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NOTE

LONG LINES AT THE POLLS VIOLATE EQUAL PROTECTION AND REQUIRE JUDICIAL AND LEGISLATIVE ACTION

BOE M. PIRAS*

“Just as a state may not directly condition the franchise on one’s place of residence, one’s place of residence cannot cause his or her vote to be cheapened or devalued.”¹ Sadie Rubin was not about to allow her vote to be cheapened or devalued when she arrived at her polling place in Gambier, Ohio and found a wait of over nine hours.² Her polling place, on the campus of Kenyon College, started the day with only two voting machines for 1,300 voters, only to have one of those machines break down.³ The final votes at Kenyon College were not cast until 4:00 the following morning.⁴ While many are inspired by the perseverance of these voters,⁵ it is also evidence of a broken electoral system that effectively denies millions the right to vote.⁶

Long lines at polling places, such as those experienced by the voters of Ohio in 2004, violate the Equal Protection Clause of the Fourteenth Amendment⁷ and need to be addressed through both litigation and legislation. The United States Supreme Court established that the right to vote is “undoubtedly” fundamental and is protected by the Equal Protection Clause of the Fourteenth Amendment.⁸ As such, election officials have an affirmative duty to create an election system that provides an adequate and substantially equal opportunity to vote for all voters and any breach of this duty will be subject to a

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1. League of Women Voters of Ohio v. Blackwell, 432 F. Supp. 2d 723, 728 (N.D. Ohio 2005).

2. League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 467 (6th Cir. 2008).

3. *Id.*

4. *Id.*

5. Kenyon College News Room: Onslaught of Kenyon Students Voting Makes National Headlines, <http://www.kenyon.edu/x22499.xml> (last visited May 4, 2009).

6. Adam Cohen, Editorial, *No One Should Have to Stand in Line for 10 Hours to Vote*, N.Y. TIMES, Aug. 25, 2008, at A18, available at <http://www.nytimes.com/2008/08/26/opinion/26tue4.html>.

7. U.S. CONST. amend. XIV, § 1.

8. Reynolds v. Sims, 377 U.S. 533, 562-63 (1964).

strict scrutiny analysis.⁹ A number of cases, which will be discussed below, have been very protective of voters' rights—holding that waits of up to two hours, in combination with other factors, violate the Equal Protection Clause. However, these cases have left prospective plaintiffs with a fair amount of ambiguity over when a strict scrutiny analysis is triggered and what factors will be analyzed under such an analysis. This paper proposes both judicial and legislative solutions to provide some clarity to the protections established in these disenfranchisement cases.

Section I of this paper will describe the prevalence of long lines at polling places across the country and how they act as barriers to voters attempting to cast ballots—effectively denying millions of people their fundamental right to vote. Section II will describe the history of utilizing the Equal Protection Clause to protect voters from long lines at the polls. Section III will advocate that a number of actions be followed by the courts and by the legislature to ensure protection of voters' fundamental right to cast a ballot. First, the courts must (1) explicitly reaffirm that unreasonably long lines as short as two hours indicate a breach of the election officials' duty to provide for fair elections and would trigger a strict scrutiny analysis—which would encourage litigation to prevent further disenfranchisement—and (2) require, under strict scrutiny analysis, that election officials consider precinct-specific factors in the allocation of resources on Election Day. Secondly, to ensure fairer elections, the legislature must adopt the Count Every Vote Act or similar legislation that (1) requires consideration of precinct-specific information in the distribution of resources, (2) requires remedial measures for states with long lines, and (3) increases the availability and use of early and absentee voting to ensure that all voters have an equal opportunity to shape the future of our country.

I. THE PROBLEM: LONG LINES AT THE POLLS CONSISTENTLY LEAD TO THE DISENFRANCHISEMENT OF A SIGNIFICANT NUMBER OF VOTERS

Long lines of voters waiting to get into their precincts to vote have made headlines in every national election in recent history. For all voters who encounter them, long lines present an obstacle to voter participation,¹⁰ but for a significant number of voters, long lines are not merely an obstacle, they are a complete bar to their ability to vote. Nowhere is this problem

9. *Ury v. Santee*, 303 F. Supp. 119, 119 (N.D. Ill. 1969).

10. Martha R. Mahoney, "Democracy Begins at Home" — *Notes from the Grassroots on Inequality, Voters, and Lawyers*, 63 U. MIAMI L. REV. 1, 8 (2008).

more evident and more urgent than in poor and minority neighborhoods.¹¹ While the disenfranchisement of any person or group is unacceptable, the continuous and widespread disenfranchisement of those populations with the most on the line is unconscionable. This section will describe the disenfranchisement that occurs as a result of long lines and highlight the unfortunate fact that the concerns of the most vulnerable populations in our society are being silenced on Election Day.

Even if most voters are able to stand in lines for hours like Sadie Rubin and ultimately cast their ballots, in each election, hundreds of thousands of voters across the country will have to leave their precincts without voting.¹² In the 2004 presidential election, despite lower than expected turnout, many lines in Ohio were reported to be two to three hours long, some were reported to be seven to nine hours long, and there was one that was as long as twenty-two hours.¹³ In that election, an estimated 15,000 voters left their polling places in Columbus, Ohio without voting because of long lines.¹⁴ On the same day, only 173 miles northwest of Columbus, in Youngstown, a pastor estimated that an additional 5,000 would-be voters left before they were able to vote.¹⁵ This unfortunate phenomenon is not limited to Ohio and the history books. According to a study conducted by the Massachusetts Institute of Technology and the California Institute of Technology (MIT/Caltech Study), 44 million registered, eligible voters did not vote in 2008, the most recent federal election.¹⁶ Four percent of those would-be voters cite long lines as the primary reason for not voting.¹⁷ Of the voters who actually *attempted* to vote but did not cast a ballot, the number jumps to 8.1% who cite long lines as the primary reason for not casting a ballot.¹⁸ Overall, in 2008, 1.67 million voters were prevented or deterred from voting in one of the most historic presidential elections in our nation's history due to long lines.¹⁹ One commentator described preparing for long lines as something "so mundane that no one thought to focus on it."²⁰ While that may slightly overstate the problem, it is clear that, even if preparations were made to reduce the length of lines, it is clear that election officials

11. Robert F. Kennedy, Jr., *Was the 2004 Election Stolen?*, ROLLING STONE, June 15, 2006, at 46.

12. Mahoney, *supra* note 10.

13. Adam Liptak, *Voting Problems in Ohio Set Off an Alarm*, N.Y. TIMES, Nov. 7, 2004, § 1, at 37, available at <http://www.nytimes.com/2004/11/07/politics/campaign/07elect.html#>.

14. Cohen, *supra* note 6.

15. *Id.*

16. Voter Registration: Assessing Current Problems: Hearing Before the S. Rules Comm., 111th Cong. 1 (2009) [hereinafter MIT/Caltech Study] (Testimony of Prof. Stephen Ansolabehere), available at http://rules.senate.gov/public/index.cfm?FuseAction=CommitteeSchedule.Testimony&Hearing_ID=c33b5ae8-ae8-413e-85db-a256ce6169f6&Witness_ID=e394ba39-8bf4-441c-8ed3-6e8c68cf4b23.

17. *Id.* at 15.

18. *Id.* at 20.

19. *See id.*

20. Cohen, *supra* note 6.

across the country have much more work to do in preventing long lines at polling places—at least in some precincts.

Such widespread disenfranchisement alone is enough to trigger a strict scrutiny analysis under the Equal Protection Clause of the Fourteenth Amendment. However, the problem is underscored and made all the more urgent considering the marginalized populations that are most often disenfranchised. Poor quality precincts—the qualities of which will be discussed in Section III—resulting in long lines, are not distributed equally among the electorate and, in fact, have a disproportionate impact²¹ on the poor and on minorities. Neighborhoods still today often reflect the effects of racial and ethnic segregation, including unequal educational levels of voters and smaller numbers of poll workers.²² Research shows that voters in low-income and minority neighborhoods are more likely to have low-quality polling places and misinformed poll workers²³—both key factors in causing long lines.²⁴ In fact, a survey “commissioned by the Elections Assistance Commission (“EAC”) reported that jurisdictions in which residents had lower incomes and levels of education tended to have ‘fewer poll workers per polling place and higher incidences of inadequately staffed polling places.’”²⁵ “In contrast, jurisdictions with higher levels of income and education [generally] had many poll workers and [reported] few staffing problems.”²⁶ The result is staggering—white Ohio suburbanites waited an average of twenty-two minutes to vote in 2004, while urban blacks waited an average of three hours and fifteen minutes.²⁷ While low-income and minority communities were already more likely to have lower rates of voter turnout, the prevalence of low-quality polling places²⁸ and long lines²⁹ in these communities only further depressed turnout among those populations.

Long lines impose significant—and often insurmountable—barriers on voters trying to cast their ballots. The number of voters in the past two elections who have been prevented from voting is staggering. We cannot sit idly by and let millions of voters—especially those on the margins of our society—continue to be silenced year after year in the most important deci-

21. *See id.*

22. Mahoney, *supra* note 10.

23. “Nearly seventeen percent of predominantly African American communities reported inadequate numbers of poll workers.” *Id.* at 4.

24. R. Michael Alvarez & Thad E. Hall, *Controlling Democracy: The Principal-Agent Problems in Election Administration*, 34 POL’Y STUD. J. 491, 497–98 (2006).

25. Mahoney, *supra* note 10, at 4 (quoting U.S. ELECTION ASSISTANCE COMM’N, A SUMMARY OF THE 2004 ELECTION DAY SURVEY 3 (2005), available at http://www.eac.gov/clearinghouse/docs/eds2004/2004-election-day-survey/attachment_download/file).

26. Mahoney, *supra* note 10, at 4.

27. Kennedy, *supra* note 11.

28. Matt A. Barreto et al., *Are All Precincts Created Equal? The Prevalence of Low-Quality Precincts in Low-Income and Minority Communities*, 62 POL. RES. Q. 445, 455 (2009).

29. Kennedy, *supra* note 11.

sions we make as citizens. We need to be proactive in solving this problem through both litigation and legislation.

II. UTILIZING EQUAL PROTECTION TO PREVENT LONG LINES AT THE POLLS

Attorneys have successfully utilized the Equal Protection Clause framework to protect the right to vote since the 1960s. The arguments utilized by attorneys in the equal protection cases have changed very little in forty years. Because the right to vote is fundamental, election officials have a duty to provide adequate and substantially equal voting facilities.³⁰ Because long lines effectively deny voters their fundamental right to cast a ballot, a wait of over two hours has been held to be a breach of that duty. Like all denials of a fundamental right, breaches of election officials' duty are analyzed under strict scrutiny—meaning that the government must then show that it was acting out of necessity to advance a compelling state interest or else its actions will be ruled unconstitutional.

The foundation for this framework began with *Ex parte Young*, a 1908 landmark U.S. Supreme Court case that empowered citizens with the right to sue the government to prevent unconstitutional deprivations of their rights.³¹ The framework evolved in the early 1960s to establish strong Equal Protection Clause precedent providing for the protection of the electorate from vote-dilution and poll taxes. Since 1969, this equal protection framework has been used to protect the electorate from inadequate voting facilities that lead to long lines, which effectively deny voters their fundamental right to vote. This section will analyze the development of this equal protection framework from 1908 until 2008. First, it will describe how the electorate may utilize an exception to sovereign immunity, established in the Eleventh Amendment, to seek an injunction against a state to prevent further disenfranchisement. Second, it will analyze the development of the strict scrutiny standard under the Equal Protection Clause of the Fourteenth Amendment specifically dealing with long lines at the polls. Finally, this section will conclude by emphasizing the fact that there is strong precedent under the Equal Protection Clause upon which plaintiffs may rely to compel states to take remedial action specifically to prevent long lines at the polls.

a. Utilize Exception to Sovereign Immunity to Seek an Injunction

While asserting an equal protection claim against the government, a plaintiff must establish his or her right to sue the state to prevent further violations.³² Before 1908, sovereign immunity, enshrined in the Eleventh

30. *Ury v. Santee*, 303 F. Supp. 119, 126 (N.D. Ill. 1969).

31. *Ex parte Young*, 209 U.S. 123 (1908).

32. While it is clear that millions of voters have been prevented from voting as a result of long lines and that elections could possibly have come out differently in the absence of such

Amendment, prevented citizens from bringing actions against state governments.³³ *Ex parte Young* created an exception to this rule. In this case, the State of Minnesota passed a law that fixed the rates at which railroads could charge to carry merchandise within the state.³⁴ The stockholders of the railroad companies sued the railroads and Minnesota's Attorney General to prevent compliance with, and enforcement of, a law that they believed to be a violation of the Constitution.³⁵ This case presented a situation where the Eleventh Amendment's establishment of sovereign immunity conflicted with the Fourteenth Amendment's equal protection and due process protections. The Supreme Court ultimately held that a suit may be brought against a public officer who has "some duty in regard to the enforcement of the laws" to enjoin that officer from enforcing an unconstitutional law.³⁶ Plaintiffs in equal protection cases utilize this exception to sovereign immunity to assert their claim against the state that election officials violated their duty to conduct fair elections when voters were unconstitutionally disenfranchised at the polls.

b. Establish an Equal Protection Claim for Long Lines and Inadequate Voting Facilities

The *Ex parte Young* exception to sovereign immunity empowered citizens with the ability to utilize the Equal Protection Clause to protect their right to vote. Vote-dilution cases like *Reynolds v. Sims*³⁷ and poll tax cases like *Harper v. Virginia State Board of Elections*³⁸ establish the equal protection standards that set the stage for plaintiffs to utilize the Equal Protection Clause in preventing long lines on Election Day. The constitutional protection against long lines in voting received its first significant holding in Illinois in *Ury v. Santee*.³⁹ In *Ury*, the court dramatically invalidated a city election that was wrought with inadequate voting facilities that caused long lines and disenfranchised a portion of the city's electorate.⁴⁰ Nearly forty years later, *League of Women Voters of Ohio v. Brunner* utilized the same equal protection principles in addressing the barriers to voting that plagued the 2004 presidential election in Ohio.⁴¹ The court of appeals in

disenfranchisement, the focus of this paper is to ensure that remedial action, as was prayed for in *League of Women Voters of Ohio v. Brunner* and will be explained in more detail below, is taken. As such, it will not address the remedies of ordering new elections or damages as a result of widespread disenfranchisement. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008).

33. See *Hans v. Louisiana*, 134 U.S. 1 (1890).

34. *Ex parte Young*, 209 U.S. at 127.

35. *Id.* at 129-30.

36. *Id.* at 155-56.

37. *Reynolds v. Sims*, 377 U.S. 533 (1964).

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

39. *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969).

40. *Id.* at 127.

41. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 466 (6th Cir. 2008).

that case affirmed the analysis in *Ury*, holding that inadequate voting facilities and lines as short as two hours could indeed violate the Equal Protection Clause.⁴² This string of cases creates the precedent upon which courts must rely in finding that long lines violate the Equal Protection Clause because they effectively deny voters their fundamental right to vote.

i. Vote-Dilution and Poll Tax Cases

In the vote-dilution case, *Reynolds*, the U.S. Supreme Court laid a strong foundation under the Equal Protection Clause for protecting the fundamental right to vote in an unequivocal opinion in 1964—holding in no uncertain terms that “[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside” violates the Equal Protection Clause of the Fourteenth Amendment.⁴³ In this case, voters in an urban county filed suit, claiming that their votes were being diluted because the Alabama legislature refused to reapportion state legislative districts based on constitutionally required, up-to-date population information.⁴⁴ The inaccurate apportionment gave the counties with higher population growth the same number of representatives as the rural counties with smaller population growth—creating a situation, for example, where one county with 50,718 residents was represented by one seat in the Alabama House and another county with 13,462 residents was represented by two seats in the Alabama House.⁴⁵ The opinion stated that this was a violation of equal protection, relying, in part, on the principle that “voters cannot be classified, constitutionally, on the basis of where they live.”⁴⁶ In determining what a valid ratio between population and representatives should be, the court stated, “[w]e are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.”⁴⁷ The Court ultimately ordered a reapportionment of the Alabama legislature.⁴⁸

In 1966, *Harper v. Harrison*, building off of the equal protection analysis in *Reynolds*, overturned a poll tax imposed on voters in the State of Virginia.⁴⁹ The Supreme Court held that “once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”⁵⁰ The Court went on to specify that “a State violates the Equal Protection Clause of the Fourteenth

42. *Id.* at 478.

43. *Reynolds v. Sims*, 377 U.S. 533, 563 (1964).

44. *Id.* at 539.

45. *Id.* at 569.

46. *Id.* at 561 (quoting *Gray v. Sanders*, 372 U.S. 368 (1963)).

47. *Id.* at 566.

48. *Id.* at 586-87.

49. *Harper v. Harrison*, 383 U.S. 663 (1966).

50. *Id.* at 665.

Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”⁵¹ To counter arguments that this holding and the holding in *Reynolds* were just the decisions of activist judges, *Harper* states, “[o]ur conclusion . . . is founded not on what we think government policy should be, but on what the Equal Protection Clause requires.”⁵²

The vote-dilution cases like *Reynolds* and the poll tax cases like *Harper* lay a strong precedent for the holdings in *Ury* and *Brunner*—that the Equal Protection Clause is violated when long lines and inadequate voting facilities deny voters their fundamental right to cast a ballot. The argument utilized in more recent cases against long lines and inadequate facilities, as described below, is that, like the poll tax and vote-dilution cases, the right to vote, once granted, cannot be denied arbitrarily.

ii. *Ury v. Santee*

Ury v. Santee resulted from a voters’ contest of a city election that was marred with inadequate facilities and long lines. Prior to Election Day in 1969, the Village of Wilmette consolidated the number of precincts from 32 to 6 to save money.⁵³ The precincts were equal in land area, but not equal in the number of registered voters assigned to each precinct—the “two largest precincts contained roughly two and a half times as many voters as the smallest precinct.”⁵⁴ On Election Day, voting was extremely hard for many residents. Lines were often intolerable. The court found that in many instances “voters . . . were required to wait for periods of two to four hours to cast their ballots and were forced to attempt to vote three, four and, in one case, five times . . . by reason of the excessively crowded conditions at the polling places.”⁵⁵ After the election, affidavits were collected from 397 voters—over two percent of all registered voters—stating that each of them attempted to vote on Election Day but were unable to do so.⁵⁶

The court in *Ury* held that the election officials had a duty to provide adequate and substantially equal voting facilities to all of the citizens of Wilmette.⁵⁷ The court found that the officials failed to perform this duty.⁵⁸ As a consequence of their failure to provide adequate voting facilities, the disenfranchised voters were denied their fundamental right to vote.⁵⁹ The court held that the election was invalid and ordered that there be a new election at the earliest possible date.⁶⁰

51. *Id.* at 666.

52. *Id.* at 670.

53. *Ury v. Santee*, 303 F. Supp. 119, 122 (N.D. Ill. 1969).

54. *Id.* at 123.

55. *Id.* at 124.

56. *Id.* at 125.

57. *Id.* at 126.

58. *Id.*

59. *Ury v. Santee*, 303 F. Supp. 119, 126 (N.D. Ill. 1969).

60. *Id.* at 127.

iii. *League of Women Voters of Ohio v. Brunner*

Brunner arose out of the 2004 presidential election in Ohio, where voters had to overcome a variety of barriers in order to cast their ballots. Among the problems that voters experienced, the League of Women Voters of Ohio (the League) asserted specifically that the number of voting machines was inadequate to prepare for the predicted number of voters who were expected to show up on Election Day and those machines that were available were misallocated among the precincts and counties.⁶¹ The League stated that the inadequate preparation caused long wait times, which “caused 10,000 Columbus voters not to vote; caused voters to wait for hours in the rain; caused one voter to faint in line; and caused many voters to leave without voting to attend work, school, or provide care to family members.”⁶²

Based on these egregious results, the League alleged that the Secretary of State and Governor established a “voting system [which] denies [voters] equal protection of the law . . . guaranteed them by the Fourteenth Amendment to the United States Constitution.”⁶³

Accordingly, the League [sought] preliminary and permanent injunctive relief requiring the Secretary and Governor “[t]o promulgate, adopt, and enforce uniform standards” related to various aspects of Ohio’s election system including voter registration, absentee ballots, voting machines, ballots, voting procedures, recruiting and training of poll workers, and assistance for disabled voters.⁶⁴

The court of appeals held that, “[i]f true, these allegations could establish that Ohio’s voting system deprives its citizens of the right to vote or severely burdens the exercise of that right depending on where they live in violation of the Equal Protection Clause.”⁶⁵ This holding is solidly based in the equal protection precedent established in *Reynolds* and *Harper* and brings the *Ury* protections against long lines and inadequate voting facilities into the new millennium.

This long string of equal protection cases—from 1964 through 2008—establishes and affirms a voter’s right to bring a claim against government officials for establishing a voting system with unreasonable barriers to voting—such as long lines—that ultimately disenfranchise voters based on where they live. As demonstrated above, in the last three presidential elections, inadequate facilities create long lines, and long lines disenfranchise a significant number of voters—and the impact largely tends to be disproportionately more severe in poor and minority neighborhoods. This is unac-

61. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 463 (6th Cir. 2008).

62. *Id.* at 468-69.

63. *Id.* at 469.

64. *Id.* at 469-70.

65. *Id.* at 478.

ceptable for any nation, but it is made all the more indefensible for a nation that holds itself out to be a beacon for democracy.⁶⁶ Only after a number of court cases and judgments similar to those in *Ury* and *Brunner* will states be forced to ensure that the vote of every eligible voter is protected, regardless of where they live.

III. THE JUDICIARY AND THE LEGISLATURE MUST ACT TO PREVENT LONG LINES THAT RESULT IN DISCRIMINATORY DISENFRANCHISEMENT

The remainder of this paper will outline a number of actions that need to be taken both by the judiciary and the legislature to ensure that all voters are afforded an equal opportunity to cast their ballots, regardless of where they live. First, the judiciary must clarify the standard for utilizing the Equal Protection Clause in cases where long lines disenfranchised voters. A clear, unambiguous standard will ensure that plaintiffs continue to bring these cases and judicially force change in how elections are conducted. The legislature must also be proactive in solving this crisis. The legislatures both in Washington, D.C. and in the states must first affirm their commitment to voter rights and ensure that all neighborhoods—especially neighborhoods of poverty and color—are equally represented by our elected officials. The following section will describe in greater detail the need for a clear judicial standard and legislative reform.

a. *Judicial Solution: Reaffirm and Clarify the Standard for Equal Protection in Voting Specifically Relating to Long Lines*

Following the precedent established in *Ury* and *Brunner*, it is clear that courts have the constitutional authority to intervene to remedy the persistent problem of long lines that lead to the disenfranchisement of voters. The first remedy proposed in this paper is that the courts must clarify its standard for voting rights under the Equal Protection Clause. A clearer standard will (1) inform members of Congress that long lines are unconstitutional deprivations of equal protection under the law, which they have a duty to remedy; and (2) encourage disenfranchised and unconstitutionally burdened voters to bring cases like *Ury* and lead to more injunctive relief that forces change in how election officials prepare for elections, as was prayed for in *Brunner*. Evan Davis, former President of the New York City Bar and counsel to New York Governor Mario Cuomo, argues that, if not for cases like these, there is “no other way that change [is] going to occur.”⁶⁷

This paper submits that courts must be explicit in affirming that a wait that exceeds two hours strongly indicates a breach in the government offi-

66. *The Flickering Beacon*, *ECONOMIST*, Feb. 3, 1990, at 30.

67. Evan Davis, *Why Should I Have To Tell Them? The Necessary Role of the Judiciary in Achieving Reform*, 69 *ALB. L. REV.* 863, 866 (2006).

cials' duty to provide an election system that does not deprive voters of their fundamental rights and would trigger a strict scrutiny analysis. Until this point, courts have found that long lines (lines as short as two hours), in conjunction with a variety of other factors, can violate the Equal Protection Clause.⁶⁸ However, the more certainty that the courts provide in stating that long lines specifically evidence a breach in election officials' duty, the more confidently plaintiffs can bring their cases and real change can be made. This section will (1) explain that two hours is the correct standard for the courts to continue to use because, in addition to the precedent established in *Ury* and *Brunner*, it accounts for the economic, practical, and psychological barriers long lines have on the electorate's ability to vote; and (2) recommend that election officials' actions be analyzed under a strict scrutiny analysis based on how they utilized a number of precinct-specific criteria to ensure adequate and substantially equal voting facilities on Election Day.

i. Two Hours is the Correct Standard Because it Takes into Account the Economic and Practical Barriers Long Lines Impose on Voters

In applying the equal protection standard, courts must, in addition to the two-hour precedent, acknowledge the increasingly significant economic and practical barriers that voters will face as the length of time that they are required to wait at the polls increases.

From economic and practical standpoints, a majority of voters in the United States are not able to devote two to nine hours in any single day to voting due to responsibilities that cannot be abrogated. The following paragraphs will outline two of the most common responsibilities that voters would not have the luxury of abandoning, even for one day. First, the majority of voters are required to be working during a significant portion of time that the polls are open, and second, both before and after work, a large number of voters (both men and women) are responsible for providing primary childcare to one or more children. In considering these responsibilities, it is easy to see how unreasonably long lines at polling places have the real potential to create economic and practical burdens on many employed, voting parents by requiring that voters either miss work or refrain from providing essential childcare in order to vote.

A study by the Bureau of Labor Statistics (BLS) shows that the vast majority of voters are required to work during the normal workweek.⁶⁹ In fact, eighty-three percent of all employed members of the electorate worked

68. *Brunner*, 548 F.3d at 477-78; *Ury v. Santee*, 303 F. Supp. 119, 124 (N.D. Ill. 1969).

69. BUREAU OF LABOR STATISTICS, AMERICAN TIME USE SURVEY (2008), available at <http://www.bls.gov/tus> [hereinafter BLS SURVEY].

on weekdays.⁷⁰ The number of people who worked during the normal workweek increased to eighty-nine percent for those who worked multiple jobs⁷¹—a statistic that is more common among lower income voters. Because only a small percentage of the employed workforce worked from home,⁷² the vast majority of employed Americans had to be present at their workplace during the normal workweek. Since Election Day is always a weekday, nearly every employed American is required to schedule voting around his or her work schedule.

Scheduling voting around the average work schedule is not an easy task. The BLS states that “on days that they worked, more than three-quarters of employed individuals age 15 and over worked between 8 a.m. and 4 p.m.”⁷³ Unfortunately, the hours that polling places are open are not significantly different from the average working day of most Americans. In Minnesota, polling places open between 7 a.m. and 10 a.m. and close at 8 p.m.⁷⁴ In Ohio, polling places are open between the hours of 6:30 a.m. and 7:30 p.m.⁷⁵ This means that if a Minnesota voter (who has to be at work at 8:00 a.m., like a majority of the electorate) arrives at her polling place fifteen minutes before the polls open at 7:00 a.m., but has to wait three hours, she will be required to miss two hours of work in order to vote. Waiting in such a long line to vote and showing up to work late would, at a minimum, impose an economic burden of two hours in lost wages and, at worst, cost the voter her job.

For many voters, the hours immediately before and after work are just as valuable as the hours they are at work because that is the time during which they must provide primary care for their children. Because a significant segment of the population must spend a portion of each day caring for children as well as working,⁷⁶ courts should take childcare, in addition to employment, into consideration in applying the equal protection standard.

A BLS study demonstrates that fourteen percent of mothers and nearly seven percent of fathers are responsible for providing primary childcare before work—between the hours of 6 a.m. and 8 a.m.⁷⁷ Those numbers

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Minnesota Office of the Secretary of State Frequently Asked Questions, http://www.sos.state.mn.us/home/index.asp?page=12&select_faq_by_faq_cat=2&record_page=1#30 (last visited May 4, 2009).

75. Jennifer Brunner, Ohio Secretary of State: Election Day Procedures, <http://www.sos.state.oh.us/SOS/elections/voterInformation/procedures.aspx> (last visited May 4, 2009).

76. “In 2008, 35.7 million households (46%) had children under the age of 18 living at home[.]” Jack Gillum, *Number of Households with Kids Hits New Low*, USA TODAY, Feb. 26, 2009, available at http://www.usatoday.com/news/nation/census/2009-02-25-families-kids-home_N.htm.

77. Mary Dorinda Allard & Marianne Janes, *Time Use of Working Parents: A Visual Essay*, 131 MONTHLY LAB. REV. 3, 8 (2008).

increase to nearly seventeen percent of mothers and twelve percent of fathers who are responsible for providing primary childcare after work—between the hours of 6 p.m. and 8 p.m.⁷⁸ According to data compiled by the BLS, the average voter with children spends between eight and nine hours per day⁷⁹ at work and spends an additional one half hour to one and one half hours providing primary childcare to one or more children.⁸⁰ According to the same data, nearly all of these hours—spent at work and spent caring for children—occur during normal voting hours, between the hours of 6 a.m. and 8 p.m.⁸¹ This leaves the “average voter with children,” if he or she does nothing else during normal voting hours, with 3.5 hours theoretically free to vote on Election Day. Because these statistics are averages, however, there are just as many people spending more time than average doing these tasks as there are people spending less time. It is for this reason that the constitutional standard of two hours to establish a breach in election officials’ duty, and not three and a half, is appropriate for the courts to affirm. There are no statistics available that specifically address the amount of time people have on Election Day to spend attempting to vote, however, the best information that the U.S. government has regarding how people spend their time clearly suggests that the amount of time that many voters with children have available to wait in long lines during voting hours is somewhat fewer than three and a half hours.

Statistics show that for a significant percentage of voters, a wait time at a polling place that exceeds two hours would likely cause them to either abrogate their duties as an employee or as a parent. This paper submits that, at a minimum, if a voter is forced to abrogate his or her responsibilities as a parent or as an employee—even for one day—in order to vote, such evidence must conclusively demonstrate a breach in election officials’ duty to provide adequate and substantially equal voting facilities.

ii. Two Hours is the Correct Standard Because it Takes into Account the Psychological Barriers Long Lines Impose on Voters

In addition to the economic and practical barriers that long lines impose on voters, psychological implications of waiting in long lines have a significant impact on the amount of time someone is able to spend in a line waiting to vote.⁸² Psychologists have studied for years the implications of long lines on a person’s propensity to remain in a long line. Psychologist

78. *Id.* Primary care is defined as “physical care of children; playing, reading or talking with children; travel related to childcare; and other childcare activities.” *Id.* at 3.

79. *Id.* at 7.

80. *Id.*

81. BLS SURVEY, *supra* note 69, at 14-15.

82. See Theodore Allen & Mikhail Bernshteyn, *Mitigating Voter Waiting Times*, CHANCE, Fall 2006, at 25, 26.

Thierry Meyer, from the Université Paris X, states that, psychologically, “waiting in line is often experienced as an obstruction”⁸³ In fact, it is such a significant burden that a sizeable portion of the population either foregoes voting after standing in a line that is too long, or is deterred from attempting to vote altogether because of long lines.⁸⁴ Psychologists refer to the former as “reneging” and the latter as “balking.”⁸⁵ Either situation leads to an unacceptable result: “reduced voter turnout, or ‘deterred’ votes.”⁸⁶

Psychologists have found that a variety of characteristics tend to increase a person’s anxiety about waiting in line—which thus makes waiting in line psychologically more burdensome.⁸⁷ This section outlines three primary characteristics associated with waiting in line—uncertain, unexplained, and unfair—that are particularly relevant to polling places and will ultimately impact a voter’s propensity to join, or remain waiting in, a long line on Election Day.

“Uncertain waits” have a negative impact on a voter’s ability to wait in a long line to vote.⁸⁸ In fact, former Harvard Business School professor David Maister states that “the most profound anxiety in waiting is how long the wait will be.”⁸⁹ Polling place workers have a variety of levels of experience⁹⁰ that may or may not equip them with the skills to judge how long of a wait it will be for people to vote at any given time. Even if they do have a general understanding of how long a wait it will be, it is possible that they will not have the time to explain this information to those in the line. Many long lines develop as a result of inadequately staffed precincts.⁹¹ Even where there is time, the poll workers will often nonetheless be unable to convey this information to people who see or hear about the lines before they arrive at the polling facility and are immediately deterred from voting.⁹² The stress due to an uncertain wait at a polling place would likely only increase if a voter only has a limited amount of time before he or she has to return to one of the responsibilities discussed above that they are unable to abrogate—work or childcare.

“Unexplained waits” also have a negative impact on a voter’s ability to wait in line to vote.⁹³ David Maister illustrates this notion of unexplained waits with an example from his own life, saying that it is psychologically

83. Thierry Meyer, *Subjective Importance of Goal and Reactions to Waiting in Line*, 134 J. OF SOC. PSYCHOL. 819, 820 (1994).

84. MIT/Caltech Study, *supra* note 16.

85. Allen & Bernshteyn, *supra* note 82, at 26.

86. *Id.*

87. See David H. Maister, *The Psychology of Waiting Lines*, <http://davidmaister.com/pdf/PsychologyofWaitingLines751.pdf> (last visited May 4, 2009).

88. *Id.* at 5.

89. *Id.*

90. Alvarez & Hall, *supra* note 24, at 503-04.

91. Mahoney, *supra* note 10, at 4.

92. Allen & Bernshteyn, *supra* note 82, at 26.

93. Maister, *supra* note 87, at 5.

less burdensome waiting longer for a taxi to arrive during inclement weather than on a clear, summer day.⁹⁴ This is particularly relevant to polling places because long waits in line to vote are often unexplained. As demonstrated below, there is a long list of factors that have an impact on wait times, each of which has the potential to independently cause long lines.⁹⁵ This means that the wait at some polling places can be very uncertain because the true cause of the long lines may be unknown at the moment they form. Even hold ups that have an obvious solution, such as running out of ballots, can take an indeterminate amount of time to resolve. For example, poll workers may not know why it is taking so long for more ballots to arrive. All of the potential problems that cause long lines also lead to uncertainty, and uncertainty leads to both balking and renegeing and discourages voters from ultimately casting their ballots.⁹⁶

“Unfair waits” have a negative impact on a voter’s ability to wait in line to vote as well.⁹⁷ This notion is particularly relevant to polling places with long lines because the perception of the inequity in waiting for hours to vote is commonly held among most of the electorate, especially those voters who are actually standing or sitting in a long line waiting to vote. To explain the general idea, David Maister uses the example of customers waiting in line while a receptionist answers the telephone.⁹⁸ He explains that a feeling of inequity arises out of a situation where customers perceive others being given priority or being helped first.⁹⁹ Voting lines, and the quality of polling places generally, are largely dependent upon the neighborhood in which the polling place is located.¹⁰⁰ During every election, news stories publicize this inequity by showing some polling places where voters are able to walk right up to the ballot box within a matter of minutes and other polling places where voters have to wait for hours in lines that extend for blocks. The undeniable inequity of the circumstances will surely impact a voter’s psyche and his or her ability to survive a long line to vote.

Psychologists have determined that each of these psychological factors has an independent, negative impact on people as they wait in a line. While waiting in long lines to vote, one might feel the effects of any or all of these elements and casting a ballot may ultimately prove to be unbearable due to the stress of waiting in the line. In fact, according to the MIT/Caltech study, three percent of all registered and eligible voters who did not attempt to vote on Election Day cited the prospect of long lines as the primary reason for not attempting to vote.¹⁰¹ While some may argue that choosing not to

94. *Id.*

95. Barreto et al., *supra* note 28.

96. *Id.*

97. Maister, *supra* note 87, at 6.

98. *Id.* at 7.

99. *Id.*

100. Alvarez & Hall, *supra* note 24, at 503–04.

101. MIT/Caltech Study, *supra* note 16.

stand in a voting line for psychological reasons is a choice¹⁰² that each voter has to make, it is clear from the MIT/Caltech study that the mere prospect of waiting in unreasonably long lines is so psychologically burdensome to some U.S. voters that many of them will not even attempt to go vote.¹⁰³ In fact, Alexander Belenky and Richard Larson, mathematicians from MIT who studied the impact of long lines on the 2004 and 2008 presidential elections, cite both balking and renegeing as having a substantial impact on elections.¹⁰⁴ Among the people who *attempted* to vote, but ultimately did not, eight percent cited long lines as the reason for them not casting their ballots.¹⁰⁵ These statistics are staggering and support the notion that the psychological impact of waiting in lines is real and it deters a substantial number of voters in every election. Not only do long lines have psychological implications for the elections in which they occur, psychological implications of long lines can also have significant lasting effects:

Long lines are not just a quadrennial problem: they leave lasting scars on the democratic process. The cost of voting encourages people to become habitual non-voters, to rationalize voting as too much trouble and ineffective, to not register for elections they won't participate in, and to become cynical about the idea of elected representation. Whole communities, and minority communities in particular, gain reputations for low participation. This fact is duly noted by the political establishment, which attends to the needs of those communities accordingly.¹⁰⁶

Psychologists have yet to study specifically how long people are able to stand in line to vote, but it is clear that these psychological barriers become significantly more burdensome as the wait time increases. As the psychological burden on voters increases, the number of people who cast ballots decreases. This adds even more weight to the holdings in the string of cases

102. On the Senate floor, debating the Count Every Vote Act, Senator Conaway dismissed long lines as a mere inconvenience:

I want us to put that inconvenience [of long waits to vote] into a proper perspective. It goes without saying we should eliminate any barrier to voting that we reasonably can eliminate. That said, one day last year the Afghan people got up early one morning, put on their best clothes and set out to vote for the first time. They left the safety of their homes to vote at the express threat to their safety and very lives. They were threatened with being shot and killed or maimed by bombs. In addition, many stood in line all day to vote.

151 CONG. REC. H126 (daily ed. Jan. 6, 2005) (Statement of Sen. Conaway).

103. MIT/Caltech Study, *supra* note 16.

104. Alexander S. Belenky & Richard C. Larson, *To Queue or Not to Queue?: In a U.S. Presidential Election, That Should NOT be a Question!*, OPERATIONS RESEARCH/MGMT. SCI. TODAY, June 2006, available at <http://www.lionhrtpub.com/orms/orms-6-06/queues.html> ("If only 19 potential voters who came to vote in each precinct in . . . 12 counties balked or reneged, one cannot be sure that the 2004 election outcome in Ohio would have been the same.").

105. MIT/Caltech Study, *supra* note 16.

106. Michael Peshkin, *Are Long Lines the 'New Poll Tax'?*, IN THESE TIMES, Nov. 25, 2008, available at http://www.inthesetimes.com/article/4068/are_long_lines_the_new_poll_tax.

cited above stating that waits in line to vote that exceed two hours are an unreasonable barrier to voting.

Unreasonably long waits in line to vote on Election Day act as real economic, practical, and psychological barriers to a significant number of voters. The result of these burdens is the complete disenfranchisement of a statistically significant portion of the electorate. Courts must affirm and clarify that a wait of over two hours to vote is conclusive evidence of a breach of the government officials' duty to provide an adequate election system on Election Day under a strict scrutiny analysis required by the Equal Protection Clause of the Fourteenth Amendment. This conclusion is supported (1) by the notion that no person should have to suffer the economic burden of missing work or have to abrogate their duties as a parent to care for their children in order to cast their vote; (2) by the fact that there is no "average voter" and that indeed a significant number of parent voters will be required to spend a majority of the normal voting hours working and providing primary childcare to their children; and (3) by the fact that, in addition to economic and practical barriers, potential voters face strong psychological pressures as a result of waiting in long lines that lead to renegeing or balking from standing in line.¹⁰⁷

Edward B. Foley, an election law expert from Ohio State University, confirmed the court's standard of an unreasonable wait stating that, despite the frequency of lines upwards of seven or eight hours in the 2004 election, even "[w]hen your line gets to two or three hours, it's system failure."¹⁰⁸ Election officials across the nation are charged with ensuring that complete "system failures" do not occur. When they do (and voters are burdened by economic, practical, and psychological barriers), courts should be clear in holding that people are effectively denied their right to vote and that election officials have breached their duty to provide an adequate election system.

iii. How Should Courts Evaluate the Government's Actions?

When a fundamental right is infringed upon by the government, courts must undertake a strict scrutiny standard of review—weighing the government's interest against the right that is infringed upon.¹⁰⁹ *Reynolds* held, in no uncertain terms, that the right to vote is fundamental under the Equal Protection Clause and infringement upon that right must be subject to the strictest of scrutiny:

107. The two hour constitutional standard asserted in this paper is more lenient than what many members of Congress deem to be an "unreasonable" amount of time to have to stand in line to vote. The Count Every Vote Acts of 2005 and 2007 require precincts where waits were over 90 minutes in any election for a federal office to undertake "remedial" measures. Count Every Vote Act, S. 450, 109th Cong. § 301 (2005).

108. Liptak, *supra* note 13, at 37.

109. *Reynolds v. Sims*, 377 U.S. 533, 562-63 (1964).

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.¹¹⁰

Under this standard, unless election officials can demonstrate that the decisions they made in allocating resources (which ultimately resulted in unreasonably long lines at the polls) were necessary to achieve a compelling state interest, a court should find that the government officials breached their duty and the Equal Protection Clause was violated. This section will outline some of the most important decisions made by election officials that impact the length of lines at the polls and advocate that a number of precinct-specific criteria be used in evaluating how those decisions were made under a strict scrutiny analysis.

Election officials have a duty¹¹¹ to provide “adequate and substantially equal voting facilities” to all voters, regardless of how much money they have or where they live.¹¹² To fulfill this duty, they must ensure that a multitude of factors are addressed in the preparation of every polling place for every election. As described above, any number of factors can independently lead to long lines at the polls.¹¹³ Alexander Belenky and Richard Larson, the professors at MIT who studied long lines in the 2000 and 2004 elections, created a list of the top nine government actions that they found to cause long lines in presidential elections.¹¹⁴ Of the nine causes, five are the direct result of an affirmative act by the government—establishing an insufficient budget, utilizing inefficient voting machines, not allowing early voting, not providing adequate instructions to voters about how to operate the voting machines, and utilizing unscientific methods to deploy voting machines and poll workers among the precincts.¹¹⁵ The remaining three causes of long lines stem from an error in the government’s preparation for readily predictable issues that arise on Election Day—underestimating voter turnout, being unprepared for an electorate that is mobilized to vote, and

110. *Id.* at 561-62.

111. Election officials have an affirmative duty to adequately prepare for and conduct elections in a way that is consistent with the Constitution. Because of this affirmative duty, a plaintiff is not required to demonstrate intent to discriminate. The court in *Ury* held:

[I]t is not necessary to allege or prove that the defendants intended to deprive plaintiffs of their constitutional rights or that they acted wilfully [sic], purposefully or in pursuance of a conspiracy. It is sufficient to establish that the deprivation of constitutional rights or privileges was the natural consequence of the actions of defendants acting under color of law, irrespective of whether such consequence was intended.

Ury v. Santee, 303 F. Supp. 119, 126 (N.D. Ill. 1969).

112. *Id.*

113. Belenky & Larson, *supra* note 104.

114. *Id.*

115. *Id.*

being unprepared for various weather difficulties.¹¹⁶ With an understanding of what causes long lines, election officials have a duty to act to address each of them to ensure that they provide adequate and substantially equal facilities.

The Count Every Vote Acts of 2005 and 2007 assert a number of specific factors that election officials must consider in distributing resources among the precincts to account for the causes of long lines outlined by Belenky and Larson. The factors outlined in the Count Every Vote Acts are as follows: the voting age population, voter turnout in past elections, the number of registered voters, the number of voters who have registered since the most recent federal election, census data for the population served by each voting site, the educational levels and socio-economic factors for the population served by each voting site, the needs and number of disabled voters and voters with limited English proficiency, and the type of voting systems used.¹¹⁷ Consideration of these factors is essential in ensuring that Election Day will run smoothly at each and every precinct. It is not enough for election officials to be satisfied with decent election results that are acceptable only because of averages compiled from data from all of the precincts. If voters are disenfranchised in only one precinct, the officials have failed to fulfill their duty and their actions in preparing that precinct will be analyzed with strict scrutiny.

Election officials have a duty to adequately consider a number of precinct-specific factors, such as those outlined in the Count Every Vote Acts, in the decisions that they make in preparing the precincts for Election Day. This is not an unreasonable burden. Consideration of these precinct-specific factors is essential to election officials' duty to ensure the administration of fair elections in every precinct. If a plaintiff is able to demonstrate that any of these or other essential factors were not taken into consideration or were misapplied and long lines and disenfranchised voters resulted, a court should find that the government officials in charge of the election breached their duty to provide adequate and substantially equal voting facilities.

b. Legislative Solution: Adequately Prepare for Elections to Prevent Long Lines at the Polls

If the legislatures in Washington, D.C. and in the states are proactive in protecting the peoples' right to vote, these matters would never have to see the inside of a courtroom. The Count Every Vote Act addresses many of the leading causes of the persistent problem of long lines and their discriminatory impact on voters. While that particular Act does not necessarily have to pass, three of its elements need to be addressed in any future voter pro-

116. *Id.*

117. Count Every Vote Act, Senate Bill 450, at § 299; Count Every Vote Act, S. 804, 110th Cong. § 299 (2007).

tection legislation—requiring the consideration of precinct-specific information in distributing resources, requiring remedial action for precincts where lines of over ninety minutes have occurred in the past, and increasing the availability and use of early and absentee voting.

While many states cap the number of people that make up a precinct, the specific needs of the people that make up each precinct are not always analyzed.¹¹⁸ To illustrate this point, the GAO found that eighty-four percent of all voting facilities in 2000 had one or more impediments for people with disabilities—and twenty-eight percent of voting facilities did not allow for curbside voting to remedy the situation.¹¹⁹ The Count Every Vote Act would require election officials to consider precinct-specific information in the distribution of election resources.¹²⁰ The Act would require consideration of both general demographic information and voting-specific information unique to each precinct. Consideration of the following demographic information suggested by the Count Every Vote Act, if used appropriately, will be essential in eliminating the discriminatory impact that long lines have on voters: age, educational level, socio-economic status, number of disabled voters, English proficiency and other census data.¹²¹ Consideration of the following voting-specific qualities of each precinct will assist election officials in reducing long lines at all precincts: turnout in past elections, number of registered voters who have registered since the most recent federal election, and type of voting systems used.¹²² With a better understanding (or some understanding at all) of who will be showing up to vote on Election Day and their specific needs, election officials can better allocate the necessary resources and prevent long lines before they form.

Long lines have a discriminatory impact on voters and the Count Every Vote Act would limit the wait for voters to ninety minutes.¹²³ While this paper asserts that, at a minimum, two hours is the point at which the government officials have breached their duty, the legislature can—and should—establish a standard that protects more people and ensures equality in the electoral process. The bill specifically states that if, in a past federal election, a precinct has seen waits that exceed ninety minutes, it must comply with a remedial plan that would be established by the Election Assistance Commission. Ideally, the Commission would ensure that precinct-specific information was used and that resources were allocated accordingly. A structure such as this is essential in identifying the problem precincts and targeting the federal government's attention and energy on

118. Alvarez & Hall, *supra* note 24, at 498.

119. U.S. GEN. ACCOUNTING OFFICE, *VOTERS WITH DISABILITIES: ACCESS TO POLLING PLACES AND ALTERNATIVE VOTING METHODS* 23 (2001), <http://www.gao.gov/new.items/d02107.pdf>.

120. Count Every Vote Act, Senate Bill 804, at § 299.

121. *Id.*

122. *Id.*

123. *Id.* at § 304.

finding an adequate remedy for each of them. Because this is a precinct-specific problem, it will only be solved with precinct-specific solutions and that is exactly what the Count Every Vote Act provides.

A significant barrier to voters and a leading factor in causing long lines is the fact that nearly the entire country is required to vote in a twelve-hour window on a single day. To solve this problem, the Count Every Vote Act would require all states to allow for early voting.¹²⁴ Early voting is an incredible tool in reducing the number of voters attempting to vote on Election Day and may actually increase voter turnout.¹²⁵ In 2004, twenty-two percent of all voters cast early ballots, significantly lightening the burden on those states that allowed it on Election Day.¹²⁶ The Count Every Vote Act should go beyond this, however, and require states to allow for no-excuse absentee voting as well. Many states currently allow for absentee voting only if a voter is going to be out of the precinct on Election Day or for a short list of other reasons.¹²⁷ These states need to drop these limitations, allow anyone to vote absentee, and encourage them to do so. Oregon, for example, conducts all of its statewide elections solely by mail ballot.¹²⁸ The result in that state has been very positive—only two percent of voters reported having any difficulties at all.¹²⁹ If election officials in every state can increase the number of people who do not have to show up at the polls at all, as well as increase the number of people who have voted prior to Election Day, they will clear a tall hurdle in reducing the pressure on precincts on Election Day. As of 2008, thirty-one states allow for some type of early voting and twenty-eight states allow for no-excuse absentee voting.¹³⁰ Both of these solutions need to be promoted and expanded to all states to ensure equality in our electoral process.

Opponents of these legislative measures cite security concerns with allowing people to vote early and vote by mail. Concern for security in voting is certainly valid and should not be taken lightly, however, all states already allow absentee voting in some circumstances. There would be few people who would argue that the right to an absentee ballot should be taken away completely. Mail fraud is already a crime in the United States.¹³¹ Legislation should not be drafted on the assumption that any benefit that would result would be outweighed by people rampantly committing felonies. Po-

124. *Id.* at § 338.

125. See Paul Gronke, Eva Galanes-Rosenbaum & Peter A. Miller, *Early Voting and Turnout*, 40 PS: POL. SCI. AND POL. 639 (2007).

126. Stephen Ohlemacher & Julie Pace, *A Third of Electorate Could Vote Before Nov. 4*, Sept. 21, 2008, <http://abcnews.go.com/Politics/wireStory?id=5849955>.

127. National Conference of State Legislatures, *Absentee and Early Voting* (2009), <http://www.ncsl.org/programs/legismgt/elect/absentearly.htm> [hereinafter NCSL].

128. *Id.*

129. Alvarez & Hall, *supra* note 24, at 500.

130. NCSL, *supra* note 127.

131. 18 U.S.C. § 1342 (1994).

litical scientist and law professor, David Schultz, has concluded that voter fraud is actually less common than one would think:

Overall, despite some episodic and sporadic accounts, the best available evidence shows that voter fraud is a minor issue in American elections. There is little hard evidence that it occurs, even less evidence that it is widespread, and almost no indication that it has altered election outcomes.¹³²

With the necessary precautions in place, no-excuse absentee and early voting are safe tools that ensure that everyone will have their votes counted on Election Day, no matter where they live.

By enacting these three legislative measures, Congress will make great strides in eliminating the barrier that long lines have to voting and their disproportionate impact on poor and minority neighborhoods. More funding will certainly be necessary in certain precincts, but the three measures described above do not necessarily result in the need for significant increases in overall spending. In fact, early and absentee voting reduce administrative burdens and are less costly methods of voting than requiring voters to vote in person on Election Day.¹³³ These three legislative measures encourage the reallocation of resources to where they are needed most, which will surely lighten the burden on precincts on Election Day and lessen the discriminatory impact of long lines at the polls.

IV. CONCLUSION

It is clear that long lines continue to be prevalent in elections year after year and are inherently disenfranchising—and discriminatory in the impact that they have on poor and minority communities. In each election, the voices of millions of eligible voters are silenced as we debate the most important issues of our time. There are specific actions that need to be taken by the judiciary and by the legislature to ensure that this trend does not continue. The judiciary has developed a clear equal protection standard over the past forty years that protects the voters from having their right to vote denied. This precedent needs to be clarified so that it applies specifically to long lines to encourage plaintiffs to bring cases that force state officials to ensure equality among the precincts. However, because it is ultimately the responsibility of the legislature to ensure equality in elections, Congress must pass the Count Every Vote Act or similar legislation that specifically addresses the causes of long lines and ensures that the disenfranchisement of millions will not occur in another election.

132. David Schultz, *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 501 (2008).

133. Gronke et al., *supra* note 125, at 644.