, TEX. OBSERVER, Apr. 18, 2008, at 6, available at <http://www.texasobserver.org/article.php?aid=2738> (recounting the events of the investigation of Texas citizens by the Texas Attorney General). Meeks was under investigation for failing to include her name, address, and signature on the backs of ballots she mailed for her senior neighbors and for mailing those ballots for them. *Id.*

4. *Id.*

5. *Id.*

daughter for voter fraud.<sup>6</sup> These civil servants, along with others across the state, were prosecuted for helping elderly and disabled citizens cast their votes through the absentee process.<sup>7</sup> Since 2006, Texas Attorney General Greg Abbott and his Special Investigations Unit have been prosecuting activists, most of whom are minorities and Democrats, trying to eliminate an “epidemic” of voter fraud across the State of Texas.<sup>8</sup>

The Texas early voting laws require that if a person by reason of illiteracy or disability cannot sign his or her application for a ballot, then it must be signed by a witness.<sup>9</sup> House Bill 54, in 2003, amended the Texas Election Code by increasing the punishments for many of the provisions of early voting.<sup>10</sup> Under Texas Election Code § 84.004, it is a crime for an individual to serve as a witness on more than one absentee ballot application.<sup>11</sup> The provisions in § 84.004 carry the penalty of a class B misde-

6. See Polly Hughes, *Texas Voter Fraud Law Under Fire*, MYSACOM, Sept. 17, 2007, [http://www.mysanantonio.com/news/MYSA091806\\_01B\\_voterfraud\\_2c76b68\\_html3136.html](http://www.mysanantonio.com/news/MYSA091806_01B_voterfraud_2c76b68_html3136.html) (recounting the events that brought Willie Ray into the lawsuit dealing with voter fraud).

7. *Id.* (describing prosecutions under a 2003 Texas law criminalizing efforts by a given individual in delivering voter ballots for persons other than the individual himself or herself). The Office of the Attorney General of Texas and other supporters of the law argue that it prevents voter fraud by those who would take advantage of elderly and disabled persons in order to steal their votes. *Id.* Democrats and other opponents of the law, however, contend that the law criminalizes legitimate behavior and discourages the elderly and disabled from voting. *Id.*

8. Steven Rosenfeld, *Vote by Mail, Go to Jail*, TEX. OBSERVER, Apr. 18, 2008, at 6, available at <http://www.texasobserver.org/article.php?aid=2738> (recounting the Texas Attorney General’s perspective in investigating the plaintiffs for voter fraud). Attorney General Greg Abbott was able to fund his efforts after receiving \$1.5 million in federal grant money from the Governor of Texas. *Id.*

9. See TEX. ELEC. CODE ANN. § 84.001(a)-(b) (Vernon 2003) (requiring, that in order to be eligible to vote by mail, one must sign an application for the ballot).

10. House Comm. on Elections, Bill Analysis, Tex. H.B. 54, 78th Leg., R.S. (2003) (adding criminal penalties to regulate certain early voting procedures). Specifically, these provisions focus on early voting mail procedures and the general prevention of fraud. *Id.*

11. TEX. ELEC. CODE ANN. § 84.004 (Vernon 2003).

- (a) A person commits an offense if, in the same election, the person signs an early voting ballot application as a witness for more than one applicant.
- (b) It is an exception to the application of Subsection (a) that the person signed early voting ballot applications for more than one applicant:
  - (1) as an early voting clerk or deputy early voting clerk; or
  - (2) and the person is related to the additional applicants as a parent, grandparent, spouse, child, or sibling.
- (c) A violation of this section does not affect the validity of an application involved in the offense.
- (d) Each application signed by the witness in violation of this section constitutes a separate offense.
- (e) An offense under this section is a Class B misdemeanor. *Id.*

meanor and each signature is an additional offense.<sup>12</sup> The purpose of this law is to reduce the harvesting of absentee votes of the elderly and disabled.<sup>13</sup>

In *Ray v. Texas*, a federal district court upheld the Texas law against claims that it violated the First and Fourteenth Amendments of the U.S. Constitution and § 208 of the Voting Rights Act.<sup>14</sup> The plaintiffs in the *Ray v. Texas* case were charged with several violations of the early voting provisions under the 2003 amendments to the Texas Election Code, but only § 84.004 had not been settled before the court.<sup>15</sup> The district court found that although the law was restrictive and may discourage some individuals from voting, the law was not as restrictive as other states' laws that had been upheld.<sup>16</sup> The court also found that the law did not have a chilling effect on voters' propensity to engage in absentee voting.<sup>17</sup> The opinion depended heavily on the U.S. Supreme Court decision in *Craw-*

12. *Id.* §84.004(d).

13. *See Ray v. Texas*, No. 2-06-CV-385, 2008 WL 3457021, at \*1 (E.D. Tex. Aug. 7, 2008) (explaining the effect of the Texas Election Code provision). “[T]he statute makes it a criminal offense for any person to sign as a witness for more than one early voting ballot application. . . .” *Id.*; House Comm. on Elections, Bill Analysis, Tex. H.B. 54, 78th Leg., R.S. (2003).

Under current law, prosecutors may have difficulty effectively prosecuting those who unduly influence an election. Many voters, such as the elderly and infirm, are homebound and unable to vote at regular polling places on election day. In recent elections, certain individuals have unlawfully assisted these voters with completing early voting ballot applications and with marking and delivering their ballots. Some individuals have also engaged in the buying and selling of mail ballots to alter election outcomes. [House Bill] 54 adds provisions relating to certain early voting by mail procedures and to the prevention of voting fraud generally; providing criminal penalties. *Id.*

14. *Ray*, 2008 WL 3457021, at \*1 (holding that the Texas law did not violate the Constitution or federal voting laws); *see also* Voting Rights Act Amendment of 1982, Pub. L. No. 97-205, § 208, 96 Stat. 134 (codified as amended at 42 U.S.C. § 1973aa-6 (2000)) (giving voters in need of assistance because of “blindness, disability, or inability to read or write” the right to choose whom provides them with assistance).

15. *Ray*, 2008 WL 3457021, at \*2 (“The challenged provision relates to the process by which a putative early voter applies for an application and specifically the need to have a witness for the application if a person is unable to sign his or her own application.”).

16. *Id.* at \*4 (discussing how an Indiana statute requiring photo identification meant to prevent voter fraud was held constitutionally valid by the U.S. Supreme Court (citing *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1624 (2008))). In *Crawford v. Marion County*, the Supreme Court held that the State’s interest in preventing voter fraud warranted the particular encroachment (i.e., requirement of photo identification) on a voter’s right to cast a ballot. *Id.*

17. *Id.* at \*5 (rejecting plaintiff’s argument that the law created a chilling effect on elderly and disabled voters right to vote). The court concluded that the plaintiffs had provided no empirical evidence to support their assertion that § 84.004 had disenfranchised potential voters. *Id.*

*ford v. Marion County Election Board*.<sup>18</sup> The Court in *Crawford* upheld an Indiana law requiring photo identification to be shown at public polling places.<sup>19</sup> The Supreme Court reasoned that the Indiana law fell under a state's power to regulate elections and to protect against voter fraud.<sup>20</sup>

For many, voter fraud is a sweeping concern across the country.<sup>21</sup> But often, the concern is exaggerated by political parties trying to gain an advantage in elections rather than to secure the integrity of the democratic process.<sup>22</sup> Fraud becomes especially complicated for the elderly and disabled voters who rely on absentee voting procedures.<sup>23</sup> Poor regulation of absentee voting can lead to fraud becoming a prevalent factor in the process.<sup>24</sup> Allegations of individuals preying on the elderly and disabled by appearing to help them vote, but instead stealing their votes or

18. 128 S. Ct. 1610 (2008).

19. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008) (holding that the Indiana voter I.D. law did not violate the U.S. Constitution or federal law).

20. *Id.* at 1616 (“We affirmed *Anderson’s* requirement that a court evaluating a constitutional challenge to an election regulation weigh the ‘precise interests put forward by the State as justifications for the burden imposed by its rule.’” (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983))).

21. See Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 ELDER L.J. 453, 454 (2005) (explaining the sweeping concern of voter fraud for elderly and disabled voters across the country). “With the growing elderly populations and the insufficient absentee ballot regulation, it may be only a short time before the public spotlight shifts from the remnants of the infamous butterfly ballot debacle of the 2000 presidential election to the increasingly critical issue of absentee voter fraud.” *Id.*

22. See Wayne Slater, *Texas AG Fails to Unravel Large-Scale Voter-Fraud Schemes in His Two-Year Campaign*, DALLAS MORNING NEWS, May 18, 2008, available at [http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DNvote fraud\\_18tex.ART.State.Edition2.46e18c2.html](http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DNvote fraud_18tex.ART.State.Edition2.46e18c2.html) (“Democrats accuse [the Texas Attorney General] of a partisan operation to discourage voters, especially minorities.”).

23. See Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 ELDER L.J. 453, 454 (2005) (explaining that it is the elderly and the disabled who heavily rely on absentee voting). “Elderly voters often have difficulty traveling to polling stations and procuring absentee ballots.” *Id.* at 453. “Moreover, elderly voters who need assistance in casting their ballots are especially vulnerable to absentee voter fraud for a variety of reasons.” *Id.*

24. See *id.* (expressing concern that the regulations are not sufficient to fight voter fraud committed upon the elderly). “In Cleveland, Ohio, a grand jury indicted Republican campaign worker John Jackson on five counts of tampering with ballots after a fellow election board member observed Jackson marking physically infirm patients’ ballots in a manner contrary to their expressed wishes.” *Id.* at 454–55. “Similarly, in Chicago, Illinois, a man reportedly entered a Cook County senior building and helped thirty-five seniors apply for absentee ballots, returning weeks later to illegally punch their ballots.” *Id.* at 455.

not fully explaining for whom they are voting for, riddle newspapers in Texas and across the country.<sup>25</sup>

The Texas law, however, disenfranchises many elderly and disabled voters by limiting the number of applications that a single individual can witness and reducing the number of homebound elderly and disabled citizens who are able to vote.<sup>26</sup> This is because the individuals who could normally assist these voters are unable to assist more than one voter for fear of criminal prosecution.<sup>27</sup> Without the support of individuals to assist absentee voters, it becomes less likely that these voters will seek further assistance and more likely that they will be discouraged from voting altogether.<sup>28</sup> Many of the plaintiffs in the *Ray* case who had assisted in signing applications testified that they would be unable to assist voters get absentee ballots in the future.<sup>29</sup> Further, another plaintiff, who was an elderly and disabled voter, testified that this law would prevent him from

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25. *Id.* (explaining the different ways that partisans will abuse the elderly in the electoral system). “One resident in the building claimed the man completed her ballot without her participation, telling her only not to worry, ‘you’re voting Democratic,’ and then instructing her to sign the ballot.” *Id.* at 455. “Finally, in New York, a grand jury ‘found problems with the way absentee ballots are handled at certain adult care facilities,’ where persons from outside the facility were ‘permitted to enter the facilit[y], meet with residents one-on-one, distribute absentee ballots and advise residents on how to cast their vote.’” *Id.*; see also Denise Grady, *Change Urged for Nursing-Home Voters*, N.Y. TIMES, Sept. 15, 2004, at A23 (reporting on the need for election officials to monitor voting in nursing homes, especially for individuals with competency issues). See generally JONATHAN BECHTLE, ALLEGATIONS OF ABSENTEE BALLOT FRAUD (2007), [http://www.libertylive.org/files/pdf/absentee\\_fraud\\_handout.pdf](http://www.libertylive.org/files/pdf/absentee_fraud_handout.pdf) (listing newspaper accounts of voter fraud from the year 2000 to 2008).

26. Steven Rosenfeld, *Vote by Mail, Go to Jail*, TEX. OBSERVER, Apr. 18, 2008, at 6, available at <http://www.texasobserver.org/article.php?aid=2738> (arguing that the individuals being investigated would not be able to help others vote).

27. See TEX. ELEC. CODE ANN. § 84.004(a) (Vernon 2003) (“A person commits an offense if, in the same election, the person signs an early voting ballot application as a witness for more than one applicant.”); *Ray v. Texas*, No. 2-06-CV-385, 2008 WL 3457021, at \*1 (E.D. Tex. Aug. 7, 2008); see also Steven Rosenfeld, *Vote by Mail, Go to Jail*, TEX. OBSERVER, Apr. 18, 2008, at 6, available at <http://www.texasobserver.org/article.php?aid=2738> (explaining that the fear of criminal prosecution has stopped many of the Texas individuals from assisting absentee voters).

28. *Ray*, 2008 WL 3457021, at \*5 (explaining the effect that the ruling might have on the plaintiffs). “The court appreciates the logical conclusion that precluding volunteers from witnessing more than one ballot application could reduce voter participation to some extent.” *Id.*

29. *Id.* at \*2 (providing testimony from plaintiff witnesses regarding how they have been impacted by § 84.004).

Willie Ray notes that she has been unable to serve as a witness to multiple voters who have asked for her assistance because of § 84.004. Ms. Ray suggests that if she (or someone similarly situated) is unable to witness a signature for an application, the applicant likely will not seek further assistance and will not vote. *Id.*

voting altogether.<sup>30</sup> The district court found that this was insufficient evidence to support the allegation that the law created a chilling effect because the amount of people affected was not significant enough.<sup>31</sup> However, it failed to articulate how many people would have to be affected before the law was significant.<sup>32</sup> As this Comment will examine, courts and lawmakers should be more concerned with not disenfranchising voters, rather than restricting some voters in the attempt to fight fraud, which is not significantly prevalent.<sup>33</sup>

Part I of this Comment will examine the history of absentee voting in the United States, from its origins in the Civil War to the present day. Part II will explain the Texas absentee voting process with emphasis on the law in question in the *Ray* case. Part III will demonstrate how the court's ruling in the *Ray* case applied the standards of election law jurisprudence. Part IV will examine the limited prevalence of voter fraud and will offer views for measuring fraud. Part V will analyze the effects of absentee voting and fraud in the 2008 elections and will highlight future initiatives being debated for the Texas Election Code. Finally, Part VI will offer suggestions for reforming the Texas absentee voting system to ensure the security of more elderly and disabled voters.

## II. BACKGROUND

Absentee voting allows voters to receive their ballots prior to election day and to cast their votes without being physically present at their pol-

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30. *Id.* (noting the corollary declaration made by Ken Bailey and his inability to continue voting due to § 84.004).

31. *Id.* at \*5.

However, the record lacks concrete evidence that § 84.004 has had an appreciable impact on elderly and disabled voter participation. On this record, the court cannot conclude that § 84.004 has had a “chilling effect” on voters or that § 84.004 has “disenfranchised” the voting public to any appreciable extent. *Id.*

32. *Id.* (stating that there was a lack of evidence, on the record, which showed noticeable disenfranchisement).

33. See LORRAINE C. MINNITE, PROJECT VOTE, THE POLITICS OF VOTER FRAUD 3 (2007), [http://projectvote.org/fileadmin/ProjectVote/Publications/Politics\\_of\\_Voter\\_Fraud\\_Final.pdf](http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf) (noting that voter fraud rarely occurs at the federal and state level alike).

It is not as if the states have failed to detail the ways voters could corrupt elections. There are hundreds of examples drawn from state election codes and constitutions that illustrate the precision with which the states have criminalized voter and election fraud. If we use the same standards for judging voter fraud crime rates as we do for other crimes, we must conclude that the lack of evidence of arrests, indictments or convictions for any of the practices defined as voter fraud means very little fraud is being committed. *Id.*



ling places.<sup>34</sup> By eliminating the need for attendance, many groups, such as soldiers, the elderly, the disabled, and college students, who would otherwise be unable to vote, have an opportunity to be heard in elections.<sup>35</sup>

### A. *The History of Absentee Voting in America*

#### 1. The Beginning of Absentee Voting in the Civil War

The practice of voting through the use of an absentee ballot was initially a product of ensuring soldiers the right to vote during the Civil War, and only applied to the military.<sup>36</sup> The Civil War and the wartime effort produced the first situation where millions of voters could not vote at their polling places.<sup>37</sup> With the concern over disenfranchising soldiers who were at war, came the first major effort for absentee balloting in the United States.<sup>38</sup> States began passing absentee voting laws for soldiers to vote in the field.<sup>39</sup> As a result, the need for a new system arose and absentee voting laws were passed in nineteen of the twenty-five states in the Union, and in seven of the eleven states in the Confederacy.<sup>40</sup> Of the

34. See Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 ELDER L.J. 453, 456 (2005) (defining the absentee voting process and explaining the common practices that are used to assist elderly voters across the state). “By eliminating the need for attendance at the polls, the absentee voting process enables many groups of people, including overseas members of the military, travelers, students and people with disabilities, to vote when they otherwise might have been denied the opportunity.” *Id.* at 456.

35. *Id.*

36. See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 150 (Basic Books 2000) (“[T]he Civil War—and the desire to permit soldiers to vote during the war—severed the link between voting and physical presence in a community.”).

After the war, more and more states made it possible for absent soldiers to vote, particularly if they were stationed within their home state. The law sometimes specified that they could vote anywhere in the state for statewide officers and anywhere in the district in congressional elections; casting ballots by mail was not the norm. *Id.*

37. See John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 492–93 (2003) (recounting the history of absentee voting during the Civil War). “The early impetus behind absentee balloting was war: making sure that soldiers on the battlefield were not disenfranchised by the military service. The Civil War inspired the first major effort for absentee balloting in the United States.” *Id.*

38. *Id.* at 493 (“During the Civil War, nineteen of twenty-five states in the Union and seven of eleven states in the Confederacy provided for some form of absentee voting for soldiers in the field.” (footnotes omitted)).

39. *Id.*

40. YOUR BALLOT’S IN THE MAIL: VOTE BY MAIL AND ABSENTEE VOTING 3 (13th ed. 2007), [http://projectvote.org/fileadmin/ProjectVote/Policy\\_Briefs/PB13-Vote\\_by\\_Mail.pdf](http://projectvote.org/fileadmin/ProjectVote/Policy_Briefs/PB13-Vote_by_Mail.pdf).

Confederate states, Texas was among those that did not pass a law allowing absentee voting.<sup>41</sup>

Absentee voting faced many hurdles when it was first introduced during the Civil War.<sup>42</sup> For example, the Republican Party was in favor of absentee voting and the Democratic Party was against it.<sup>43</sup> This is because, at the time, the Republicans believed that soldiers would support President Lincoln and the war effort, and the Democrats did not approve of how President Lincoln was managing the war.<sup>44</sup>

Although the major debate over absentee voting was divided along party lines,<sup>45</sup> there were also concerns of “fraud, corruption, and the lack of privacy in voting.”<sup>46</sup> This concern stemmed, for many states, out of the lack of control of the ballots from the soldiers after voting at the polls.<sup>47</sup> Absentee voting laws also met resistance by the courts.<sup>48</sup> Many state

41. See JOSIAH HENRY BENTON, *VOTING IN THE FIELD: A FORGOTTEN CHAPTER OF THE CIVIL WAR* 28 (Plimpton Press 1915) (stating that three of the four states that seceded in 1861 without passing a law allowing absentee voting—namely, Louisiana, Texas, and Arkansas—had particular reasons for doing so). Benton states that “Texas and Arkansas were large States with a sparse population, and apparently no interest was taken to the subject.” *Id.*

42. See John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 494 (2003) (outlining the challenges created by absentee voting during the Civil War). Some of the initial challenges facing absentee voting in the United States included political deadlock, lack of privacy for voters, corruption and fraud. *Id.*

43. *Id.* at 493–94 (explaining the political divide that was created as a result of absentee voting). “Opposition to absentee voting prevailed in a number states, and in a number of others, efforts to pass legislation were thwarted initially and passed only later in the war.” *Id.*

44. *Id.* at 494 (explaining that Republicans supported absentee voting because they believed that soldiers in the field would vote Republican while Union Democrats disapproved of absentee voting and of how Lincoln was prosecuting the war).

45. *Id.* (noting the political tension during the Civil War caused by concerns of outside influences on military absentee voting).

46. *Id.* (highlighting other concerns raised by absentee voting when it was first enacted during the Civil War, especially in regards to illegal ballots, false swearing by judges, voter intimidation and ballot box tampering by military officers).

47. See John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 494–496 (2003) (citing legislative history of the Michigan House of Representatives, the New York State Legislature, the New Jersey Committee on Elections, and the Republican State Committee of New York discussing state concerns about absentee voting). There were a myriad of concerns related to the issue of absentee ballots: the possibility of ballot box stuffing or destruction, the lack of security in controlling the ballots, and the possibility of coercion and influence exerted by military officials upon soldiers in casting votes. See *id.* at 494–497.

48. *Id.* at 493 (expressing that the debate was not limited to politics, but was also dealt with in the judicial system). “Courts struck down a number of state laws for violating state

courts overturned absentee voting laws because they violated state constitutions.<sup>49</sup> As a result, many states amended their constitutions to allow for the new absentee voting laws.<sup>50</sup> Texas, however, would not amend its constitution to allow for absentee voting until 1921.<sup>51</sup> After the Civil War, absentee voting disappeared, but many of these amendments to the state constitutions did not.<sup>52</sup> This would allow for a reemergence of absentee voting laws to occur and an expansion to civilian voters.<sup>53</sup>

## 2. Civilian Absentee Voting

The success of absentee voting among soldiers during the Civil War propelled a similar movement within the civilian population.<sup>54</sup> Between 1911 and 1924, a major wave of civilian absentee voting laws were implemented across the country.<sup>55</sup> By 1913, three states, Kansas, Missouri, and

constitutional provisions that protected the right to a secret ballot or required voting in person.” *Id.*

49. *Id.* (citing *Clark v. Nash*, 234 S.W. 1, 3 (Ky. 1921)). Judicial criticism was initially raised in Union states since Confederate states “had scrapped their old constitutions after seceding.” *Id.* at 497. Virginia, a Confederate state, had laws providing for in-person voting in its pre-secession constitution, but after secession its legislature authorized absentee voting for its soldiers. *Id.*

50. *Id.* at 496–99 (noting that Pennsylvania, Connecticut, Kansas, Maine, Maryland, Nevada New York, and Rhode Island amended their state constitutions in 1864 to allow military absentee voting). However, in Indiana and Massachusetts, absentee voting proponents were unsuccessful. *Id.*

51. Tex. S.J. Res. 1, 37th Leg., 4th R.S. (1921) (proposing amendment to the Texas Constitution to permit absentee voting).

52. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 501 (2003) (discussing the end of the absentee voting system after the Civil War). As of 1915, only Kansas, Maine, Michigan, Nevada, New York and Rhode Island retained their military absentee voting statutes. *Id.*

53. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 150 (Basic Books 2000) (“Soldiers opened the gates to a broader dispensation.”). Keyssar goes on to say that “[t]he logic of allowing nonresident military personnel to vote seemed to apply almost equally well to others whose jobs forced them to be away from home on election day.” *Id.*

54. See Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 ELDER L.J. 453, 457 (2005) (explaining that the use of absentee voting in the military would lead to use in the civilian population). “With the onset of the Civil War, ‘the first constitutional provisions that actually protected the right to vote’ were enacted, with military service playing an important role.” *Id.* at 457. “The wartime environment produced the first situation where millions of voters were away from their homes on election day.” *Id.* “The dual responsibilities facing soldiers, the electoral duty of each citizen and the duty to serve, encouraged the initial enactment of absentee voting laws.” *Id.*

55. *Id.* at 458 (explaining that a movement towards civilian voting occurred “between 1911 and 1924, when forty-five of the then forty-eight states,” adopted a form of absentee

North Dakota, enacted civilian absentee voting laws to a larger class of civilian voters.<sup>56</sup> A dramatic shift followed, which was due to the United States' entrance into World War I and an increased mobility of the American workforce.<sup>57</sup> By 1917, twenty-four out of the then forty-eight states had some form of absentee voting law.<sup>58</sup> Texas's first absentee voting law was passed in 1917 by the 35th Legislature.<sup>59</sup> The Texas law was only an

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voting). "Such dramatic reform was due to the increased mobility of workers, especially 'among traveling salesmen and railway mail clerks who were necessarily absent from their places of residence on election day.'" *Id.* at 458. "However, the absentee ballot was often entirely restricted to those individuals who were absent from their homes on election day, as only select states allowed absentee voting for electors unable to reach the polling place due to illness or physical disability." *Id.*

56. P. Orman Ray, *Absent Voters*, 8 AM. POL. SCI. REV. 442, 442 (1914).

In 1911, the Kansas [L]egislature, and in 1913, the legislatures of Missouri and North Dakota enacted laws which permit voters who are absent from their regular election districts on the day of an election to send home their ballots by mail from any point within their respective States, and to have these ballots counted by the proper local officials before the final result is officially announced. Similar bills were introduced in the last session of the Pennsylvania and the Wisconsin legislature. In November, 1914, the voters of Michigan will vote upon a proposed amendment to their state constitution which, if adopted, will authorize the legislature of that State to provide some system of voting by mail for the benefit of qualified electors "in the actual military service of the United States or of this State, or in the army or navy thereof, in time of war, insurrection or rebellion;" also for "any student while in attendance at any institution of learning, or any member of the legislature while in attendance at any session of the legislature," and for commercial travelers. Three different bills are now (April, 1914) pending in the Massachusetts legislature to permit voters absent from their regular voting districts on state and national election days, to have their votes registered and counted. One of these bills also covers the case of voters who are detained from the polls by reason of sickness. *Id.*

57. See YOUR BALLOT'S IN THE MAIL: VOTE BY MAIL AND ABSENTEE VOTING 3 (13th ed. 2007), [http://projectvote.org/fileadmin/ProjectVote/Policy\\_Briefs/PB13-Vote\\_by\\_Mail.pdf](http://projectvote.org/fileadmin/ProjectVote/Policy_Briefs/PB13-Vote_by_Mail.pdf) (illustrating the changes of absentee balloting throughout history—specifically noting the fluctuations that resulted from the Civil War, World War I and World War II—and indicating that "[c]urrently, all states permit absentee balloting").

58. *Id.* (providing documented trends for absentee balloting and noting that today, absentee balloting fraud takes four forms: "(1) forging signatures or signing fictitious names; (2) coercing or influencing a vote; (3) vote buying; and (4) misappropriating absentee ballots").

59. Tex. S.B. 33, 35th Leg., R.S. (1917) (codifying the first absentee voting statute); see also *Wood v. State ex rel. Lee* 120 S.W.2d 955, 957 (Tex. Civ. App.—Texarkana 1938), *rev'd*, 126 S.W.2d 4 (Tex. 1939).

The first absentee voting law was passed by the 35th Legislature in 1917 as S.B. No. 33, Chap. 40, p. 62, Acts 1st Called Session, amending R.S. 1911, Article 2939 and reads: "Any qualified elector as defined by the statutes of this state, who *expects to be absent* from the county of his residence, and at any other place in this State, on the day of his election may vote subject to the following conditions, to-wit:" (Then follows conditions under which said elector may vote). *Id.*

emergency provision, and the voter had to apply in person no more than ten and no less than three days before the election.<sup>60</sup>

Like the Civil War, World War I saw an increase in the need for absentee voting for soldiers; however, now with the more mobile workforce, these laws were expanded to include persons of other professions who could not be present on election day.<sup>61</sup> An even a greater change was that some states began to allow absentee voting for people who were physically unable to reach their polling place.<sup>62</sup> In 1924, only three states, Rhode Island, Connecticut, and Kentucky, did not have some sort of civilian absentee voting legislation.<sup>63</sup>

### B. *Absentee Voting Today*

Absentee voting has changed dramatically since its wide spread practice in the beginning of the twentieth century and into the twenty-first century.<sup>64</sup> The shift includes the idea of “convenience voting” and making voting more accessible.<sup>65</sup> Today, the privilege of absentee voting has

60. See P. Orman Ray, *Absent-voting Laws, 1917*, 12 AM. POL. SCI. REV. 251, 252 (1918) (“[T]he Texas and Indiana laws, were passed as ‘emergency measures.’”). Both statutes, along with six others, were entirely new enactments. *Id.*

61. See John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 504 (2003) (explaining that it was the American workers, particularly traveling salesmen and railway mail clerks, who increased the need for an absentee voting system for civilians). Some states even extended absentee voting eligibility to university students. *Id.* “By 1924, there were only three states without absentee ballot legislation.” *Id.*

62. See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 277 (Basic Books 2000) (“The thrust of the law clearly had become to include rather than exclude, to incorporate citizens into policy rather than to screen them out.”). By the end of the twentieth century, “absentee ballots, almost everywhere, had become relatively easy to obtain.” *Id.*

63. See P. Orman Ray, *Absent-voting Legislation, 1924-1925*, 20 AM. POL. SCI. REV. 347, 347 (1926) (“With the enactment of laws in Georgia and South Carolina in 1924, only three states are now without absent-voting legislation, namely, Rhode Island, Connecticut, and Kentucky.”); see also *Clark v. Nash*, 234 S.W. 1 (Ky. 1921) (holding Kentucky’s absentee voting law unconstitutional).

64. See Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 ELDER L.J. 453, 458 (2005) (observing the changes in absentee voting in the United States and arguing that the law has become more relaxed in the twenty-first century). Low voting turnout is one of the reasons for this transformation. *Id.* Absentee voting is seen as a way to increase voting numbers. *Id.*

65. *Id.* (discussing the changing landscape of absentee voting). “Over the last thirty years, there has been a significant movement away from the traditional polling place, instead embracing the concept of ‘convenience voting.’” *Id.* at 458. “States are also taking steps to relax statutory requirements to vote by absentee ballot, allowing a greater portion of the electorate to qualify to vote in absentia.” *Id.* at 459. “Over half of the states now allow residents to participate in ‘no-excuse voting,’ which permits a voter to register to vote absentee without requiring a reason for the individual’s absence on election day.” *Id.*

expanded to people who would otherwise be unable to vote at their local polling place.<sup>66</sup> For example, the Texas Election Code allows for various groups, who otherwise would be unable to vote in person, to vote absentee.<sup>67</sup> The number of individuals eligible to vote today through absentee voting procedures has expanded since absentee voting began in America.<sup>68</sup> As a result, the number of individuals voting in absentia has also increased dramatically.<sup>69</sup>

Absentee voting continues to increase across the country.<sup>70</sup> However, the specifics on those who may engage in absentee voting vary from state

66. See *Ragan v. Burnett*, 305 S.W.2d 759, 760 (Ky. 1957).

Absentee voting is entirely separate and distinct from the regular voting on election day. The right to vote by absentee ballot is a special privilege granted by the legislature, exercisable only under special and specified conditions to insure the secrecy of the ballot and the fairness of voting by persons in this class. The absentee vote is completely separable from the general vote. If the procedures for conducting this phase of the election are violated to such an extent that a substantial number of votes cannot properly be counted, regardless of the candidate for whom the votes were cast, then the entire absentee vote, as a unit and as in the case of a precinct, should be disregarded. *Id.*

See also *De Flesco v. Mercer County Bd. of Elections*, 129 A.2d 38, 40 (N.J. Super. Ct. App. Div. 1957) (“The opportunity of an absentee to cast his vote . . . by mail has the characteristics of a privilege rather than of a right. Even the recognized right of every voter personally to express his will at the polls is not an absolute right but a conditional right . . .”); *Portmann v. Bd. of Elections of Stark County*, 19 N.E.2d 531, 534 (Ohio Ct. App. 1938) (recognizing the view that absentee voting is privilege rather than an absolute right); John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 509–10 (2003) (recognizing the immense increase in absentee voting without the limiting provisions of the past and the trend towards “voter convenience”).

67. See TEX. ELEC. CODE ANN. §§ 82.002-.004 (Vernon 2003) (stipulating the restrictions for early voting for situations related to health, age, and incarceration); TEX. ELEC. CODE ANN. § 82.003 (Vernon 2003) (stipulating the age restriction for early voting as being “65 or older on election day”).

68. See John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 509–10 (2003) (stating that in the 1936 presidential election, only two percent of the votes cast across the nation were absentee ballots as compared to the 2000 presidential election where fourteen percent of all votes were cast prior to election day). Even more demonstrative of the increased popularity of absentee voting is seen by the state of Oregon’s adoption of absentee mail voting-only system. *Id.*

69. *Id.* at 511 (“Between the 1962 and 2000 general elections, absentee ballots increased from 2.6% of all votes to 24.6%.”).

70. See NCSL ELECTIONS REFORM TASK FORCE, VOTING IN AMERICA: FINAL REPORT OF THE NCSL ELECTIONS REFORM TASK FORCE (2001), <http://www.ncsl.org/programs/press/2001/electref0801.htm> (“Absentee voting and early voting are increasing throughout the country.”). Table 7 of the report shows a graphical representation of the widespread growth of absentee voting by listing every state and whether or not an excuse is needed to cast an absentee vote in that state; whether or not the state statute allows some-

to state.<sup>71</sup> Each state has its own statutes determining who may vote in an absentee election and what they must do in order to cast an absentee ballot.<sup>72</sup> In twenty states, there is no-excuse absentee voting which allows registered voters to apply for an absentee ballot without having to give a statutorily enumerated excuse.<sup>73</sup> In contrast, thirty states require that a voter have an excuse or a reason for voting absentee.<sup>74</sup> Some examples of permissible excuses listed in state statutes include the following: absence from the country during election day; inability to vote on election due to disability, illness, religious beliefs, work schedule or involvement in military duty.<sup>75</sup> Under its current statutory scheme, Texas requires an excuse to vote absentee in elections.<sup>76</sup>

### C. *The Risk of Voter Fraud in Absentee Voting*

According to the National Commission on Federal Election Reform, absentee voting is more susceptible to fraud than in-person voting.<sup>77</sup> This is because there are more opportunities for fraud to occur; because the

one to have “[p]ermanent [a]bsentee [s]tatus”; whether or not absentee applications are accepted year-round; and the corresponding statutory cite. *Id.* “One estimate is that as many as one in four voters cast their vote before election day in 2000.” *Id.*

71. *Id.* at tbl.7 (depicting differences between state policies concerning the requirements to cast an absentee ballot).

72. *Id.* (illustrating, for example, that in some states an excuse is required in order to cast an absentee ballot). In Texas, one may cast an absentee ballot if he or she (1) will not be in the “town, county or the state on election day,” (2) “[h]as a disability or any physical illness,” (3) “is caring for someone with a physical illness or disability,” (4) is “[a]n elderly voter,” or (5) is a person charged, but not convicted, of a crime and is incarcerated. *Id.*

73. *Id.* (stating that when an excuse is not required, a registered voter may “receive an absentee ballot in the mail, vote, and then either mail or hand-deliver the completed ballot to the appropriate office”). Many states, including California, Arizona, and New Mexico do not require one to give an excuse to justify casting an absentee vote. *Id.* at tbl. 7.

74. *Id.* (representing that the majority of states require a voter to have a statutorily enumerated excuse before he or she is allowed to cast an absentee ballot). States including Texas, New York, and Louisiana require absentee voters to have an excuse for casting an absentee ballot. *Id.* at tbl.7.

75. See NCSL ELECTIONS REFORM TASK FORCE, VOTING IN AMERICA: FINAL REPORT OF THE NCSL ELECTIONS REFORM TASK FORCE (2001), <http://www.ncsl.org/programs/press/2001/electref0801.htm> (summarizing the range of excuses states permit to be used to cast an absentee ballot). The enumerated excuses may be representative of preventative measures taken on behalf of state legislatures since one of the disadvantages the Elections Reform Task Force found concerning absentee voting was that “[s]ome believe that expanded use of absentee and early voting methods may increase the risk of voter fraud.” *Id.*

76. *Id.* at tbl.7 (evidencing that Texas also does not allow a voter to obtain permanent absentee status and the application to vote absentee is not accepted year-round).

77. See COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 46 (2005), [http://www1.american.edu/ia/cfer/report/full\\_report.pdf](http://www1.american.edu/ia/cfer/report/full_report.pdf) (“Absentee ballots remain the largest source of potential voter fraud.”).

process is typically decentralized, it is therefore harder to control than other types of voting.<sup>78</sup> As the Century Foundation points out, most of the cases involving absentee voting do not amount to “outright fraud[,]” but rather “questionable handling of absentee ballots.”<sup>79</sup>

Voter fraud becomes more alarming when it involves those who have difficulty fighting back, such as the elderly and disabled.<sup>80</sup> Types of fraud that affect the elderly and the disabled include voter harvesting or “granny farming,” where political groups sign up elderly and disabled voters to vote for their candidates,<sup>81</sup> and ballot box stuffing schemes, where votes of the elderly and disabled are stolen without their knowl-

Absentee balloting is vulnerable to abuse in several ways: Blank ballots mailed to the wrong address or to large residential buildings might get intercepted. Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation. Vote buying schemes are far more difficult to detect when citizens vote by mail. *Id.*

78. *Id.* (“States . . . should reduce the risks of fraud and abuse in absentee voting by prohibiting ‘third party’ organizations, candidates, and political party activists from handling absentee ballots.”). Furthermore, the Commission suggests that “[s]tates also should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted.” *Id.*

79. CENTURY FOUND., *BALANCING ACCESS AND INTEGRITY: THE REPORT OF THE CENTURY FOUNDATION WORKING GROUP ON STATE IMPLEMENTATION OF ELECTION REFORM 68* (2005), <http://www.tcf.org/Publications/ElectionReform/baicomplete.pdf> (“If not amounting to outright fraud in all cases, recent newspaper reports detail numerous incidents of, at the very least, questionable handling of absentee ballots.”). According to the Century Foundation, these reports include the following:

The South Dakota Republican Party hired eight people to register voters and fill out absentee ballot applications. The state GOP has previously been accused of improperly notarizing the absentee ballot applications. Illinois officials began investigating allegations of voter fraud in January. The investigation centers on thirteen ballots cast from a boarding house in East St. Louis. Questionable absentee ballots resulted in a New Jersey judge overturning two elections in Atlantic County. In the city of Passaic, New Jersey, three dozen voters claimed they had been victims of absentee ballot fraud in 2003. One hundred twenty-two Colorado residents are under investigation for allegedly voting twice, once with an absentee ballot and again at a polling place. The incidents occurred despite the state’s requirement that all voters present identification before casting ballots. From 2000 to 2004, prosecutors brought criminal cases in at least fifteen states for absentee ballot fraud. *Id.* (footnotes omitted).

80. See Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 *ELDER L.J.* 453, 462 (2005) (discussing the vulnerability of elderly voters to voter fraud). “The elderly require heightened protection distinct from that accorded to other population groups because they face a high risk of being victimized by voter fraud.” *Id.* at 462.

81. See Posting of Gentry Lange to The No Vote By Mail Project, *Absentee Ballot Fraud Hits Texas, Grannyfarming a Longterm Problem*, <http://novbm.wordpress.com/2008/03/05/absentee-ballot-fraud-hits-texas-grannyfarming-a-longterm-problem/> (Mar. 5, 2008) (expressing concerns of the practice of vote harvesting in Texas).



edge to give a particular candidate more votes.<sup>82</sup> As a result of the fraud suffered by the elderly, twenty-three states have enacted legislation to try and reduce the fraud perpetrated on the elderly.<sup>83</sup>

Traditionally, the elderly vote in much larger numbers than many other demographics.<sup>84</sup> Though elderly persons represent only 17.2% of the total United States voter population, they are still the group with the highest voter turnout, with 62.5% of citizens over the age of sixty-five voting in the 2006 national election.<sup>85</sup> The Census Bureau has limited information about the voting of citizens with disabilities, but one alarming statistic is that 12.4% of the voter population did not vote because of illness or disability.<sup>86</sup> Much of the scholarship concerning voters with disabilities discusses providing access to polls, with one answer to the issue being absentee voting.<sup>87</sup>

82. See Posting of Gentry Lange to The No Vote By Mail Project, What's Wrong with Voting by Mail or Absentee Ballot, <http://novbm.wordpress.com/2008/02/20/whats-wrong-with-voting-by-mail-or-absentee-ballot/> (Feb. 20, 2008) (listing the different types of fraud that have affected absentee voting).

83. See Charles P. Sabatino & Edward Spurgeon, *Symposium, Facilitating Voting as People Age: Implications of Cognitive Impairment*, 38 MCGEORGE L. REV. 843, 856 (2007), available at <http://www.abanet.org/aging/voting/pdfs/introduction.pdf> (examining the “internal” and “external” barriers to voting in nursing homes and “other residential long-term care settings”).

Access strategies currently in place in some states rely wholly on absentee balloting. [Syracuse University law professor Nina Kohn] notes that while some twenty-three states have laws or regulations specifically addressing voting in nursing homes, and sometimes other [long-term care] settings, they vary significantly in the degree to which assistance is provided to residents. *Id.*

84. See KELLY HOLDER, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2006, at 11 (2008), <http://www.census.gov/prod/2006pubs/p20-556.pdf> (showing that the number of elderly voters is greater than the number of voters from other demographic groups).

85. *Id.*

86. *Id.* at 15 (stating that there are people who are unable to vote because of an illness or disability and this problem can be solved by allowing willing volunteers to assist the sick and disabled in voting).

87. See COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 39 (2005), [http://www1.american.edu/ia/cfer/reportfull\\_report.pdf](http://www1.american.edu/ia/cfer/reportfull_report.pdf) (“There are almost 30 million voting-aged Americans with some kind of disability—about 15[%] of the population . . .”).

Congress passed the Voting Accessibility for the Elderly and Handicapped Act in 1984 and the Americans with Disabilities Act of 1990, which required local authorities to make polling places physically accessible to people with disabilities for federal elections. Yet a Government Accountability Office survey of the nation's polling places in 2000 found that 84[%] of polling places were not accessible on Election Day. *Id.* See also NCSL ELECTIONS REFORM TASK FORCE, VOTING IN AMERICA: FINAL REPORT OF THE NCSL ELECTIONS REFORM TASK FORCE (2001), <http://www.ncsl.org/programs/press/2001/electref0801.htm> (“State and local election officials should ensure nondiscriminatory,

### III. THE TEXAS EARLY VOTING SYSTEM

#### A. *Texas's Absentee Voting Laws*

Under the Texas Election Code, absentee voting is known as “early voting” and is conducted by personal appearance either at the polling place or by mail.<sup>88</sup> A voter is eligible for early voting through the mail if that person has a sickness or physical illness that limits him or her from appearing in person to the polling place on election day, without needing personal assistance.<sup>89</sup> This includes those who are about to give birth or expect to give birth.<sup>90</sup> A voter is also eligible for early voting through the mail if that voter is sixty-five years old or older<sup>91</sup> or confined in prison on election day.<sup>92</sup> If the person is eligible for early voting, he or she must apply for an early voting ballot.<sup>93</sup> The application for a ballot must be signed by the person seeking the ballot.<sup>94</sup> If the person is unable to sign the application, then a witness can sign the application for that person.<sup>95</sup> The witness must indicate his or her relationship to the applicant or if there is no relationship then indicate as such.<sup>96</sup>

Once the application has been submitted for early voting and all the statutory requirements are met, then the early voting clerk will issue the applicant an early voting ballot.<sup>97</sup> If the voter is unable to prepare the ballot, he or she may select an authorized person to provide assistance in preparing the ballot to be sent off.<sup>98</sup> This person can be anyone except “the voter’s employer, an agent of the voter’s employer, or an officer or

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equal access to the election system for all voters, including elderly, disabled, military and overseas voters.”).

88. TEX. ELEC. CODE ANN. § 81.001 (Vernon 2003) (defining “absentee voting” as “early voting”).

89. *Id.* § 82.002(a).

90. *Id.* § 82.002(b).

91. *Id.* § 82.003.

92. *Id.* § 82.004(a) (providing people confined in jail the opportunity to vote early).

(a) A qualified voter is eligible for early voting by mail if, at the time the voter’s early voting ballot application is submitted, the voter is confined in jail:

- (1) serving a misdemeanor sentence for a term that ends on or after election day;
- (2) pending trial after denial of bail;
- (3) without bail pending an appeal of a felony conviction; or
- (4) pending trial or appeal on a bailable offense for which release on bail before election day is unlikely. *Id.*

93. TEX. ELEC. CODE ANN. §§ 81.001-.004 (Vernon 2003) (providing the procedure for applying for an early voting ballot).

94. *Id.* §86.005(c) (requiring the party wishing to vote absentee to return the application signed and in the envelope provided).

95. *Id.* § 86.010(a).

96. *Id.* § 84.003(a).

97. *Id.* § 86.001(b).

98. TEX. ELEC. CODE ANN. § 86.010(a) (Vernon 2003).

agent of a labor union to which the voter belongs.”<sup>99</sup> The assistance that may be provided may include “(a) reading the ballot to the voter; (b) directing the voter to read the ballot; (c) marking the voter’s ballot; or (d) directing the voter to mark the ballot.”<sup>100</sup>

Section 84.004 of the Texas Election Code provides that a person who signs the application as a witness for more than one applicant commits a criminal offense.<sup>101</sup> The exception to this provision is if that person is an early voting clerk, deputy early voting clerk or the witness is related to the applicant as a “parent, grandparent, spouse, child or sibling.”<sup>102</sup>

The Texas law was enacted to prevent voter fraud and to stop the practice of individuals from unlawfully assisting homebound elderly and disabled.<sup>103</sup> The Texas Legislature was concerned about the buying and selling of mail ballots to affect elections.<sup>104</sup>

#### IV. ELECTION LAW JURISPRUDENCE

The right to vote is a “fundamental political right” which preserves all other rights recognized in the American form of democratic government.<sup>105</sup> However, the Supreme Court has found that the right to vote and to associate politically is not an absolute right,<sup>106</sup> and voting by absentee is not a fundamental right, but a privilege.<sup>107</sup> The court in *Ray* took note of the fact that absentee voting is only a privilege in its comparison of § 84.004 to other states’ laws and relies on that in its decision.<sup>108</sup>

99. *Id.* § 64.032 (stipulating who may provide assistance to a voter while he or she is voting).

100. *Id.*

101. *Id.* § 84.004.

102. *Id.*

103. *See* House Comm. on Elections, Bill Analysis, Tex. H.B. 54, 78th Leg., R.S. (2003) (equating unlawful assistance with conduct where a person “knowingly marks or attempts to mark another person’s ballot without the consent of that person”).

104. *Id.* (noting the increasing problem of “buying and selling mail ballots to alter election outcomes”).

105. *See* *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666–67 (1966) (referring to “the political franchise of voting” as a “fundamental political right” (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886))). In *Harper*, the Court held that when a state makes the affluence of the voter or payment of any fee an electoral standard, it violates the Equal Protection Clause).

106. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute.”)

107. *McDonald v. Board of Comm’rs of Chicago*, 394 U.S. 807 (1969) (making the distinction between an infringement upon the fundamental right to vote and the “claimed right to receive absentee ballots”).

108. *Ray*, 2008 WL 3457021, at \*5 (finding that the Texas Legislature imposed less of a burden on absentee voters than the Indiana law in *Crawford* did on in-person voters).

Therefore, under the court's holding, a population of voters can be disenfranchised by laws that limit the ability to vote because the law applies only to absentee voting.

#### A. *Earlier Standard Applied to Voting Rights*

In its 1966 decision of *Harper v. Virginia Board of Elections*,<sup>109</sup> the United States Supreme Court first announced its standard for protecting the voting rights of citizens.<sup>110</sup> In *Harper*, the Court held that a Virginia poll tax was unconstitutional and violated the Equal Protection Clause of the Fourteenth Amendment.<sup>111</sup> The Court in this case applied the highest level of scrutiny to determine whether the law was constitutional.<sup>112</sup> Under a strict scrutiny standard, the challenged law must be narrowly tailored to advance a compelling state interest.<sup>113</sup> The Court examined the right to vote in terms of its legitimizing the democratically elected government and demonstrated a concern for its structure.<sup>114</sup> This analysis put emphasis on the individual's right to vote rather than on the ability

The state law at issue in this case restricts the right of a voter to have the witness of choice witness the voter's signature on an early voting *application*. The law has nothing to do with in-person voting on election day. It is well settled that voting by absentee ballot is not a fundamental right requiring strict scrutiny analysis. *Id.*

109. 338 U.S. 663 (1966).

110. *Harper v. Va. State Bd. Of Elections*, 383 U.S. 663, 666 (1966) (“We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”); *see also* Demian A. Ordway, *Disenfranchisement and the Constitution: Finding a Standard that Works*, 82 N.Y.U. L. REV. 1174, 1186 (2007) (explaining the history of the *Harper* standard and comparing it to the *Burdick* standard).

111. *Harper*, 383 U.S. at 665 (finding that although the right to vote in federal elections is derived from Article II of the U.S Constitution, the fundamental right to also vote in state elections is implicit).

112. *Id.* at 667 (“[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” (citing *Reynolds v. Sims*, 377 U.S. 533 (1964))).

113. *See id.* at 670 (“We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”); *see also* Demian A. Ordway, *Disenfranchisement and the Constitution: Finding a Standard that Works*, 82 N.Y.U. L. REV. 1174, 1188 (2007) (“The standard that had emerged, strict scrutiny, required only that the challenged law be narrowly tailored to advance a compelling state interest.”).

114. *Harper*, 383 U.S. at 670 (“[W]ealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened”); *see* Demian A. Ordway, *Disenfranchisement and the Constitution: Finding a Standard that Works*, 82 N.Y.U. L. REV. 1174, 1190 (2007) (describing the Supreme Court's use of a structural argument concerning the right to vote).

for the states to regulate elections.<sup>115</sup> Had the court in *Ray* used the *Harper* standard, it is likely that the court would have come down against § 84.004 of the Texas Election Code because the law was overly broad in going after all those needing applications and did not specifically target those who are engaging in vote harvesting.

Following *Harper*, the Supreme Court began to pull away from its strict scrutiny standard. The Court in *Storer v. Brown* found that “there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos.”<sup>116</sup> In *Anderson v. Celebrezze*, the Court overturned an Ohio statute that required an “independent candidate” to file a statement of candidacy in March for the November election.<sup>117</sup> In *Anderson*, the Court reasoned it should weigh the individual’s interest in the election against the state’s interest in controlling elections.<sup>118</sup> In 1992, the Court in *Burdick v. Takushi* adopted the reasoning in *Anderson* and created a sliding scale test for election law cases.<sup>119</sup> *Burdick* marked a doctrinal shift in the Court’s view on election law because the *Burdick* test emphasizes the severity of the law and its impact on the ability for individuals to vote, rather than emphasize how the law affects an individual’s right to vote.<sup>120</sup> Following this holding, the court in *Ray* made its ruling based on whether or not the law was as

115. See Demian A. Ordway, *Disenfranchisement and the Constitution: Finding a Standard that Works*, 82 N.Y.U. L. REV. 1174, 1188 (2007) (“Ultimately, because a democratic government’s authority derives from the people, and because voting is the only direct means of ensuring that elected officials act in accordance with the people’s wishes, restricting the franchise undermines the people’s ability to check the performance of their elected leaders.”).

116. *Storer v. Brown*, 415 U.S. 724, 794 (1975) (recognizing the need for some state regulation in election laws to maintain order).

117. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

118. *Id.* at 789 (finding that the “magnitude” of an election law would be a factor in determining the level of scrutiny the Court should apply to the test).

119. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.* (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). See Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 332 (2008) (“Whatever *Burdick*’s ambiguities, the case does appear to mark a transition in the Court’s thinking about judicial review of electoral mechanics.”).

120. See Demian A. Ordway, *Disenfranchisement and the Constitution: Finding a Standard that Works*, 82 N.Y.U. L. REV. 1174, 1190–91 (2007) (arguing that the Supreme Court departed from its original focus on structure concerns and shifted to concerns about severity).

severe as other state laws and not on the impact the law had on the voters.<sup>121</sup>

### B. *The Burdick Sliding Scale Test*

The Supreme Court in *Burdick v. Takushi* followed the reasoning in *Storer v. Brown* that there is “no litmus-paper test” for determining the validity of electoral restrictions.<sup>122</sup> *Burdick* created a sliding scale test that looked at the severity of the burden the law was imposing to determine the level of scrutiny.<sup>123</sup> If the burden is severe, the Court will apply strict scrutiny, but if the burden is reasonable, the Court will apply mere rational basis standard.<sup>124</sup> For example, in *Burdick* the Court held that Hawaii’s prohibition on write-in voting on ballots was constitutional.<sup>125</sup> The Court reasoned that the candidate in question had other alternatives for putting his name on the ballot, and the law did not severely affect his associational right to run for office.<sup>126</sup>

The Court’s balancing test balances the precise interests put forward by the State as justifications for the “burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden” the voter’s rights.<sup>127</sup> States not only have the power to regulate elections, but also must do so to ensure that elections are conducted in an

121. See *Ray*, 2008 WL 3457021, at \*5 (finding that § 84.004 was not as severe as Indiana’s voter ID law in the *Crawford* case).

122. *Storer*, 415 U.S. 730 (stating that decisions regarding election laws are made based on the facts and circumstances of the law, in addition to the interests claimed by the State and the individuals challenging the laws). “The rule is not self-executing and is no substitute for the hard judgments that must be made.” *Id.* “What the result of this process will be in any specific case may be very difficult to predict with great assurance.” *Id.*

123. *Burdick*, 504 U.S. at 434 (finding that the test appropriate for election law cases should be based on the severity of the law).

Thus, as we have recognized when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” But when a state election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions. *Id.* (citation omitted).

124. *Id.*

125. *Id.* at 430 (“[P]rohibition, taken as part of the State’s comprehensive election scheme, does not impermissibly burden the right to vote.”).

126. *Id.* (finding that a candidate who wishes to run for office in Hawaii has several options for putting his or her name on the ballot). “The State provides three mechanisms through which a voter’s candidate-of-choice may appear on the primary ballot.” *Id.*

127. *Anderson*, 460 U.S. at 789 (setting forth the balancing test that evaluates the extent and effects of the injuries to the constitutional rights of voters against the interests of the State and the corresponding burden that arises in protecting those State interests).

orderly, fair, and honest manner.<sup>128</sup> Thus, a state's regulatory interest will probably be upheld if the law does not discriminate on its face the right to vote.<sup>129</sup> The test, as it is outlined in the *Burdick* case, is as follows:

A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>130</sup>

The Supreme Court's current standard of review is the *Burdick* sliding scale test.<sup>131</sup> When reviewing election laws, courts will now focus on the severity of the law to determine which standard of review to apply to determine if the law passes constitutional muster.<sup>132</sup> What is missing from the *Burdick* test, however, is a clear test for what laws will be overly severe and which ones are not as burdensome.<sup>133</sup> Courts often have to apply holdings concerning in-person voting to absentee voting laws to determine the law's severity, and because absentee voting is only a privilege, unlike in-person voting, it is less likely that laws limiting absentee voting will be struck down.<sup>134</sup>

128. See *Burdick*, 504 U.S. at 433 (“[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974))).

129. See *Anderson*, 460 U.S. at 782–83, 806 (finding that an Ohio statute requiring an independent candidate for President turn in his nominating petition by a specific deadline imposed by the State to be placed on the ballot was an excessive burden and was therefore unconstitutional).

130. *Burdick*, 504 U.S. at 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

131. *Crawford*, 128 S. Ct. at 1616 (reaffirming the requirements established in the *Anderson* holding that courts use a sliding scale to assess the justifications for a given election law of the State).

132. See *Burdick*, 504 U.S. at 434 (stating that the severity of restrictions will be used to determine which standard of review to apply to the regulations).

133. See *id.* (lacking any indication of what kind of law the court would consider a severe restriction).

134. See, e.g., *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004) (upholding a state's restrictions on eligibility to vote by absentee ballot as constitutional); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D. Fla. 2004) (upholding Florida's state law which required absentee ballots to be returned by 7 p.m. on election day). *But see Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 103–104 (2d Cir. 2008) (holding that a New York law prohibiting absentee ballots for the election of political party county committees was unlawful). While making this holding, the Second Circuit specifically pointed out that it was

C. *The District Court's Application of Election Law Jurisprudence in Ray v. Texas*

The plaintiffs in *Ray v. Texas* were Willie Ray, Jamillah Johnson, Gloria Meeks, Rebecca Minneweather, Parthenia McDonald, Walter Hinojosa, and the Texas Democratic Party.<sup>135</sup> The issue in the case was whether § 84.004 of the Texas Election Code was consistent with the First and Fourteenth Amendments and § 208 of the Voting Rights Act.<sup>136</sup> The district court, in determining whether § 84.004 was constitutional, had to determine what kind of burden the law imposed.<sup>137</sup> Because the court found that there was no Supreme Court case on point, it relied on the Supreme Court's recent holding in *Crawford v. Marion County*.<sup>138</sup>

*Crawford* was a case dealing with an Indiana law that required voters to present a photo ID at polling places before they were allowed to vote.<sup>139</sup> The Supreme Court ruled that, although this restriction made it difficult for poor, elderly and disabled voters who did not already have an ID to vote, the law still did not impose a severe burden as required by the *Burdick* test.<sup>140</sup> The Supreme Court went on to say that even though a small group of people might have great difficulty in obtaining a photo ID,

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not holding “that there is a general constitutional right to obtain absentee ballots.” *Id.* at 112. The court also stated the following:

[N]or do we hold that there is a constitutional right to obtain absentee ballots in all county committee races in New York State. Instead, after applying a deferential standard of review, and after examining the record in this as-applied challenge, we conclude that the arguments proffered by the State are so extraordinarily weak that they cannot justify the burdens imposed by [New York's election law]. *Id.*

135. *Ray*, 2008 WL 3457021, at \*1.

136. *See id.* (discussing whether it is constitutional for a person who signs more than one early voting application as a witness to face criminal charges).

137. *See id.* at \*1-5 (holding that § 84.004 of the Texas Election Code was constitutional and granting summary judgment to the defendants).

138. *Id.* at \*4 (looking to the Supreme Court's holding in the *Crawford* case to determine the burden imposed by § 84.004).

139. *Crawford*, 128 S. Ct. at 1623 (holding Indiana's photo ID law constitutional and finding that the law did not impose a severe burden on voters). “When we consider only the statute's broad application to all Indiana voters we conclude that it ‘imposes only a limited burden on voters' rights.’” *Id.*

140. *Id.* at 1616 (finding that although the law may make it more difficult for some voters to vote the law was still constitutional).

[U]nder the standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), however, we confirmed the general rule that “evenhanded restrictions that protect the integrity and reliability of the electoral process itself” are not invidious and satisfy the standard set forth in *Harper*. *Id.*



the burden was still not severe.<sup>141</sup> The Supreme Court therefore applied a lower standard and found that the State's interest in protecting against fraud outweighed the individual's right to vote without a photo ID.<sup>142</sup>

One of the issues raised in *Crawford* was that the Indiana state legislature and advocates of the photo ID voting law had no evidence that the type of abuses the law was trying to prevent ever occurred in the state of Indiana.<sup>143</sup> The Court also noted that even though the criminal law in Indiana made it a crime to commit such an offence, the law is still not unconstitutional because it is part of the State's interest in creating its election law system.<sup>144</sup>

The court in *Ray v. Texas* found that because the Indiana law at issue in *Crawford* was found not to impose a severe burden on an individual's right to vote, and § 84.004 was less of a burden than the Indiana photo ID law, it was therefore not severe enough to require strict scrutiny.<sup>145</sup>

The *Ray* court found that absentee voting was not a fundamental right and thus would not carry the same weight as the photo ID law, which dealt with in-person voting.<sup>146</sup> The court also noted that the law only affected a very small number of people, and the law only restricted their right to choose who will serve as a witness for their application.<sup>147</sup> There-

141. *See id.* 1630–33 (elaborating that having to drive a long distance to a polling place or not having a vehicle was not sufficient reason to overturn the Indiana statute).

142. *Id.* at 1624 (finding that the law was not severe enough to impose the strict scrutiny standard). “The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting ‘the integrity and reliability of the electoral process.’” *Id.*

143. *See id.* at 1618–19 (explaining that the law was designed to prevent impersonations at polling places and yet none of these impersonations took place).

The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history. Moreover, petitioners argue that provisions of the Indiana Criminal Code punishing such conduct as a felony provide adequate protection against the risk that such conduct will occur in the future. It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's story by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor—though perpetrated using absentee ballots and not in-person fraud—demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election. *Id.* (footnotes omitted).

144. *Crawford*, 128 S. Ct. at 1619–20 (noting that it was a crime to commit voter fraud by voting for someone other than oneself). “The only kind of voter fraud that [the voter ID law] addresses is in-person voter impersonation at polling places.” *Id.*

145. *Ray*, 2008 WL 3457021, at \*5 (finding that the Texas Legislature imposed less of a burden on absentee voters than the Indiana law did on in-person voters).

146. *Id.*

147. *Id.* at \*4-5.

fore, the court ruled that the State's interest in reducing fraud did not outweigh the individual's right to vote absentee.<sup>148</sup>

One of the difficulties raised by the *Burdick* test is how a lower court is to discern what kind of "burden" a law imposes.<sup>149</sup> Lower courts will find that there is not always a Supreme Court decision that tells them the severity of the burden a particular type of law imposes.<sup>150</sup> The court in *Ray v. Texas* had to apply a standard dealing with voter ID laws because there was no clear indication from the Supreme Court how to rule on a law like § 84.004.<sup>151</sup> As a result, the court argued that the Indiana law, in comparison, imposed a stricter burden on the voter than § 84.004.<sup>152</sup> This is supported by the argument that absentee voting is not a right, but a privilege, and as such the burden is not as great.<sup>153</sup> This analysis ignores the important role absentee voting plays for the elderly and disabled voters who rely on witnesses to vote absentee.<sup>154</sup> Even though absentee voting is only a privilege, many individuals still rely on the process and have no alternative.<sup>155</sup> If there is no witness to assist with a ballot application, some of these individuals would be unable to vote. As the plaintiffs argued, § 84.004 would reduce the number of volunteers available to assist elderly and disabled voters, which would lead to some voters being without a witness and, consequently, without the ability to vote.<sup>156</sup> The court also viewed the burden as being less than *Crawford* because § 84.004 did

148. *Id.* at \*1-5 (finding the State's interest in fighting voter fraud to outweigh the individual's right to choose a witness to vote in absentia).

149. See Demian A. Ordway, *Disenfranchisement and the Constitution: Finding a Standard that Works*, 82 N.Y.U. L. REV. 1174, 1192 (2007) (arguing that the word "burden" is vague and the Supreme Court has not articulated what it means by the word).

150. See *id.* ("Furthermore, while the two steps in *Burdick* purport to be analytically distinct, in reality the initial assessment of the burden infects the later assessment of the state's justification. In practice, *Burdick* reduces the determination to this initial decision, only exacerbating the existing uncertainty and unpredictability for litigants.").

151. See *Ray*, 2008 WL 3457021, at \*2-5 (analyzing the types of laws that the Supreme Court have ruled are not a strict burden).

152. *Id.* at \*5 (finding that the burden imposed in the *Crawford* case dealing with the Indiana statute was greater than the one imposed in Texas).

153. *Id.* (finding that absentee voting is not a fundamental right).

154. See Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 ELDER L.J. 453-462 (2005) (discussing the vulnerability of elderly voters to voter fraud).

155. See *Ray*, 2008 WL 3457021, at \*2 (finding that at least one of the plaintiffs relies on the absentee voting process).

156. See *id.* at \*5 (finding that some of the plaintiffs would no longer be able to provide assistance to elderly and disabled voters on their early voting ballot application). Plaintiffs however are determined to continue providing assistance to those requiring and requesting assistance with the early voting application ballot. *Id.*

not create a chilling effect to weigh on the side of the law being more severe.<sup>157</sup>

### 1. The Texas Law Creates a Chilling Effect and Should Be Unconstitutional

A reason that the district court upheld the Texas law is because there is no concrete evidence that the law has had a chilling effect on voting of the elderly and the disabled.<sup>158</sup> In *Smith v. California*,<sup>159</sup> the Supreme Court defined a chilling effect as the “collateral effect of inhibiting freedom of expression, by making the individual the more reluctant to exercise it.”<sup>160</sup> By this definition, a chilling effect could be when an individual is made apprehensive by criminal prosecution to exercise his or her rights of freedom of association and expression.<sup>161</sup> Usually, if there is a chilling effect it will weigh heavily on the side of the government in a balancing test.<sup>162</sup> A court will look to see if the plaintiff or an individual who is similarly situated would be chilled from exerting his or her rights of speech or expression.<sup>163</sup> An example of a chilling effect would be laws that require groups to disclose their membership.<sup>164</sup> These laws can lead to public harassment of groups that society deems unpopular.<sup>165</sup> These

157. *Id.* (finding that there was no chilling effect resulting from the Texas law).

158. *Id.*

159. 361 U.S. 147 (1959).

160. *Smith v. California*, 361 U.S. 147, 151 (1959) (“Our decisions furnish examples of legal devices and doctrines in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it.”).

161. *See Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940) (reversing the conviction of an individual who was originally convicted for violating an Alabama statute that prohibited labor picketing); *see also Near v. Minnesota* 283 U.S. 697, 722–23 (1931) (comparing how in both civil and penal statutes there is an inherent and pervasive threat of abuse of power that threatens an individual’s freedom of speech).

162. *See generally* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964) (holding that an Alabama law concerning libelous publications was constitutionally deficient under the First and Fourteenth Amendments).

163. Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 822 (1969) (“However, in applying this test, chilling is used to emphasize the importance of facilitating the exercise of the freedoms of speech and association and to underline the consequences which the Court’s decision will have for others similarly situated with the plaintiff.”).

164. *Id.* (“Laws, regulations or investigations requiring an organization to register or to disclose its membership lists or forcing an individual to disclose his associational ties and activities can have a chilling effect on association.”).

165. *Id.* at 823 (“The disclosure demanded can result in public harassment of unpopular groups and, in some instances, imposition of the stamp of disloyalty.”).

laws would also have the effect of discouraging membership in these groups.<sup>166</sup>

The plaintiffs in *Ray* argued that the Texas law, by imposing criminal prosecution, creates a chilling effect on the voters, and those assisting them to vote, by making it difficult or impossible for the elderly, disabled, illiterate or homebound voters to receive needed assistance.<sup>167</sup> This criminal penalty can include large fines and may even include jail time.<sup>168</sup> In a situation where a voter has no one to assist him, he requires the help of a civil servant to help him request a ballot.<sup>169</sup> If that individual is unable to help the voter because a law chills the individual's behavior, then the rights of the voter are limited.<sup>170</sup> The court, in its opinion, points out that plaintiff Rebecca Minneweather stopped assisting mail-in votes as a result of § 84.004, and Willie Ray is no longer able to help multiple voters obtain their absentee ballots, even though there are those who asked for her assistance.<sup>171</sup> Furthermore, plaintiff Reuben Robinson was elderly and

166. See *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963) (discussing the effects of a chilling effect on associational rights). The Supreme Court held that the Florida Legislative Investigative Committee did not have enough evidence that a relationship between the NAACP and Communist activities existed. *Id.* at 554–55. The Court stated, “To permit legislative inquiry to proceed on less than an adequate foundation would be to sanction unjustified and unwarranted intrusions into the very heart of the constitutional privilege to be secure in associations in legitimate organizations engaged in the exercise of First and Fourteenth Amendment rights.” *Id.* at 558.

167. See *Ray*, 2008 WL 3457021, at \*2 (arguing that there were laws that made it nearly impossible for people to vote who needed assistance because the people that wanted to help chose not to because of fear of criminal charges).

The plaintiffs contend that § 84.004 has had a chilling effect on Democratic Party activists who have assisted mail-in voters in the past, but have stopped due to their fear of prosecution and/or confusion concerning the statute's scope. In turn, this lack of assistance has resulted in the disenfranchisement of elderly and disabled voters. *Id.*

168. See TEX. ELEC. CODE ANN. § 84.004(e) (Vernon 2003) (stating that an offense related to unlawfully witnessing an application for more than one person is a “Class B misdemeanor”).

169. See *Ray*, 2008 WL 3457021, at \*1 (explaining that if a voter is unable to sign his application, he will require the assistance of a witness who will sign his application). The witness must provide information regarding the relationship to the voter requiring assistance. *Id.*

170. See *id.* (pointing out that if some voters do not get assistance, they will be unable to vote). “The court appreciates the logical conclusion that precluding volunteers from witnessing more than one ballot application could reduce voter participation to some extent.” *Id.*

171. *Id.* at \*2-3 (observing the plaintiffs' argument that due to § 84.004, the plaintiffs were unable to further assist voters who specifically requested assistance by plaintiffs). Although plaintiffs were not prosecuted, plaintiffs no longer provide assistance due to the fear of being prosecuted. *Id.*

needed assistance voting and would not be able to vote without it.<sup>172</sup> The court also noted that those voters who are unable to retain an available legal witness for an application would be unlikely to seek further assistance.<sup>173</sup> The district court, however, found that this chilling effect was not “appreciable” because not enough people had been impacted.<sup>174</sup> So even though the district court has conceded the fact that there is some chilling effect, it will not find the law unconstitutional until a larger number of persons are affected.

#### D. *Section 84.004 Is Being Applied in a Discriminatory Manner*

The Supreme Court, in *United States v. Mississippi*,<sup>175</sup> held that the Fifteenth Amendment protects the right to vote regardless of race against any denial or abridgment by State action.<sup>176</sup> States are required to pass unbiased restrictions, and establish a system that “protect[s] the integrity and reliability of the electoral process itself.”<sup>177</sup> The *Crawford* case and the *Ray* case both assert that any State action to reduce fraud as long as reasonable and non-discriminatory on its face should be upheld.<sup>178</sup> The

172. *Id.* at \*3 (explaining that one of the plaintiffs claimed that he would not be able to vote in elections without assistance, but yet the court noted that Robinson was able to vote in the 2008 Democratic primary without assistance). The record indicates instances where disabled and elderly voters were able to vote despite their claim of needing assistance. *Id.* Furthermore, some plaintiffs are still willing to assist others regardless of the punishment instilled by § 84.004. *Id.*

173. *Id.*

174. *See Ray*, 2008 WL 3457021, at \*5 (finding that the evidence was not sufficient to support the allegation of a chilling effect). The record does not include evidence that a voting group, specifically the elderly and the disabled, is significantly impacted on its ability to vote. *Id.*

175. 380 U.S. 128 (1965).

176. *United States v. Mississippi*, 380 U.S. 128, 138 (1965) (holding that the right to vote is protected by the Fifteenth Amendment). “The Fifteenth Amendment protects the right to vote regardless of race against any denial or abridgement by the United States or by any State.” *Id.* The Attorney General sued the state of Mississippi for engaging in acts that prevented its African-American citizens from voting in elections, arguing that these acts violated the Constitution. *Id.* at 130. The district court dismissed the suit, and the United States directly appealed to the Supreme Court. *Id.* at 131. The Supreme Court, in reversing the lower court’s decision, stated, “The allegations of this complaint were too serious, the right to vote in this country is too precious . . . for this complaint to have been dismissed.” *Id.* at 144.

177. *Anderson*, 460 U.S. at 788 n.9 (discussing the “generally-applicable and even-handed restrictions” the Court has upheld in support of keeping elections unbiased). States also have the right to prevent “party raiding” to prevent wasteful and confusing encumbrances with names of frivolous candidates and other goals not related to First Amendment values. *Id.*

178. *See Crawford*, 128 S. Ct. at 1610 (holding that the State’s interest was sufficient since showing a photo ID was “not a significant increase over the usual voting burdens”);

Texas law, although it may seem non-discriminatory on its face, is being enforced in a very discriminatory fashion.<sup>179</sup>

The Attorney General of Texas has gone after eight people for violation of the Texas law; all of those individuals were affiliated with the Democratic Party, and all but one was African-American or Hispanic.<sup>180</sup> Willie Ray, Jamillah Johnson, Gloria Meeks and, Rebecca Minneweather, all African-American women and Walter Hinojosa, a Hispanic man, all are political activists associated with the Democratic Party who have provided lawful assistance to registered voters in Texas, particularly elderly and disabled voters; they simply wish to continue helping those who need assistance voting in the future.<sup>181</sup> Parthenia McDonald, an African-American woman, also joined the suit as a woman who is severely physically handicapped and requires assistance in voting.<sup>182</sup> At first glance, it seems that the law is being enforced because of partisan politics against minority groups, and this discrimination has been upheld by the district court because it is not clear that on its face this is what the law was in-

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*Ray*, 2008 WL 3457021, at \*7 (accepting the role of §84.004 as furthering the State's goal of eliminating voter fraud).

179. See Ralph Blumenthal, *Texas Democrats File Suit Against Voting Fraud Law*, N.Y. TIMES, Sept. 23, 2006, at A12, available at [http://www.nytimes.com/2006/09/23/us/politics/23suppress.html?\\_r=1&oref=slogin](http://www.nytimes.com/2006/09/23/us/politics/23suppress.html?_r=1&oref=slogin) (asserting that the manner in which the law is being enforced is designed to suppress Democratic votes). Those who filed suit against the state of Texas dispute "both the constitutionality of the law and the way it is being enforced." *Id.* They argue that the statute is being selectively enforced "so that they can 'suppress voting by disfavored groups' that generally support Democrats." *Id.*

180. *Id.* (suggesting the racial bias in the enforcement of the law). "[T]he suit said he had prosecuted only about eight people under the new law, all affiliated with the Democrats and all but one African-American or Hispanic." *Id.* Texas Attorney General Abbott has called voting fraud "an epidemic," and he has highlighted his work against voter fraud. *Id.* The Texas Solicitor General disputes any bias, stating they are conducting investigations of people from both parties. *Id.*

181. See *Ray*, 2008 WL 3457021, at \*2-3 (providing examples of the various people who dedicated their time to assist the elderly and disabled to vote); Original Complaint at 3-5, *Ray v. Texas*, No. 2-06-CV-385, 2006 WL 3225372 (E.D. Tex. Sept. 21, 2006).

182. See Original Complaint at 5, *Ray v. Texas*, No. 2-06-CV-385, 2006 WL 3225372 (E.D. Tex. Sept. 21, 2006).

Plaintiff McDonald is severely physically handicapped and uses a wheel chair. She is a homebound individual who is 78 years old and she requires assistance in voting. Plaintiff McDonald requires the assistance of another person in order to vote, and she depends on trusted friends to assist her in applying for a mail-in ballot and in casting her mail-in ballot. The assistance that Plaintiff McDonald requires in order to cast her ballot includes the actual mailing of her ballot. *Id.*

tended to do.<sup>183</sup> The law was intended to reduce voter fraud when it was proposed by the former Democratic lawmaker Steven D. Wolens.<sup>184</sup>

Even though the statute was proposed by a Democrat, it still has been used by Republican Party members to target Democrat activists seeking to assist voters who have a propensity to vote Democrat.<sup>185</sup> The author of the bill stated that it was also intended to stop the practice of individuals unlawfully assisting elderly, sick, and homebound voters and to prevent campaigns or political parties from buying and selling absentee votes to skew elections.<sup>186</sup> It was never proven that any of the individuals prosecuted had ever been guilty of voter fraud, but instead the law in its application has only served to arrest minority political activists, who are generally themselves elderly, from assisting elderly and disabled voters as they have done so legally for many years prior.<sup>187</sup>

#### E. *The Law Violates § 208 of the Federal Voting Rights Act Which Preempts Texas State Law*

The plaintiffs contended that § 84.004 of the Texas Election Code violated § 208 of the Federal Voting Rights Act of 1965, which preempts the state law.<sup>188</sup> Section 208 of the Voting Rights Act of 1965, as amended, provides the following:

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183. See *Ray*, 2008 WL 3457021, at \*5-6 (“A facial challenge must fail where the statute has a plainly legitimate sweep” (citing *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623 (2008)) (internal quotations omitted)).

184. See Ralph Blumenthal, *Texas Democrats File Suit Against Voting Fraud Law*, N.Y. TIMES, Sept. 23, 2006, at A12, available at [http://www.nytimes.com/2006/09/23/us/politics/23suppress.html?\\_r=1&oref=slogin](http://www.nytimes.com/2006/09/23/us/politics/23suppress.html?_r=1&oref=slogin) (showing that the Democratic lawmaker who sponsored the law, Steven D. Wolens, took issue with the plaintiffs’ argument that the law was to suppress the minority vote and asserted that it was intended to “eliminate vote fraud in absentee balloting”). To further support his argument, Wolens also stated that both he and his wife had been victims of manipulated elections and vote harvesting. *Id.*

185. See generally Office of the Attorney General of Texas, Greg Abbott, *Let’s Stamp Out Voter Fraud*, [http://www.oag.state.tx.us/alerts/alerts\\_view.php?id=128&type=3](http://www.oag.state.tx.us/alerts/alerts_view.php?id=128&type=3) (last visited Apr. 18, 2009). The instances described by Texas Attorney General Greg Abbott are some that would later go on to be the subject in *Ray v. Texas*, but here I am using them to show the types of evidence that proponents of regulation might cite.

186. House Comm. on Elections, Bill Analysis, Tex. H.B. 54, 78th Leg., R.S. (2003) (showing that the law was “intended to prevent . . . voting fraud generally” and to stop the practice of individuals unlawfully assisting the elderly, sick, and home bound voters and “the buying and selling of mail ballots to alter election outcomes”).

187. See Ralph Blumenthal, *Texas Democrats File Suit Against Voting Fraud Law*, N.Y. TIMES, Sept. 23, 2006, at A12, available at [http://www.nytimes.com/2006/09/23/us/politics/23suppress.html?\\_r=1&oref=slogin](http://www.nytimes.com/2006/09/23/us/politics/23suppress.html?_r=1&oref=slogin).

188. *Ray*, 2008 WL 3457021, at \*6 (discussing the language of § 208 of the Voting Rights Act). “The plaintiffs’ position is that § 208 entitles the voter to use his or her witness of choice without restriction.” *Id.*

Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.<sup>189</sup>

The court in *Ray* recognized that § 208 of the Voting Rights Act applies to absentee voting.<sup>190</sup> The court, however, found that the phrase in the statute “a person of the voter's choice”<sup>191</sup> does not allow a person to choose any person to assist him or her without limitation.<sup>192</sup> However, this analysis fails to recognize that in these situations, voters might have no other choice. Thus, although a state may put limitations on those who can assist a voter, it should not remove all of a voter's choices.

## V. VOTER FRAUD IS NOT A WIDE SPREAD ISSUE AND LAWS SHOULD NOT DISENFRANCHISE VOTERS

### A. *The Prevalence of Voter Fraud*

As defined by Project Vote, a nonpartisan, nonprofit organization,<sup>193</sup> in its report *The Politics of Voter Fraud*, voter fraud is the “intentional corruption of the electoral process by the voter.”<sup>194</sup> The question is then,

189. 42 U.S.C. § 1973aa-6 (2000).

190. *Ray*, 2008 WL 3457021, at \*6 (rejecting the State's argument that the law does not apply to early voting); 42 U.S.C. § 1973l(c)(1) (2000) (defining the terms “vote” and “voting” to encompass various acts including “other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly”).

191. 42 U.S.C. § 1973aa-6 (2000) (stipulating the federal election law as it is applied to absentee voting).

192. *Ray*, 2008 WL 3457021, at \*7 (explaining how the court agrees that the states retain some power to determine which persons “may assist with the delivery of absentee ballots”). The Supreme Court has held that the language regarding a voter's right to choose a person for assistance does not “grant the voter the right to make that choice without limitation.” *Id.*

193. Project Vote, Our Mission, <http://www.projectvote.org/our-mission.html> (last visited Mar. 29, 2009) (“Project Vote is the leading technical assistance and direct service provider to the civic participation community.”).

Despite recent upticks in voter participation, a significant portion of the electorate, concentrated in low-income and minority communities, is still alienated from the electoral process. This weakens our democracy by excluding from major public policy decisions the voices of the most vulnerable and least powerful. Project Vote knows that strong democracy needs active participation from all sectors of society, and works hard to engage low-income and minority voters in the civic process. *Id.*

194. LORRAINE C. MINNITE, PROJECT VOTE, *THE POLITICS OF VOTER FRAUD* 3 (2007), [http://projectvote.org/fileadmin/ProjectVote/Publications/Politics\\_of\\_Voter\\_Fraud\\_Final.pdf](http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf) (“This definition covers knowingly and willingly giving false information to establish voter eligibility, and knowingly and willingly voting illegally or participating in a conspiracy to encourage illegal voting by others.”).



how bad is voter fraud and is it something that should be reduced at the expense of disenfranchising voters?

The issue of the prevalence of voter fraud is generally divided along party lines.<sup>195</sup> Republicans usually argue that voter fraud is widespread and a major problem to the electoral process.<sup>196</sup> While on the other side, the Democrats usually argue that voter fraud is not a significant problem.<sup>197</sup> The reason that Republicans emphasize voter fraud is because laws designed to restrict fraud also tend to limit the access of voters who have a higher propensity to vote Democratic than Republican, including the poor, the disabled, and minorities.<sup>198</sup>

There is, however, no statistical or empirical data that suggests that voter fraud is a widespread a problem.<sup>199</sup> In fact, according to Project Vote, voter fraud is “extremely rare” and at the federal level there were only twenty-four people convicted of or that pled guilty to voter fraud between 2002 and 2005.<sup>200</sup> Furthermore, a number of election law experts conducting their own research argue that the claim that voter fraud

195. See Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, available at <http://www.nytimes.com/2007/04/12/washington/12fraud.html?scp=7&sq=voter%20fraud&st=cse> (discussing the Democratic and Republican Party’s views on the severity of voter fraud).

196. See *id.* (explaining the view of the Republican Party on the prevalence of voter fraud). “Although Republican activists have repeatedly said fraud is so widespread that it has corrupted the political process and, possibly, cost the party election victories, about 120 people have been charged and 86 convicted as of last year.” *Id.*

197. See *id.* (explaining the view of the Democratic Party on voter fraud). “Democrats contend[ ] that the problem has been greatly exaggerated to promote voter identification laws that could inhibit the turnout by poor voters.” *Id.*

198. Editorial, *The Myth of Voter Fraud*, N.Y. TIMES, May 13, 2008, available at <http://www.nytimes.com/2008/05/13/opinion/13tue1.html?scp=1&sq=voter%20fraud&st=cse> (proposing the real reason Republicans claim voter fraud is prevalent). “Republicans seem to think that laws of this kind will help them win elections, but burdensome rules like these—and others cropping up around the country—pose a serious threat to democracy and should be stopped.” *Id.*

199. See LORRAINE C. MINNITE, PROJECT VOTE, THE POLITICS OF VOTER FRAUD 3 (2007), [http://projectvote.org/fileadmin/ProjectVote/Publications/Politics\\_of\\_Voter\\_Fraud\\_Final.pdf](http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf) (illustrating the “long history in America of elites using voter fraud allegations to restrict and shape the electorate”).

It is not as if the states have failed to detail the ways voters could corrupt elections. There are hundreds of examples drawn from state election codes and constitutions that illustrate the precision with which the states have criminalized voter and election fraud. If we use the same standards for judging voter fraud crime rates as we do for other crimes, we must conclude that the lack of evidence of arrests, indictments or convictions for any of the practices defined as voter fraud means very little fraud is being committed. *Id.*

200. *Id.* (asserting that “[v]oter fraud is extremely rare” and demonstrating that the evidence that is available is negligible).

is a widespread problem is unjustified.<sup>201</sup> Voter fraud is not the “enormous and growing” problem that President Bush’s senior political advisor Karl Rove suggested that it is,<sup>202</sup> nor is it an “epidemic” that is “infesting the electoral process” according to Texas Attorney General Greg Abbott.<sup>203</sup> In the 2008 presidential election, there were concerns that the group ACORN, a community organization active in political issues, committed acts of voter fraud.<sup>204</sup> While this is true, the amount of fraud that plagued headlines was greatly exaggerated.<sup>205</sup>

The evidence that is usually relied on by proponents of election law regulation is anecdotal.<sup>206</sup> Greg Abbott provides examples of such anecdotal

201. See Ian Urbina, *Panel Said to Alter Finding on Voter Fraud*, N.Y. TIMES, Apr. 11, 2007, at A1, available at <http://www.nytimes.com/2007/04/11/washington/11voters.html?scp=5&sq=voter%20fraud&st=cse> (reporting that the Election Assistance Commission, the “federal panel responsible for conducting election research,” has concluded that the pervasiveness of voter fraud is debatable). See generally LORRAINE C. MINNITE, *AN ANALYSIS OF VOTER FRAUD IN THE UNITED STATES* 6-7 (2003) (conducting an analysis of twelve states and reporting that documented voter fraud was very rare, and that liberal absentee laws have not facilitated voter fraud occurrence).

Voter fraud appears to be very rare in the [twelve] states examined in that report. Legal and news records turned up little evidence of significant fraud in these states or any indication that fraud is more than a minor problem. Interviews with state officials further confirmed this impression. *Id.* at 6

202. See Ian Urbina, *Panel Said to Alter Finding on Voter Fraud*, N.Y. TIMES, Apr. 11, 2007, at A1, available at <http://www.nytimes.com/2007/04/11/washington/11voters.html?scp=5&sq=voter%20fraud&st=cse> (“A number of election law experts, based on their own research, have concluded that the accusations regarding widespread fraud are unjustified.”).

203. Office of the Attorney General of Texas, Greg Abbott, *Let’s Stamp Out Voter Fraud*, [http://www.oag.state.tx.us/alerts/alerts\\_view.php?id=128&type=3](http://www.oag.state.tx.us/alerts/alerts_view.php?id=128&type=3) (last visited Apr. 18, 2009) (asserting the overemphasized belief held by the Texas Attorney General about the prevalence of voter fraud in Texas).

America has helped make those elections happen, and we should be proud. But while we work to ensure the polls in other countries are free of corruption, we shouldn’t forget about our own. In Texas, an epidemic of voter fraud is infesting the electoral process and it’s time we rooted it out. *Id.*

204. See Stephanie Strom, *On Obama, ACORN, and Voter Registration*, N.Y. TIMES, Oct. 11, 2008, at A1 (“‘Rumors of ACORN’s voter fraud have been greatly exaggerated and to a large extent manufactured.’” (quoting Bertha Lewis, ACORN’s interim chief organizer, or chief executive))

205. See *id.* at A13 (stating that “some questionable registrations” were collected but that the workers involved were terminated by ACORN).

206. See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 644–45 (2007) (arguing that anecdotal evidence is both misleading and generalized and that statistical information should be used by lawmakers and judges when dealing with election laws, namely ID laws). “Advocates selectively emphasize the anecdotes that are sure to evoke indignation or other emotions rather than the most typical fraud incidents and omit facts or other stories that cut against their desired policy result.” *Id.* at 644.

dotal evidence in his case for stricter enforcement of voter fraud regulations:

[T]hree people, including a Texarkana City Council member, were indicted in Bowie County for illegally possessing mail-in ballots of several senior voters. In Reeves County, the mother of a March 2004 primary candidate for sheriff and another woman were indicted in January for illegally possessing and transporting election ballots of several voters. In Nueces County, four women allegedly targeted elderly voters during last year's local school board elections, going door-to-door soliciting votes and then taking ballots and carrier envelopes to the post office. A Hardeman County commissioner pleaded guilty to illegally collecting mail-in ballots during the 2004 elections that put him in office. And in Bee County, a Beeville resident pleaded guilty to mailing an absentee ballot in the name of her deceased mother during the November 2004 elections.<sup>207</sup>

Although providing no statistical or empirical evidence, Texas Attorney General Greg Abbott has continued to rely on anecdotal evidence such as the aforementioned in his attempt to get stricter voting laws to limit fraud, namely a voter ID law.<sup>208</sup>

Professor Michael Saks argues that anecdotal evidence is discounted in many fields because such evidence only provides a weak inference about the entire issue.<sup>209</sup> Author Spencer Overton points out that anecdotal evidence is used in other political arguments, which also makes weak inferences.<sup>210</sup> He cites examples like Ronald Reagan's story of a "Welfare Queen" using eighty different names to cheat Social Security out of \$150,000.<sup>211</sup> In truth, Overton points out that it was only two names and

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207. Office of the Attorney General of Texas, Greg Abbott, Let's Stamp Out Voter Fraud, [http://www.oag.state.tx.us/alerts/alerts\\_view.php?id=128&type=3](http://www.oag.state.tx.us/alerts/alerts_view.php?id=128&type=3) (last visited Apr. 18, 2009). These are various examples of voter fraud, similar to the one at issue in *Ray v. Texas*, but here I am quoting them to show incidents that proponents of regulation may use as evidence to strengthen their position.

208. See Editorial, *Texas Legislators Gear Up for Another Voter ID Push*, CALLER-TIMES, Jan. 29, 2008, <http://www.caller.com/news/2008/jan/29/texas-legislators-gear-up-for-another-voter-id-a/>.

209. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 644–45 (2007) (citing Michael J. Saks, *Do You Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1159–61 (1992)).

210. *Id.* (arguing that anecdotal evidence is not sufficient for making an informed decision about voter fraud, and that courts and lawmakers should wait for more empirical data to be collected). "Anecdotes about voter fraud are also misleading and fail to indicate the frequency of the alleged fraud." *Id.* at 645.

211. *Id.* (providing an example of anecdotal evidence). "For years Reagan told the story of an alleged 'welfare queen' who he claimed used eighty different names and a dozen Social Security cards to defraud the government of more than \$150,000." *Id.* at 645.

the amount taken was only \$8,000, but even still, the Reagan Administration continued to use the exaggerated tale.<sup>212</sup> The Federal Rules of Evidence also seem to suggest that the use of some anecdotal evidence is not probative.<sup>213</sup> Federal Rules of Evidence do not allow for past specific incidents of conduct to be admitted to prove a witness's character.<sup>214</sup> Like anecdotes, specific incidents of conduct are not probative to the relevant issues in the case—guilt and innocence.<sup>215</sup> The drafters of the Federal Rules of Evidence did not want to allow evidence that does not tend to show the facts, while also excluding evidence that has a prejudicial effect by skewing the emotions of jurors one way or another.<sup>216</sup> Since the drafters have excluded this evidence from being used in a courtroom, lawmakers should not rely on similar types of evidence to decide the policy of voter fraud regulations. Although politicians do not usually follow the strict rules of evidence, it still goes to strengthen the argument that this type of evidence should not be relied on as heavily as it is.

One reason that so much of the argument concerning voter fraud relies on anecdotal evidence is that there is no high-quality statistical analysis.<sup>217</sup> Project Vote, however, points out that even if the standards used to determine other crime rates (e.g., evidence of arrests, indictments or

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212. *Id.*

213. See FED. R. EVID. 403 (stating that certain evidence may be excluded if its “probative value is substantially outweighed” by various factors, including the possibility of being misleading or confusing); FED. R. EVID. 404 (stating the rule for inadmissibility of character evidence to prove conduct).

214. See FED. R. EVID. 405(b) (stating that character must be an essential element of the claim, charge, or defense before proof may be made of a person's specific instances of conduct).

215. *Id.* (stating that specific instances of conduct are not a method to prove a person's character unless character “is an essential element of a charge, claim, or defense”).

216. See FED. R. EVID. 404(a) advisory committee's note (“Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as ‘circumstantial.’”).

217. See Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 102–03 (2007) (arguing that evidence of voter fraud might be hard to detect even if more studies are conducted).

The argument in this and the next section is that even if we did have these additional studies, this might not lead to any real advance in the debate (unless it were found that there was no fraud, and there was no risk of anyone being deterred from voting; however, even in this event people may say that we need new laws to avoid the perception of fraud, or that laws would be bad because of the risk that some people might be deterred). Therefore, I argue that the amount of voter fraud or deterrence will be salient depending on how bad we think fraud or voter deterrence is. Our underlying value judgments will skew our perception of the problem. *Id.* (footnote omitted).

convictions) are applied to voter fraud, there is still very little evidence of voter fraud.<sup>218</sup>

### B. *The Harm Caused by Voter Fraud Compared with Disenfranchising Voters*

Even though voter fraud is not as large a problem as the policy makers make it out to seem, it still exists and causes harm to the voting public. Proponents for laws regulating voter fraud claim that the integrity of elections needs to be maintained and that voter fraud dilutes the votes of legitimate voters.<sup>219</sup> The Supreme Court, in *Purcell v. Gonzalez*,<sup>220</sup> noted that “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory government” and “[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.”<sup>221</sup> The government then has two interests in reducing

218. LORRAINE C. MINNITE, PROJECT VOTE, THE POLITICS OF VOTER FRAUD 3 (2007), [http://projectvote.org/fileadmin/ProjectVote/Publications/Politics\\_of\\_Voter\\_Fraud\\_Final.pdf](http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf) (showing that a researching committee found very little evidence of voter fraud and did not cite any because it is very difficult to detect). “We need better data, better election administration, transparency and more responsible journalism to improve public understanding of the legitimate ways in which electoral outcomes can be distorted and manipulated.” *Id.* at 4. See generally CENTURY FOUND., BALANCING ACCESS AND INTEGRITY: THE REPORT OF THE CENTURY FOUNDATION WORKING GROUP ON STATE IMPLEMENTATION OF ELECTION REFORM 68–69 (2005), [http://www.tcf.org/Publications/Election\\_Reform/baicomplete.pdf](http://www.tcf.org/Publications/Election_Reform/baicomplete.pdf).

The South Dakota Republican Party hired eight people to register voters and fill out absentee ballot applications. The state GOP has previously been accused of improperly notarizing absentee ballot applications. Illinois officials began investigating allegations of voter fraud in January. The investigation centers on thirteen ballots cast from a boarding house in East St. Louis. Questionable absentee ballots resulted in a New Jersey judge overturning two elections in Atlantic County. In the city of Passaic, New Jersey, three dozen voters claimed they had been victims of absentee ballot fraud in 2003. One hundred twenty-two Colorado residents are under investigation for allegedly voting twice, once with an absentee ballot and again at a polling place. The incidents occurred despite the state’s requirement that all voters present identification before casting ballots. From 2000 to 2004, prosecutors brought criminal cases in at least fifteen states for absentee ballot fraud. *Id.* (citations omitted).

219. See Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 116–17 (2007) (arguing that there are two claims made by proponents of election regulation: first is a broad claim about securing the integrity of elections, and second, that voter fraud dilutes votes of legitimate voters).

220. 549 U.S. 1 (2006).

221. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (arguing that if voters feel like their vote is outweighed by fraudulent votes then their vote will not matter and they will have no incentive to vote). The plaintiffs in this case argued that they had a “fundamental political right” to vote. *Id.* The State countered that it had a “compelling interest in preventing voter fraud.” *Id.* In the end, the Supreme Court vacated the appellate court’s injunction

voter fraud.<sup>222</sup> Those interests are the interest in upholding the rule of law and to avoid massive fraud.<sup>223</sup> The rule of law interest is relatively straight forward; states have an interest in making sure that their laws are followed and that their citizens are not engaging in illegal activity.<sup>224</sup> What is more complicated is deterring massive fraud, whereby an election would be stolen or rigged and the results illegitimate.<sup>225</sup>

The case law has suggested that even one fraudulent vote will dilute the weight of a citizen's vote and is just as bad as completely disenfranchising the voter.<sup>226</sup> However, as Flanders argues, this may not actually be true.<sup>227</sup> Flanders points at the case law surrounding the Supreme Court's decision in *Bush v. Gore*<sup>228</sup> and the scholarship which it has spawned.<sup>229</sup>

to continue its election regulations due to factual issues that could not be resolved before an upcoming election. *Id.* at 5.

222. See Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 120 (2007) (discussing two interests which are the "rule of law" worry" and "massive fraud" worry).

223. *Id.* (laying out the two interests the State has in ensuring that voter fraud and vote dilution do not affect the outcome of elections).

224. *Id.* (discussing the government's interest in maintaining the rule of law in elections).

The first worry the Court might be addressing is the state's interest in upholding and sustaining rule-of-law values. In other words, the state has an interest in the integrity of the election system it has set up, to the extent that it does not want people to violate the law, and thus violate the "integrity" of the election process. *Id.*

225. *Id.* at 122 (discussing the huge problem that could arise with massive fraud in the voting system).

So here is one case where the perception that there has been massive fraud is bad, because massive fraud is bad—it suggests that the election might have gone to the wrong candidate. What could be a better example of an election losing legitimacy than an election that did not even do its job of electing the candidate with the most legitimate votes? The state has a real interest in preventing this kind of lack of confidence in the election system, because massive fraud gives people a reason to lose confidence that their votes have really done any work in electing a candidate. *Id.* at 123.

226. See *Reynolds v. Sims*, 377 U.S. 553, 555 (1964) (explaining how the right to vote may be denied by a debasement of the weight of one citizen's vote). "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Id.*; see also *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (concluding that the ultimate result of vote fraud will be to disenfranchise voters).

227. See Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 132–33 (2007) (stating that one fraudulent vote may not have the disastrous effects of voting dilution that case law suggests). "[P]erfection is not required, as long as the standards do not fall radically short of acceptable." *Id.*

228. 531 U.S. 98 (2000).

229. See Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 132–33 (2007) (showing that election administration and voter fraud took a very controversial center stage in the high profile case of *Bush v. Gore*, where the results of

After the Court's decision, there were court cases dealing with voting technology and the fairness of the technology between the different polling places.<sup>230</sup> Voting technology is not perfect and there will inevitably be errors, so what Flanders argues is that there seems to be "a tolerable amount of error in tabulating votes."<sup>231</sup> Therefore, he continues, there exists a dilution of the weight of an individual's vote through simple error.<sup>232</sup> Flanders further cites other examples of dilution of the weight of a voter's vote such as in a two party system, where a vote for a third party will not result in the voter's interest being heard.<sup>233</sup> This is because it is almost impossible for that candidate to win; also, Flanders notes that in any election, the weight of a vote cannot be tailored to the political beliefs of a particular individual, meaning that no candidate will ever satisfy the beliefs of all their constituents.<sup>234</sup> So bearing this in mind, Flanders argues that the interest that a state has in deterring voter fraud is not to prevent every incident of voter fraud, because it will dilute voter confidence, but preventing massive voter fraud from determining elections.<sup>235</sup>

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the 2000 presidential election may have been negatively affected by voter fraud and possible vote dilution).

230. *Id.* at 133 (arguing that voting technology has also been the cause of voter dilution in recent elections).

Several lawsuits were brought against states that had disparities in voter technology—some counties had advanced technology that allowed the votes to be counted even if the marks were not clear or that informed voters if they had not voted in a particular race, while other counties did not. These cases pressed the question, did the result in *Bush* not require that each county have similar standards? *Id.* (footnote omitted).

231. *Id.* (analyzing the fact that perfection in the election process is impossible and that minor errors are normal and inevitable).

232. *Id.* (discussing the dilution caused by voting technology).

Again, it is because we understand that perfection is not a reasonable standard to expect the state to aspire to. Also . . . it may be the case that some votes that were not clearly punched will end up getting counted even though the person did not follow the instructions on how to punch the ballot—so in a way, that vote will be illegitimately counted, and it will dilute the votes of those who did cleanly punch their ballot. Yet, here as well, I imagine our intuition is that this is acceptable. We do not demand perfection. Sometimes there are just mistakes, and mistakes are part of life. Not all errors in administration give rise to a cause of action. *Id.*

233. *Id.* at 133–35 (giving additional examples of ways how an individual's vote can be denied the same weight as the votes of other individuals and how this affects the legitimacy of elections). "The harm is not that one's vote is being given less weight in support of a candidate; one's vote is being given less weight in support of the election being legitimate." *Id.*

234. Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 133–35 (2007) (stressing how important the weight of individual votes hold on the legitimacy of the electoral process).

235. *Id.* (discussing that instead of focusing on voter fraud in general, the goal of the State should be to focus exclusively on massive fraud since minor voter fraud and voter dilution is an inevitable occurrence).

This is because where voter fraud is outcome determinative, the legitimacy of the election is called into question, but where the fraud does not determine the outcome of the election, the vote is still part of a legitimate election and vote dilution does not harm the interest of the voter.<sup>236</sup> Statistics and other data about fraud should also be used to determine if voter fraud in the aggregate will affect turnout.<sup>237</sup>

The Texas law does not prevent massive voter fraud, and therefore the State's interest is limited. The prevalence of voter fraud, as has been discussed, is not widespread and therefore will not likely be outcome determinative.<sup>238</sup> Furthermore, the law only limits the witnesses from signing applications for voters who are unable to do so themselves, and thus the amount of people the law affects is not significant to determine an election.<sup>239</sup> The damage the law creates by disenfranchising elderly and minority voters is far more significant than the effect fraud has on the electoral system.

The disenfranchisement of even one voter is something that laws should avoid.<sup>240</sup> This is because the right to vote is symbolic and expressive. It is the right to participate in the process, *not* the right to determine

236. See *id.* (rationalizing the difference between voter fraud that does not affect the election and outcome determinative fraud).

When there is a massive amount of errors, it calls into question whether the right person has won the election. Suppose that there is so much error that no one can be certain that the election result is a product of the votes cast or of an error in the machinery. Then this rises above the level of a mere mistake that we can live with and suggests that there should be another election. Relatedly, the mistake may reach the level of a serious state interest, even though it is not massive, but because the election is close and the mistake is potentially outcome determinative. *Id.*

237. See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 673 (2007) (explaining the need for more statistical data in order to determine the future of election laws). “While the simple task of bringing a photo-identification card to the polls may not appear to be an unreasonable obstacle for an individual voter, judges should examine whether this requirement reduces voter turnout in the aggregate.” *Id.* “Photo-identification requirements that exclude legitimate voters interfere with the ability of citizens to identify with one another as a political community, create alliances with others of different backgrounds, and use the vote instrumentally to enact political change.” *Id.*

238. See Jeremy Landers, *Lawmakers to Assess Voter Fraud in the State*, KIII TV3, Jan. 25, 2008, <http://www.kiiitv.com/news/txstatenews/14401362.html> (implying that voting fraud in the state of Texas is not as widespread as asserted by the legislature). “The Texas Attorney General’s Office says that of 108 potential voter fraud cases referred to it since August 2002, 22 were prosecuted.” *Id.* Additional evidence of this is the failure of a voter identification bill during the 2007 legislative session. *Id.*

239. See TEX. ELEC. CODE ANN. § 84.004 (Vernon 2003).

240. See Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 146 (2007) (arguing that denying even one individual the right to vote and to practice his or her right of expression could cause serious harm for the State).



the outcome; voting is only outcome determinative in the aggregate.<sup>241</sup> Overton argues that, for an election, legitimacy consists of having as many people vote as possible,<sup>242</sup> but Flanders points out that it is unreasonable to expect lawmakers to pass a law that would allow for the greatest amount of participation because this would lead to the absence of most election laws.<sup>243</sup> However, lawmakers should also avoid laws that try to prevent all fraud, because these laws would be too strict.<sup>244</sup>

The Texas law disenfranchises voters who are unable to sign their own absentee ballot applications, namely elderly and disabled voters who do not have any family members who are able to witness for them.<sup>245</sup> There is no evidence that before this law was passed that the statutory scheme that had been in effect was not sufficient to deal with voter fraud.<sup>246</sup> The scheme had provided a ban on illegal voting,<sup>247</sup> on providing unlawful

241. *See id.* at 147–48 (asserting that the right to vote is not the right to determine the outcome of an election, but the right to express oneself). “[T]he right to vote has a value even if one’s individual vote is not outcome determinative. From this perspective, one can see voting as perhaps the most significant symbol of citizenship.” *Id.*

242. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 657–58 (2007) (asserting that legitimacy in government comes from having as many people vote as possible). “Even in the absence of a photo-identification requirement, the United States already has one of the lowest voter-participation rates among the world’s democracies.” *Id.* at 658. “In light of the importance of widespread participation, policy-makers should examine the data on the number of legitimate voters a photo-identification requirement would exclude.” *Id.*

243. Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 142 (2007) (claiming that laws and regulations are necessary in the election process and thus it is necessary to eliminate some people from the process to ensure legitimacy).

244. *See id.* (expressing concern that if too many rules are applied to the election process, voters will be negatively affected).

245. *See generally Ray*, 2008 WL 3457021 (holding § 84.004 constitutional). The court held that § 84.004 did not specifically target a group of voters, but rather focused on eliminating voter fraud. *Id.* Furthermore, restrictions may apply to voters when they choose to request aid. *Id.*

246. *See id.* at \*4 (finding that the existing framework before the revisions were passed was sufficient to fight voter fraud). “Texas law has long provided for criminal and other penalties to combat voter fraud.” *Id.*

247. TEX. ELEC. CODE ANN. § 64.012(a) (Vernon 2003) (providing the various ways a person may commit an offense of illegal voting). Some ways include the following: (1) voting when a person knows he or she is ineligible to vote, (2) attempting to vote multiple times in an election, (3) impersonating another in order to vote, and (4) marking another’s ballot without consent. *Id.*

assistance,<sup>248</sup> and on providing false information on an application for an absentee ballot.<sup>249</sup>

The district court in *Ray* found that the claim that § 84.004 actually fought fraud was “somewhat dubious” because it only limited the number of signatures a witness could sign on *applications* for an early voting ballot, but does not limit the number of signatures on *actual ballots* that a person may witness.<sup>250</sup> The court also found that this inconstancy makes it less likely that the law was passed to fight fraud.<sup>251</sup>

## VI. THE 2008 ELECTION AND BEYOND

### A. Races Decided by Absentee Votes

During the elections of 2008, many contests came down to divisions of only several hundred votes between candidates.<sup>252</sup> Absentee voting had a major impact in the outcome of the 2008 elections because many of the races were decided by results of absentee ballots that were not counted on election night.<sup>253</sup> In Minnesota, a mandatory recount in the Senate

248. *Id.* § 64.036(a)(1)-(4) (providing the various ways a person may commit an offense of unlawful assistance). Some ways include the following: (1) providing assistance when a voter is not eligible for assistance, (2) preparing the voter’s ballot in a way other than how they were directed while they were assisting that voter, (3) suggesting how they should vote while assisting them, and (4) providing assistance when the voter has not requested assistance. *Id.*

249. *Id.* § 84.004 (prohibiting the providing of false information on a ballot or application).

250. *Ray*, 2008 WL 3457021, at \*5 n.2 (expressing concern about the effectiveness of the law at reducing fraud).

251. *Id.* (speculating the legislature’s true intent in passing § 84.004).

252. See, e.g., Sarah Wheaton, *A New Day, a New Day in Court in Minnesota*, N.Y. TIMES, Nov. 8, 2008, available at <http://thecaucus.blogs.nytimes.com/2008/11/08/a-new-day-a-new-day-in-court-in-minnesota/> (“Senator Norm Coleman and his Democratic challenger, Al Franken, are locked in an inconclusive contest that appears likely to come down to a few hundred votes.”); Brandon Formby, *Texas House Hopefuls Separated by Handful of Votes in Irving*, DALLAS MORNING NEWS, Nov. 7, 2008, available at 2008 WLNR 21188398 (discussing the results of a 2008 Texas House District race in Irving where the election night results showed a difference of twenty-nine votes between the two candidates); David M. Herszenhorn, *Senate Races Hang in the Balance*, N.Y. TIMES, Nov. 6, 2008, available at <http://www.nytimes.com/2008/11/06/us/politics/06senate.html?hp> (discussing the results of several races in the 2008 Senate election).

253. See Sarah Wheaton, *A New Day, a New Day in Court in Minnesota*, N.Y. TIMES, Nov. 8, 2008, available at <http://thecaucus.blogs.nytimes.com/2008/11/08/a-new-day-a-new-day-in-court-in-minnesota/> (stating that many absentee ballots had been found and would be counted); see also Brandon Formby, *Texas House Hopefuls Separated by Handful of Votes in Irving*, DALLAS MORNING NEWS, Nov. 7, 2008, available at 2008 WLNR 21188398 (stating that over 280 absentee and provisional ballots remain to be counted in a 2008 Texas House race where the winner’s lead is only twenty-nine votes); David M. Herszenhorn, *Senate Races Hang in the Balance*, N.Y. TIMES, Nov. 6, 2008, available at <http://>

race between Al Franken and Norm Coleman raised concerns of voter fraud in thirty-two absentee ballots that were found and that were not counted.<sup>254</sup> In Alaska, the Senate race was also close and was decided by the absentee ballots that were later found and counted.<sup>255</sup> Furthermore, in the Texas State House of Representatives race in the 105th district, the candidates were separated by only twenty-nine votes when election night ended.<sup>256</sup> The election was decided by a handful of provisional and absentee ballots that remained to be counted after election night.<sup>257</sup> The Texas House of Representatives race was watched closely by many in the state because it decided the balance of power in the state legislature.<sup>258</sup> In all of these races, the issue of voter fraud was a major concern, especially because it could have been outcome determinative.<sup>259</sup> In these

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[www.nytimes.com/2008/11/06/us/politics/06senate.html?hp](http://www.nytimes.com/2008/11/06/us/politics/06senate.html?hp) (reporting on how absentee ballots affected the Alaskan 2008 Senate race).

254. See Sarah Wheaton, *A New Day, a New Day in Court in Minnesota*, N.Y. TIMES, Nov. 8, 2008, available at <http://thecaucus.blogs.nytimes.com/2008/11/08/a-new-day-a-new-day-in-court-in-minnesota/>.

255. David M. Herszenhorn, *Senate Races Hang in the Balance*, N.Y. TIMES, Nov. 6, 2008, available at <http://www.nytimes.com/2008/11/06/us/politics/06senate.html?hp> (reporting that the close 2008 Alaskan Senate race would not be decided until days after the election because thousands of absentee ballots needed to be counted).

With 99[%] of Alaska's precincts reporting, Mr. Stevens was ahead of Mark Begich, the mayor of Anchorage, by 48.2[%] to 46.7[%], with the remaining votes going to fringe candidates. Since thousands of absentee ballots remained to be counted, the final outcome may not be known for days. *Id.*

256. See Jason Whitely, *Harper-Brown Wins Re-Election to District 105*, TXCN.COM, Nov. 10, 2008, [http://www.txcn.com/sharedcontent/dws/news/localnews/tv/stories/wfaa081110\\_mo\\_19e603380.html](http://www.txcn.com/sharedcontent/dws/news/localnews/tv/stories/wfaa081110_mo_19e603380.html); Brandon Formby, *Texas House Hopefuls Separated by Handful of Votes in Irving*, DALLAS MORNING NEWS, Nov. 7, 2008, available at 2008 WLNR 21188398 ("According to results . . . , Ms. Harper-Brown received 19,830 votes compared with Mr. Romano's 19,801.").

257. See *id.* ("Originally, Harper-Brown had a 34 vote lead before the Dallas County Ballot Board chose 61 of 231 provisional ballots, ones with discrepancies, to add to the final vote count."); Brandon Formby, *Texas House Hopefuls Separated by Handful of Votes in Irving*, DALLAS MORNING NEWS, Nov. 7, 2008, available at 2008 WLNR 21188398 ("Republican incumbent Linda Harper-Brown leads the House District 105 race by 29 votes . . . . But there are still more than 280 provisional and absentee ballots to count, meaning Democratic challenger Bob Romano could pull out a victory.").

258. Jason Whitely, *Harper-Brown Wins Re-Election to District 105*, TXCN.COM, Nov. 10, 2008, [http://www.txcn.com/sharedcontent/dws/news/localnews/tv/stories/wfaa081110\\_mo\\_19e603380.html](http://www.txcn.com/sharedcontent/dws/news/localnews/tv/stories/wfaa081110_mo_19e603380.html) ("Political watchers across Texas focused on the outcome of the race because it could have changed the balance of power in the Texas House of Representatives."); Brandon Formby, *Texas House Hopefuls Separated by Handful of Votes in Irving*, DALLAS MORNING NEWS, Nov. 7, 2008, available at 2008 WLNR 21188398 ("The eyes of Texas are on Irving, where the balance of power in the state House could hinge on a race that probably won't be decided for days, if not weeks.").

259. See Sarah Wheaton, *A New Day, a New Day in Court in Minnesota*, N.Y. TIMES, Nov. 8, 2008, available at <http://thecaucus.blogs.nytimes.com/2008/11/08/a-new-day-a-new-day-in-court-in-minnesota/>.

cases, close scrutiny by state justice departments, rather than stricter voter laws, helped resolve allegations of voter fraud.<sup>260</sup>

### B. *The Future of Texas Election Law*

Since 2006, the Texas Attorney General has only prosecuted twenty-six cases of voter fraud, all of which have been against Democrats, mostly Blacks and Hispanics.<sup>261</sup> Various examples are found in the Texas Attorney General's news releases: John Akers, 58, was charged with six counts of election fraud for unlawfully turning in mail-in ballots<sup>262</sup>; Melva Kay Ponce, a 53 year-old woman, was charged with illegal voting because she posed as her mother during early voting in the November 2004 election<sup>263</sup>; and four other individuals were charged with illegally handling mail-in ballots under chapter 86 of the Texas Election Code in the May 2005 Robstown ISD elections.<sup>264</sup> In eighteen of the twenty-six cases, individuals were lawful voters who were prosecuted for a procedural violation of mishandling the ballots, violating the amended acts of the Texas

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day-in-court-in-minnesota/ (declaring that in extremely close elections, uncounted ballots turn up all the time).

260. See *id.* (detailing that there would be a statewide canvass in order to check the ballots cast); Wayne Slater, *Texas AG Fails to Unravel Large-Scale Voter-Fraud Schemes in His Two-Year Campaign*, DALLAS MORNING NEWS, May 18, 2008, available at [http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-votefraud\\_18tex.ART.State.Edition2.46e18c2.html](http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-votefraud_18tex.ART.State.Edition2.46e18c2.html) (“When an attorney general makes certain cases a priority, he can dispatch investigators, assign teams of state lawyers and direct millions of dollars from federal grants and the agency budget. Such assistance helps bolster action in counties, especially where local prosecutors lack the resources.”).

261. Wayne Slater, *Texas AG Fails to Unravel Large-Scale Voter-Fraud Schemes in His Two-Year Campaign*, DALLAS MORNING NEWS, May 18, 2008, available at [http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-votefraud\\_18tex.ART.State.Edition2.46e18c2.html](http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-votefraud_18tex.ART.State.Edition2.46e18c2.html) (describing allegations by Texas Democrats that the Texas Attorney General is engaged in a partisan campaign to discourage minority voters). Yet, despite the effort, the Texas Attorney General's Office has yet to uncover any voter fraud schemes large enough to potentially swing an election. *Id.*

262. Press Release, Office of the Attorney Gen. of Tex., Gregg Abbott, Attorney General Abbott Obtains Voter Fraud Indictments in Two Counties (June 3, 2005), <http://www.oag.state.tx.us/oagnews/release.php?id=1013>.

263. *Id.*

264. *Id.*

The indictments allege that during the school district election all four defendants personally handled or mailed ballots for persons unrelated to them. If convicted, the four could face up to a \$2000 fine and up to 180 days in jail on each count. The charges are Class B misdemeanors. The four allegedly were targeting elderly voters, going door-to-door soliciting votes and then taking ballots and carrier envelopes to the post office for mailing. *Id.*

Election Code.<sup>265</sup> The legislative history of the 2003 amendment suggests the law was designed to increase the penalties and to reduce the prevalence of abusive practices against the elderly and homebound.<sup>266</sup> But the Texas Attorney General, Greg Abbott, is using the highly technical procedures implemented in the 2003 amendment to pick and choose whom to prosecute for seemingly political purposes.<sup>267</sup>

Now the Texas Attorney General is pushing lawmakers to pass a bill that would require individuals to present a photo ID at their polling place.<sup>268</sup> Presumably, this type of law is designed to eliminate voter im-

265. Wayne Slater, *Texas AG Fails to Unravel Large-Scale Voter-Fraud Schemes in His Two-Year Campaign*, DALLAS MORNING NEWS, May 18, 2008, available at [http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-votefraud\\_18tex.ART.State.Edition2.46e18c2.html](http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-votefraud_18tex.ART.State.Edition2.46e18c2.html).

The cases his office pursued largely have involved mail-in ballots. In 18 of the 26 cases, the voters were eligible, votes were properly cast and no vote was changed – but the people who collected the ballots for mailing were prosecuted. *Id.*

266. See generally House Comm. on Elections, Bill Analysis, Tex. H.B. 54, 78th Leg., R.S. (2003).

267. See Wayne Slater, *Texas AG Fails to Unravel Large-Scale Voter-Fraud Schemes in His Two-Year Campaign*, DALLAS MORNING NEWS, May 18, 2008, available at [http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-votefraud\\_18tex.ART.State.Edition2.46e18c2.html](http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-votefraud_18tex.ART.State.Edition2.46e18c2.html) (noting the small number of voter fraud cases prosecuted and the overwhelmingly partisan nature of the prosecutions); see also Press Release, Office of the Attorney Gen. of Tex., Gregg Abbott, Attorney General Abbott Gets Indictments Against Reeves County Women for Voter Fraud (Jan. 13, 2006), <http://www.oag.state.tx.us/oagNews/release.php?print=1&id=1396> (reporting that Anita Baeza and Trinidad Villalobos were indicted for possessing and transporting mail-in ballots); Press Release, Office of the Attorney Gen. of Tex., Greg Abbott, Nueces County Woman Sentenced for Voter Fraud (May 5, 2006), <http://www.oag.state.tx.us/oagNews/release.php?id=1557> (reporting that Josefina Marinas Suarez, 44, was indicted for violations of Chapter 86 of the Texas Election Code); Press Release, Office of the Attorney Gen. of Tex., Greg Abbott, Attorney General Abbott Obtains Felony Indictment Against Corpus Christi Woman for Voter Fraud (June 15, 2006), [http://www.oag.state.tx.us/criminal/an\\_release.php?id=1609](http://www.oag.state.tx.us/criminal/an_release.php?id=1609) (reporting that Maria Dora Flores, 65, was indicted for violations of Chapter 64 of the Texas Election Code); Press Release, Office of the Attorney Gen. of Tex., Greg Abbott, Four Indicted by Brooks County Grand Jury for Voter Fraud Committed During 2006 Primary (Jan. 31, 2008), <http://www.oag.state.tx.us/oagNews/release.php?id=2362> (reporting that Mario Soriano, Lydia Molina, Elva Lazo, and Maria Trigo were charged with possessing and handling ballots for other persons and were each charged with a Class B misdemeanor).

268. See Editorial, *Texas Legislators Gear Up for Another Voter ID Push*, CALLER-TIMES, Jan. 29, 2008, <http://www.caller.com/news/2008/jan/29/texas-legislators-gear-up-for-another-voter-id-a/>; see also Wayne Slater, *AG Abbott Bungling Raises Suspicion in Voter ID Debate*, DALLAS MORNING NEWS, Mar. 7, 2009, available at <http://trailblazersblog.dallasnews.com/archives/2009/03/ag-abbott-bungling-raises-susp.html> (comparing Republicans' assertions that the law will discourage fraud with Democrats' allegations that the law is intended to discourage poor and minority voters).

personations just as in the recent Supreme Court case of *Crawford*.<sup>269</sup> According to a recent article, an estimated 150,000 to 400,000 individuals have no photo ID, and these voters tend to be “elderly, female and poor.”<sup>270</sup> Under the current Supreme Court holding in *Crawford*, this type of law will pass constitutional muster.<sup>271</sup> Therefore, it is up to Texas’s lawmakers to recognize that such laws will be used for political purposes, and will not be used to stop voter fraud. The law will only serve to disenfranchise more voters.

## VII. PROPOSALS

In order to protect the franchise of the elderly and disabled voters in Texas, the state legislature should eliminate or modify the election code to free the hands of civil servants to witness applications for absentee ballots. The legislature should evaluate how it preserves the problem of voter fraud and if it still finds that voter fraud exists, it should modify the law to include as many voters as it possibly can.

### A. *The Texas Legislature Should Rely on Good Information in the Formation of Its Election Laws*

Instead of relying on anecdotal evidence, which can be unreliable in determining whether election fraud exists in absentee voting, Texas should look at normative<sup>272</sup> or statistical information<sup>273</sup> when it creates election laws. The Texas Legislature can look at both the available statis-

269. See *Crawford*, 128 S. Ct. at 1618–19 (discussing how the Indiana statute was meant to address “in-person voter impersonation at polling places”).

270. Editorial: *Still Looking for Massive Vote Fraud*, DALLAS MORNING NEWS, May 23, 2008, available at [http://www.dallasnews.com/sharedcontent/dws/dn/opinion/editorials/stories/DN-voter\\_23edi.ART.State.Edition1](http://www.dallasnews.com/sharedcontent/dws/dn/opinion/editorials/stories/DN-voter_23edi.ART.State.Edition1) (noting that these voters “tend to be Democrats, leaving Republicans to answer to a charge of partisanship”).

271. See generally *Crawford*, 128 S. Ct. at 1627 (holding that Indiana’s voter ID law was not “a significant increase over the usual burdens of voting”).

272. See Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 95 (2007) (arguing that in the absence of clear statistical data, courts should rely on a normative argument).

Whatever the motivation, the result has been less attention paid to the normative aspect of voter fraud (call this the “normative vacuum” in election law scholarship). Why exactly is voter fraud bad? Even if voter fraud happened only infrequently, would it still be a serious harm and could this justify attempts to prevent voter fraud? A similar set of questions could be asked from the other side of the voter fraud equation, the side having to do with new restrictions on people’s ability to vote. Those who object to additional restrictions (photo identification, etc.) worry that the restrictions will deter many voters from going to the polls. *Id.*

273. See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 673 (2007) (arguing for the use of more statistical data by judges and policy makers to determine the future of election laws).

tical data on voter fraud, albeit limited, or simply look at the normative arguments, such as balancing the franchise of voters against the need to decrease voter fraud.<sup>274</sup> The statistical data has shown that voter fraud is not widespread; therefore, regulation can be limited in combating the issue proportionally to the severity of the problem.<sup>275</sup> Furthermore, the normative argument would be that it is better to allow some fraud, as long as it is not outcome determinative, rather than risk disenfranchisement of voters.<sup>276</sup> This is because the right to vote is a symbolic right of expression but voter fraud is only an issue if it changes the outcome of an election.<sup>277</sup>

### B. *Texas Should Adopt a Permanent Absentee Voter Registration to Decrease Fraud*

Given that some fraud exists, if a state legislature wants to pass a law to combat it, the law should be drafted in such a way that does not disenfranchise voters. Specific to combating absentee voter fraud, one alternative would be to provide permanent voter registration for absentee voting.<sup>278</sup> A permanent voter registration allows elderly and disabled voters to register for their absentee ballot once and then every election

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274. See *id.* at 672 (emphasizing how statistical evidence can help to determine various relevant factors, such as racially polarized voting and education, which can help to determine the validity of a photo-identification requirement). “These various factors will differ from state to state, and thus the legal status of voter-identification laws may vary.” *Id.*

275. See Editorial, *The Myth of Voter Fraud*, N.Y. TIMES, May 13, 2008, available at <http://www.nytimes.com/2008/05/13/opinion/13tue1.html?scp=1&sq=voter%20fraud&st=cse> (arguing that voter fraud is not a prevalent issue as Republican politicians claim and that the issue has been used to pass more restrictive voting laws that reduce the turnout of Democratic voters). “These bills are not a sincere effort to prevent non-citizens from voting; that is a made-up problem. The real aim is to reduce turnout by eligible voters. . . . There is no evidence that voting by noncitizens is a significant problem.” *Id.*

276. See Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 133 (2007) (stating that as long as the errors in the election process are not outcome determinative, it is not necessary to ensure that all errors are eliminated). “Most elections do not turn on margin-of-error numbers and so there is no need to be absolutely sure that there are no mistakes. There is just the continuing interest in preventing massive levels of mistakes.” *Id.*

277. See *id.* at 147 (asserting that the right to vote is a right indeed and an honor that has symbolic meaning to the groups of individuals who have fought hard to receive it and thus should not be taken away due to minor errors in the election process).

278. See NCSL ELECTIONS REFORM TASK FORCE, VOTING IN AMERICA: FINAL REPORT OF THE NCSL ELECTIONS REFORM TASK FORCE (2001), <http://www.ncsl.org/programs/press/2001/electref0801.htm> (finding three states have developed permanent absentee voting systems in which voters may apply once for permanent absentee status).

afterwards receive a ballot until the voter revokes his or her status.<sup>279</sup> Thus, the need for the civil servants to serve as witnesses on absentee ballot applications would be reduced.<sup>280</sup>

Three states, California, Utah and Washington, allow a voter to apply for permanent absentee registration for any reason, and another six states allow voters to apply for one-year absentee status, which lets them vote in all elections for the duration of that year.<sup>281</sup> There are also ten states that allow the disabled and ill to apply for permanent absentee status.<sup>282</sup> Texas requires an application for every ballot for early voting in every election.<sup>283</sup> The Texas statutory scheme even requires that the applicant ask for ballots for any possible runoff elections in the initial application.<sup>284</sup> Instead of requiring elderly and disabled voters to submit a new application for each election they wish to vote in, a more practical law would allow them to apply for permanent absentee status and reduce the risk of fraud. This is because fewer people would need to register as absentee voters; consequently, the need for civil servants to witness on voters' applications is reduced.<sup>285</sup> This type of system would work best for

279. *See id.* (discussing the effects of a permanent absentee voter registration system). “Three states . . . allow voters to apply once for permanent absentee status for any reason until such time as the voter revokes such status.” *Id.*

280. *See* Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 *ELDER L.J.* 453, 485–86 (2005) (arguing for the use of permanent absentee registration). “As is the process in a number of states previously mentioned, electors who wish to apply for permanent absentee voter status should submit a doctor’s certification of their disability or need for permanent status with their initial registration form.” *Id.* at 458. “That single, simple step would then ensure many homebound electors would be able to cast a ballot in each and every election.” *Id.* “By instituting such a limitation, the risk of absentee ballot fraud is decreased, as fewer people are permitted to register as absentee voters, while simultaneously limiting the risk of voter fraud among the elderly.” *Id.*

281. *See* NCSL ELECTIONS REFORM TASK FORCE, *VOTING IN AMERICA: FINAL REPORT OF THE NCSL ELECTIONS REFORM TASK FORCE* (2001), <http://www.ncsl.org/programs/press/2001/electref0801.htm> (discussing the states that allow some form of permanent absentee status).

282. *See id.*

283. *See* TEX. ELEC. CODE ANN. § 84.001(c)-(f) (Vernon 2003) (requiring an application, but not allowing for the application to provide permanent status).

284. *Id.* § 84.001(e) (“An applicant for a ballot to be voted by mail may apply for ballots for the main election and any resulting runoff election on the same application.”). “The timeliness of the application for both elections is determined in relation to the main election. However, if the application is not timely for the main election, the timeliness of the application for the runoff election is determined in relation to that election.” *Id.*

285. *See* Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 *ELDER L.J.* 453, 485–87 (2005) (arguing for the use of permanent absentee registration). The voters could “remain on a permanent list, so applications don’t have to go out and come back for everyone in every election year[, which] limits opportunities for partisan mischief.” *Id.* at 486.



the elderly and disabled who could submit a doctor's note to verify their disability and illness.<sup>286</sup>

### VIII. CONCLUSION

The district court in *Ray v. Texas* relied on the *Crawford* case dealing with an in-person voting law, and found that since the right to vote absentee is not as great as the right to vote in-person, the burden was not severe enough to afford it a high standard of review.<sup>287</sup> The court's holding makes it difficult or impossible for any constitutional challenge to a law that affects absentee voting in Texas to be upheld.<sup>288</sup> The court in *Ray* also failed to recognize that voters would be disenfranchised by § 84.004 because the law would chill their ability to express themselves through the electoral process.<sup>289</sup>

Even if the court did not err in its judgment of the *Ray* case, the Texas absentee witness law is not an effective law. The law is based on unreliable anecdotal evidence of voter fraud, which does not provide an accurate basis to determine whether fraud is at the epidemic level that it purports to combat.<sup>290</sup> Voter fraud is often used by political parties to discourage voting in certain groups rather than a means of securing the integrity of

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286. See *id.* at 485 (arguing for the use of permanent absentee registration). States have a "statewide voter registration list . . . that contains the name and registration information of every legally registered voter in the [s]tate." *Id.* at 487. "By utilizing these preexisting databases, each state would be capable of compiling and maintaining accurate lists of all absentee voters." *Id.* "In addition, permanent absentee voter provisions would reduce the constant updating required as part of yearly registration systems by eliminating the necessity to update an absentee voter's registration status each year." *Id.*

287. *Ray*, 2008 WL 3457021, at \*5 n.2 (discussing the language of § 84.004 which speaks about restrictions on the applications to vote, but not the actual ballot). "It is well-settled that voting by absentee ballot is not a fundamental right requiring strict scrutiny analysis." *Id.* at \*5.

288. See generally *id.* (following previous holdings that a strict scrutiny standard should not be applied to absentee ballots). Absentee voting is not considered a fundamental right, which would require a strict scrutiny standard of review. *Id.* at \*5. "[W]hen a state election provision imposes only 'reasonable, non-discriminatory restrictions' upon the First and Fourth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify restrictions." *Id.* at \*3. (citation omitted).

289. See *id.* at \*5 (acknowledging that putting restrictions on voters could potentially reduce voter participation, but stating that there is not enough evidence to show a disparity in voter participation amongst the elderly and disabled). The court also determined that § 84.004 was not "unconstitutional either because it infringes one's right to vote or because it is overbroad." *Id.* at \*6.

290. See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 644–45 (2007) (providing examples of how anecdotal evidence cannot be relied upon because such evidence is deeply flawed). "Voter-fraud anecdotes are often misleading, incomplete, and unrepresentative." *Id.* at 644.

the ballots that are cast. Voter fraud is not a widespread problem and laws to prevent fraud need to be tailored to avoid disenfranchising voters.

Gloria Meeks, Willie Ray, and the other victims of the Texas absentee witness law were trying to do what they felt was their civic duty by registering elderly and disabled voters and witnessing on their applications. The Texas law not only discriminated against these individuals but also discriminated against the disabled and elderly voters who they sought to help. The laws that should be adopted need to be sufficient enough to monitor and regulate elections, but need to be flexible enough so as to not disenfranchise voters and make voting absentee easier for the voters who depend on the process.