

VOTING MATTERS IN NEW YORK:
Participation, Choice, Action, Integrity



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TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
I. VOTER PARTICIPATION	1
A. Overview.....	1
B. Voter Registration Can Be Strengthened.....	3
C. Voter Education Can Be Enhanced.....	14
II. VOTER CHOICE	18
A. New York Ballot Access Laws: An Overview.....	19
B. Ballot Access in Presidential Primaries.....	22
C. Overhaul of the System: Recommendations.....	26
III. VOTE CASTING	32
A. Overview.....	32
B. Voting Must Be Convenient.....	32
C. Allegations of Race and National Origin Discriminations Require Systemic Data Collection and Analysis.....	35
D. Polling Sites Must Be Accessible to the Disabled.....	36
E. The Mechanics of Voting at Polling Sites Should Be Simple and Reliable.....	38
F. Election Workers Should Be Supported.....	45
G. Offsite Voting Should be Strengthened.....	56
IV. VOTE INTEGRITY	67
A. Vote Counting Can Be Improved.....	67
B. Election Law Enforcement Can Be Upgraded.....	78
CONCLUSION	84
APPENDIX:	
Summary of Recommendations.....	A-1
Voting Milestones.....	A-4
Election Resources.....	A-6

EXECUTIVE SUMMARY

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.¹

The presidential election of 2000 and its aftermath focused the attention of all Americans on the core elements of our electoral system. An unprecedented spotlight fell on the nuts and bolts of elections: voter registration, ballot formats, voting machines, absentee ballots, vote counting, and vote verification. These issues usually receive scant attention, except when a race is so close that literally, every vote counts. When that happens, election laws, practices and officials are subject to intense scrutiny. After Florida, no one can deny that the machinery of our democracy — a model throughout the world, for its empowerment of individual citizens and respect for rule of law — is vulnerable. The Supreme Court has underscored that these matters must be squared with the equal protection clause and other constitutional guarantees.

Under the Constitution, the states bear special responsibilities to protect the right to vote and the integrity of our elections. In New York, the State Board of Elections is vested with the responsibility for administration and enforcement of laws relating to elections. County boards of elections have the primary responsibility for registration and election operations. Towns and cities are responsible for procuring voting machines and hiring poll workers. At times, these entities have overlapping responsibilities, with different priorities. At all levels, New York's election administration is served by representatives of the two major political parties, providing institutionalized checks and balances. Overall, these entities collectively provide reliable election administration and results.

While New York State does not confront precisely the same problems as did Florida, other challenges do exist here that cannot be ignored. Detailed stringent technical rules over

¹ Wesberry v. Sanders, 371 U.S. 1, 17 (1964).

ballot access cause candidates to wage lengthy administrative challenges and litigation, resulting in limited voter choice and administrative burdens for election officials preparing the ballot. Most New Yorkers vote on 40-year-old lever voting machines, no longer in production. While these machines may be reliable upstate, in New York City, they frequently malfunction on Election Day. Voters complain about long lines and inadequate voting hours. In most of the State, in primaries, polls do not open until noon. Numerous polling places are not accessible to the disabled. Many voters report that they arrive at polling sites intending to vote, only to learn that the registration records do not include their names. Without a statewide computerized record and modern communication technology, prompt resolution of this problem is often difficult. At some polling sites, election-day workers lacking adequate training provide insufficient or incorrect information to voters on registration matters and emergency and affidavit ballots. Some absentee or military ballots are not counted even though the voter's intent is clear because they lack postmarks or because they include miscellaneous marks or tears.

To date, these challenges have not triggered serious consequences on a large scale. However, that tenuous record could change this fall, when the electoral system in New York City will face unprecedented stress. As a result of recently adopted term limits, most races for municipal office will engender serious competition. In this new context, the vulnerabilities of New York's election infrastructure, if unaddressed, could have significant ramifications.

The recent public focus on electoral issues — and the impending elections in New York City — make this an opportune time to examine New York's election laws and practices, identify problems and explore solutions. The overriding goal is to ensure that voting matters in New York. Any comprehensive reform of the electoral system must promote four interrelated

values: voter participation; voter choice; the act of voting; and vote integrity.² This report explores these values in turn.

VOTER PARTICIPATION.

In one of the most hotly contested presidential election years in recent memory, just 51.21 percent of the voting-age population in this country voted, a significant decrease from the 60.84 percent turnout in the 1968 presidential election. In New York, even with a high-profile Senate contest, only 49.42 percent of the voting-age population voted.³ When the value of every vote becomes apparent, the problem of low rates of voter participation is particularly disconcerting.

Thanks largely to recent vigorous registration drives and the implementation of the National Voter Registration Act, New York's voter registration rate is high. About 11.2 million of the State's 13.6 million voting-age population are registered -- an 83 percent rate. When non-citizens and felons ineligible to vote are omitted, the effective registration rate is approximately 92 percent. But there remains over one million voting-eligible New Yorkers who are not registered. Under state law, the deadline to register to vote is 25 days prior to Election Day. Qualified but unregistered citizens who become motivated to vote in the days before an election are not able to exercise their franchise. This should be redressed.

² Of course, numerous other significant issues relate to the right to vote and the integrity of the election system: campaign finance reform, redistricting, at-large voting, and issue referenda are just a few of the many complex and important issues beyond the scope of this report but which deserve attention in their own right.

³ While New York's turnout rate places it slightly below the national average, the reality is somewhat more complicated. "Voting-age population" includes non-citizens and others ineligible to vote. Because New York's population includes a higher percentage of non-citizens than most states, New York's turnout rate among eligible voters most likely exceeds the national average. Nonetheless, turnout in New York could and should be higher.

New York State should take the following steps to enhance voter participation:

- * **Institute Election-Day Registration.** States with the greatest turnout rates have implemented successfully election-day registration. Their experience demonstrates that this step can enhance voter participation. Election-day registration should be implemented with measures which prevent and detect voter fraud and minimize administrative expense.
- * **Establish a Statewide Registration List.** A statewide computerized registration list will assist registered voters in proving qualifications to vote while enabling election officials to curb election fraud.
- * **Expand Voter Education with Voter Guides and a Voter's Bill of Rights.**

VOTER CHOICE.

Voter participation also turns on voter interest — and the ability of voters to express those interests through the candidate of their choice. As a practical matter, voter choice is determined by ballot access — that is, the candidates listed on the ballot. New York State's ballot access rules require gathering numerous signatures and compliance with detailed technical requirements. The rules have invited considerable administrative challenge, litigation, and cost to all concerned, without necessarily serving well the state interests in ballot clarity or administrative efficiency. No other state imposes such hurdles on ballot access.

New York should adopt ballot access rules which provide meaningful choice to voters, while avoiding voter confusion and unreasonable administrative burdens. Specifically, the State should pursue the following proposals:

- * **Reform Petition Requirements.**
 - Cut in half signature requirements for all state and local offices.
 - Lengthen petitioning period.
 - Ease technical restrictions and requirements to allow citizens to sign more than one petition and to give candidates more time to correct non-substantive errors.

*** Offer Candidates Alternatives to Signature Gathering.**

- Permit automatic ballot access for federally matched candidates in presidential primaries.
- Explore matching alternatives or filing fees for all other offices.

VOTE CASTING.

Government can facilitate voter participation in a third way: by making voting by qualified voters easy, convenient, and effective.

a. Improving Voting Machines.

The presidential election of 2000 exposed the frailties in the mechanics of voting: ballot face; punch cards; absentee ballots. New York State and local governments have a duty and opportunity to modernize the means of voting. To guarantee the integrity of the system, a first step must be to ensure that all lever machines used in New York State are adequately maintained, serviced, and repaired. Simultaneously, officials must explore advanced voting technology such as electronic voting. Any technological innovation must be assessed in terms of ease of voting, security, privacy, and reliability. Election officials must weigh the costs and benefits of innovation and be mindful of inequities in aptitude, knowledge, and access to technology.

*** Upgrade Existing Voter Machines.** Ensure that replacement parts are available for lever machines.

*** Authorize State Board of Elections to Test Advanced Voting Technology.** The State Board of Elections must be given express authority to explore and test voting technologies in primaries and general elections. The State Board of Elections should have discretion to study voting machines on which the full ballot face does not appear.

Upgrading the mechanics of voting is critical not only to the integrity of the electoral system, but also to encouraging voter participation: voters must have confidence that their vote will count and count accurately.

b. Better Assistance at the Polls.

Successful operations of the polling site – irrespective of legal reforms or modernized machines – ultimately rests on the shoulders of the people who work at the polls. These individuals perform a critical civic service; they open the polling places, verify voters, hand out ballots, tally results, and answer questions. They work long hours for relatively low pay. Most poll workers perform well under the circumstances. Many, however, could use greater support. Moreover, notwithstanding the best efforts of qualified poll workers, problems at the polling site will occur. Some voters believe they are registered, when registration records say otherwise. Individuals arrive at one polling site, when they should be elsewhere. Local officials could better facilitate voting by registered voters — while curbing voter fraud — if they had access to a comprehensive, current and electronic statewide voter registration list. To address these problems, New York should take the following steps:

- * **Recruit Additional Poll Workers** from nontraditional sources such as high schools and colleges, corporations, government agencies, non-profit groups, and smaller political parties. (Representatives of the two major parties should continue to provide needed checks and balances).
- * **Increase Compensation and Training for Election Workers.**
- * **Consider Flexible Hours for Poll Workers.**
- * **Equip Election Workers with Modern Technology.** Provide poll workers and county boards with modern communication capability and access to computerized voter information.

c. Making Voting Easier.

The majority of New Yorkers vote at local polling sites on Election Day, consistent with the traditional belief that voting at centralized community locations allows our citizenry to perform collectively a critical civic duty and right. But Election Day voting often proves challenging for some voters. First, some individuals find it inconvenient if not impossible to come to the polling place during voting hours, especially in those areas where polls do not open

until noon. Second, the Office of the Attorney General has received allegations that voting by African-American, Asian-American, and Latino citizens was made more difficult by nonfunctional voting machines in minority neighborhoods, and insufficient numbers of bilingual poll workers. State and county boards of elections do not routinely and uniformly collect the data that would make possible a systematic investigation of these serious charges. Third, a 1999 survey found, that in some counties, virtually none of the polling sites were accessible to people with physical disabilities, as required by federal and state law.

Restrictions to voting by qualified voters should be eliminated if any state interest served by those restrictions can otherwise be protected. To that end, New York should pursue the following recommendations:

*** Make Voting Convenient.**

- Phase in standardized polling site hours statewide at 6 a.m. - 9 p.m., as long as sufficient numbers of poll workers can be recruited.
- Encourage private employers to accommodate voters.

*** Enforce Accessibility of Poll Sites.**

- Create an Accessibility Fund to assist localities upgrading polling places.
- Train boards of elections and ADA county coordinators in best practices for making sites accessible.

*** Ensure Full Participation by All Voters.**

- Require State Board of Elections to collect, analyze, and disclose allegations of discriminatory practices, the relevant election administration data, and the steps taken to address such problems.

d. Expanding Absentee Balloting.

Full voter participation cannot be achieved simply with reform at the polling site. New York permits offsite voting for members of the military and persons who qualify as absentee voters; i.e., those who are physically unable to go to the polls as a result of disability, illness, or

absence from the county on Election Day. Where voters qualify to vote absentee, it should be easy and effective. At the same time, New York should adopt measures to address the potential manipulation of absentee voters.

In recognition that our society has become increasingly mobile and that voter turnout remains relatively low, other states permit greater use of absentee and other offsite voting such as voting by mail or online. While these measures in the future may expand voter participation, New York must address serious security, privacy, and reliability concerns before it can adopt them with confidence.

To strengthen offsite voting for qualified voters, New York should take the following specific steps:

* **Count Military Ballots Without Postmarks Where Voter Provides Suitable Affirmation.** Military ballots should be counted even if they lack a postmark, so long as the ballots arrive within seven days of Election Day and the voter affirms that the ballot was cast before Election Day.

* **Bolster Absentee Balloting.**

- Consider permitting primary care-givers to vote by absentee ballot.
- Delete intrusive questioning on absentee ballot applications.
- Mandate special oversight of absentee voting at nursing homes and similar institutions.
- Limit use of authorized agents in the distribution of absentee ballots.
- Phase out use of punch cards for absentee ballots.

VOTE INTEGRITY.

Voter participation not only is broadened through greater voter registration, increased education, expanded voter choice, and facilitated voting; it also depends on the public's faith in the integrity of our electoral process. This confidence will be achieved by effective and accurate vote canvassing and re-canvassing and by the enforcement of election laws.

The recent election and its aftermath in Florida demonstrated that the methodology for

counting votes and verifying that calculation must be reliable, efficient, and equitable.

Technological advances such as optical-scanning equipment for mark-sense ballots used successfully in several New York City counties should be considered by all larger counties.

While New York State does not face the identical challenges of individual vote counting at issue in Florida, there are measures New York should take to ensure the counting of all legitimate votes.

In addition to vote counting measures, New York can underscore the integrity of our electoral process by enforcing election laws fairly and effectively. This report contains numerous measures to prevent and detect election fraud, including but not limited to: developing and employing a statewide registration list to curb multiple voting; mandating special nursing home oversight; and limiting the use of authorized agents in the distribution of absentee ballots. The District Attorneys are responsible for determining whether particular facts warrant a criminal investigation and prosecution. Yet, in cases which do not rise to the level of criminal culpability, the State Board of Elections has few tools for enforcement.

New York State should take the following steps to enhance the integrity of elections:

- * **Count All Unambiguous Ballots By Repealing Technical Bars.** Election Law Section 9-112 precludes counting a ballot with an extraneous tear or mark despite the fact that the voter's intent is clear and there is no evidence of fraud. It should be amended.
- * **State Board of Elections Should Set Standards for Counting Punch-Card and Mark-sense Ballots.**
- * **Move September Primary to June.** When there is litigation over election results from the September primary, election administrators often encounter extreme challenges in preparing for the November general election. A June primary would provide for efficiency and equity in election administration.
- * **Authorize State Board of Elections to Impose Intermediate Sanctions for Election Law Violations.** The Board should have authority to impose civil monetary penalties.
- * **Enact Criminal Penalties for Vandalizing or Defrauding Computer Voting Data or Systems.**

A CALL TO ACTION.

As public officials and institutions debate the future of elections in New York State, this report should serve as a framework for these discussions. Some of the recommendations are simple; some pose technological or logistical challenges; some require legislative action; others require further study.

The legitimacy and vitality of elected government in this nation and in our State depends on an engaged citizenry, a spirited debate of ideas and candidacies, and efficient and reliable elections. It is incumbent on public officials to seize this rare opportunity and adopt the necessary reforms. Together, we can ensure that voting matters in New York.

I. VOTER PARTICIPATION

A. OVERVIEW

American democracy long has celebrated the principle of universal suffrage. Yet, our history shows that, in practice, we have fallen far short of this standard. The early years enshrined legal exclusions of entire classes of people: for example, those who did not own property, women, and African Americans. Later, many states adopted restrictions such as poll taxes and literacy tests which in practice operated to deprive many Americans of the right to vote.

Significant progress has been made toward universal suffrage. Constitutional amendments have conferred the right to vote on classes of citizens previously excluded: the Fifteenth Amendment states that the right to vote cannot be denied “on account of race, color, or previous condition of servitude;”¹ the Nineteenth Amendment extends suffrage to women;² the Twenty-Fourth Amendment ensures the right to vote cannot be denied by reason of failure to pay a poll or other tax;³ and the Twenty-Sixth Amendment extends the vote to citizens 18 years or older.⁴ The Voting Rights Act of 1965 establishes an enforcement scheme to assure all citizens equal access to the political process regardless of race.⁵ Subsequent acts of Congress as well as Supreme Court decisions have struck down a variety of restrictions on the franchise, including white primaries; racial gerrymandering; literacy tests; and durational

¹ U.S. Const. amend. XV, §1.

² U.S. Const. amend. XIX, § 1.

³ U.S. Const. amend. XXIV, § 1; See Harper v. Virginia State Bd. Of Elections, 383 U.S. 663, 670 (1966).

⁴ U.S. Const. amend. XXVI, § 1.

⁵ 42 U.S.C.A. §§ 1971, 1973-1973bb-1.

requirements.⁶

As a result of constitutional amendments, legislation, and litigation, every American citizen now is entitled to vote, subject to qualification requirements such as age and residency.⁷

The vitality of American democracy and the legitimacy of our elected officials, however, depends on effective universal suffrage: not only must every American have the right to vote but each American should be motivated to exercise that right.

Despite essential reforms, voter turnout in America remains distressingly low. In the 2000 presidential election, only 51.21 percent of the voting-age population in this country exercised their franchise.⁸ In New York, the turnout rate was 49.42 percent.⁹ An individual's decision not to participate in a particular election may be explained by many factors: apathy, alienation, a belief that elections will not impact issues of concern, lack of information, varying degrees of interest depending on the public office or issues at stake, or belief that the voting process is difficult and cumbersome. While government may not control or even be able to affect many of these factors, government should remove structural impediments to voting which unjustifiably reduce voter participation.

⁶ Terry v. Adams, 345 U.S. 461 (1953) (prohibits racial primaries); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (prohibits racial gerrymandering); 42 U.S.C. §1973aa (abolishing literacy tests); Dunn v. Blumstein, 405 U.S. 330, 358 (1972) (striking down one-year residency requirement).

⁷ A person convicted of a felony is prohibited from voting in New York while incarcerated or on parole for such offense. N.Y. Elec. Law § 5-106.

⁸ Curtis Gans, Committee for the Study of the American Electorate (2000) (relying on voting-age population data from the U.S. Census which includes non-citizens and others ineligible to vote).

⁹ Id. This figure rises to about 57 percent when voting-age population is narrowed to exclude persons ineligible to vote. According to 1990 census figures, there are approximately 13.7 million voting-age New York residents, 1.35 million of whom are non-citizens. Another 120,000 of the population are felons in prison or on parole who are not eligible to vote, leaving about 12.2 million New Yorkers eligible to vote. Of these, about 6.9 million voted in the 2000 general election.

This chapter examines two areas that may contribute to low voting rates by New Yorkers: 1) voter registration requirements and practices; and 2) limited voter education or knowledge about electoral issues.

B. VOTER REGISTRATION CAN BE STRENGTHENED.

One continuing prerequisite to voting remains the requirement that voters be registered. Indeed, every state but North Dakota has a registration requirement.¹⁰

New York uses registration as a means to ascertain that the intended voter is qualified to cast a ballot.¹¹ The State requires that the voter be at least 18 years of age and meet a 30-day residency standard.¹² With registration, applicants must verify their identity and address, and election officials can check records for duplicate entries.

1. Present Registration System.

a. REQUIREMENTS.

Article II, § 5 of the New York Constitution provides that “[l]aws shall be made ... for the registration of voters.¹³ Initially, New York required voters to register annually.¹⁴ In 1954, concerned that this approach tended to depress voter participation, the State Legislature authorized permanent personal registration at the localities’ discretion; the Legislature

¹⁰ See U.S. Federal Election Commission, State Voter Registration Requirements <<http://www.fec.gov/pages/Voteinst.htm>>.

¹¹ See People ex rel. Stampleton v. Bell, 119 N.Y. 175, 181-182 (1890) (noting that registration is a “safeguard against frauds; for it is a means for furnishing all the electors of the district with the knowledge of what persons will claim the right of voting, a sufficient time in advance of the election for them to act upon it, if necessary”).

¹² An exception exists to permit American citizens who do not meet the residency requirement nevertheless to cast a vote in presidential elections. N.Y. Elec. Law § 5-102.

¹³ See also N.Y. Elec. Law § 5-100 (individuals also may vote with a court order).

¹⁴ See Siwek v. Mahoney, 347 N.E.2d 599, 601-602 (1976) (New York first required all voters to register in person, then only those living in cities and villages with populations over 5,000 and, ultimately, permitted registration by mail).

mandated it in 1965. This permitted voters to maintain registration status so long as they did not change their address or fail to vote in two successive general elections.¹⁵

While the State Constitution requires registration to “be completed at least 10 days before each election,”¹⁶ New York Election Law requires that individuals register to vote at least 25 days in advance of the election in which they wish to vote.¹⁷

b. METHODS FOR REGISTERING.

The New York State Board of Elections is charged with taking “all appropriate steps to encourage the broadest possible voter participation in elections.”¹⁸ Each county board of elections maintains a system for voter registration. Every board submits an annual report to its local legislative body and to the State Board of Elections, which includes a detailed description of programs to enhance voter registration, especially for groups historically under-represented among registered voters.¹⁹ The State Board of Elections reviews each plan and assists in developing and implementing registration outreach.²⁰

¹⁵ See id.

¹⁶ N.Y. Const., art. II, § 5.

¹⁷ N.Y. Elec. Law § 5-210(3).

¹⁸ Id. § 3-102(14). In 1974, the State Board of Elections was established in the Executive Department, vested with the responsibility for administration and enforcement of laws relating to elections in New York State. See Donohue v. Board of Elections of State of New York, 435 F. Supp. 957, 964 and n.13 (E.D. NY 1976); N.Y. Elec. Law § 3-100. County Boards of Elections have the primary responsibility for registration and election administration. Donohue, 435 F. Supp. at 964, n.13. Towns and cities, however, are responsible for procuring voting machines and hiring poll workers. At times, these entities have overlapping responsibilities, with different priorities. At all levels, New York’s election administration is served by representatives of the two major political parties, providing institutionalized checks and balances. While there may be persuasive arguments for election administration by a neutral civil service, there are competing arguments favoring the open checks and balances offered by New York’s politically interested and engaged parties.

¹⁹ N.Y. Elec. Law § 3-212(4)(b).

²⁰ See id. § 3-212(4)(b)(3).

At present, a New Yorker can register to vote by several means: in person; by mail; on official local registration days; and at designated New York State agencies.

(i) Application In Person or by Mail.

Registration may be accomplished by appearing at the local board of elections during regular business hours or by mailing a completed registration form to the board of elections.²¹ Forms may be obtained from the State Board of Elections (in person, by telephone or downloaded from their website) and at local post offices.²²

(ii) Official Local Registration Days.

Election Law requires that the board of inspectors for every election district meet to accept registrations between the sixth Saturday and the fourth Saturday before a general election.²³ New York City and counties with a population greater than 300,000 are required to hold two such meetings each year, while all others need only meet once (except in presidential election years, when they too must meet twice.) This requirement at times has proved costly, and a formality given the other available means to accept registrations. Boards of election sometimes decide, by resolution, not to hold local registration meetings.²⁴

(iii) Agency-Based Registration.

In an attempt to increase the number of registered citizens, Congress enacted the National Voting Registration Act (“NVRA”) in 1993.²⁵ Commonly referred to as the “Motor Voter

²¹ See N.Y. Elec. Law § 5-210(1) (the ability to register by mail was added in 1949); see also 42 U.S.C. § 1973gg-4 (1993) (National Voter Registration Act requires states to accept and use national mail voter registration forms).

²² The State Board of Elections maintains a toll free hotline: 800-FOR-VOTE. See also <<http://www.elections.state.ny.us>>.

²³ N.Y. Elec. Law § 5-202(1).

²⁴ See id. § 5-202(6).

²⁵ 42 U.S.C. § 1973gg.

law,” NVRA requires that an individual applying for a driver’s license be given the opportunity to register to vote. In addition, NVRA requires states to provide for registration at public assistance and disability services offices, as well as other designated state agencies. Such agencies must provide a voter registration form, assist in filling it out (if requested), accept the completed application, and transmit it to state election officials.²⁶ The New York State Board of Elections is charged with administering the NVRA program in this state.²⁷ New York has designated 15 state agencies – including the Office of Alcoholism and Substance Abuse Services, the Department of Labor, the Division of Veterans’ Affairs and the Workers’ Compensation Board – as voter registration sites.²⁸

NVRA has increased significantly voter registration in New York. In 1998, only 70 percent of New York State’s voting-age population was registered to vote.²⁹ That year, the last for which comparative data is available, 37 states had a registration rate greater than New York’s.³⁰ New York State “led the nation in voter registration applications received from

²⁶ NVRA also contains registration list maintenance provisions that limit the circumstances under which states may remove the name of registrants. For example, states may not remove the name of any person from a registration list because that person failed to vote. Id. §1973gg-6(b).

²⁷ See N.Y. Elec. Law §§ 5-211, 5-212. A system for agency-based registration in New York State was the subject of Executive Order 43 (1984). See also N.Y. Comp. Codes R. & Regs. tit. 9, § 4.104.

²⁸ The Office of the Attorney General is representing the State in a lawsuit brought by the federal government which asserts that New York has failed to implement fully the requirements of NVRA 1) by not designating as state voter registration agencies private entities which provide Medicaid applications and which receive public monies; and 2) by allegedly not fully implementing NVRA at agencies such as the Office of Mental Health. See United States v. New York, 96 CV 5562 (E.D.N.Y., filed in 1996).

²⁹ See U. S. Federal Election Commission, Voter Registration and Turnout 1998 (last modified June 3, 1999) <<http://www.fec.gov/pages/reg & to 98.htm>>.

³⁰ See U.S. Federal Election Commission <<http://www.fec.gov>>

agency-based programs, and . . . in mail-based voter registration applications.”³¹ In 1999, 38 percent of the 1,160,755 voter registration applications received by county boards of elections resulted from NVRA implementation. The Department of Motor Vehicles was responsible for 328,642, or 75 percent, of NVRA registrations.³² As of November 1, 2000, 11,262,816 of New York State’s approximately 12.2 million voting-eligible citizens, or 92 percent, were registered to vote,³³ leaving about one million voting-eligible New Yorkers unregistered.

There are some issues to resolve with respect to NVRA implementation. Some New Yorkers, who believed they had registered to vote pursuant to NVRA, attempted to vote in the 2000 November election but were told by election officials that their names did not appear on registration records. Indeed, the number of such complaints increased this past election. Several factors may explain this situation: 1) voters failing to submit registration applications or submitting incomplete data; 2) inadequate information storage and retrieval practices;³⁴ 3) untimely transmittals of voter registration applications from NVRA agencies to boards of elections;³⁵ and 4) an increase in new voters because of the presidential election. The State Board of Elections should explore these concerns to identify the precise nature of the problem and the appropriate solutions which may include: voter education, simplification of registration forms, additional training of personnel at state agencies, improved data entry by state agencies,

³¹ New York State Board of Elections, 1999 Ann. Rep., Voter Registration/NVRA at 6.

³² Id. at 5.

³³ See New York State Board of Elections, Total Statewide Enrollment, (last modified Feb. 5, 2000) <[http:// www.elections.state.ny.us](http://www.elections.state.ny.us)>.

³⁴ For example, the New York City Board of Elections discovered after the 2000 election that election-day registration rolls were incomplete due to inadequate computer memory allocated for voter registration by the City’s computer mainframe.

³⁵ Some of the registration applications required the voter affirmatively to check a box indicating a desire to register in addition to simply supplying information.

expedited information transmittal by state agencies to boards of elections, improved data entry by boards of elections, and publicizing best practices by particularly efficient agencies and counties. Indeed, the State Board of Elections is planning additional NVRA training for state agencies. The State Board of Elections also should report – by county and by municipality with population over 75,000 – the results of agency-based voter registration pursuant to the NVRA.

2. Recommendations.

Notwithstanding the significant strides in the registration rate of New Yorkers, it is disconcerting that New Yorkers who become motivated to register within 25 days of the election are barred from doing so. Widespread participation in the electoral process ensures that government decision making reflects the full range of citizen views, and these recommendations are intended to accomplish that goal.³⁶

To bolster voter registration, New York should take the following steps: institute election-day registration coupled with stiff anti-fraud measures, expand the use of electronic registration forms, and establish a statewide registration list.

a. INSTITUTE ELECTION-DAY REGISTRATION.

As each election approaches, campaign events, candidate advertisements, and media coverage of candidates and campaign issues intensify dramatically. Citizens, who early in the campaign may be apathetic or at least unengaged, increasingly may be motivated to debate issues and ultimately wish to exercise their right to vote. Yet, by the time a citizen is engaged in political discourse, the deadlines for registering to vote have passed.

This dilemma can be solved by instituting election-day registration, which makes

³⁶ More voter registration should mean that more people will vote. In this past presidential election, 60.2 percent of those registered in this State actually cast a vote. However, the rate at which those registered actually vote has declined in recent elections from 75.8 percent in 1992, to 63.3 percent in 1996 to 60.2 percent this year, while the numbers of votes cast in those years totaled, respectively, 6.9 million, 6.4 million and 6.8 million. See New York State Board of Elections <[http:// www.elections.state.ny.us](http://www.elections.state.ny.us)>.

participation in the electoral process possible for all who are qualified to vote. Such a system will promote greater voter participation overall; unlike other registration methods, it can be expected that 100 percent of those who register to vote on Election Day actually will cast a vote.

Election-day registration statutes are currently in effect in six states: Idaho; Maine; Minnesota; New Hampshire; Wisconsin; and Wyoming. Four of the six ranked among the highest in voter turnout for the November 2000 election: the percentage of voting-age residents who voted in Minnesota was 69.4 percent – highest in the country; Maine ranked second at 67.34 percent; Wisconsin third at 66.5 percent; and New Hampshire was fifth at 62.2 percent.³⁷

These States successfully expanded voter participation without experiencing an increase in fraud. Indeed, three of these States have had election-day registration for more than 25 years: Maine; Minnesota; and Wisconsin. They have adopted a variety of measures to ensure that those who register on Election Day are indeed qualified to vote:

- Five of the six States require that an applicant sign an oath or affidavit attesting that he or she is qualified to vote.
- Four states – Idaho, Minnesota, New Hampshire and Wisconsin – require photographic proof of identity such as a driver's license or student identification card.
- Minnesota and Wisconsin verify election-day registrants by means of non-forwardable post cards sent to the address provided by the voter.
- Wyoming officials are authorized to investigate the qualifications of those they question.

Although criminal charges have been brought against two individuals in New Hampshire for voter fraud, election officials in Idaho, Maine, Minnesota, Wisconsin, and Wyoming have reported no incidents of fraud in connection with election-day registration.

³⁷ See Minnesota Secretary of State, Elections Division; Maine Secretary of State, Elections Section; Wisconsin State Elections Board; Newsweek, Nov. 20, 2000, at 18. North Dakota – which has no registration requirement – was eleventh, with a turnout rate of 61.7 percent.

Expanding voter participation can be accomplished without sacrificing the integrity of the electoral process. The purpose of registration – to ensure that all voters are qualified – can be served if election-day registration is implemented in New York with all the fraud-prevention measures used in States with election-day registration. Specifically, New York should adopt the following measures:

- require individuals wishing to register on Election Day to sign an oath or affidavit attesting that they are qualified to vote;
- require adequate proof of identity and residence such as an official government identification document;
- require election-day registrants to vote by paper ballot, segregate the ballots, and permit challenges; and
- promptly verify election-day registrants by means of non-forwardable post cards sent to the address provided by the voter.

Pursuant to existing provisions of the Election Law, local boards would be authorized to investigate the qualifications of those who register on Election Day, and to seek prosecution for duplicate registrations.³⁸ Election-day registrants' ballots would be canvassed along with absentee, military, affidavit and other paper ballots, after verification.

Instituting election-day registration in New York requires amending the State Constitution, Article II, Section 5 so that it no longer requires voter registration to be completed 10 days prior to an election. Election Law § 5-100 also must be amended to provide a process for citizens to register and vote on Election Day. Until a constitutional amendment succeeds, the Election Law should be amended to permit registration up to 10 days before the election, consistent with the terms of the Constitution.

Election-day registration, accompanied by the fraud prevention mechanisms, should expand voter participation in New York State while preserving vote integrity.

³⁸ N.Y. Elec. Law § 17-104.

b. EXPAND REGISTRATION FORM DOWNLOADING.

Another way to enhance voter participation is to increase the distribution of the voter registration form. NVRA's success has demonstrated that greater dissemination of the registration application increases registration. Once a voter has the form, he or she simply completes it and mails or delivers it to the appropriate local board. Currently, a voter may download a standardized National Voter Registration Form from the Federal Election Commission's (FEC) website³⁹ and the New York State voter registration form from the State Board of Elections' website.⁴⁰ Certain private websites, such as the AARP's "beavoter" site and MTV's "Rock The Vote" site, also provide links to the New York State Board of Elections website for downloading forms. Typically, a voter accesses these sites, downloads a registration form, completes it, and mails it to the Board of Elections.⁴¹

Wider dissemination of the registration form should be encouraged. The Attorney General has established a link between the Attorney General's Office's website and the website of the State Board of Elections.⁴² The State Board of Elections should consider making voter registration forms available on additional websites maintained by other governmental agencies and on popular commercial sites.

While the increased ability to download a voter registration form from public and private sites may expand the likelihood of registration with few potential problems, invitations from websites to enter the data online may be problematic. Some dot-com companies offering the

³⁹ See U.S. Federal Election Commission <<http://www.fec.gov>>.

⁴⁰ See New York State Board of Elections <<http://www.elections.state.ny.us>>.

⁴¹ Although e-signatures are the legal equivalent of personally executed signatures, pursuant to Chapter 57-A of the N.Y. Consolidated Laws, various security concerns must be resolved before implementing a system for on-line registration.

⁴² See New York State Office of the Attorney General <<http://www.ag.ny.gov>>.

form on their sites reportedly have required that it be sent to them for forwarding to the appropriate board of elections. This risks a problem in transmitting the information to the correct site. It also permits an entity to copy the personal information that appears on the registration application, combine it with other information known about the user, and store it in their data files for potential future commercial use. Such website operators should be prohibited from using or disclosing a voter's personal identifiable information from the online registration forms for non-electoral purposes unless they secure the voter's consent. Further, all such websites should feature an information notice clearly disclosing their policy on collection, use, and disclosure of data.

c. CREATE A STATEWIDE-REGISTRATION LIST.

Any steps to increase registration – such as election-day registration and further dissemination of registration applications online or through traditional means – must be accompanied by modern management of registration. At present, the State Board of Elections does not maintain a statewide list of registered voters. Each county maintains a separate list of registered voters. While the county list may be computerized,⁴³ counties do not have access to an updated electronic statewide list of registered voters. The State Board of Elections periodically compiles a list from each county for the sole purpose of confirming changes of residence. However, this list remains categorized by county, is not alphabetized statewide, and is not kept current on an ongoing basis.

Approximately a dozen states – including North Carolina, Minnesota, and Missouri – have integrated statewide registration lists. Such a list assists poll workers in resolving election-day problems resulting from incomplete or inaccurate registration information. Indeed,

⁴³ For example, the Erie County Board of Elections stores all voter registration information in computer files updated when addresses change. This computerized system, which costs between \$200,000 and \$300,000 a year, may provide election workers at polling places access to current voter registration information.

to address information transmittal, retrieval, and storage problems, which undermine the promise of the NVRA, the FEC recommends that each state establish a statewide computerized voter registration database. In some states, voter registration data tracks registrants with unique identifiers such as birth dates and the last four digits of Social Security numbers to allow election officials to purge the lists of deceased voters or those who have moved out of the jurisdiction.⁴⁴ Such a list also helps election officials prevent voter fraud. With a current statewide list, election officials may determine whether a voter is registered in more than one jurisdiction.

The State Board of Elections should be given the express authority and resources to compile and maintain an electronic statewide list of registered voters. County boards of elections and ultimately local polling sites should be able to consult this list. The statutory framework for such a responsibility already exists.⁴⁵

The creation of a statewide registration list, however, raises significant questions regarding voter privacy. Registration lists may be used for purposes unrelated to enhancing the electoral system. For example, private businesses that currently use registration lists, in combination with other data, to furnish political candidates detailed information about voters, are exploring using such lists to serve non-political customers.⁴⁶ In addition, individuals can use voter data to harass others. For example, a convicted killer reportedly obtained the address of a former acquaintance he blamed for his predicament from the New York City Board of

⁴⁴ Given privacy implications, Social Security numbers should not be made available to the public.

⁴⁵ N.Y. Elec. Law § 3-103.

⁴⁶ See Don't Suppress Voter Registration Lists, *Virginian-Pilot*, Dec. 7, 2000, at B10; see also Before You Go Cast Your Vote, Politicians Know About You, *Virginian-Pilot*, Dec. 5, 2000, at A1.

Elections so that he could stalk her.⁴⁷

The creation of a statewide registration list should be accompanied by rules regulating the use of voter data for non-electoral purposes. Currently, New York law provides no substantial protections for the privacy of registration lists.⁴⁸ State and federal government regulation of access to and use of public record data is constitutional,⁴⁹ and a number of states have laws that restrict access to voter data.⁵⁰ Federal law makes it illegal to sell data from the FEC for commercial purposes.⁵¹

Limiting access to voter registration information to the electoral purposes for which it was gathered appropriately balances citizens' privacy concerns with the values of political discourse and government accountability.

Through election-day registration and these other steps, registration can be made easier for qualified voters, and thereby enhance voter participation.

C. VOTER EDUCATION CAN BE ENHANCED.

Voter turnout also is affected by voters' belief that they lack sufficient information about the candidates, the electoral issues, or the process of voting.

State and local authorities currently are responsible for some voter education. County

⁴⁷ See In Prison, Free to Get Information; Inmates Abuse a Law to Obtain Personal Data, Critics Say, N.Y. Times, Oct. 20, 1997, at B1.

⁴⁸ See N.Y. Pub. Off. Law § 89(6); N.Y. Elec. Law §§ 3-220, 5-602, 5-604; N.Y. Comp Codes R. & Regs. tit. 9, § 6202.1.

⁴⁹ See Los Angeles Police Dep't v. United Reporting Publ'g Corp, 528 U.S. 32 (1999); see also Reno v. Condon, 528 U.S. 141 (2000).

⁵⁰ For example, in California, voter information is confidential and is made available only to candidates, political committees, and for research and journalistic purposes, as determined by the Secretary of State. In West Virginia, voter registration information cannot be used for commercial purposes; in Kansas, the use of voter registration lists for commercial purposes is a class C misdemeanor.

⁵¹ See 2 U.S.C. § 438(a)(4); 11 C.F.R. § 104.15.

election boards are required to publish in newspapers the names of candidates for each office and mail every person who has voted at least once during the past four years, the days, hours, and location of the upcoming elections and information on absentee ballots and accessibility for the disabled.⁵² The Secretary of State must publish in newspapers of general circulation in each county the text of any ballot questions concerning constitutional amendments.⁵³ The State Board of Elections also must publish an abstract of any such amendment or other ballot questions.

While state and county officials provide basic information about polling sites and ballot questions, New York City officials distribute more substantive information. The New York City Campaign Finance Board, for example, produces and mails a voters' guide prior to each election, containing candidate biographies and statements, as well as explanations and abstracts of any ballot questions.⁵⁴

County boards of elections should be required, with state funding, to produce and distribute voters' guides similar to New York City's. Such guides should include a sample ballot.⁵⁵ For statewide ballot referenda, the State Board of Elections, in consultation with the Attorney General's Office or other designees, could prepare official state ballot question information containing succinct "pro" and "con" statements. This information could be included in local voters' guides.

County boards of elections also should consider greater use of technology to disseminate voter information. Some county boards maintain websites with detailed information

⁵² See N.Y. Elec §§ 4-104(2), 4-122.

⁵³ See id. §4-116.

⁵⁴ See NYC Charter § 1053(a).

⁵⁵ A similar proposal is before the Rockland County Legislature.

about polling locations and other voting issues.⁵⁶ These web sites have great potential to educate voters and ease the county boards' administrative burden. The New York City Board of Elections' website, for example, allows voters to find their polling site by sending a request to the board by email, to which personnel respond.⁵⁷ With available technology, a voter should be able to type in a home address, and automatically learn the location of the polling site.

County boards also should consider using "information kiosks" in public places, to extend the reach of online voter information resources, especially to voters who do not have computers at home. New York City has launched an ambitious effort to establish a network of electronic kiosks in government buildings, libraries, grocery stores and check-cashing outlets.⁵⁸ These kiosks allow citizens to access information and services from city government. They can pay parking tickets and property taxes, check building inspection records, and print application forms.⁵⁹ Such kiosks could provide information on voter registration and procedures, absentee voting, and polling-site locations.

Finally, the State Board of Elections could create and publish a "Voter's Bill of Rights" describing a New Yorker's voting rights under federal and state law.⁶⁰ At a minimum, the Voter's Bill of Rights should set forth a voter's rights: (1) to cast a vote in privacy at a polling place, regardless of physical disability; (2) to request and receive assistance from an inspector,

⁵⁶ See, e.g., <<http://www.albanycounty.com.departments/elections/>>; <<http://www2.cortland-co.org/election/cpoll1.html>>; <<http://www.vote.nyc.ny.us/>>; <<http://www.chemungcounty.com/boe2.html>>; <<http://www.co.rockland.ny.us/boe.htm>>; <<http://www.co.saratoga.ny.us/election.html>>; <<http://www.co.oswego.ny.us/election/>>.

⁵⁷ See New York City Board of Election <<http://www.vote.nyc.ny.us/>>

⁵⁸ See At 37 Kiosks, City Hall at Your Fingertips, N.Y. Times, Sept. 9, 1997, at A1.

⁵⁹ See id.

⁶⁰ The Commissioner of Tax and Finance is required to publish a taxpayer's bill of rights. N.Y. Tax Law § 3004.

who must provide aid without influencing the content of the vote; (3) to vote by paper or emergency ballot if the voting machine malfunctions; (4) to vote by affidavit ballot if one's registration status is challenged; (5) to secure another paper ballot, if the ballot is defective, mutilated or spoiled; (6) to take time in voting; (7) to vote after the poll-closing time if one began waiting on line to vote prior to such time; and (8) to vote by absentee ballot if unable to appear at the polling place because of illness, disability or absence from the county on Election Day. The Voter's Bill of Rights, printed in English and other languages as the Board of Elections deems appropriate, could be included in voter guides, posted on county and state board of elections websites, and prominently displayed at polling places.

Instituting these education measures should alleviate voter confusion and build greater understanding and confidence in our election system. This effort is especially needed to mitigate any voter cynicism resulting from the recent election contests and to facilitate voter participation in the numerous upcoming election races.

II. VOTER CHOICE

Voter participation may be enhanced through voter registration reform and increased voter education. For participation to have meaning, however, voters must have choices. In general, political choices exist in the context of competing visions, ideologies, purposes, and parties. In elections, the choices are more concrete: Will you vote for Candidate X or for Candidate Y? If your choice is neither X nor Y, but Candidate A – and Candidate A is not listed on the ballot at your polling place – then your choice cannot be honored.

Ballot access – that is, the process for determining whose name gets listed on the ballot for public office – is critical to democracy. The rules should promote the core political freedoms of the First Amendment: the freedom of citizens to organize around and elect candidates of their choosing, and the freedom of candidates to stand for election to public office.⁶¹ To uphold these essential freedoms, ballot access measures must be designed to maximize voter choice.

Choice, however, is not the only value that informs ballot access; unfettered voter choice is neither possible nor desirable. Because physical ballots – the face of voting machines and contours of paper ballots – have limited capacity, it simply is not possible to provide space (“ballot position”) to all. Additionally, states have a strong interest in minimizing the risk of voter confusion and in ensuring administrative regularity; these interests would be undermined, if not defeated, by unrestricted ballot access.

Balancing these constitutional values and practical concerns, the Supreme Court has held that states are entitled to require that candidates demonstrate a “modicum of support” for

⁶¹ See Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 n15 (1979) (regarding restrictive ballot access schemes: “[by limiting the choices available to voters, the State impairs the voters’ ability to express their political preferences”); see also Williams v. Rhodes, 393 U.S. 23, 30 (1968) (restrictive ballot access schemes burden “the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively”).

access to the ballot.⁶² All others may be excluded. States may choose any manner to measure a “modicum of support” – so long as the means selected do not unduly burden voters and/or candidates in their associational rights or tend to discriminate against non-mainstream parties or candidates.⁶³

A. NEW YORK BALLOT ACCESS LAWS: AN OVERVIEW.

1. Legal Requirements.

Since the early 1900s, New York has measured a candidate’s “modicum of support” through the collection of a specified number of voter signatures on a petition. A petition contains the names, addresses and signatures of registered voters who support listing the particular candidate on the ballot for a specific public office. The petition is used most often in party primaries.

In New York, a candidate seeking to appear on a primary ballot must file a petition containing signatures ranging from 15,000 for statewide offices to 500 for an Assembly seat, or the signatures of five percent of the voters enrolled in the party, whichever is less.⁶⁴ An independent candidate, or the candidate of a political organization that has not achieved party status, faces slightly different signature requirements: 15,000 for statewide office, but at least 100 signatures must come from each of half or more of the state’s 31 CD. For an assembly petition, however, an independent candidate must collect 1,500 signatures or five percent of the total number of votes last cast for the Office of Governor, which ever is less.⁶⁵

⁶² See Jenness v. Fortson, 403 U.S. 431, 442 (1971).

⁶³ See Illinois State Bd. of Elections, 440 U.S. at 185.

⁶⁴ See N.Y. Elec. Law § 6-136; see id. § 6-104(2) (candidates for statewide office may qualify for the primary ballot by obtaining 25 percent of vote at state party convention); compare § 6-106 (candidates for Supreme Court Justice nominated at judicial district conventions).

⁶⁵ See id. § 6-142(2).

In addition to the requirements for the number of valid signatures, petitioners must adhere to various technical rules governing who may sign, when, and how. For example, a voter is permitted to sign only one petition for each office (the so-called “ban on cross-signing”); if a voter signs the petition of more than one candidate, the later-dated signature is not counted.⁶⁶ Similarly, a voter’s signature must be accompanied by the town (or city) in which the voter lives. If a voter gives his or her residence as a village within a town, or mistakenly identifies the residence by some other designation, the voter’s signature may be discarded (the “town/city trap”).⁶⁷ Finally, strict requirements govern who may witness voter signatures,⁶⁸ and mandate that signatures be collected within a 38 day period.⁶⁹ Signatures not properly witnessed or collected after, or before, the prescribed period do not count.⁷⁰

Once filed, a petition in proper form and appearing to bear the requisite number of signatures is considered presumptively valid. Nevertheless, rival campaigns can challenge the legal sufficiency of the petition and the genuineness of its signatures. Initially, the board conducts an adjudicatory proceeding on the specified objections, often including a line-by-line review of the petition.⁷¹ In addition, a special proceeding – essentially, a lawsuit – also may be

⁶⁶ See N.Y. Elec. Law § 6-134(3).

⁶⁷ See id. §§ 6-130, 6-132. In Zobel v. New York State Bd. of Elections, 678 N.Y.S.2d 794 (3d Dep’t 1998), a statewide independent nominating petition containing more than enough signatures was rejected when the court invalidated 435 signatures because the signer (or subscribing witness) designated the incorrect town or city on the petition. See generally, Robelotto v. Burch, 661 N.Y.S.2d 104 (3d Dep’t 1997).

⁶⁸ See N.Y. Elec. Law § 6-132.

⁶⁹ For fall primary elections, signatures must be collected and filed within a 38-day period during June and July. See id. §§ 6-134(4), 6-158(1).

⁷⁰ See id. § 6-154(1).

⁷¹ See N.Y. Elec. Law § 6-154(2); (see also N.Y. Comp. Codes R. & Regs. tit. 9, § 6204.1 (1978). General objections must be filed at the board within three days after petition is filed, and specifications of the grounds of the objections within six days thereafter.

filed in State Supreme Court, to validate or to invalidate the petition.⁷² It is not uncommon for a petition to be challenged administratively and in court simultaneously.

In the past ten years, the Legislature has taken steps to liberalize New York's strict ballot access rules. The Election Reform Act of 1992 and the Ballot Access Law of 1996 eliminated a number of vexing details applicable to petition cover sheets, reduced signature requirements for state and local offices, and created a presumption of validity and a three-day cure period for filed petitions.⁷³ Recent court decisions have eased the ballot access restrictions by holding unconstitutional the requirement that persons who serve as witnesses to signatures on designating petition reside in the political jurisdiction in which the petition is circulated.⁷⁴

While recent reforms have mitigated the strict requirements of New York's ballot access rules, they did not eliminate them. Indeed, the remaining numerical requirements, technical rules, and the administrative and legal proceedings associated with ballot access in New York continue to have a palpable adverse impact upon candidates and their supporters. For example, in anticipation of the technical challenges so often lodged, candidates routinely gather two to three times as many signatures as are required under the statute. The process is costly and inconvenient – and there are no guarantees of success. Many viable candidates – even occasionally incumbents with organizational support – have lost their place on the ballot for failing to adhere precisely to the law's technical rules. Still others decide not to seek office at all.

⁷² See N.Y. Elec. Law § 16-102.

⁷³ Election Reform Act of 1992, 1992 N.Y. Laws 79 (codified as amended in scattered sections of N.Y. Elec. Law); The Ballot Access Law of 1996, 1996 N.Y. Laws 709 (same).

⁷⁴ Lerman v. Board of Elections, 232 F.3d 135 (2d Cir. 2000) (invalidating residential requirement for petition witnesses for all state-wide contests, citing Molinari v. Powers, 82 F. Supp. 2d 57, 73-77 (E.D.N.Y. 2000) (invalidating same requirement in presidential primaries).

Examples of potential candidacies foiled by the technicalities of petition circulation and signature gathering are legion. A city council candidate's petition was invalidated for being one signature short when measured against a June enrolled voters' list, even though he had enough signatures under a list compiled in July when the petition was filed.⁷⁵ Valid petition signatures have been discarded because they were collected a few days before the petitioning period officially began.⁷⁶ A failure to number pages of a joint petition, a longstanding pitfall for novice candidates, resulted in the disqualification of 28 of 33 city and county candidates.⁷⁷ In a recent case, an incumbent candidate prevailed on a pagination issue, but only after pursuing an appellate court ruling on the eve of the election.⁷⁸

Recent reforms have not reduced significantly the volume and intensity of ballot access litigation in New York. To the contrary, a broad computer-assisted search of case law indicates that election law litigation in New York has remained roughly constant. Suits under Article 16 of the Election Law to validate or invalidate petitions have averaged several dozen a year statewide since 1980. Lengthy ballot access litigation not only imposes costs and inconvenience on candidates, but it also creates difficulties for election officials who cannot prepare paper ballots or voting machines until the candidates are known.

B. BALLOT ACCESS IN PRESIDENTIAL PRIMARIES.

As a general matter, the same rules and problems that govern ballot access in non-presidential election contests in New York – a short circulating season, the ban on cross-signing, the town/city trap and the like—apply as well in presidential primary contests. The

⁷⁵ See Horwitz v. Egan, 694 N.Y.S.2d 139 (2d Dep't 1999).

⁷⁶ See Vitaliano v. D'Emic, 663 N.Y.S.2d 627 (2d Dep't 1997).

⁷⁷ See Bonnett v. Miner, 713 N.Y.S.2d 87 (3d Dep't 2000) (addressing N.Y. Elec. Law § 6-134(2)); see also Collins v. Kelly, 678 N.Y.S.2d 791 (3d Dep't 1998).

⁷⁸ See Collins, 678 N.Y.S.2d 791.

problems are magnified further by special rules, and the significance and attention given presidential primaries. For example, New York’s presidential primaries occur in March. Thus, the traditional 38 day petitioning period occurs during the winter holiday season from Thanksgiving to just after New Year’s Day.⁷⁹ As the period for signature gathering progresses, the pool of voters eligible to sign petitions shrinks because voters are limited by law to signing only one petition for each office.⁸⁰

Unlike many states, New York does not have a single numerical signature requirement for presidential primary elections fixed in law and applied equally to both major parties. Instead, every four years, New York enacts afresh two sets of numerical requirements for the upcoming presidential primaries, one tailored by and for the Republicans and the other by and for the Democrats.⁸¹ Far from reflecting a neutral standard for measuring a “modicum of support,” these presidential primary access rules are products of the parties.⁸²

Historically, the numerical requirements set by the State Republican Committee and applied solely to contenders for the Republican presidential nomination have required more voter signatures than the “Democratic option.” In 1988, the “Republican option” required that prospective delegates gather the signatures of the lesser of five percent of enrolled

⁷⁹See Rockefeller v. Powers, 917 F. Supp. 155 (E.D.N.Y. 1996.), aff’d, 78 F. 3d 44, 45 (2d Cir. 1996) (“Rockefeller II”).

⁸⁰ See id.

⁸¹ See Rockefeller v. Powers, 909 F. Supp. 863, 864 (E.D.N.Y. 1995), rev’d on other grounds, 74 F.3d 1367, 1374 (2d Cir. 1995) (Rockefeller I). Third parties – several recognized by New York law – rarely conduct presidential primaries, instead choosing to select their presidential candidates through other means (conventions or committee designation) or to cross-endorse major party nominees.

⁸² See Anderson v. Celebrezze, 460 U.S. 780, 803, n.30 (1983) (“the drafting of election laws is no doubt largely the handiwork of the major parties that are typically dominant in the state legislatures”).

Republicans or 1,250 enrolled Republicans in each congressional district ("CD").⁸³ By comparison, the "Democratic option" granted statewide ballot position to a candidate who gathered 5,000 signatures from Democrats enrolled anywhere in the State; there effectively was no distribution requirement.⁸⁴

The practical impact of New York's ballot access system was illustrated starkly when in 1988, Sen. Robert Dole, the 1976 Republican nominee for vice-president and the then-Senate majority leader, Rep. Jack Kemp, a popular New York congressman, and Pat Robertson, a well-known evangelist, all failed to achieve ballot position in all 34 of the state's congressional districts.⁸⁵ In 1992, there was no Republican primary.

In 1996, the "Republican option" was the same: candidates were required to gather 1,250 signatures or five percent of enrolled Republicans in each CD to ensure ballot access for their delegate slates. Again the results were profound. Pat Buchanan, a nationally known TV journalist with deep roots in the party's conservative wing, and Steve Forbes, a multimillionaire publisher of Forbes magazine, both faced exclusion from the statewide ballot. Texas Senator Phil Gramm skipped New York altogether, citing the costs and difficulties associated with New York's ballot access scheme.⁸⁶

Republican voters and candidate Steve Forbes challenged the constitutionality of New

⁸³ See Rockefeller II, 78 F. 3d at 45.

⁸⁴ See Molinari v. Powers, 82 F. Supp.2d 57, 69 (E.D.N.Y. 2000). For the 1996 and 2000 Democratic presidential primaries, candidates were allowed to field delegate slates in each CD by gathering signatures of the lesser of .5 percent of enrolled Democrats or 1,000 enrolled Democrats in each district. Such slates were unnecessary, however, to garnering convention delegates. Under national Democratic party rules, presidential candidates win convention delegates based upon the statewide popular vote, not the vote for delegate slates in local contests.

⁸⁵ See Rockefeller I, 74 F.3d at 1372, n.7.

⁸⁶ See Rockefeller II, 917 F. Supp. at 158.

York's ballot access system. The U.S. Court of Appeals for the Second Circuit found New York's rules made it virtually impossible for a candidate other than the party leadership's handpicked choice to achieve ballot position across the State.⁸⁷ Accordingly, the Court held, the ballot access scheme as applied to the Republican presidential primary - including its numerical and distribution requirements, the short petitioning period, the "shrinking pool," the technical challenges, etc. – unduly burdened voters' and candidates' rights in violation of the First Amendment.⁸⁸ As a remedy, the court ordered Steve Forbes' (and later, Pat Buchanan's) delegate slates onto the ballot in all districts.⁸⁹ For the first time in years, the Republican presidential primary in New York was contested statewide.

In late 1999, the Legislature lowered the signature requirements for the Republican presidential primary of 2000. In place of the requirement of 1,250 signatures or 5 percent standard invalidated in Rockefeller, the Republicans opted for 1,000 signatures or .5 percent for each CD, plus 5,000 signatures statewide.

This significant reduction, even taken together with the other reforms, failed fundamentally to change the landscape. At the close of the petitioning phase for the 2000 Republican presidential primary, none of the major Republican presidential candidates had achieved ballot position in all 31 CDs – not John McCain (the war hero senator who recently had bested the party's frontrunner in the New Hampshire primary), not Steve Forbes, not even George W. Bush, the undisputed handpicked choice of the state's Republican establishment.⁹⁰

McCain's New York supporters and others filed suit. In Molinari v. Powers, a federal

⁸⁷ Rockefeller II, 78 F.3d at 45.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ See Molinari, 82 F. Supp.2d at 62, 63, 68.

court found that, although the signature requirements statewide and for each congressional district were substantially lower than in 1996 and other technical requirements had been abolished or eased, the burden remained the same: presidential hopefuls still labored under a truncated signature gathering season, severe numerical and distribution signature requirements, the prohibition against cross-signing (and the concomitant "shrinking pool" of eligible signers), enormous statewide organizing obstacles and, critically, various technical requirements.⁹¹ Again, the law was invalidated and a court ordered additional candidates' names onto the ballot.

C. OVERHAUL OF THE SYSTEM: RECOMMENDATIONS.

Given New York's long experience with ballot access litigation, New York's ballot access rules should be reformed in two critical ways: first, overly restrictive petitioning requirements should be eased or eliminated; and second, candidates should be permitted to demonstrate a modicum of support through fewer petitions or through other means.

1. Ease Restrictive Petition Requirements.

Five substantive changes to the law of petitioning will maximize voter choice in New York elections: (i) substantially lowering numerical signature requirements; (ii) tripling the number of days during which signatures may be gathered; (iii) permitting voters to sign the petition of more than one candidate for each office; (iv) abolishing the town/city "trap"; and (v) creating a ten-day cure period in which petition defects may be corrected.

a. CUT SIGNATURE REQUIREMENTS IN HALF.

New York requires many more signatures than most other states relying upon signature requirements for ballot access.⁹² For example, for congressional races, New York requires

⁹¹ See id. at 67-71.

⁹² Thirteen states and the District of Columbia require petition signatures for candidates to qualify for the ballot.

primary candidates to gather 1,250 signatures of enrolled party members, or the signatures of five percent of the enrolled party members residing in the district, whichever is less.⁹³ Most states require far fewer signatures – as few as 100 in New Jersey, for example.⁹⁴ New York can join the mainstream by halving its signature request for all non-presidential offices.

The numerical requirements for ballot access in Presidential races should be reduced even more. For the 2004 presidential primary, New York should grant statewide ballot access in any political party's primary to any presidential candidate (and his or her delegate slates) who gathers 5,000 signatures of eligible voters statewide, with no fewer than 50 each in one-half of the State's congressional districts. A total figure of 5,000, modestly distributed, is less restrictive than the standard used in New York's other statewide contests.⁹⁵ Given the singular importance of presidential primaries, the rapidly unfolding nature of the presidential season, and the fact that presidential candidates often cannot decide whether to enter New York's primary until relatively late in the game, it is reasonable to demand less of presidential contenders.

Requiring 5,000 signatures coupled with a modest distribution requirement tracks the option successfully employed in the 1996 and 2000 Democratic presidential primaries. It also is consistent with other state's ballot access rules for presidential primaries. Other than New York, only nine states require that presidential candidates procure signatures as a proxy for support. Of those nine, three – New Jersey, Alabama, and Vermont – require between 500 and

⁹³ N.Y. Elec. Law § 6-136(2), (2)(g).

⁹⁴ For example: Arizona (five percent of party registration within district), Illinois (.5 percent of party's gubernatorial vote within district), Iowa (one percent of gubernatorial), Maine (1,000 signatures), Massachusetts (2,000 party members or registered independents), Michigan (one percent of party vote for secretary of state), New Jersey (100), New Mexico (two percent of party gubernatorial), Rhode Island (500), South Dakota (one percent of party gubernatorial), Tennessee (25), Vermont (500), Wisconsin (1,000).

⁹⁵ For example, gubernatorial candidates must gather 15,000 signatures statewide, with no fewer than 100 each in one-half of the state's CDs.

1,000 signatures statewide, with no distribution requirement; the remaining six have statewide requirements that range from 1,000 to 10,000, coupled with modest distribution requirements.

b. LENGTHEN THE PETITIONING PERIOD.

New York's petitioning period of 38 days is the shortest of any state. The period should be expanded to 90 days. A ninety-day period would place New York well within the mainstream of other petition states, whose petitioning periods run from 41 days to more than a year.⁹⁶ It is a simple reform; we should enact it now.

c. PERMIT VOTERS TO SIGN MORE THAN ONE PETITION FOR THE SAME OFFICE.

New Yorkers should be allowed to sign the petition of more than one candidate for the same office. The current ban on cross-signing makes no meaningful contribution to measuring candidate support. At the petitioning phase, it is not only possible but likely that voters who have not been exposed to a full fledged campaign might want to maintain their voting options by supporting ballot access for more than one candidate. Allowing voters to sign more than one petition expands available choices on election day. New York should permit cross-signing, as do at least five other states and the District of Columbia.⁹⁷

d. ELIMINATE THE TOWN/CITY TRAP.

The requirement that a voter who signs a petition list the "town" or "city" with his or her address⁹⁸ should be eliminated. In recent years, the "town/city" requirement has become a trap

⁹⁶ For example, South Dakota (93 days); Illinois (90 days); Arizona (same); Maine (74 days); Rhode Island (54 days). Only Wisconsin approximates New York, allowing only 41 days. Michigan permits gathering signatures during nearly an entire term of office. Iowa, New Jersey, Massachusetts, New Mexico, Tennessee, and Vermont do not specify when signature gathering may begin.

⁹⁷ Iowa and Rhode Island expressly permit cross signing. Maine, Massachusetts, Tennessee, and the District of Columbia are silent on the subject.

⁹⁸ N.Y. Elec. Law §§ 6-130 6-132.

for the unwary: valid voter signatures have been stricken where voters mistakenly list the village in which they reside, rather than the larger “town/city” of which the village is a part.⁹⁹

Moreover, now that election records are computerized, the original justification for this requirement – to facilitate the review of records organized by city and town – no longer exists.¹⁰⁰ The town/city requirement should be eliminated; the voter’s mailing address should suffice to establish the eligibility of a voter to sign a petition.

e. EXPAND THE CURE PERIOD TO 10 DAYS.

The three-day post-filing period to cure non-substantive petition defects was the most widely hailed provision of the 1996 reform legislation. Practitioners indicate that the cure period is an especially important mechanism for first-time or insurgent candidates. Enlarging this period to ten days would reduce costly and time-consuming administrative and legal challenges, and assist first-time candidates to navigate the process. New York should create a ten-day window for curing non-substantive petition errors.

2. Alternatives to Petitioning.

At the same time that New York reforms its petitioning system, it also should permit candidates to achieve ballot access through means proved successful in other states.

a. PERMIT AUTOMATIC BALLOT ACCESS FOR FEDERALLY-MATCHED PRESIDENTIAL CANDIDATES.

In at least six states, a candidate who qualifies for federal matching funds automatically has ballot position in that state’s presidential primary.¹⁰¹ Federal law provides that a presidential

⁹⁹ For example, the Election Law requires a voter who lives in the Village of Montauk – which is located in the Town of East Hampton – to use East Hampton as her address on a designating petition, even though Montauk is the voter’s postal and commonly understood residential address. See Molinari, 82 F. Supp. 2d at 71.

¹⁰⁰ See id. at 72.

¹⁰¹ The six states are: Ohio, Arizona, Delaware, Kentucky, Colorado and North Carolina.

candidate who raises \$100,000 in individual contributions, of which \$5,000 is raised in at least 20 different states, qualifies for matching funds.¹⁰² In 2000, at least ten candidates qualified for federal matching funds, including long-shot candidates Gary Bauer and Alan Keyes.

Qualification for federal matching funds – based on a proven ability to raise funds in small increments from several states – is a valid proxy for “modicum of support” among an electorate as large and diverse as the United States. Ballot access through qualification for federal matching funds has promoted voter choice, as well as ballot manageability and protection against frivolous candidacies. Governor Pataki has endorsed a version of the federal matching model.¹⁰³

New York should provide automatic ballot access statewide to any presidential candidate who qualifies for federal matching funds under the Presidential Election Campaign Fund Act.

b. EXPLORE A FEE-BASED OR MATCHING ALTERNATIVE FOR ALL OTHER OFFICES.

Candidates for offices other than the Presidency also should have a choice of ways to gain ballot access. New York should explore alternatives used by other states. Today, in more than half the 50 states, candidates can qualify for the ballot, among other ways, by paying a modest filing fee.¹⁰⁴ Evaluation of those states’ experience is necessary to determine whether

¹⁰² Presidential Election Campaign Fund Act, 26 U.S.C. § 9001 (the "Fund Act").

¹⁰³ See Press Release, Office of the Governor, Governor Pataki Proposes Sweeping Presidential Primary Reform, Mar. 13, 2000.

¹⁰⁴ For example congressional candidates gain ballot access by paying the following fees: \$100 in Alaska; three percent of the office’s annual salary in Georgia; one percent of the office’s annual salary in Kansas, Montana, Nebraska, Washington and West Virginia; one percent of the total salary for the term of office in South Carolina; \$500 in Kentucky, \$300 in Minnesota, \$50 in New Hampshire, and \$2,500 in Texas.

The federal constitution requires that the states permitting ballot access via filing fees also allow an alternative means of gaining access. Lubin v. Panish, 415 U.S. 709, 718 (1974).

the filing fee alternative to signature gathering is consistent with maintaining a manageable ballot.

A second possibility is a version of the federal matching model for state and local elections. Potential candidates for state or local races who raise a set amount of money from a certain number of contributors within the relevant jurisdiction would be entitled to ballot access. As a corollary, if one qualifies for public funding in a New York City race, he or she automatically should gain ballot access absent any signature gathering. Such methods could be authorized in addition to, rather than in lieu of, qualification by petition.¹⁰⁵

By reforming petition requirements and providing alternates, New York can offer the electorate greater choice.

Half dozen states require both a qualifying fee and petition signatures. See, e.g., California (requires congressional candidates both to gather no fewer than 40 nor more than 60 signatures and to pay a fee of one percent of the annual salary for the office); Hawaii (25 signatures and \$75 fee); Idaho (500 signatures and a \$150 fee); Ohio (50 signatures and a \$50 fee); Pennsylvania (1,000 signatures and a \$150 fee); and Virginia (1,000 signatures and a fee of 2 percent). Michigan allows the payment of a fee for all but statewide and federal offices. See Mich. C.L.A. § 168.163 (\$100 for the state legislature).

¹⁰⁵ See Evan A. Davis, Election Law Reform in the State of New York, 51 Alb. L. Rev. 1, 13-15 (1986) (discussing ballot qualification requirements based on campaign fund-raising success).

III. VOTE CASTING

A. OVERVIEW.

Increased voter registration, education, and choice are important measures to motivate voter participation. However, the value of these efforts is undermined if the voting experience itself is fraught with difficulties.

This past election, most New Yorkers exercised their franchise with ease and confidence that their votes counted. Most found helpful, hard-working election officials at the polling sites. However, some voters encountered problems such as long lines, discrepancies in registration records, malfunctioning voting machines, and insufficient numbers of paper ballots. Some received information which was confusing, if not misleading.

In New York, as across the country, the system for casting votes, long assumed to be reliable, nevertheless suffers from administrative inefficiencies, inadequate resources and, until now, a lack of public attention. This chapter examines voting at polling sites, as well as offsite voting. It suggests ways to improve vote casting and encourage full citizen participation.

B. VOTING MUST BE CONVENIENT.

Election Day is set by federal and state statute. All elections for federal office must be on the first Tuesday after the first Monday in November, as must all general elections for state office in New York.¹⁰⁶ Primaries take place on the first Tuesday after the second Monday in September.¹⁰⁷ New York bars any election, funded even in part by government, from taking place on a Saturday or Sunday.¹⁰⁸

¹⁰⁶ See 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1; N.Y. Elec. Law § 8-100(1)(c).

¹⁰⁷ See N.Y. Elec. Law § 8-100 (1)(a) (presidential primaries are held in the spring); see id. § 8-100 (1)(b) (a New York City run-off primary is held on the second Tuesday after the initial primary).

¹⁰⁸ See id. § 8-100.

With primary and general elections held on Tuesdays, a work day for most, many New Yorkers find it inconvenient, if not impossible, to vote, or encounter long lines, particularly before 9 a.m. and after 5 p.m. Although changing Election Day to a non-work day might encourage more people to vote, the existing bar on Saturday or Sunday voting reflects New York's traditional regard for religious observance by many citizens on those days, making this option undesirable.

1. Some Jurisdictions Have Added Days for Elections.

Several jurisdictions have held multi-day elections with some success. For more than five years, Clark County, Nevada, which includes Las Vegas, has permitted registered voters to cast ballots up to two weeks before Election Day at seven permanent sites and 53 locations visited by six mobile units. Increasing numbers of voters have opted to vote early – from five percent of the electorate in 1994 to 17 percent in 1996, 30 percent in 1998, and 44 percent in 2000. In a 1998 survey of these early voters, 97 percent reported a positive experience and indicated they intended to vote early in future elections.

Other jurisdictions allow voters to mail in their ballots in advance of Election Day. For example, voters in Oregon may mail their ballots three weeks before Election Day.¹⁰⁹ Similarly, in 2000, Canadian citizens were permitted to vote three days prior to the national election and about 738,000 out of 20 million did.¹¹⁰

While early voting increases convenience for voters, there are also disadvantages. Election administrators may have to recruit workers for the additional days of voting, although the job itself may be less stressful and recruitment therefore easier. Another potential

¹⁰⁹ Or. Rev. Stat. § 254.470(3) (1999).

¹¹⁰ See Record Number of Voters Cast Ballots Early in Canada, Associated Press, Nov. 22, 2000, Int'l News, BC cycle; see High Turnout Spurs Voting Chaos, Calgary, Dec. 28, 2000, at 3.

disadvantage is that widespread acceptance of early voting will reduce the common experience of exercising a civic privilege on one day, at one site with other citizens. (That disadvantage has to be weighed, however, against the fact that a one-day Election Day during the week may mean citizens are foregoing the privilege altogether.)

Given these disadvantages, New York at this time should consider other ways to make voting more convenient.

2. Phase in Uniform Hours for Voting.

Expanding voting hours is another way to increase the convenience of voting. In New York, polls remain open from 6 a.m. to 9 p.m. in general elections and in primaries in New York City, and in Nassau, Suffolk, Rockland, Westchester, Orange, and Erie counties. These hours are among the longest offered by any state, offering the greatest accommodation for voters encountering one-day elections.¹¹¹

Not all New Yorkers, however, have the benefit of these extended hours. During primaries in most counties, polls remain open only from noon to 9 p.m.¹¹² Many voters in rural upstate districts, who may face long drives home from their workplaces, are not able to vote after the workday ends. As a result, they may not be able to exercise their franchise at all. Ideally, all New Yorkers should enjoy equal opportunities to cast their ballots between 6 a.m. and 9 p.m. Putnam County is expanding its hours. Other counties should pursue this goal, consistent with the availability of poll workers.

3. Encourage Private Employers to Accommodate Voters.

In New York, Election Day is a state holiday.¹¹³ For some state employees, it is one of

¹¹¹ See John Harwood, Fixing the Electoral System, Wall St. J., Dec. 12, 2000, at A1.

¹¹² See N.Y. Elec. Law § 8-100(2).

¹¹³ See N.Y. Gen. Constr. Law § 24.

two “floating” holidays, allowing employees to select a different day as leave. The law does not require private employers to give workers the day off, and most do not. However, private employees who do not have sufficient time outside working hours to vote may, under certain circumstances, take up to two hours paid leave to vote during the workday. This benefit is available only to voters who give their employers two-days notice and who do not have four hours after the opening of polls and the beginning of their working shift or between the end of the working shift and the closing of the polls.¹¹⁴ Private employers should be encouraged to give employees greater latitude so more citizens can vote.

C. ALLEGATIONS OF RACE AND NATIONAL ORIGIN DISCRIMINATION REQUIRE SYSTEMIC DATA COLLECTION AND ANALYSIS.

It is imperative that public officials ensure the full participation of the entire electorate, especially populations that suffered past discrimination in voting. The Attorney General’s Office has received allegations that, during the November 7, 2000 election:

- Asian-American voters were subjected to racially discriminatory remarks, improperly denied affidavit ballots, and falsely advised that the polls were closed before the actual closing time;
- Latino voters were harassed, intimidated, and intentionally misinformed about voter registration laws in New York City and other parts of the State;
- Boards of elections failed to provide appropriate translation services to many non-English speaking citizens; and
- Polling sites in minority neighborhoods had a disproportionately insufficient number of functioning voting machines.

These allegations are serious. A statewide review and analysis of election administration exploring such concerns has never been conducted. Indeed, there currently is no comprehensive system for collecting voter complaints and other data required to evaluate flaws in election administration that may affect disparately voters on the basis of race or

¹¹⁴ N.Y. Elec. Law § 3-110.

ethnicity.

New York should enact legislation to require (1) local boards of election to collect information related to the number of affidavit ballots, emergency ballots, broken voting machines, polling sites that opened late, complaints from voters, and other important factors; and (2) analyze and report this data and the impact of these issues on racial, ethnic, and language minorities. Once this information has been compiled and reported, it will be possible to move from anecdotes to a systemic review of election administration and, as appropriate, fashion remedies.

D. POLLING SITES MUST BE ACCESSIBLE TO THE DISABLED.

Approximately 250,000 New Yorkers of voting age have mobility impairments that require the use of wheelchairs or walking aides.¹¹⁵ Polling sites can be inaccessible for a variety of reasons: a door is not wide enough for a wheelchair; the building has steps without a proper ramp; there are insufficient numbers of designated parking spaces. Voting machines also can cause problems for individuals in wheelchairs if, as often happens with older machines, the mechanism to lower the machine is broken or poll workers do not know how to operate it.

Federal and New York State laws prohibit discrimination against individuals with disabilities and require polling places to be accessible to such individuals.¹¹⁶ Although localities, such as New York City and Schenectady County, appear to have achieved near 100 percent compliance with these provisions, New York State as a whole has not. A 1999 survey of 125 polling sites in three upstate counties demonstrated that, virtually none of these counties were

¹¹⁵ See U.S. Census Bureau, Disability 1990 Census Table 1: State totals.

¹¹⁶ Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-34; see Voting Accessibility for the Elderly and Handicapped Act, id. § 1973(ee)j; N.Y. Elec. Law § 4-104(1-a); see also N.Y. Comp. Codes R. & Regs. tit. 9, 6206.1(1986)

accessible to individuals with physical disabilities, under relevant federal guidelines.¹¹⁷

Localities with inaccessible sites have two options: move the voting to accessible locations; or make the sites accessible to the disabled. While moving or consolidating polling places initially can be confusing for voters who may have voted at the same location for many years, after one or two elections, people generally become accustomed to the new site. But moving or consolidating sites may not be feasible if the change requires voters to travel far, causes congestion at a particular place, or, as often is the case in rural areas, no other option exists.

Localities that choose to make a polling site accessible to the disabled may have to make modifications ranging from simply posting a sign in front of a designated parking space or changing a door handle so it can be used easily by individuals with physical disabilities, to more complex structural changes such as constructing a ramp or widening a door.

Individuals who are blind or have visual impairments also face obstacles to voting, particularly with respect to voting machines. Low-cost solutions include placing large print or braille labels on machine controls or having an audiotape of the ballot's content. Other options include purchasing new electronic voting machines, with the capacity to accept a speech synthesizer or a twelve-key telephone-pad style device adaptable for audio use for the blind or visually impaired.¹¹⁸

The State can assist localities in making voting accessible to the disabled in two ways.

¹¹⁷ Surveys were conducted by the Catskill Center for Independence on behalf of the Attorney General's Office. Counties were advised of these deficiencies and asked to make the changes needed to comply with the law. Unfortunately, these negotiations failed, and the Attorney General's Office was forced to sue. One county immediately agreed to make all its polling sites accessible to the disabled. The court ordered the two other counties to make the necessary changes. See People v. County of Delaware, 82 F. Supp.2d 12 (N.D.N.Y 2000). After several months of hard work by local officials, all 125 sites in the three counties were fully accessible in time for the November 2000 presidential election.

¹¹⁸ See Mindy Sink, Seeing-Eye Democracy, N.Y. Times, Nov. 2, 2000, at G7.

First, New York State should create an “Accessibility Fund” to which counties could apply for money for necessary, but sometimes costly, upgrades.¹¹⁹ Second, because legal accessibility standards and practical requirements of site access can be quite technical in nature, the State should help train county ADA coordinators (or equivalent) and election officials. Such training can be provided on a regional basis by the State Board of Elections, the Office of Advocate for Persons with Disabilities, and the Attorney General’s Office. Funding and training should facilitate voluntary compliance.

E. THE MECHANICS OF VOTING AT POLLING SITES SHOULD BE SIMPLE AND RELIABLE.

Efforts to ensure that polling sites are convenient and accessible to all New Yorkers will be moot if the voter finds the manner of voting unreliable or confusing. This section reviews the various ways that New Yorkers currently cast their ballots at polling sites.

1. New Yorkers Vote By Paper Ballot and Lever Voting Machines.

Whether the electorate in New York votes by paper ballot, mechanical voting machine or electronic machines, the integrity of our election and voter participation depends upon several factors: ease, security, reliability, and privacy. Ease means that the act of voting and the administration of voting are relatively simple.¹²⁰ Security means assurance that each vote and

¹¹⁹ This fund could be used for structural changes as well as the purchase of newer voting machines which can be lowered easily, can shift the screen, or otherwise allow voting by wheelchair-bound citizens.

¹²⁰ For example, the ballot layout itself should be clear. While the Election Law addresses the placement of candidates and parties, see, e.g., N.Y. Elec. Law § 7-104, it provides only general guidance with respect to the layout of ballot proposals; see id. § 7-110. In the November election, the bond issue was placed at the lower right hand corner of the ballot in New York City. Many voters complained that they did not see the proposal and did not vote on it. The ballot proposal was placed prominently on the ballot elsewhere in the State. In the future, the New York City Board of Elections should better highlight ballot proposals. For statewide questions, the State Board of Elections should set uniform standards for ballot placement.

only one vote will be cast by a legitimate voter in the proper election district, and that each vote will be counted as the voter intended. Reliability means that any failures will be individual, not system wide. Privacy means that each voter's ballot choices remain secret from fellow voters, election officials, and others.¹²¹

a. PAPER BALLOTS.

New York voters use paper ballots at the polling site when casting emergency and affidavit ballots.¹²² Emergency ballots are used when a voting machine breaks down. These can be official printed paper ballots supplied to the polling place or, if unavailable, whatever can be provided "as nearly in the form of the official ballots as practicable."¹²³ When a registration list does not include the name of the person attempting to vote, the person may complete an emergency paper ballot along with the affidavit, swearing to the necessary qualifications. Paper ballots cast under such circumstances are called "affidavit ballots."¹²⁴

From a voter's standpoint, paper ballots are simple; one can easily record one's vote. It is the responsibility of the poll workers to ensure the security, reliability, and privacy of ballots.

b. MECHANICAL LEVER MACHINES.

Cities and towns select and finance the voting machines used in their communities.¹²⁵

¹²¹ See Deborah Phillips, Voting Technology: Are We Ready for Internet Voting?, The Voting Integrity Project.

¹²² Paper ballots used for military votes, absentee votes, and special voters are discussed below as forms of offsite voting. Paper ballots also are used outside of New York City where there are insufficient numbers of voting machines for all the primary contests, N.Y. Elec. Law § 7-205(a); and in New York City school board elections where existing voting machines cannot accommodate proportional representation. See N.Y. Comp. Codes R. & Regs. tit. 9, § 6209.2 (a)(3)(1996).

¹²³ N.Y. Elec. Law § 7-120(2).

¹²⁴ Id. § 8-302(3)(e)(ii).

¹²⁵ See id. §§ 7-203(1);7-200.

The New York State Board of Elections is responsible for testing voting machines and determining whether they can safely and properly be used by voters at elections.¹²⁶ The Board also may authorize certain trials of previously unauthorized voting machines.¹²⁷

Most New York counties use mechanical lever-type machines.¹²⁸ With a lever machine, a voter enables the machine by pulling a handle that closes the curtain, ensuring privacy. The user pulls down selected levers to indicate choices. When the voter exits the booth, he or she opens the curtain with the handle, automatically returning the levers to their original position and turning a connected counter wheel. Assuming the counters initially were set at zero, the position of each counter at the close of the polls indicates the number of votes cast. Interlocks in the machine prevent the voter from voting for more candidates than permitted.

Many voters and election officials consider the 22,000 old-fashioned lever machines user-friendly and hard to defraud.¹²⁹ The machines do not rely on paper, electricity, or computer programmers. They leave no chads and, at 950 pounds each, cannot be stolen

¹²⁶ See id. § 7-201(1); see also N.Y. Comp. Codes R. & Regs. tit. 9, §6209 (1996).

¹²⁷ See N.Y. Elec. Law § 7-201(4)(a). However, experimentation is limited by New York State requirements that voting machines present vertical or horizontal lists of candidates' names and offices, and that all the candidates' names for any one office appear on one screen or page. See id. § 7-104(4).

¹²⁸ Jacob Myers, a Rochester resident, developed and built the first voting machine for the public in 1888. The first official use of a lever voting machine, known as the "Myers Automatic Booth," occurred at a town meeting in Lockport, New York in 1892. Four years later, the machines were used on a large scale in the City of Rochester and, by the 1930s, these lever machines were installed in every major city in the United States. By the early 1960s, well over half of the voters in the United States cast votes on these machines.

Outside New York City and Albany, most of them were manufactured by AVM, now owned by Sequoia. In New York City and Albany, voters use "Shoup" machines. Shoup machine ballots run the party names across the top; AVMS run them down the left side.

¹²⁹ See Tom Precious, N.Y. Looks to Voting's Future, Buffalo News, Nov. 17, 2000, at 1A.

readily.¹³⁰

These machines also have disadvantages. They are large, so relatively few fit in a single polling place, leading to longer lines for voters;¹³¹ the mechanics of the lever machine make it difficult to use for some individuals who lack the muscle strength necessary to pull the lever because of physical disabilities; and write-in voting is problematic.¹³²

Most lever machines in New York are over 40-years old. According to a product manager for Sequoia Pacific, “only rebuilt used machines can be purchased, usually for about \$2800 each.”¹³³ When election boards have to transport voting machines to and from polling sites, as they do in New York City, bumpy rides take their toll. (Outside of New York City, machines are usually stored at polling places.) Machines also malfunction due to technical errors and mishandling because of poor inspector training. On Election Day 2000, at least 31 polling sites in New York City reported broken voting machines.¹³⁴ In addition, the New York City Board of Elections did not have enough mechanics to promptly fix all the broken machines,

¹³⁰ See id.

¹³¹ Gruley and Cummins, Down for the Count: Election Day Becomes a Nightmare, As Usual, for Bernalillo County, Wall St. J., Dec. 12, 2000, at A1.

¹³² Although the Election Law provides that voting machines allow for write-in votes, N.Y. Elec. Law § 7-104(4)(b), New York City machines generally do not in primary elections. See Gelb v. Board of Elections of New York, 224 F.2d 149 (2d Cir. 2000) (asking the New York Court of Appeals to determine whether boards of elections must provide that opportunity in primary elections). New York City recently reversed its longstanding legal opposition to this requirement. See D. Wise, After 42 Years, City Reverses Itself on Write-In Ballots in Primaries, N.Y.L.J., Jan. 9, 2001, at 1 C. S., (the design of the voting machines requires that write-in ballots be cast in a remote portion of the machine, potentially confusing the voter; in primaries with many contests, the machine may not have room for write-in-ballots, forcing the use of paper ballots).

¹³³ Bob Gardinier, Voting Booths Become High-Tech, Alb. Times Union, Oct. 16, 1996, at B4.

¹³⁴ Joel Stashenko, But for the Grace of God Goes New York in Voter Tally, Associated Press State & Local Wire, Nov. 22, 2000, BC Cycle.

causing voters to wait in lines at polling places for large portions of the day.

New York must find a way to repair expeditiously broken lever machines and to offer an effective alternative means to vote. The manufacturers are no longer producing new machines or parts, so repair depends on cannibalizing existing machines. If that proves insufficient, New York could encourage the private sector to meet this need, or explore other options including production by Corcraft, New York's coordinating company for prison industries. Replacement of parts for the old machines, and repair, must be part of a sensible strategy to sustain this equipment at least for the near future.

2. New York Must Modernize Its Voter Technology.

New York increasingly will find it difficult to maintain sufficient numbers of the lever machines to serve its voters from New York City or other jurisdictions. For that reason, as well as to take advantage of technological improvements, New York State should expeditiously survey new voting technology. Options to consider include freestanding electronic machines and online voting.

a. ELECTRONIC VOTING MACHINES.

There are at least two kinds of direct recording free-standing electronic machines; those resembling lever machines and the so-called "ATM-type machines". Electronic lever machines present a picture – all on one screen – that resembles the ballot face of a lever machine. ATM-type models use different screens for various ballot contests. First, the voter verifies his or her registration by traditional means or using a special card. Once the machine is activated, the voter touches his or her choices on the screen. Should the user choose to "write in" a candidate, a visual keyboard appears which the voter can use to "type in" the name of a candidate. The individual may change any selection until he or she presses a spot on the electronic pad, indicating that the vote is complete and should be cast. The machine adds the

current voter's choices to those of previous voters, storing the information on a "memory cartridge, diskette or smart-card."¹³⁵ An electronic lever machine costs about \$6,000;¹³⁶ an ATM-type apparatus costs between \$3,000 and \$5,000.

About nine percent of the nation's registered voters now use electronic lever machines with satisfactory results. Three New York towns currently use electronic lever voting equipment: Clifton Park in Saratoga County, and Malone and Burke in Franklin County.

While many voters cast their ballots on electronic machines with relative ease, some segments of the population, particularly the elderly, may not be comfortable using computers. This reluctance should abate as the population grows more accustomed to using computers, with the increased availability of ATM banking, electronic lottery machines, or government information kiosks.

b. ONLINE VOTING AT POLLING SITES.

Online voting may offer possibilities in the future but it currently poses difficult challenges. Conceptually, a voter could vote online at his or her normal polling place, or at any polling place in the county.

Online voting at traditional polling places would require the deployment of Internet-connected computers. While initial costs could be significant, the cost of printing ballots would be reduced. Voters would verify that they are registered or otherwise qualified to vote. Each vote cast on the computers would be transmitted directly to the county board of elections.

Any online system – in fact, any method of voting – must satisfy four concerns: ease, security, reliability, and privacy. Online voting systems must be able to withstand hacking, manipulation, and other forms of fraud. The California Internet Task Force, created by the

¹³⁵ U.S. Federal Elections Commission, Report on Direct Records Electronic Voting Systems <<http://www.fec.gov/pages/dre.htm>>.

¹³⁶ See Tom Precious, supra note 132.

California Secretary of State, studied online voting at length. It reports that adequate guarantees against many security and reliability problems already are at hand, others imminent.¹³⁷ Internet security engineers use techniques such as encryption and digital or electronic signatures, and biometric identifiers such as fingerprint logons are emerging.¹³⁸ New York law provides that “[t]he use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand.”¹³⁹ The Internal Revenue Service and other federal agencies accept the use of electronic signatures on official documents such as tax returns.¹⁴⁰ The potential ways to bolster security, however, will need to be balanced with their impact on the privacy of voters.

Implementation of online voting at polling sites should be undertaken with caution. Any system should be tested under controlled conditions in small contests before use in an election of any size. To assure reliability, it should be instituted alongside traditional voting mechanisms. Gradual implementation will foster voter confidence and understanding.

The State Board of Elections should have the authority to review various electronic machines and online voting practices and test them in elections to address security, reliability, and privacy issues. The Board now is limited to approving voting machines that meet state requirements established for traditional ballots or voting machines such as provisions requiring vertical or horizontal lists of candidates’ names and offices, and identification of all the

¹³⁷ California Internet Task Force, Final Report Online, <<http://www.ss.ca.gov/executive/vote/appendix>>.

¹³⁸ See Deborah Phillips, supra note 124; see also Pamela A. Stone, Electronic Ballot Boxes: Legal Obstacles to Voting Over the Internet, 29 McGeorge L. Rev. 953, 978, nn. 211-215 (1998).

¹³⁹ N.Y. State Technology Law § 104(2).

¹⁴⁰ See Stone, supra note 141; see 15 U.S.C. §§ 7001 et seq. (the Electronic Records and Signatures in Commerce Act of 2000 provides for a presumption of validity of electronic signatures). New York’s Medicaid program also currently accepts such signatures.

candidates for any one office on one screen or page.¹⁴¹

Modernizing voting technology – both the updating of existing mechanical machines and the evaluation and adoption of more advanced technology – may be costly. Towns and other local authorities will need help from the federal government, the State and counties to assist in this endeavor. New York should support federal efforts to provide technical and financial assistance to the states. For example, Senators Charles Schumer (D-N.Y.) and Sam Brownback (R-Kan.) have proposed a \$10 million federal study to set standards for the conduct of elections and alternative voting practices, such as mail, Internet, and computerized voting machines, expanded voting hours or weekend voting. After the study, the federal government would make matching grants of \$25 billion over five years available to state and local governments to help meet those standards, including the purchase of appropriate equipment. Alternatively, Senators Mitch McConnell (R-Ky.) and Robert Torricelli (D-N.J.) have proposed appropriations of \$100 million a year for matching grants to states that follow the recommendations on improved voting technology of four nationally designated “Election Administration” commissioners.

With modernized, reliable, and secure voting technology, citizens in New York may be able to vote at polling sites with more ease and confidence; this in turn will encourage greater voter participation.

F. ELECTION-DAY WORKERS SHOULD BE SUPPORTED.

The exercise of the right to vote – even with the most modern technology – depends upon a corps of poll workers performing efficiently and fairly a multitude of election duties. These workers play a critical role in our electoral system which merits improvements in

¹⁴¹ See N.Y. Elec. Law § 7-104(4)(b) (setting forth strict requirements for the format of the ballot); see also N.Y. Comp. Codes R. & Regs. tit. 9, §6209.2(a)(3)(1996) (requiring each machine to “provide a full ballot display on a single surface”).

recruitment, compensation, training, and problem solving.

1. Requirements For Election Workers.

Election workers have numerous responsibilities relating to voter registration, absentee ballots, and vote counting, yet they are most visible for their work at the polling sites.¹⁴² Four election inspectors and two clerks generally work at each Election District (“ED”).¹⁴³ Before the polls open, they ensure that the precinct is ready to receive voters, securing voting machines, and paper ballots.¹⁴⁴

Two inspectors from different parties oversee the mechanics of voting. They supervise the use of registration records to verify a person’s right to vote which may be challenged by any election worker, poll watcher or registered voter.¹⁴⁵ If information is missing in the registration record or the challenge is not resolved by information supplied under oath by the voter, the inspectors advise the person of the right to vote by affidavit ballot or to seek a court order.¹⁴⁶

Inspectors provide voter assistance such as sample ballots and, when available, candidate information prepared by the local board of elections.¹⁴⁷ Polling staff may not persuade voters to support any particular candidate or ballot proposal. However, upon request, they may advise on how to activate the voting apparatus and, if the voter is physically

¹⁴² N.Y. Elec. Law §§ 2-202, 8-407. As inspectors, clerks and coordinators share many election administrative duties, this report refers to them collectively and interchangeably as poll workers of election sites unless referring to specific responsibilities. For example, inspectors have the authority to rule on questions and challenges, administer oaths, conduct registration, and canvass the vote. Coordinators typically are poll-site supervisors.

¹⁴³ Id. §§ 3-400, 3-408.

¹⁴⁴ Id. § 8-102.

¹⁴⁵ Id. §§ 8-302, 8-502, 8-506.

¹⁴⁶ Id. § 8-302. At the end of the day, inspectors prepare a challenge report which lists the challenged voters and whether they were permitted to vote. Id. § 8-508.

¹⁴⁷ N.Y. Elec. Law § 8-306.

handicapped, assist in casting his or her vote.¹⁴⁸ Poll workers oversee the use of paper ballots and inspect voting machines after each voter and when the polls close.¹⁴⁹

Election workers in New York State are not traditional public employees. Rather, the law dictates that they be selected by the two major parties in an effort to provide checks and balances to partisan bias. Indeed, the State Constitution and Election Law mandate equal representation between the two major parties in appointments of election inspectors, poll clerks, and coordinators in each ED.¹⁵⁰ The county boards of elections appoint inspectors, poll clerks, and where appropriate, coordinators, for a one-year term, for each ED, generally using lists prepared by the political parties.¹⁵¹

An inspector or poll clerk must meet several basic qualifications: 1) be a registered voter; 2) be a resident of the county in which he or she serves (or, for New York City, poll workers, reside within the City); 3) be an English speaker; and 4) not be a holder of or candidate for any elective office or their immediate family members.¹⁵² All election staff, after original designation, and every three years thereafter, must attend training, and pass an examination.¹⁵³ Most jurisdictions in New York provide two or three hours of training covering the law, registration, use of voting machines, and poll workers' duties.¹⁵⁴

¹⁴⁸ Id.

¹⁴⁹ Id. §§ 8-202, 8-310, 8-312.

¹⁵⁰ N.Y. Const., art. II, § 8; N.Y. Elec. Law §§ 3-400, 3-401, 3-408.

¹⁵¹ See N.Y. Elec. Law §§ 3-400, 3-401, 3-404, 3-406, 3-416; see also Barnes v. Feuer, 359 N.Y.S.2d 471 (1974) (in some counties, town clerks help recruit election workers, following the two-party format.)

¹⁵² See N.Y. Elec. Law §§ 3-400, 3-401.

¹⁵³ See id. §§ 3-412, 3-414.

¹⁵⁴ Each board must use instructions and examinations prepared by the State Board of Elections but may provide supplementary material. See N.Y.S. Board of Elections County

Inspectors, clerks, and coordinators are paid by the town, city or village containing the ED in an amount fixed by the local legislative body, except in New York City where the Mayor sets the rate.¹⁵⁵ Inspector salaries range from about \$75 to \$200 for the day, depending on the size of the county or jurisdiction.¹⁵⁶

2. Present Practices and Recommendations.

A close election, such as the Presidential race in Florida or the New York State Senate race for the 26th district, shines a spotlight on the deficiencies of our election system, and poll workers frequently are caught in the glare. Complaints heard this year included insufficient staffing at polling sites and inadequately trained inspectors.¹⁵⁷ The League of Women Voters and others reported that, at some locations, overworked polling-place personnel dispensed confusing or misleading information or in some other way thwarted a voter's ability to cast a ballot.¹⁵⁸ On occasion, they did not respond effectively when voting machines malfunctioned.¹⁵⁹

Board Ann. Rep. 1999.

¹⁵⁵ See N.Y. Elec. Law § 3-420.

¹⁵⁶ See id.; see also N.Y.S. Board of Elections County Board Ann. Rep. 1999. In NYC, the amount is not less than \$130 a day for an inspector and not less than \$200 for a coordinator. Thus, an inspector on Election Day is paid approximately \$9.25 per hour and a coordinator \$14.25 per hour. Inspectors and clerks who attend a required training session are paid at least \$5 plus transportation expenses. Poll workers in NYC, who attend training, receive \$25. See New York City Voter Assistance Commission <<http://www.ci.nyc.us/htm1/vac/home.html>>.

¹⁵⁷ See Florida's a Warning to N.Y., Daily News, Dec. 1, 2000, Ideas and Opinions, at 61; see also Voting Made Difficult, N.Y. Times, Nov. 9, 2000, at A22.

¹⁵⁸ See Repair New York's Broken Elections, Daily News, Dec. 28, 2000, Ideas and Opinion, at 42.

¹⁵⁹ See Lessons Lie in 2000 Election Quagmire, Times Union, Nov. 19, 2000, Perspective, at B5; see also Headaches Plague Broken Ballot Machines All Over City, Daily News, Nov. 8, 2000, News, at 3.

In certain locations, election-day workers ran out of emergency ballots and envelopes.¹⁶⁰ Poll workers at various precincts plagued with machine problems incorrectly distributed affidavit, instead of emergency ballots. Hundreds of voters in Rockland County, who discovered that their names were not on the registration rolls, reportedly were not provided with affidavit ballots, as required.¹⁶¹ At one polling site in Broome County, election inspectors reportedly gave voters the wrong envelopes for affidavit ballots. Some poll coordinators complained that they had insufficient staff to handle the volume of paper ballots. In one Brooklyn precinct, poll personnel reportedly had to borrow a voter's cell phone to obtain assistance from the New York City Board of Elections.¹⁶² According to election officials, some voting machine breakdowns were the result of inadequately trained inspectors and clerks who did not understand how to operate the equipment.¹⁶³ These problems resulted in long lines of voters; some frustrated voters left without voting.

Poll workers may not be responsible for all of these election-day complaints. Undoubtedly, most are well intentioned, responsible citizens, proud of performing this civic duty. They are not full-time civil service or election-law professionals. Unless this is revisited, government can best serve its responsibility to the electorate through more effective recruitment, compensation and training of election workers and assistance in problem solving at the polls.

¹⁶⁰ See The 2000 Elections: the Mechanics; Preparations for Smooth Day at Polls Run Afoul of Murphy's Law, N.Y. Times, Nov. 9, 2000, at B20; see also Heavy Turnout Blamed for Equipment Breakdowns, Associated Press & Local Wire, Nov. 7, 2000; see also Headaches Plague Ballot Broken Machines All Over City, supra note 162.

¹⁶¹ See Heavy Turnout Blamed for Equipment Breakdowns, supra note 163.

¹⁶² See The 2000 Elections, supra note 163.

¹⁶³ See id.

a. EXPAND RECRUITMENT OF POLL WORKERS.

Although voter registration forms and mail check cards invite voters to serve as poll workers on election day,¹⁶⁴ many county election commissioners advise that recruiting qualified election-day personnel is problematic.¹⁶⁵ Polls in certain districts in New York State reportedly have opened with inspectors of only one party present.¹⁶⁶ It may be especially difficult to attract bilingual workers to attend to the needs of the large non-English speaking populations in New York State.¹⁶⁷ The difficulty in recruiting election workers in several jurisdictions may be due to many factors: poor or late compensation; demographic changes; low unemployment; long and early hours; relative lack of civic duty among younger citizens; and the general decline of political parties, which traditionally supply election-day workers.¹⁶⁸

As the customary sources of poll workers diminish, other methods of recruitment should be explored. Some states have lowered the age requirements to recruit high school students as poll workers or assistants.¹⁶⁹ While details of the programs differ, most authorize election officials to appoint students 16 years or older to serve at precincts; require the approval of the educational institution where the student is enrolled; establish minimum academic qualifications

¹⁶⁴ See N.Y. Elec. Law § 5-210.

¹⁶⁵ See End Poll Worker Shortage, J. News, Dec. 8, 2000, Our Views, at 8B; see County Needs Election Inspectors for Primary, Times Union, Aug. 13, 1998, at F1.

¹⁶⁶ See Albany Democrats Take a Walk on The GOP Side on Primary Day, A Group of Democrats Signed on as Republican Election Commissioners, Times Union, Oct. 1, 1994, at A1.

¹⁶⁷ See New Voters, Old Problems, City Limits, Fax Wkly. Nov. 13, 2000.

¹⁶⁸ See, e.g., Election Inspectors Investment in Democracy, N.Y.S. Board of Elections Task Force on Inspector Recruitment and Training, at 14.

¹⁶⁹ To facilitate student recruitment, states such as Illinois, Florida, Missouri, Kansas, Minnesota, Michigan and California lowered the age requirements for poll workers.

and training; and offer academic credit and/or a modest stipend.¹⁷⁰ Generally, the students serve under the direct supervision of a poll worker and, at least in California, are not permitted to tally votes.¹⁷¹

The results have been impressive: significant numbers of students have supplemented traditional sources of election-day workers, sometimes providing nearly thirty percent of the personnel. The general consensus among election directors is that the youth performed well and fulfilled their expectations. This effort not only augments existing election-day staff and inculcates civic values in the younger generation, but also may inspire their parents' involvement. University students also have been incorporated into the election-day infrastructure serving at the polls and at the central board in certain jurisdictions.¹⁷²

In addition to recruiting at schools, several jurisdictions have looked to public service employees. Los Angeles County implemented a policy allowing county employees to work at polling sites with their supervisor's approval.¹⁷³ In Clark County, Nevada, county agencies are required to provide supervisors for polling sites. Other jurisdictions have targeted private industry and not-for-profit groups. In the metropolitan St. Louis area, an ad-hoc committee consisting of retired U.S. Senators, labor union representatives, academics and business

¹⁷⁰ See 1998 Cal. Stat. 199; see also High School Seniors find work at Polls: In San Bernardino County, 430 Students got a chance to get involved in the Democratic process, Press-Enterprise, Mar. 8, 2000, at B7; see also 2000 Minn. Laws 467 (codified Minn. Stat. § 204B.19 (2000)).

¹⁷¹ See 1998 Cal. Stat. 199; see also 1994 Mo. Laws 632; Mo. Rev. Stat § 115.104 (1999).

¹⁷² Testimony of Neal Rosenstein, Government Reform Coordinator, New York Public Interest Group before the New York City Voter Assistance Commission hearing on Voting, Voter Registration and Voter Participation, City Hall, Dec. 15, 2000.

¹⁷³ See Poll Workers See Function As Civic Duty, Daily News of Los Angeles, Nov. 3, 1999, at SV1.

leaders helped elections officials recruit workers from leading employers.¹⁷⁴ In several communities including Riverside County, California, and Nassau County, New York, not-for-profit organizations “adopt a poll,” providing volunteer poll workers who give their stipend to their favorite civic group or charity.

Faced with decreasing numbers of election-day workers, some counties have pursued a jury model, recruiting poll workers via summons.¹⁷⁵ Employers are prohibited from penalizing their “drafted” workers and required to compensate the employee for any lost pay as a result of working at the poll.¹⁷⁶ To address the long hours which discourage poll service, some election officials have instituted split shifts. Other communities identify workers for future elections by focusing on voters at the polling site; presumably those who vote are civic minded and may be interested in volunteering to serve as election workers in the future.

These innovations suggest many New York communities could expand the pool of potential polling-place workers. Encouraging participation from a broad spectrum of citizens may foster greater understanding and confidence in the electoral process. The State Board of Elections could support county boards by creating model recruitment plans and materials.

New York should take four specific steps. First, communities should target students. Students under 18 can serve as “inspector assistants.” To the extent that election officials wish to assign high school youth additional responsibilities, New York will need to amend the

¹⁷⁴ See Election Workers Are Needed Across Area, St. Louis Post-Dispatch, Nov. 12, 1999, Metro, at B1.

¹⁷⁵ See In Future, Sarpy May Draft Poll Workers, Omaha World-Herald, Sept. 11, 2000, NEWS, at 9 (every voter in Douglas County, Nebraska, the largest county in the state, must serve four elections, before they are removed from the list for five years).

¹⁷⁶ While transforming poll work from a traditional voluntary role into a civic obligation may augment the pool of poll workers, it also may create significant administrative and costly burdens for localities.

provision requiring all poll workers to be registered voters.¹⁷⁷ Second, election officials should seek the voluntary cooperation of the business community to allow employees to serve as election-day workers.¹⁷⁸

Third, election officials should consider instituting a flexible or eight-hour shift, provided that the minimum number of election-day workers are present at all times.¹⁷⁹ To further relieve fatigued workers and improve the canvassing process, local election authorities could explore appointing special inspectors to count ballots and tally votes. Finally, to enlarge the pool of trained election inspectors, more consideration should be given to recruiting qualified registered voters who are not enrolled in the major two parties.¹⁸⁰ Inclusiveness will encourage

¹⁷⁷ Compare, Minn. Stat. § 204B.19 (2000) (permits student poll workers consistent with balanced partisan representation); with N.Y. Elec. Law §§ 3-400; 3-401.

¹⁷⁸ New York law currently authorizes employees to take time off from work to vote under specific circumstances. N.Y. Elec. Law § 3-108.; see People v. Ford Motor Co., 63 N.Y.S. 2d 697 (3d Dep't 1946). New York State, like Minnesota, could enact legislation to prohibit employers from penalizing employees who work at the polls, with safeguards including notice for employers with few employees; see also Minn. State. § 204B. 195 (2000); see also N.Y. Jud. Law § 519.

¹⁷⁹ Election workers could certify that the election was carried out lawfully, and that the ballots and results were safeguarded during their particular shifts. At least one inspector of each party, including the chairperson, should be required to work the full shift at each poll. See Election Inspectors Investment in Democracy, N.Y.S. Board of Elections Task Force on Inspector Recruitment and Training, at 8; see also End Poll Worker Shortage, supra note 168.

¹⁸⁰ See Election Inspectors Investment in Democracy, N.Y.S. Board of Elections Task Force on Inspector Recruitment and Training, at 8. (The League of Women Voters has such a proposal which warrants serious review.) Section 8 of Article II of the Constitution states that:

All laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties.

This provision seeks to ensure equal representation of the two major parties; it does not bar the participation of New Yorkers who have designated another political party affiliation. There are currently eight political parties in the State: Democratic, Republican, Liberal, Conservative, Independent, Right to Life, Working Families, and Green Party.

participation in the electoral process.

b. INCREASE POLL WORKER COMPENSATION.

Increased and uniform compensation, within a county, may be an effective recruitment tool.¹⁸¹ In addition, communities could consider higher pay for special responsibilities such as troubleshooters, supervisors, or poll workers with seniority.

c. IMPROVE POLL WORKER TRAINING.

In addition to recruitment and compensation, emphasis needs to be placed on instruction. The training of polling place workers in New York is inadequate.¹⁸² Since 1977, the League of Women Voters of New York State has advocated for greater training for election workers. While most New York communities offer two to three hours of training to poll workers, in 1994, Albany City and County officials conducted two days of training.¹⁸³ To fully realize the promise of the National Voter Registration Act, poll workers should understand the agency-based registration program, including the problems that arise because newly registered voters and address changes may not be reflected in the county registration rolls and ways to resolve these problems.

Strategies to intensify the training for potential poll workers include: increasing the stipend offered for attending instruction;¹⁸⁴ engaging attendees with more interactive lessons;

¹⁸¹ See id. at 5, 7; see Pay Parity Urged for Poll Workers, Buffalo News, Jan. 4, 1996 at 5B.

¹⁸² See Florida's a Warning to N.Y., supra note 160; see City Plagued by Voting Woes Bad Machines, Long Lines Hit, Daily News, Nov. 9, 2000, at 2; see Panel Urges Improvement of City Election System, N.Y. Times, Aug. 14, 1985, at B5; see also Election Inspectors Investment in Democracy, N.Y.S. Board of Elections Task Force on Inspector Recruitment and Training, at 2.

¹⁸³ See Jennings Outlines Plans to Have an Orderly, Accurate Election Day, Times Union, Oct. 8, 1994, Capital Region, at B4.

¹⁸⁴ Approximately twenty counties in New York pay \$5 for workers to attend training. N.Y.S. Board of Elections County Board Ann. Rep. 1999.

require annual training; adding instruction on new laws and procedures, sensitivity and cultural diversity issues; and providing special problem-solving classes for supervisors.¹⁸⁵ Finally, to ensure regular review of training programs and communication among appropriate county boards of elections personnel, the State Board of Elections should convene an advisory board for inspector training and recruitment.¹⁸⁶

d. IMPROVE COMMUNICATIONS PRACTICES.

Even with adequate numbers of well-trained election-day workers, problems will arise at polling sites. This year, thousands of New York City inspectors and voters had difficulty reaching the City Board of Elections to secure help with broken machines, missing or inaccurate registration information, paper ballot shortages, and long lines.

Voters calling the new phone bank, VOTE-NYC, operated by the local board of elections, encountered chronic busy signals.¹⁸⁷ Civic organizations in New York City and throughout the State received thousands of calls complaining about problems at polling sites or the inability to contact county boards of elections.¹⁸⁸ The New York Public Interest Group (NYPIRG), and other groups, reportedly received numerous calls from polling-place workers requiring aid in resolving problems.

¹⁸⁵ The Pilot Poll Worker Academy in Los Angeles County may provide a model for New York election officials. Inspectors attend three half-day intensive sessions with simulations and role playing.

¹⁸⁶ See Election Inspectors Investment in Democracy, N.Y.S. Board of Elections Task Force on Inspector Recruitment and Training, at 11. The Board could review best practices from other jurisdictions, teaching techniques and professional standards.

¹⁸⁷ See The 2000 Elections, *supra* note 163; see also Headaches Plague Ballot Broken Machines All Over City, *supra* note 162 (telephone calls rang through to an “all circuits are busy” message for a large portion of the day); see also Voters in Apple Jam - Sights & Sounds of Voters in Apple Jam Voters, N.Y. Post, Nov. 8, 2000, Metro, at 97.

¹⁸⁸ Testimony of Neal Rosenstein, Government Reform Coordinator, New York Public Interest Group before the New York City Voter Assistance Commission hearing on Voting, Voter Registration and Voter Participation, City Hall, Dec. 15, 2000.

Smooth election day operations requires an infrastructure of people, outreach and technology. The first line of defense, as discussed above, is properly trained election workers, at the polling sites and sufficient permanent staff at headquarters.¹⁸⁹ Second, poll workers must be able to report problems with voter information and machinery and receive an immediate response from off-site election officials. Many jurisdictions rely on a dedicated phone line for workers, cell phones, beepers, pagers, or laptop computers. All county boards and ultimately all poll workers should have access to computerized voter information via CD ROM or modem; the statewide registration list proposed here will assist.¹⁹⁰ Finally, there must be an effective telephone information line and back-up phone bank for voters. Offsite telephone centers with computerized menus and toll-free numbers can field calls prior to and on Election Day. Instituting this and other communication technology will reduce election-day worker stress and increase efficiency and productivity at the polls.

As long the American electoral system maintains the tradition of voting in a central, community place, the integrity of our system will depend upon capable, well-prepared, election-day workers. To ensure efficient administration of elections which will promote voter participation, New York needs to explore polling-site innovations pertaining to voting mechanics and poll workers. Money must be included in the federal and state budget for localities to implement these reforms.

G. OFFSITE VOTING SHOULD BE STRENGTHENED.

The previous discussion focused on voting at the polling site – its convenience,

¹⁸⁹ The Board of Elections in the City of New York suffered reductions in the permanent staff in response to the fiscal crises of the mid 1990's, which has impacted on service provision. Testimony of Joseph L. Gentili, Deputy Executive Director, Board of Elections in the City of New York before the New York City Council Committee on Governmental Operations, City Hall, Feb. 8, 2001.

¹⁹⁰ See Computerized Voter Registration Systems, N.Y.S. Temporary Commission on Voting Machine Equipment and Voter Registration Systems, May 1986.

accessibility, technology, and personnel. There are distinct advantages to onsite voting. First, a centralized polling place permits the community to perform collectively the civic act of voting. Second, a centralized polling place permits close supervision of the voting process to ensure qualified voters, discourage fraud, intimidation and manipulation of vulnerable voters, and safeguard the privacy of the voter and the secrecy of the ballot.¹⁹¹

Low voter participation rates, however, require that public officials and the citizenry reexamine certain of these assumptions. With low turnout, the collective civic ritual of voting may be more illusory than real. Perhaps, in the 21st century, our fast paced and mobile society is outgrowing the polling place.

One response to election-day problems at the polling site is to expand off-site voting – voting away from the polling place. Traditionally, offsite voting has consisted of military and absentee ballots.¹⁹² Newer means include more generalized voting by mail and online. Offsite voting has the potential for enhancing voter participation, but it requires steps to prevent fraud and manipulation, and ensure voter privacy.

¹⁹¹ See Glenn B. Simpson and Evan Perez, Tainted Returns: As Absentee Voters Increase in Number, Fear of Fraud Grows, Wall St. J., Dec. 20, 2000, at A1, c.6 (“[I]t’s much tougher to police the law when a voter’s home becomes the polling place and there is no single Election Day, as is the case with voting by mail. Since there’s no booth to provide privacy, an unethical campaign worker can also monitor the ballot-marking and ensure a sales pitch isn’t wasted.”)

¹⁹² In addition, offsite voting is permitted for special ballots. Special federal voters are United States citizens last domiciled within New York State who now reside outside the United States. Subject to certain conditions, they are permitted to vote in all federal elections. See N.Y. Elec. Law § 11-120. The ballots are counted, canvassed and preserved in the same manner as absentee ballots. Special presidential voters are qualified voters who moved less than 30 days before a presidential election and are not yet qualified to vote from their new address. See id. §11-104, 11-106, 11-108, 11-110. Subject to certain conditions, these voters may vote, but only for President and Vice President. Finally, special ballots are used when persons cannot go to the polling site on account of religious tenets, see id. § 11-300 employment by the Board of Elections; see id. § 11-302, and domestic violence; see id. § 11-304, 11-306.

1. Voting By Military Ballots.

New York State first permitted absentee voting for members of the military services.¹⁹³ During the Civil War, union soldiers were encouraged to vote by absentee ballot. Indeed, New York law continues to pay special deference to members of the military.¹⁹⁴ New York State Constitution Article 2 § 4 ensures military voters do not lose their residence by virtue of their service. Article 10 of the Election Law provides that military voters are entitled to vote as fully as if they were present at the polls.¹⁹⁵

State law makes it relatively simple for a member of the military to register and to vote by military ballot.¹⁹⁶ Anyone in the military or the spouse, parent or child of anyone in the service may vote by absentee ballot.¹⁹⁷ A family member can make an initial application for a military ballot for a member of the military serving overseas.¹⁹⁸ Applying for a military ballot results in permanent personal registration.¹⁹⁹ A military voter who registers by applying for a military ballot can vote in an election so long as that registration is at least 10 days before the election. Local boards of elections must send military ballots to registered voters 32 days before a general

¹⁹³ See Pamela A. Stone, Electronic Ballot Boxes: Legal Obstacles to Voting Over the Internet, 29 McGeorge L. Rev. 953, 972, nn. 171-175 (1998) (until the late 1970s, absentee voting was largely limited to military voters).

¹⁹⁴ N.Y. Elec. Law § 8-404 (voters who apply for an absentee ballot from a Veteran's Hospital and then move to another, receive a ballot with reapplying).

¹⁹⁵ The provisions of law concerning military ballots are to be liberally construed for the purpose of providing military voters the opportunity to vote. Id. § 10-126.

¹⁹⁶ A federal postcard application and a State military ballot application are treated alike. Id. § 10-106(7-a).

¹⁹⁷ Id. §§ 10-102(2), 10-104; see also 50 App. U.S.C.A. § 459 (1948).

¹⁹⁸ N.Y. Elec. Law § 10-106(1).

¹⁹⁹ Id. § 10-106(7).

or primary election.²⁰⁰

Voting by a military ballot follows the same procedures and form as voting by absentee ballot.²⁰¹ A military ballot must be received (i) before the polls close on Election Day; or (ii) within seven days after the election as long as there is a stamp dated before Election Day from the United States Postal Service, a foreign country's postal service, or a federal agency.²⁰²

The presidential contest in Florida brought to the nation's attention the problem that the military does not always deliver its members' ballots by governmental mail service, so that the ballots can arrive at county boards of election without postmarks. In New York, if ballots arrive after Election Day without a postmark or date stamp, they are void, and the votes are not counted. That military ballots often are distributed late due to ballot access contests exacerbates this problem. The Department of Defense is examining ways to address this problem. However, it may be difficult to devise a single system which complies with the laws of 50 states.

One possible solution is for a military voter to affirm on the envelope that he or she voted no later than Election Day. As long as that ballot is received within a week of Election Day, the vote will count. While not providing the same level of objective proof as a postmark, this alternative recognizes that a reduced level of scrutiny may be appropriate for members of the military.

2. Voting By Absentee Balloting Should be Strengthened.

Absentee voting, first instituted for members of the military, has been extended to certain civilians who cannot come to the polling site on Election Day. The New York Constitution

²⁰⁰ *Id.* § 10-108(1).

²⁰¹ *Id.* §§ 10-112, 7-123.

²⁰² *Id.* § 10-114(1).

permits absentee balloting when the qualified voter will be outside the county, ill, or disabled on Election Day.²⁰³

An absentee ballot application may be submitted by a voter or on his or her behalf by a spouse, child, parent, a member of a household, or a duly authorized agent. The law does not restrict whom a voter can authorize as agent or the number of voters on whose behalf one agent can act.

The voter must provide his or her address, declare that he or she is a qualified voter, and has met one of the statutory requirements for an absentee ballot. The individual must provide detailed information on the reasons for the absence, dates, and destination.²⁰⁴ The county board approves or, after a prompt investigation, denies the application for absentee ballots.²⁰⁵ The list of absentee voters is provided to party leaders and made available to the public.²⁰⁶

Absentee ballots resemble machine ballots to the extent possible.²⁰⁷ New York State uses three types of absentee ballots: traditional paper ballots; mark-sense; and punch cards. Mark-sense ballots, like many standardized test answer sheets, require the user to fill in a circle associated with each electoral choice. Punch cards require the user to remove the small square of paper or “chad,” designated by surrounding perforation, associated with each electoral choice.

²⁰³ N.Y. Const. Art. II, § 2; see N.Y. Elec. Law § 8-400(1). To vote by absentee ballot on Election Day, a voter must be: (1) unavoidably absent from the county of his residence, (or if a resident of the City of New York from the City) because of duties, occupation, business, or studies; (2) absent from the county or city because he or she is on vacation elsewhere; (3) unable to appear at the polling place because of illness or physical disability; (4) an inmate or patient of a veteran’s administration hospital; (5) accompanying a spouse, parent or child who will be absent in accordance with §8-400(1); or (6) detained in jail awaiting action by a grand jury or awaiting trial, or confined in prison after a conviction for an offense other than a felony.

²⁰⁴ See N.Y. Elec. Law § 8-400(3).

²⁰⁵ See id. § 8-402(1).

²⁰⁶ See id. § 8-402(7). Making this available to the public raises privacy concerns.

²⁰⁷ See id. § 7-122.

Westchester, Monroe, St. Lawrence, and Rockland counties use punch cards for absentee ballots, similar to those used in Florida counties. While punch cards can be punched using a machine or manually perforated, all the punch cards used in New York State are the manual type punctured by a stylus. The names of the candidates and office are printed on the cards.

All absentee ballots include instructions on how to vote and a warning that stray marks will void the ballot.²⁰⁸ The ballots are contained in specified envelopes. On the back of the envelope, a voter again must declare his or her eligibility to vote, his or her inability to vote in person, and represent that he or she has not voted elsewhere.²⁰⁹

Valid absentee ballots include those (i) received by a board of elections before the close of polls on Election Day or (ii) postmarked the day before the election and received within seven days after the election.²¹⁰

Absentee voters who reside in certain institutions such as nursing homes due to age, mental status or physical dependency may be vulnerable to manipulation. The Election Law provides for a special procedure for voters who reside in Office of Mental Hygiene facilities, nursing homes, residential care facilities and Veterans Administration hospitals.²¹¹ If a county has at least one of these facilities with five or more absentee voters, the board of elections may assign a bipartisan team of two inspectors to go to the facility and accept the votes.²¹² The

²⁰⁸ See id.

²⁰⁹ See N.Y. Elec. Law § 7-122(8). The envelope also contains information identifying the voter's address and election district, enabling the county boards to sort the ballots for counting.

²¹⁰ See id. § 8-412(2). Those received at least seven days before the election can be sent to the polling place to be counted on Election Day, after the polls close. All others must be counted at the county board.

²¹¹ Id. § 8-407.

²¹² County boards may extend the practice to other facilities, even those with fewer than five absentee voters.

county specifies the timing for taking the votes. A team of inspectors distributes the ballots to the voters or uses portable voting machines. If a voter can express his or her wishes but cannot physically vote, the inspectors may mark the ballot for the voter. Poll watchers may be present.

An examination of absentee ballots in practice suggests areas for improvement in eligibility, application, and voting. First, many voters who wish to participate in the electoral process find it difficult to go to a polling place during the limited time frame allotted for voting. For example, increasing numbers of New Yorkers are primary caretakers for the elderly and disabled and these responsibilities may prevent the caretaker from going to the polling site. The Legislature should consider whether a person with such responsibilities should be able to vote by absentee ballot.

In addition to broadening the categories of voters who may vote by absentee ballot, New York should revisit the manner by which voters must demonstrate that they are qualified to vote by absentee ballot. Absentee ballot applications are unnecessarily intrusive. For example, voters who anticipate they will be out of town on business on Election Day must state the nature of the work requiring the absence.²¹³ A voter who will be on vacation must indicate the dates and destination. Finally, an ill or disabled voter must indicate the name and address of his or her physician. The public release of this information may jeopardize the voter's security and privacy. Certain of these questions can be dropped without harm. Should an election official have reason to doubt that the voter is qualified to vote absentee, he or she can investigate further.

The State also should strengthen provisions to curb fraud and manipulation in absentee voting. The special optional procedures for ensuring that voters in nursing homes and other residential institutions are not manipulated by partisan officials should be made mandatory. Any county with a nursing home or similar institution, with five or more absentee voters, should be

²¹³ See *id.* § 8-400(3).

required to provide a bipartisan team of inspectors to oversee the voting by absentee ballot at that institution. This proposal would go a long way toward eliminating the significant potential for abuse of the absentee ballot system in institutional settings.

New York's law is far too lax in permitting authorized agents to secure any number of absentee ballots. The absentee ballot process, unless carefully regulated, provides an advantage to established parties over insurgents, as the former have the organization in place to secure absentee ballots for the party faithful. To curb fraud and manipulation, other states bar agents from securing absentee ballots.²¹⁴ In such states, an absentee ballot must be mailed to the voter or picked up by the voter or an immediate family member at the county board. Such a rule could be too restrictive. For instance, a voter may become ill in the days immediately before an election and not have ample time to obtain a ballot by mail; and that voter may not have an immediate family member living nearby. Instead, individuals should be permitted to serve as an authorized agent for up to three voters. This will help prevent concerted absentee voter drives and the fraudulent practices which sometimes accompany those efforts. At the same time, it would allow those needing absentee ballots to secure them.

3. Additional Offsite Voting Should be Studied for The Future.

Permitting absentee voting only where the voter is ill, physically disabled, or absent from the jurisdiction reflects the traditional preference for voting at one's polling site. A contrasting option – voting by mail or online – would permit any voter to vote away from the polling site without the need to show cause.

a. VOTING BY MAIL.

Several jurisdictions, including Oregon, California, and Washington, have experimented with voting by mail with promising but cautionary results. Voting by mail offers several

²¹⁴ See, e.g., Fla. Stat. ch. 101.62 (a)-(b).

advantages. First, it can increase voter turnout.²¹⁵ Second, voting by mail can be less costly than traditional election practices. For example, Washington found a 10 percent decrease in costs with all-mail elections.

Disadvantages of voting by mail are common to other offsite voting proposals. The absence of an election inspector may make voting by mail more vulnerable to manipulation and fraud. Voting by mail may undermine our communitarian tradition. While the present practice of absentee voting shares this risk, the need to demonstrate or at least claim need reduces the opportunities for fraud and manipulation. Before voting by mail is implemented on a widespread basis in New York, serious consideration must be given to measures to prevent fraud and manipulation by political parties and others.

b. VOTING ONLINE.

Another way to vote offsite is voting online through the Internet.²¹⁶ Several jurisdictions recently have experimented with voting online, including counties in Arizona, Washington, California, and the Department of Defense.²¹⁷

Initial results are thought provoking. Voter turnout appears to increase with Internet voting. For example, this past March, online voting was permitted but not required in Arizona's Democratic primary. More than 86,000 individuals voted in the primary, up from 13,000 in 1996 primary. Eighty percent of the primary voters cast their votes via the Internet. According to

²¹⁵ With voting by mail, voter turnout increased ten percent in Oregon and doubled in California. Washington found a 53.2 percent response with all-mail ballots as opposed to 38.3 percent for traditional ballot methods. However, all-mail and in-person voter turnouts were equal in Colorado school board elections. See Stone, supra note 196, at 972, n. 162.

²¹⁶ Online voting with a computer connected to the Internet is distinguished from electronic voting on a free-standing computer at the polling place.

²¹⁷ The Department of Defense, in conjunction with the Federal Voting Assistance Program, launched a pilot online voting program tested in five locations. Final evaluation is not complete.

Arizona officials, the highest turnout increase was in Hispanic and American Indian neighborhoods.²¹⁸

Among the other advantages to voting online may be its simplicity. A poll of voters in Maricopa County, Arizona who cast non-binding online ballots in the November presidential election reported that all found the online voting system easy or very easy to use and 85 percent indicated a preference to vote online in the future. In Thurston County, Washington, 94 percent of the participants in a non-binding presidential primary, said they would prefer to vote online in future elections.²¹⁹ Another advantage of Internet voting may be cost savings; after the initial investment, there may be considerable reduced paper and personnel costs. The ease, immediacy, and reliability of vote tabulations may be another advantage.

Of course, there are potential problems relating to the technology of online voting. Some voters may not receive necessary PIN numbers; voters' computers may not connect with the voting website, and some can be frustrated by "busy" messages. Moreover, the digital divide among Americans based on race, income and age presents serious obstacles. Most Americans – and disproportionately the young, poor, less educated, and rural and inner city residents – do not have Internet access.²²⁰ As of August 2000, 58.5 percent of American households – 61.6 million American households – did not have Internet access. Only 18.9 percent of individuals who lived in households with annual incomes less than \$15,000 were Internet users. In contrast,

²¹⁸ Not all online voting has been successful in improving voter participation. See James Ledbetter, Net Voting Experiment Leaves Alaska Cold, (Jan.26, 2000) <<http://TheStandard.com>> (Alaska permitted online voting in a Republican straw primary pitting Steve Forbes against George Bush in January 2000, but only 35 of over 4,000 voters used this option).

²¹⁹ See Online Voting Earns High Marks from Users, Spokesman-Review, Mar. 6, 2000, at A11.

²²⁰ See Deborah Phillips, Voting Technology: Are We Reading for Internet Voting?, The Voting Integrity Project.

more than 70 percent of people living in households with an annual income over \$75,000 used the Internet.²²¹ To some extent, disparities in Internet access can be remedied by providing access at local public libraries, government offices and schools, and through the distribution of laptops to local communities, during the elections, as was done by some community groups in Arizona.

While time may remedy the access problem, other problems may persist. The security of voting information in cyberspace must be safeguarded. Online voting requires that election officials have strategies to verify voters' identity to ensure that only qualified voters participate. The integrity of the electoral system also requires verification that the vote cast is the vote received. At present, as the California Internet Task Force study found, phantom websites can be constructed to reveal a citizen's vote or transform it into a vote for the opposing candidate, and send it to the real site. Putting elections online may not increase turnout if voters do not trust the process.

In sum, voter participation may be enhanced through increased convenience and accessibility at the polling site, modernized voting technology, enhanced recruitment, compensation, and training of poll workers, and greater opportunities for offsite voting. However, the promise of increased voter participation must be pursued while preventing fraud, preserving security, and ensuring privacy. Only when these concerns are met, can vote integrity and voter participation be maximized.

²²¹ See U.S. Department of Commerce, Falling Through the Net: Toward Digital Inclusion 25, 36 (Oct. 2000).

IV. VOTE INTEGRITY

Efforts to enhance voter participation ultimately will be served by equally vigilant efforts to ensure the integrity of the electoral process through reliable vote counting and election fraud prevention.

A. VOTE COUNTING CAN BE IMPROVED.

This year, perhaps for the first time, the process and rules of counting votes – at least in Florida – were subject to intense scrutiny by the Supreme Court, the media, and the public. In finding Florida’s “clear intent of the voter” canvassing standard too subjective, the Court explained that “[h]aving once granted the right to vote on equal terms, the state may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”²²² New Yorkers understandably are concerned about the standards and practices in our State and want to be reassured that they produce a vote tally that accurately reflects the intent of the voters. The integrity of our election process depends on it.

1. The Canvassing Process.

County boards of elections are responsible for “canvassing” (counting) election results in New York State.²²³

a. VOTES CAST BY VOTING MACHINE.

Because of the widespread use of voting machines in New York, election night canvassing has not been a source of much controversy. It is relatively easy to extract vote totals from machines, which are not subject to ambiguities in interpretation.

As soon as polls close, the inspectors at each polling place lock and canvass the voting machines. In counties where machines are equipped to print the totals recorded on the

²²² Bush v. Gore, 121 S. Ct. 525, 530 (2000).

²²³ N.Y. Elec. Law § 9-204.

counters, the printout is removed from the machine by the inspectors and, after observation by poll watchers²²⁴ and candidates, becomes the official “return of canvass.”²²⁵ In counties where machines are not so equipped, the inspectors open the counting compartments in the presence of poll watchers and candidates. The chairperson of the board of inspectors reads aloud the totals from the counters to ensure accurate transcription while another inspector records them in ink. This is repeated with another inspector, from a different political party. Watchers and candidates are given an opportunity to inspect the counters. The totals are entered on “returns of canvass,” signed by all inspectors.²²⁶

b. VOTES CAST BY PAPER BALLOT.

There often will be paper ballots that must be counted by hand at a polling place: absentee ballots, “emergency” ballots cast where voting machines have broken down, and write-in ballots.²²⁷

Before an inspector may open a paper ballot, he or she must check the name on the envelope against the voter registry. If the inspector finds that the voter is registered and has not voted by machine, the envelope is opened and the unfolded ballot is placed in a ballot box.²²⁸ (This protects the secrecy of the ballot.)

Before canvassing paper ballots, the inspectors must confirm that the number of

²²⁴ Candidates or political parties may appoint poll watchers to attend any meeting of the inspectors and to observe all activity at the polling place. Id. § 8-500.

²²⁵ Id. § 9-102.

²²⁶ Id.

²²⁷ Affidavit ballots are not counted at the polling place because affidavit voters’ registration status first must be verified by the county board.

²²⁸ If for any reason, a voter is found ineligible to vote absentee, the inspector returns the ballot unopened to the county board. N.Y. Elec. Law § 9-104.

accepted ballots matches the number of verified ballot voters.²²⁹ Valid ballots are opened and counted in the presence of poll watchers and candidates. The final ballot tally is reported on the return of canvass.²³⁰

A ballot may be voided by the inspectors for various technical violations of Section 9-112 of the Election Law, even if the intent of the voter is clear. For example, a ballot may be voided if extrinsic papers or articles are attached to the ballot or included in the envelope; if the ballot is defaced or torn; if there are erasures; if there is a mark other than an X or a check; or if a name is written other than in the designated space for write-in candidates. An erasure or invalid mark only voids the office or ballot question near the erasure or mark. If a candidate's name appears more than once on a ballot (i.e, the candidate is nominated by more than one party) and the ballot indicates more than one vote for that candidate, only the first counts. If the voter's intent cannot be ascertained, the ballot is void.²³¹

There appears to be some variance across the State in how strictly inspectors adhere to the technical requirements of Section 9-112. In some counties, unambiguous votes are routinely disqualified for violating the statute. In Broome County, for example, some military ballots were rejected in the 2000 general election canvass because the voters had written messages on the margins of the ballots, complaining that the ballot did not fit neatly into the envelope. Other counties, however, tend to forgive highly technical violations, relying on case law holding that "it is not the purpose of the law to disenfranchise a voter for some simple mistake or obscurity, if

²²⁹ If ballots exceed verified voters, the numbers are reconciled by randomly removing and voiding ballots. Id. § 9-108.

²³⁰ Id. § 9-114(3).

²³¹ Id. § 9-112(6).

his intent may be discovered by reasonable interpretation.”²³²

c. REPORTING ELECTION DAY CANVASS RESULTS.

After the tallies are completed for the machine and paper ballot canvasses, the chairperson of the board of inspectors publicly proclaims the results.²³³ An inspector delivers the returns of canvass along with all paper ballots to the county board of elections.²³⁴ In all cities and in Nassau County, a signed statement of the results also is delivered to the city or county police headquarters,²³⁵ where the results are tabulated and statements of returns are made available to the press.²³⁶

d. CANVASSING ADDITIONAL PAPER BALLOTS.

Before the results are complete, the canvassing board must count all remaining paper ballots: absentee ballots not counted at the polls (some arrive after Election Day, while in some counties absentee ballots are not delivered to polling sites), as well as verified affidavit ballots collected at the polls, military, special federal and special presidential ballots.

Most of these paper ballots are counted by hand. The process must be completed within ten days of a general election, or within eight days of a special or primary election. The counting is performed by a bipartisan central board of inspectors, composed of the county board of elections or designated poll clerks, and may be observed by poll watchers designated by the

²³² Dowgwilla v. Cohen, 7 N.Y.S. 2d. 256, 257 (2d Dep’t. 1938), appeal dismissed, 17 N.E. 2d. 463; but see Williams v. Rensselaer County Board of Elections, 471 N.Y.S. 2d. 373 (3d Dep’t. 1983), appeal dismissed, 472 N.Y.S. 2d. 922 (ballot invalid where voter checked inside a box containing candidate’s name, but not within the “voting square” contained within such box).

²³³ N.Y. Elec. Law § 9-122.

²³⁴ Id. § 9-124.

²³⁵ In New York City, a second copy of the statement is transmitted or delivered to the City Board of Elections.

²³⁶ N.Y. Elec. Law § 9-126(1).

candidates, political parties and independent bodies.²³⁷ The standards and practices for counting these ballots are identical to those used in the polling-site paper ballot count.

To expedite the counting of paper ballots, some counties have invested in absentee ballot counting machinery. Two types are used in New York State, depending on the type of paper ballot. “Mark-sense” ballots which require the voter to pencil his or her vote in a circle or square are counted by optical scanner. Mark-sense ballots are used in Manhattan, Queens, and Staten Island (with the two remaining New York City counties scheduled to adopt them this year), and in Broome, Erie, Onondaga and Putnam counties. The second type of counting machine reads punch cards. In New York, punch cards are used for absentee ballots in Westchester, Monroe, St. Lawrence, and Rockland counties.

To ensure that the result does not deviate from the result achieved by hand counting, New York State Board of Elections’ regulations provide exact specifications for ballot-counting machinery.²³⁸ The regulations set forth the application process for machine approval, detailed testing procedures and reliability standards, staffing levels and training for machine maintenance and operation, and procedures for ballot tabulation. Election Law provides that where machines are used to tabulate ballots, “any ballots which cannot be counted by the machine shall be counted manually[.]”²³⁹

e. CHALLENGES TO BALLOTS.

During both the polling-site and post-Election Day canvasses, poll watchers may challenge individual ballots. If the inspectors cannot agree on whether to count a ballot, the

²³⁷ Id. § 9-209.

²³⁸ N.Y. Comp. Codes R. & Regs. tit. 9, §§ 6210 and 6211.

²³⁹ N.Y. Elec. Law § 9-209(2)(c)(3); but see N.Y. Comp. Codes R. & Regs. tit. 9, § 6211.10 (b)(1)(ii) (“Any ballot which is deemed unacceptable for machine tabulation...shall be duplicated by the commissioners or their designees [and] the original ballot shall be replaced by the duplicate ballot”).

ballot is set aside. A candidate may challenge any ruling by the board to count, exclude, or set aside a ballot, through a court proceeding.²⁴⁰ If after three days there is no court order against counting a set-aside ballot, the ballot is counted.²⁴¹

Challenges also may be made to machine-tabulated ballots. Before ballots are fed into the machine, they “shall be reviewed for tabulating acceptability.”²⁴² During this process, a poll watcher may challenge a ballot under Section 9-112.

No New York statute, regulation or case addresses whether counties using punch cards should count hanging, pregnant or dimpled chads. Many factors may have contributed to the apparent lack of controversy over chads in New York. First, punch cards are used only in four counties, and only by absentee voters, making it unlikely that the ballots returned with incomplete punches would decide an election. Second, because punch cards are used here only by absentee voters, they are not punched while fastened to a voting stall as in Florida, so there is no “well” in which chads may accumulate and prevent further chads from falling. Third, the ballot is printed directly on each punch card, not superimposed on the punch card as in Florida. This avoids alignment problems, which may have caused some incomplete punches in Florida.

Nonetheless, some punch cards are returned with hanging, dimpled or pregnant chads, and the State Board of Elections has no statewide standard on how to count such ballots. Each county may determine its own standard. At least two of the four counties using punch cards – Rockland and St. Lawrence – do not have written guidelines on counting incompletely punched ballots. In Rockland County, all ballots are fed into the machine, and the machine counts are

²⁴⁰ A court challenge to a ballot canvass is governed by N.Y. Elec. Law § 16-106.

²⁴¹ N.Y. Elec. Law § 9-209(2)(d).

²⁴² N.Y. Comp. Code. R. & Regs. tit. 9, § 6211.10(b).

honored. In St. Lawrence County, the Board applies an informal policy: when paper ballots are opened, clerks visually inspect them for hanging chads. Any chad hanging by one corner or two is removed before the ballot is fed into the machine. Dimpled and pregnant chads and chads detached at one corner only are left intact, and the parties rely on the machine count.

2. Recanvassing, Judicial Review and Certification.

Within 15 days after a general, special, or primary election, the bipartisan central board of inspectors automatically conducts a recanvass of all Election Day returns, i.e., those votes counted at the polling sites, from both machines and paper ballots.²⁴³ The voting machine custodian, the state and county chairs of each party and all candidates have a right to observe. If the recanvass finds error in the original canvass, the recanvass results supercede.²⁴⁴

A dispute over the accuracy of a recanvassed machine tally or a county board's decision to count or disqualify specific paper ballots may be resolved in court, under Article 16 of the Election Law. Such challenge is treated as a "summary proceeding," rather than a formal action, which expedites the process. A court may direct another recanvass, or that specific contested ballots be counted or excluded, or that the candidate or his or her agent be permitted to examine contested ballots or voting machines.²⁴⁵

After the election-day canvass, the subsequent paper ballot canvass, the recanvass of the election-day results, and the resolution of any court challenge, the county board certifies the final tallies for each office and proposition.²⁴⁶

²⁴³ Paper ballots canvassed after Election Day are not subject to recanvass.

²⁴⁴ N.Y. Elec. Law § 9-208(2).

²⁴⁵ Id. §§ 16-106, 16-112.

²⁴⁶ Id. § 9-210. Certification statements relating to national or state offices or propositions must be delivered to the State Board of Elections within 25 days after an election. Id. § 9-214.

3. Problems and Recommendations.

For the most part, New York's vote counting and verification procedures work smoothly. Canvassing and recanvassing of voting machines – which covers the vast majority of New York's votes – is usually a matter of checking the numbers. Where recanvassing discloses errors in the initial number transcriptions, corrections are made with few disputes. In 1997, for example, a Manhattan poll worker omitted a zero from a canvass statement and 350 votes were transcribed as "35," swinging the outcome of a City Council primary to the eventual loser. The error was discovered on recanvass and corrected without protest from the defeated candidate.²⁴⁷

A few areas, however, may be improved.

a. COUNT ALL UNAMBIGUOUS AND ANONYMOUS BALLOTS.

In extremely close elections, controversies often arise in the counting of absentee and other paper ballots. As absentee ballots are opened, representatives from opposing campaigns or parties often seek to have opponents' votes invalidated on hyper-technical grounds. This process is not about rejecting ballots where the voter's intent is unclear; rather, it is about invalidating unambiguous ballots that violate a technical requirement of Section 9-112: a choice is circled rather than checked, the ballot has a small tear in the corner, the voter accidentally mailed his shopping list along with the ballot, or some equally trivial violation. Candidates and parties of all political stripes have made challenges on such technical grounds, with the result that voters' intent is denied.

Section 9-112 is derived from Section 358 of the Election Law of 1909. The original aim of the ballot-voiding requirements was to preserve secrecy and eliminate a notorious technique of political machines. Political parties sometimes instructed voters who had made *quid pro quo* exchanges for their votes to identify themselves on their ballots by some specific subtle marking.

²⁴⁷ Recount Hands Lopez Win, Daily News, Sept. 18, 1997, 2.

The poll worker would see a small tear on the side of the ballot, and believe the voter had kept his bargain. To eliminate such voter exchanges and covert signaling, the law aimed to invalidate all ballots with tears, accompanying articles, or marks other than an X or check. Today, Section 9-112 chiefly functions as grounds for candidates and their parties to challenge opponents' votes. Vote trading may remain a concern, but may not warrant this harsh response. Moreover, county boards and New York courts applying Section 9-112 have differed in weighing voter intent against the technical requirements of the statute.

Section 9-112 should be amended to remove all grounds to challenge a paper ballot, except where the voter's intent is unclear or the voter has revealed his or her identity on the ballot. Where a ballot contains votes for two candidates for the same office or the voter's name, it should be invalidated. But if a candidate seeks to have a ballot invalidated because the voter has marked his or her choice in an unconventional manner or made extrinsic marks, that candidate should be required to establish ambiguity of intent or disclosure of identity. This proposed amendment also would promote uniformity in the statewide canvassing of paper ballots.

b. CONSIDER "MARK-SENSE" EQUIPMENT FOR CANVASSING ABSENTEE BALLOTS IN LARGE COUNTIES.

All but a few counties in New York State count absentee and other paper ballots by hand. In small counties with relatively few ballots to count, ballot counting machinery is probably not economical. However, election boards of populous counties such as Nassau and Albany should consider whether ballot counting machinery would allow more cost-effective counting of absentee ballots. When the outcome of an election hinges on absentee ballots, the public benefits from an expeditious and accurate count.

Of course, there remain questions as to the reliability of the available equipment. With punch cards, there will always be some small number of hanging, dimpled and pregnant chads,

and some risk or claim of unintentional alteration through handling. Moreover, Florida's recent experience has undermined voter confidence in punch card readers.

The four punch card counties and the larger hand-counting counties therefore should give serious consideration to adopting the mark-sense technology. Rockland County currently is considering such a proposal. The State Board of Elections should conduct a study of the use of these ballots and machines. While initial anecdotal reports seem favorable, concerns remain.²⁴⁸ For example, election workers may encounter difficulty in setting the "decision threshold" (sensitivity) on mark-sense readers. Voters using pencils vary in their writing force, and may not fill in the entire circle to be marked. A high threshold may leave valid votes uncounted, while a low threshold may be too sensitive to slight marks in blank circles and mistakenly invalidate ballots as "overvotes."

c. ESTABLISH STATEWIDE STANDARDS ON CANVASSING PUNCH CARD AND MARK-SENSE BALLOTS.

After Bush v. Gore, the State Board of Elections must promulgate regulations for counties to follow in canvassing punch card and mark-sense ballots. An "equal protection" claim might be raised here if the result of a statewide election hinged on the absentee vote in the counties using these ballots. The State Board should provide clear rules prior to the next election on counting partially punched chads and on the appropriate sensitivity level for mark-sense readers.

In addition, the State Board must address the counting of mark-sense or punch card ballots that cannot be fed into vote-counting machinery. The statute provides for hand counting, while the regulation calls for duplicating the ballot for machine counting. This discrepancy must

²⁴⁸ It's a Close Call When Picking Voting Machine, Orlando Sentinel Trib., Oct. 29, 1990, A1.

be addressed.²⁴⁹

d. SHIFT THE PRIMARY DATE FROM SEPTEMBER TO JUNE.

As a result of the very short time presently allotted between a primary and general election, New York faces a danger every election year that the canvassing of primary returns will continue up until the general election.

New York Election Law provides that party primaries be held on the second Tuesday in September before every general election, except that presidential primaries shall be held on the first Tuesday in March.²⁵⁰ Non-presidential primaries were moved from June to September in 1974, in the belief that a June through November general election season was unduly lengthy, expensive, and subject to greater opportunities for “electoral abuse.”²⁵¹ While these concerns may be legitimate, the September primary places the system under enormous pressure. As recent events have shown, complications and legal disputes sometimes arise in the canvassing process, delaying a final result by weeks or months. No matter how long it takes to certify a primary winner, the general election must be held in early November. The public has an interest in the quick resolution of primary races so that general campaigning can commence.

Moreover, election officials need to identify the party nominees to make certain preparations for the general election. For example, absentee and military ballots with the nominees’ names must be printed and distributed well before Election Day. If a primary result were delayed a month or more, such preparations might not be possible.

With New York City about to enter an election with an unprecedented number of open seats, the September primary may well be a disaster-in-waiting. Even if the City primary runs

²⁴⁹ Compare N.Y. Elec. Law § 9-209 (c)(3) with N.Y. Comp. Codes R. & Regs. tit. 9 § 6211.10(b)(1)(ii).

²⁵⁰ N.Y. Elec. Law § 8-100(1)(a).

²⁵¹ 1974 N.Y. ch.9 § 3 Memoranda.

smoothly, there may be a need for some run-off elections. By statute, a run-off must be held two weeks after the primary,²⁵² curtailing the general campaign even more.

For these reasons, New York should return to a June date for non-presidential primaries.²⁵³

B. ELECTION LAW ENFORCEMENT CAN BE STRENGTHENED.

The integrity of the electoral process further is promoted by addressing election fraud. Each individual voter, candidate, and election official can take steps to ensure that voter registration, ballot access, voting and vote counting is conducted by qualified persons adhering to the rule of law. Challenging a citizen's electoral rights – to register, to sign a candidate's petition, to vote, and to have that vote count – is a serious step that should not be taken lightly, but only when the evidence so warrants and the law permits. Certainly, New Yorkers are committed to the integrity of the electoral process. Nevertheless, notwithstanding the best efforts of our citizenry, well-intentioned candidates, hardworking poll workers and committed election officials, there may be on occasion wrongful conduct or fraud in voter registration, in ballot process, and in tabulation.

New York State has a legal framework for responding to allegations of election fraud. The State Board of Elections has the responsibility for the enforcement of the Election Laws and other statutes governing campaigns, elections and related procedures.²⁵⁴ When the State Board

²⁵² NY Elec. Law § 8-100(1)(b)

²⁵³ Apart from the practical perils, the September primary is also a tremendous institutional advantage for incumbents, who typically do not face serious primary challenges. If an incumbent's would-be challengers in the opposing party wage a difficult primary, the eventual primary winner is likely to emerge battle-scarred, cash-poor, and not as well known as the incumbent. With time, the nominee might heal intra-party wounds, replenish campaign coffers, and reach the public with his or her message. But with the general election just 60 days away, time is not on the challenger's side.

²⁵⁴ N.Y. Elec. Law § 3-104(1). The Attorney General had this responsibility until 1974.

of Elections determines that there is substantial reason to believe a violation has occurred, it must investigate expeditiously or ensure an appropriate investigation by a county board of elections.²⁵⁵ If, after an investigation, the state or county board finds reasonable cause to believe that a violation warranting criminal prosecution has occurred, it refers the matter to the District Attorney of the appropriate county.²⁵⁶ In addition, under certain circumstances, the Attorney General, alone or in conjunction with a District Attorney, may be responsible for prosecutions under the Election Law.²⁵⁷ Election fraud also may violate federal law under some circumstances.²⁵⁸

An individual may be prosecuted for crimes relating to voting and elections pursuant to Election Law, Article 17, or pursuant to Penal Law provisions. Article 17 establishes that a person may be guilty of a misdemeanor for false, fraudulent and wrongful conduct in connection with primary elections, including but not limited to:

- voting or attempting to vote under a name other than one's own;
- multiple voting;
- filing false declaration with board of election inspectors or other election officials as to residence;
- inducing election officials to violate their duty or the Election Law;
- paying or offering to pay money or other valuables to induce any voter to vote or refrain from voting;
- willfully defacing or injuring a voting booth, list of candidates or cards for instruction of voters;
- certain misconduct in relation to petitions;

²⁵⁵ Id. § 3-104(2).

²⁵⁶ Id. § 3-104(3).

²⁵⁷ N.Y. Exec. Law § 70.

²⁵⁸ See generally, The Scope of Federal Election Offenses, N.Y.L.J., June 3, 1997.

- certain misconduct by officers, clerks, inspectors or other election officials or employees.²⁵⁹

Specific Election Law provisions address the discouragement or intimidation of voters, including but not limited to provisions which prohibit:

- refusing to permit employees to attend an election;²⁶⁰
- duress and intimidation of voters.²⁶¹

It is a felony for any person to:

- register or attempt to register in duplicate districts, when one knows he is not a qualified voter, with a false name or residence;
- falsely make an oath, fraudulently deface or destroy a certificate of nomination or official ballot;
- knowingly procure fraudulent documents in order to vote;
- knowingly vote when not qualified or facilitating another to so vote.²⁶²

It is a felony for a public officer or employee to knowingly and willfully omit, refuse or neglect to perform Election Law duties, for an election officer to willfully refuse to accord any voter, candidate or duly accredited watcher rights guaranteed by the Election Law, or willfully violate an Election Law provision relating to the registration, taking, recording, counting, canvassing, tallying or certifying of votes.²⁶³

Wrongful conduct in connection with voting and elections not only may violate Election Law provisions but also may violate provisions of the Penal Law. For example, individuals have

²⁵⁹ N.Y. Elec. Law §§ 17-102, 17-108, 17-116, 17-122, 17-168.

²⁶⁰ Id. § 17-118.

²⁶¹ Id. §§ 17-148, 17-150

²⁶² Id. §§ 17-104, 17-120, 17-160, 17-132.

²⁶³ Id. §§ 17-106, 17-128.

been prosecuted for conduct relating to elections as offering a false instrument for filing,²⁶⁴ forgery,²⁶⁵ perjury,²⁶⁶ and conspiracy.

In New York, an adequate legal framework exists for the investigation and prosecution of election fraud. The Penal Law and the Election Law provide appropriate misdemeanor and felony offenses for various election misconduct. In response to a particular allegation of election fraud, the appropriate District Attorney will exercise his or her discretion to determine whether the facts warrant further investigation and ultimately prosecution. When the Governor advises the Attorney General that “he has reason to doubt whether in any county the law relating to crimes against the elective franchise is properly enforced,” the Attorney General receives a report of all prosecutions and complaints from the relevant District Attorney and the Attorney General shall “take charge of prosecutions under the election law.”²⁶⁷

Suggestions for preventing, detecting or punishing fraud are contained throughout this report. For example, registration fraud and multiple voting can be curbed by the establishment and maintenance of a comprehensive computerized statewide registration list. If election officials have access to current registration information at the polling sites or through county boards of elections, they will be armed with effective tools in preventing voter fraud. Fraud in absentee voting and the manipulation of voters at residential institutions can be addressed by mandating special nursing home voting oversight and limiting the use of authorized agents in the

²⁶⁴ See N.Y. Penal Law §§ 175.30, 175.35; see, e.g., People v. Maxam, 557 N.Y.S.2d 534 (App. Div. 3d 1990) (affirming conviction for attesting to petitioner signatures-for candidate for Town Supervisor for Chester, Warren County-defendant did not witness).

²⁶⁵ See N.Y. Penal Law § 170.00; see, e.g., People v. Miller, 524 N.Y.S.2d 622 (Sup. Ct. 1988) (prosecution for fraudulent behavior in regard to nominating petitions as subscribing witnesses).

²⁶⁶ See N.Y. Penal Law § 210.10; see, e.g., Miller, 524 N.Y.S.2d 622.

²⁶⁷ N.Y. Exec. Law § 70.

distribution of absentee ballots.

As New York increases the computerization of voter registration data and other election information, there must be adequate criminal penalties. With the expanded use of computerized voting data and electronic machines, the possibilities for election fraud may grow. Technological solutions may address many security and privacy concerns. Any computerized voting system should have an audit trail to ensure accountability. However, as we upgrade voting machinery, so too should we strengthen the criminal laws, prohibiting computer-related fraud. Article 17 of the Election Law provides criminal penalties for “violations of the elective franchise” but does not contemplate the magnitude of damage that computer hackers might inflict on the electoral process. Its harshest penalty, for an E felony, is four years in prison.²⁶⁸

New York’s “computer hacking law” imposes a class C felony penalty, with a sentence not exceeding 15 years in prison, on anyone who by tampering with a computer he or she has no right to use, or an information facility accessible through such a computer, intentionally alters or destroys data worth more than \$50,000.²⁶⁹ Given the importance of voter data, the Election Law should be amended to impose the same penalty on those who intentionally alter or destroy computerized voter information.

In some instances of wrongdoing, a criminal prosecution may be inappropriate, yet inaction may leave the wrongdoing unaddressed. In such cases, an intermediate sanction may be appropriate. Therefore, the State Board of Elections should be authorized to impose civil monetary penalties in appropriate cases of violations of the Election Law. Nothing here would deprive the District Attorneys of their authority to make determinations of criminal culpability and

²⁶⁸ N.Y. Elec. Law § 17-132. Under N.Y. Penal Law § 55.10(1)(b), undesignated felonies such as this one are deemed class E felonies, for which N.Y. Penal Law § 70.00(2)(e) prescribes the maximum penalty.

²⁶⁹ N.Y. Penal Law § 56.27.

act accordingly. Rather, this would offer an intermediate sanction. An administrative infrastructure, procedures and practices can be designed, perhaps modeled on analogous civil monetary penalties such as those imposed by the State Ethics Commission²⁷⁰ and the State Education Department.²⁷¹

These recommendations will help deter, detect, and punish election fraud. In doing so, New York will bolster voter confidence in our electoral system.

²⁷⁰ See, e.g., N.Y. Exec. Law § 94(13).

²⁷¹ See, e.g., N.Y. Educ. Law § 5003(6).

CONCLUSION

As New Yorkers examine the future of elections in the State, this report should serve as a blueprint for discussion. The administration and conduct of elections is a complex endeavor involving millions of voters, thousands of machines, election officials, poll workers and polling sites. Any comprehensive reform of the electoral system must promote four interrelated concerns: voter participation; voter choice; voter action; and vote integrity. This report explores these values and offers recommendations on how each can be improved. Some of the concrete suggestions for progress are basic; some pose technological or logistical challenges; some require legislative action; some require financial support from the federal and state government; others require further study.

The right to vote is the most fundamental right of the American democracy. The legitimacy and vitality of elected government in this nation and in our State depends on an engaged citizenry, a spirited debate of ideas and candidacies, and efficient and reliable elections. New York has a long tradition of electoral activism and innovation. It is incumbent on public officials to seize this unique opportunity and adopt the necessary reforms. The impending elections in New York City and elsewhere demand prompt action. Together, we can ensure that voting matters in New York.

SUMMARY OF RECOMMENDATIONS

I. ENCOURAGE VOTER PARTICIPATION

A. Voter Registration Can Be Strengthened.

1. Institute election-day registration.
2. Expand registration form downloading.
3. Create a statewide registration list.
4. Limit access to voter registration information to the electoral purposes.

B. Voter Education Can Be Enhanced.

1. Publish voter guides, including ballot referendum information.
2. Use Internet and computer kiosks to educate voters.
3. Create and publicize a voter's bill of rights.

II. EXPAND VOTER CHOICE

A. Ease Restrictive Petition Requirements For Ballot Access.

1. Cut signature requirements in half.
2. Lengthen the petitioning period.
3. Permit voters to sign more than one petition for the same office.
4. Eliminate town/city trap.
5. Expand cure period to ten days.

B. Offer Alternatives to Petitioning.

1. Permit automatic ballot access for federally matched candidates.
2. Explore a fee-based or matching alternative for all other offices.

III. UPGRADE VOTE CASTING.

A. Voting Must be Convenient.

1. Phase in uniform hours for voting.
2. Encourage private employers to accommodate voters.

B. Allegations of Race and National Origin Discriminations Require Systemic Data Collection and Analysis.

1. Require State Board of Elections to collect, analyze, and disclose allegations of discriminatory practices, the relevant election administration data, and the steps taken to address such problems.

C. Polling Sites must be Accessible to the Disabled.

1. Create Accessibility Fund to assist upgrading polling sites.
2. Train ADA county coordinators and boards of elections.

D. The Mechanics of Voting at Polling Sites Should Be Simple and Reliable

1. Upgrade existing voting technology.
2. Ensure legal framework and adequate funding to explore advanced voting technology.

E. Election Workers Should Be Supported.

1. Expand recruitment.
2. Increase compensation.
3. Improve poll worker training.

F. Offsite Voting Should Be Strengthened.

1. Count military ballots without postmarks where voter provides suitable affirmation.
2. Consider permitting primary care-givers to vote by absentee ballot.
3. Delete intrusive questions on absentee ballot applications.
4. Mandate special oversight of absentee voting at nursing homes and similar institutions.
5. Limit use of authorized agents in the distribution of absentee ballots.
6. Phase out use of punch cards for absentee ballots.
7. Additional offsite voting by mail and the Internet should be studied.

IV. BOLSTER VOTE INTEGRITY

A. Vote Counting Can Be Improved.

1. Count all unambiguous and anonymous ballots.
2. Consider mark-sense equipment for canvassing absentee ballots in large counties.
3. Establish statewide standards for canvassing punch-card and mark-sense ballots.
4. Shift the primary date from September to June.

B. Election Law Enforcement Can Be Upgraded.

1. Detect registration fraud and multiple voting by establishment of statewide registration list.
2. Curb fraud in absentee ballots.
3. Authorize State Board of Elections to impose civil monetary penalties for Election Law violations.
4. Enact criminal penalties for vandalizing or destroying computerized voting data.

VOTING MILESTONES

The hallmark of American democracy is the right to vote. Through the years, Americans have fought and worked hard to see that every citizen has the right to vote. The history of the vote in America is a history of struggle for the principle of one person, one vote.

- 1778 New York State law provides for the Governor and Lieutenant Governor to be elected by ballot while retaining the voice vote for legislators and other officials.
- 1787 The U.S. Constitution guarantees suffrage only to white men owning property.
- 1787 The ballot system is instituted for all state elections in New York.
- 1807-1843 Property ownership is decreasingly a requirement to vote in the United States.
- 1848 Elizabeth Cady Stanton and others hold a women's rights convention in Seneca Falls, New York, proclaiming the "Declaration of Sentiments" and endorsing women's right to vote.
- 1859 Registration is required for voters in New York State.
- 1870 The 15th Amendment to the U.S. Constitution is ratified, guaranteeing the right to vote to all men age 21 years or older regardless of race or ethnicity.
- 1890 New York requires that ballots published by parties be replaced with official ballots at all elections.
- 1892 The mechanical-lever voting machine first used in Lockport, New York.
- 1917 New York is the first Eastern State to permit women to vote in national and state elections.
- 1920 The 19th Amendment to the U.S. Constitution is ratified, guaranteeing women age 21 and older the right to vote.
- 1964 The 24th Amendment to the U.S. Constitution is ratified, prohibiting the imposition of poll taxes in national elections.
- 1965 The Voting Rights Act of 1965 bans racial discrimination in voting practices and procedures, including literacy tests and poll taxes.
- 1966 The Supreme Court prohibits voter registration fees in Harper v. Board of Elections, 303 U.S. 663 (1966).

- 1971 The 26th Amendment to the U.S. Constitution is ratified, lowering the voting age to 18.
- 1974 The New York State Board of Elections is created to administer and enforce the Election Law.
- 1975 Amendments to the Voting Rights Act of 1965 ban discrimination against minority-language citizens.
- 1984 The Voting Accessibility for the Elderly and Handicapped Act requires “access for elderly and handicapped individuals to registration facilities and polling places in federal elections.”
- 1989 New York requires accessibility of polling sites to individuals with disabilities.
- 1990 The Americans with Disability Act of 1990 (ADA) requires, among other things, for public services, programs, and activities such as voting, to be accessible to individuals with disabilities.
- 1993 The National Voter Registration Act (the “Motor Voter Law”) provides for a national mail-in voter registration form and requires states to provide registration documents to applicants for drivers’ licenses and certain state benefits.

ELECTION RESOURCES

Asian American Legal Defense and Education Fund

Association of the Bar of the City of New York, Election Law Committee

Association of Towns of the State of New York

Ballot Access News

Board of Elections

Commissioners of St. Louis County, Missouri

Borough of Manhattan Community College

Brennan Center for Justice

City Clerk

Deerborn, Michigan

City Clerk's Office, Elections Division

City of Minneapolis

Registrar of Voters

Clark County, Nevada

Common Cause (National)

Common Cause (New York State)

Conference of New York State NAACP Chapters

Department of Elections, City of Detroit, Michigan

Election Commission, Douglas County, Nebraska

Election Material Processing and Polls and Officers Division

Registrar Recorder, Los Angeles County, California

Empire State Democratic Initiative

Federal Election Commission

Idaho Secretary of State, Elections Division

Supervisor of Elections

Indian River County, Florida

Institute for Puerto Rican Policy

Jackson County Board of Election Commissions

Kansas City, Missouri

Johnson County, Kansas Election Office

The League of Women Voters of Buffalo

The League of Women Voters (National)
The League of Women Voters of New York State
Maine Secretary of State, Elections Section
Medgar Evers College Center for Law and
Social Justice
Milwaukee District Attorney's Office
Minnesota Secretary of State, Election Division
NAACP National Voter Fund
National Conference of State Legislatures
New Hampshire Office of State Planning
New York City Board of Elections
New York Public Interest Research Group
New York State Association of Counties
New York State Board of Elections
New York State Conference of Mayors & Municipal Officials
New York State County Election Commissioners
People for the American Way
Princeton University
Puerto Rican Legal Defense and Education Fund
Registrar of Voters, County of Riverside, California
Registrar of Voters, San Bernardino County, California
State University of NY at Stony Brook
Syracuse University
Tennessee Division of Elections
University of California, Berkeley
US Department of Justice
The Voting Integrity Project
Wisconsin Elections Board
Wyoming Secretary of State Election Administration