

# ELECTORAL DUE PROCESS

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## ABSTRACT

*Elections and their aftermath are matters left to the states by the U.S. Constitution. But the Supreme Court has made clear that the right to vote is federally protected, and fiercely so. When an election failure takes place and deprives citizens of their votes, challengers must resort to state law remedies. Many states have procedural requirements for election challenges that are stringent to the point of being prohibitive.*

*This Note argues that the due process concerns raised by these burdensome state procedures are amplified by their voting rights context. Where a voter must take to the courts to vindicate her right to vote, she should not be further deprived by an unfair process. Federal courts hearing cases about unfair election-challenge procedures have been reluctant to interfere and are thus overly deferential to the states.*

*This Note offers a new approach for “electoral due process” claims—an approach that is properly preservative of voters’ substantive rights and their rights to a fair hearing.*

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*At the bottom of all the tributes paid to democracy, is the little man, walking into the little booth, with a little pencil, making a little cross on a little bit of paper—no amount of rhetoric or voluminous discussion can possibly palliate the overwhelming importance of that point.*  
— Winston Churchill<sup>1</sup>

## INTRODUCTION

The 2000 presidential election left Americans reeling and uncertain about the integrity of the electoral system. Congress quickly passed the Help America Vote Act (“HAVA”).<sup>2</sup> In response to the hanging chads that loomed large in the national psyche,<sup>3</sup> a federal solution was presented—federal money was made available to state and local governments for election administration updates like electronic voting machines.<sup>4</sup> HAVA funds and updates were accepted by all fifty states, the District of Columbia, American Samoa, Guam, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.<sup>5</sup>

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1. 404 Parl Deb HC (5th ser.) (1944) col. 667 (UK).

2. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 42 U.S.C.).

3. Senator Kit Bond described the effect the 2000 presidential election had on the nation:

The 2000 election opened the eyes of many Americans to the flaws and failures of our election machinery, our voting systems, and even how we determine what a vote is . . . . We learned of hanging chads and inactive lists. . . . We learned of legal voters turned away, while dead voters cast ballots. We discovered that many people voted twice, while too many weren’t even counted once . . . . This . . . bill . . . tries to address each of the fundamental problems we have discovered.

148 CONG. REC. S10,488–02 (daily ed. Oct. 16, 2002) (statement of Sen. Bond).

4. See 52 U.S.C. § 20901(a), (b)(1)(C), (b)(1)(F) (2012) (providing funding for “educating voters concerning . . . voting technology” and “[i]mproving, acquiring, . . . or replacing voting systems and technology and methods for casting and counting votes”). Crafting HAVA was a delicate matter because the Constitution leaves the “[m]anner of holding Elections” to the states. U.S. CONST. art. I, § 4, cl. 1. This plenary grant of power to the states restricts meddling by the federal government. Congress may condition federal funds on state performance of objectives that are not within Congress’s enumerated powers, as long as those objectives are “in pursuit of the general welfare,” *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (internal quotation marks omitted), and the offered funds do not operate as a compulsion, *id.* at 211. HAVA is an allowed vehicle for Congress to use to facilitate election technology updates because the offered federal funds—and the attached election administration changes—were voluntary for the states. See Jennifer Nou, *Privatizing Democracy: Promoting Election Integrity Through Procurement Contracts*, 118 YALE L.J. 744, 781–82 (“Under the Spending Clause, conditional grants like HAVA merely create incentives rather than coercive pronouncements for states and thus do not constitute unconstitutional intrusions into state sovereignty.”).

5. See U.S. ELECTION ASSISTANCE COMM’N, ANNUAL GRANT EXPENDITURE REPORT: FISCAL YEAR 2015, at 2 (Mar. 2016), <https://www.eac.gov/assets/1/28/Final%20FY%202015>

During the 2016 election, all states but three used electronic voting machines.<sup>6</sup> Every state also now uses electronic voter-registration databases, which are accessed on Election Day to verify the eligibility of each voter who comes to the polls.<sup>7</sup> These updates work to prevent the election failures of an earlier era—those of faulty hole punching, of eligible voters turned away by poll workers, and of accidental over- or undervoting.<sup>8</sup>

During the 2016 election cycle, however, this new technology fomented a new breed of concerns: tampered-with electronic voting machines; the inadvertent misprogramming of electronic voting machine software; and remote interference with voter registration databases.<sup>9</sup> Hackers working from Russia “hit” the electronic election systems in thirty-nine states during the 2016 primaries and general election.<sup>10</sup> At least “a handful of states” experienced interference with election administration during this cybersecurity attack, but there is very little information about the extent to which these hits impacted Election Day.<sup>11</sup> In July 2018, Special Counsel Robert Mueller secured

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%20Grants%20Report.pdf [https://perma.cc/LT4B-LWAL] (reporting that as of September 30, 2015, \$3,247,294,645 has been given to these jurisdictions under HAVA).

6. See Drew Desilver, *On Election Day, Most Voters Use Electronic or Optical-Scan Ballots*, PEW RES. CTR. (Nov. 8, 2016), <http://www.pewresearch.org/fact-tank/2016/11/08/on-election-day-most-voters-use-electronic-or-optical-scan-ballots/> [https://perma.cc/6H4U-6LZ9] (reporting that Washington, Oregon, and Colorado conduct all voting by mail, while the other forty-seven states use at least some optical-scan voting and direct-recording electronic voting machines).

7. See *VRM in the States: Electronic Registration*, BRENNAN CTR. FOR JUSTICE (Feb. 3, 2017), <https://www.brennancenter.org/analysis/vrm-states-electronic-registration> [https://perma.cc/V67R-R2JM] (“Thanks to . . . the Help America Vote Act, every state now has (or soon will have) a computerized statewide voter registration database capable of sharing information in some form with other government databases.”).

8. See 148 CONG. REC. S10,488–02, *supra* note 3 (referring to these election problems as the motivation for HAVA).

9. See, e.g., Brian Barrett, *America’s Electronic Voting Machines are Scarily Easy Targets*, WIRED (Aug. 2, 2016, 9:57 AM), <https://www.wired.com/2016/08/americas-voting-machines-arent-ready-election/> [https://perma.cc/8E7J-PM25] (“[R]esearchers have demonstrated that many [electronic voting systems] are susceptible to malware or, equally if not more alarming, a well-timed denial of service attack.”).

10. Michael Riley & Jordan Robertson, *Russian Cyber Hacks on U.S. Electoral System Far Wider than Previously Known*, BLOOMBERG (June 13, 2017, 5:00 AM), <https://www.bloomberg.com/news/articles/2017-06-13/russian-breach-of-39-states-threatens-future-u-s-elections> [https://perma.cc/2QAT-B4E5].

11. See Sari Horwitz, Ellen Nakashima & Matea Gold, *DHS Tells States About Russian Hacking During 2016 Election*, WASH. POST (Sept. 22, 2017), [https://www.washingtonpost.com/world/national-security/dhs-tells-states-about-russian-hacking-during-2016-election/2017/09/22/fd263a2c-9fe2-11e7-8ea1-ed975285475e\\_story.html](https://www.washingtonpost.com/world/national-security/dhs-tells-states-about-russian-hacking-during-2016-election/2017/09/22/fd263a2c-9fe2-11e7-8ea1-ed975285475e_story.html) [https://perma.cc/G5FX-6FYQ] (reporting that “the hackers seemed to be looking for vulnerabilities”).

indictments against twelve Russian intelligence agents for charges related to “large-scale cyber operations [conducted] to interfere with the 2016 U.S. presidential election.”<sup>12</sup> The 2017 French presidential election also suffered an “infrastructure” attack from Russian hackers.<sup>13</sup> And the 2018 midterm elections were no different. By the end of Election Day, civil rights organizations had reported at least 29,000 voting irregularities across the country.<sup>14</sup> In Georgia, North Carolina, Pennsylvania, and Texas, machines are said to have flipped voters’ choices.<sup>15</sup> In New York City, so many voting machines began malfunctioning that one organization created a map of affected polling places.<sup>16</sup> In one Georgia county, five different polling places experienced voting machine failure; remaining voters used provisional ballots, but it is not yet clear whether votes cast on those machines earlier in the day were preserved.<sup>17</sup>

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12. Indictment, *United States v. Netyksho*, No. 1:18CR00215, 2018 WL 3407381 (D.D.C. July 13, 2018).

13. See Andy Greenberg, *The NSA Confirms It: Russia Hacked French Election ‘Infrastructure’*, WIRED (May 9, 2017, 12:36 PM), <https://www.wired.com/2017/05/nsa-director-confirms-russia-hacked-french-election-infrastructure/> [<https://perma.cc/K4WS-4HWH>] (reporting that the nature of the “infrastructure” attack has not been clearly revealed by the French government, but that the En Marche political party has described the attack as “a massive, coordinated act of hacking”).

14. Amy Gardner & Beth Reinhard, *Broken Machines, Rejected Ballots and Long Lines: Voting Problems Emerge as Americans Go to the Polls*, WASH. POST (Nov. 6, 2018), [https://www.washingtonpost.com/politics/broken-machines-rejected-ballots-and-long-lines-voting-problems-emerge-as-americans-go-to-the-polls/2018/11/06/ffd11e52-dfa8-11e8-b3f0-62607289efee\\_story.html](https://www.washingtonpost.com/politics/broken-machines-rejected-ballots-and-long-lines-voting-problems-emerge-as-americans-go-to-the-polls/2018/11/06/ffd11e52-dfa8-11e8-b3f0-62607289efee_story.html) [<https://perma.cc/377X-SQWJ>].

15. See *id.* (“Complaints also emerged about voting machines flipping voters’ choices in Pennsylvania, North Carolina, Texas and Illinois.”); John Bowden, *Voters Report Texas Voting Machines Changing Straight-Party Selections*, HILL (Oct. 26, 2018, 11:27 AM), <https://thehill.com/policy/technology/413320-voters-report-texas-voting-machines-changing-straight-party-selections> [<https://perma.cc/CE2Z-BPZ9>] (reporting this problem in Texas and Georgia).

16. Courtney Norris, Nsikan Akpan & Joshua Barajas, *Which States Were Hit by Voting Problems on Election Day?*, PBS NEWS HOUR (Nov. 6, 2018, 6:44 PM), <https://www.pbs.org/newshour/politics/which-states-were-hit-by-voting-problems-on-election-day> [<https://perma.cc/B7MB-W7U3>] (reporting voting machine problems in New York City and including a link to the map showing voting machine outages). The map represents each voting machine failure as a dot. Erica Anderson, NYCity News Serv., Jenny Ye, Quartz, Spenser Metsel, Ally J. Levine & Sisi Wei, ProPublica, *Breakdown in New York City*, PROPUBLICA: ELECTIONLAND (Nov. 8, 2018, 10:30 AM), <https://projects.propublica.org/graphics/election-2018-broken-machines> [<https://perma.cc/543L-SUVV>].

17. Gardner & Reinhard, *supra* note 14. All of this is to say nothing of the fact that Georgia Secretary of State Brian Kemp administered the very election in which he was running for governor; Kemp’s administration of the election, including an eleventh-hour “investigation” launched into Georgia Democrats, which suggested “without evidence” that they “tr[ie]d to hack the state’s voter registration files,” has been the subject of significant criticism. Richard Fausset

These recent breaches have claimed the spotlight, but post-HAVA election failures are not new. In 2008, electronic voting machines were improperly programmed for the congressional primary in Louisiana.<sup>18</sup> At least 2167—and likely 5000—-independent voters were prevented from casting Democratic votes, even though they were explicitly allowed to do so by state law.<sup>19</sup> The margin in that primary was 1484 votes.<sup>20</sup> In 2012, at least one polling station in Virginia had an electronic voting machine with faulty programming.<sup>21</sup> The machine had to be decommissioned on Election Day because votes cast for President Barack Obama were being tallied for Governor Mitt Romney.<sup>22</sup> Virginia experienced election failures again during the 2014 midterm elections, when “thirty-two electronic voting machines at twenty-five polling places” stopped functioning properly.<sup>23</sup> The entire Texas voter-registration system crashed during the 2014 midterm

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& Alan Blinder, *Brian Kemp's Office, Without Citing Evidence, Investigates Georgia Democrats Over Alleged Hack*, N.Y. Times (Nov. 4, 2018), <https://www.nytimes.com/2018/11/04/us/politics/georgia-elections-kemp-voters-hack.html> [https://perma.cc/LW8H-9Z8F]; Nicquel Terry Ellis, *Will Georgia Voting Controversies Discourage Voters from Turning Out?*, USA TODAY (Nov. 2, 2018, 11:27 PM), <https://www.usatoday.com/story/news/politics/elections/2018/11/02/midterms-stacey-abrams-brian-kemp-voter-suppression-controversy-minority-turnout/18007527002> [https://perma.cc/7BLA-FYSS].

18. See Andrew Appel, *Independent Voters Disenfranchised in Louisiana*, FREEDOM TO TINKER (Oct. 19, 2008), <https://freedom-to-tinker.com/2008/10/19/independent-voters-disenfranchised-louisiana/> [https://perma.cc/F3UK-VDXD] (“[W]hen Independent voters pressed the button on the voting machine for a candidate in the Democratic congressional primary, nothing happened. In effect, these voters said that they were prevented from voting in the Democratic Congressional primary.”). My father was a candidate in this race, and I worked on his campaign. He unsuccessfully filed suit to challenge the election on the basis of the electronic voting machine irregularities.

19. See *id.* (reporting that the Sequoia AVC Advantage version 9.00H direct-recording electronic voting machines used in the election improperly “locked out” independent voters, preventing them from casting a ballot).

20. *Id.*

21. See James Orr, *US Election 2012: Voting Machine “Changes Vote for Barack Obama to Mitt Romney*,” TELEGRAPH (Nov. 6, 2012, 9:05 PM), <http://www.telegraph.co.uk/news/worldnews/us-election/9659694/US-election-2012-voting-machine-changes-vote-for-Barack-Obama-to-Mitt-Romney.html> [https://perma.cc/GJ7F-7YPT] (“An electronic voting machine was taken out of service on Tuesday after being captured on video changing a vote for President Barack Obama into one for Mitt Romney.”).

22. *Id.* Similar vote flipping was reported in 2012 for electronic voting machines in Nevada, Texas, North Carolina, and Ohio. Mark Clayton, *Voting-Machine Glitches: How Bad Was It on Election Day Around the Country?*, CHRISTIAN SCI. MONITOR (Nov. 7, 2012), <https://www.csmonitor.com/USA/Elections/2012/1107/Voting-machine-glitches-How-bad-was-it-on-Election-Day-around-the-country> [https://perma.cc/PWE2-KT8E].

23. Pippa Norris, *Why American Elections are Flawed (And How to Fix Them)* 9 (Harvard Kennedy Sch., Working Paper No. RWP16-038, 2016), <https://ssrn.com/abstract=2844793> [https://perma.cc/WT9X-HZPT].

election, forcing many to choose between forfeiting their vote altogether and taking the extra time to cast a provisional ballot.<sup>24</sup>

Computer science professors at Princeton, Johns Hopkins, U.C. Berkeley, U.C. Davis, and the University of Michigan have attested to the ease with which they—or any programmer—could tamper with voting machine software.<sup>25</sup> One boasted a personal best of complete software reprogramming in under a minute.<sup>26</sup>

How is this new generation of election threats to be addressed? More federal funding could encourage states to opt for newer technology. It seems, however, that no security measure could completely prevent meddling. In 2017 alone, even the best-protected organizations, from the NSA and the CIA to Deloitte and Merck, were brought to their knees.<sup>27</sup> If even the entities with the very best cybersecurity are suffering breaches, the same should be expected in the election process. In a time of such sophisticated threats to the integrity of our electoral process, preventive measures alone are not enough. Congressional researchers released a report in 2016 that

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24. *Id.* (citation omitted).

25. See David L. Dill, *Our Voting System Is Hackable by Foreign Powers*, SCI. AM. (Mar. 1, 2017), <https://www.scientificamerican.com/article/our-voting-system-is-hackable-by-foreign-powers/> [<https://perma.cc/BK82-6C2X>] (“[P]rofessor J. Alex Halderman says that he and his students could have changed the result of the November [2016] election . . . and there are videos to prove it.”); Andrea Foster, *Computer Scientists Hack into Voting Machines*, CHRON. OF HIGHER EDUC.: WIRED CAMPUS (July 30, 2007), <https://www.chronicle.com/blogs/wiredcampus/computer-scientists-hack-into-voting-machines/3217> [<https://perma.cc/PDB2-LFY8>] (reporting that in a study commissioned by the California Secretary of State, the U.C. professors “hack[ed] into electronic voting machines from three manufacturers”); Daniel Turner, *How to Hack an Election in One Minute*, MIT TECH. REV. (Sept. 18, 2006), <https://www.technologyreview.com/s/406525/how-to-hack-an-election-in-one-minute/> [<https://perma.cc/NV5N-6FFF>] (reporting that with “\$12 worth of tools,” the team “show[ed] exactly how entire voting systems could be not just rendered inoperable, but deliberately hacked to rig an election”).

26. See Chris Newmarker, *Princeton Prof Hacks E-Vote Machine*, WASH. POST (Sept. 13, 2006, 6:42 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/13/AR2006071300989.html> [<https://perma.cc/BRN9-A52U>] (“One member of the group was able to pick the lock in 10 seconds, and software could be installed in less than a minute . . .”).

27. See Lily Hay Newman, *The Biggest Cybersecurity Disasters of 2017 So Far*, WIRED (July 1, 2017, 10:00 AM), <https://www.wired.com/story/2017-biggest-hacks-so-far/> [<https://perma.cc/99DS-QW7q>] (reporting the breaches suffered by the NSA, the United Kingdom’s National Health Service, U.S. pharmaceutical giant Merck, and the CIA’s “Vault 7” data trove); Zack Whittaker, *These Were 2017’s Biggest Hacks, Leaks, and Data Breaches*, ZDNET (Dec. 18, 2017, 8:21 AM), <http://www.zdnet.com/pictures/biggest-hacks-leaks-and-data-breaches-2017/> [<https://perma.cc/SSG6-FPWD>] (reporting the breaches suffered by the TSA; the U.S. Air Force; Deloitte, one of the “Big Four” accounting, tax, and audit corporations; Verizon; Equifax; Bell Canada, Canada’s largest telecommunications company; Virgin America; Oxford University; Cambridge University; and New York University).

stated, “Cybersecurity experts [recognize] that preventive measures are insufficient by themselves” to prevent a cyberattack on American elections because “an adversary with enough motivation, resources, and expertise, such as a nation-state, can often overcome” such security measures.<sup>28</sup> What is required, then, is a new remedial framework.

Remedies for election failures are a matter of state law. Just as Election Day policies and voter registration processes are left to the states,<sup>29</sup> so too are the procedures for challenging election practices and election results.<sup>30</sup> Each state has its own guidelines for alleging that an election was defective or wanting in some way, for investigating the election structure and results, and for remedying any identified error.<sup>31</sup> While each state has developed a unique election-challenge process,<sup>32</sup> the majority are structured to restrict the number of challenges, to impose short timelines on election challengers, and to minimize the number of challenges that ultimately succeed.<sup>33</sup> These measures serve the admittedly important state interest of having a settled victor take office in time—a victor untainted by doubts in the process by which she was selected.<sup>34</sup> However, at a certain point, such procedures burden

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28. ARTHUR L. BURRIS & ERIC A. FISCHER, CONG. RESEARCH SERV., THE HELP AMERICA VOTE ACT AND ELECTION ADMINISTRATION: OVERVIEW AND SELECTED ISSUES FOR THE 2016 ELECTION 17 (2016), <https://fas.org/sgp/crs/misc/RS20898.pdf> [<https://perma.cc/6ECK-PLQN>].

29. See U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding elections . . . shall be prescribed in each State . . .”). Only boundaries set by other provisions of the Constitution can limit the states’ *garde* of elections. The Fifteenth Amendment, for instance, provides that neither race nor color nor “previous condition of servitude” may be used to deny or abridge a citizen’s right to vote. U.S. CONST. amend. XV, § 1. The Supreme Court also explained, “States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.” *Carrington v. Rash*, 380 U.S. 89, 96 (1965). Such a deprivation, the Court said, would “impose[] an invidious discrimination in violation of the Fourteenth Amendment.” *Id.*

30. See *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) (“[T]he Constitution confers upon the states the ‘power to control the disposition of contests over elections to . . . state and local offices.’” (citation omitted)).

31. See *infra* Part I.

32. These election challenges are often referred to as “election contests” in state statutes, case law, and scholarship.

33. See *infra* Part I.

34. See, e.g., Joshua A. Douglas, *Discouraging Election Contests*, 47 U. RICH. L. REV. 1015, 1024 (2013) (“The system craves finality, particularly on election night . . . . A contested election undermines the notion that the winner has an electoral mandate.”) [*hereinafter* Douglas, *Discouraging Election Contests*].

voters<sup>35</sup> constitutional rights.<sup>36</sup> Federal courts have, at times, stepped in to require states to adjust their challenge procedures to be less burdensome on challengers. The standard for reviewing these procedures, however, has been deferential to the states, and rare has been the successful challenge.<sup>37</sup>

This Note argues that state procedural rules should be reformed to allow litigants to more easily discover the extent of election failures and to prove their impact on election outcomes. Federal courts should propel these changes by adopting more exacting legal standards for “electoral due process” claims—that is, claims that involve the sufficiency and fairness of procedures for challenging elections. By demanding more from these state procedural frameworks, federal courts could protect our uniquely decentralized American electoral process<sup>38</sup> from the impact of modern threats *and* protect the constitutional rights of voters—all with minimal federal judicial encroachment into the “political thicket.”<sup>39</sup>

Part I of this Note provides an overview of states’ procedural frameworks for challenging elections. Part II lays out a brief history of federal courts’ treatment of election questions, highlighting the uniqueness and centrality of the right to vote. Part III proposes a new approach for electoral due process cases. This approach would demand more of state procedures for election challenges—a change that is newly imperative in an age of unprecedented election interference threats.

## I. SURVEY OF STATE PROCEDURES FOR ELECTION CHALLENGES

States require much of litigants who wish to challenge election results. Short deadlines, expensive filing fees, and summary proceedings make it more difficult for challengers to be heard on the

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35. This Note discusses the rights of voters, but the rights of candidates are conceptually the same in this context. *See* *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (“The rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.”).

36. *See infra* Part II.B.

37. Douglas, *Discouraging Election Contests*, *supra* note 34, at 1017 (“[T]here have been no successful election contests for federal office (either House of Congress or President) or governor in recent memory.” (citations omitted)).

38. *See* Norris, *supra* note 23, at 7 (referring to the “decentralized nature of [the] US electoral administration” in which there are 8000 separate jurisdictions responsible for election administration and security).

39. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016) (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946)).



merits of their claims—and much more difficult for them to succeed. Some scholars urge states to impose additional burdens. For example, sore-loser laws would punish candidates who challenge results “by restricting their future ballot access or giving these candidates a disfavored ballot placement in a subsequent election,” or by “requir[ing] that the candidate’s advertisements in the next election include a disclaimer.”<sup>40</sup>

In addition to these procedural burdens, which are discussed more fully below, some states hinder litigants from even learning about election failures. For instance, “standard operating procedures” in Georgia led state workers to wipe electronic voting machine data from servers in 2017, just after the filing of a lawsuit that concerned the machines’ poor performance.<sup>41</sup> Though policies like these are not formal rules, they impact a challenger’s ability to gather evidence that is crucial for making a case about election failures.

No matter the improbability of navigating these rules, a litigant cannot completely evade eccentric challenge procedures by instead filing suit in federal court.<sup>42</sup> Concerns over election administration, as a matter left to the states, must first be adjudicated according to state-provided procedural vehicles. Only once available state remedies are exhausted may a litigant raise constitutional election-failure claims in federal district court.

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40. Douglas, *Discouraging Election Contests*, *supra* note 34, at 1018. Private litigants who bring election challenges are more incentivized to bring meritorious claims than spurious claims. As the name for sore-loser laws suggests, candidates face considerable ignominy for bringing an election challenge. They are vulnerable to portrayal as refusing to accept defeat graciously. A candidate willing to become an election challenger is a candidate who is willing to forfeit future political aspirations if her challenge is revealed to be baseless. An organization or political party willing to support a voter in bringing an election challenge would be subject to similar criticisms. Whether party or candidate, the challenger would have to grapple with the potential shame of losing publicly a second time. Further, any candidate or party that is so unmoored as to be unchecked by that chastening concern is likely a candidate or party that is so on the fringe that the public would not even credit their claims of election failure or follow the litigation. In such a case, the public would accept the originally announced results as final and consider any ongoing litigation nothing more than an inevitable confirmation of those results. Finally, the legal system has a number of safeguards against spurious and manipulative claims, including sanctions, swift dismissals, and counterclaims. Those ordinary safeguards are sufficient without the imposition of prohibitive, election-specific procedures.

41. See Frank Bajak, *Georgia Election Server Wiped After Suit Filed*, AP NEWS (Oct. 27, 2017), <https://apnews.com/877ee1015f1c43f1965f63538b035d3f> [<https://perma.cc/6FV3-MF68>] (reporting that a server was wiped just after a “security expert disclosed a gaping security hole,” and that “[t]he server data could have revealed whether Georgia’s most recent elections were compromised by hackers”).

42. See *infra* Part II.C.

A. *Shortened Deadlines and Expensive Fees*

Understandably, states generally require that an election challenge be filed promptly after Election Day. If challenges were allowed indefinitely, legitimate challenges might not be brought until deep into the allegedly wrongful victor's tenure of service. A greatly delayed revelation of mistaken election results would undermine the legitimacy of governance. Voters and legal systems would have to reckon with relics of the invalid exercise of public office: the prosecutorial choices of improperly elected district attorneys, the swing votes of improperly elected legislators, and the common law making of improperly elected state supreme court judges. A state's interest in the timely resolution of any doubts as to the integrity of an election is clear.<sup>43</sup>

However, some states require the filing of petitions challenging elections almost immediately after an election—long before the victor would be inaugurated. For example, Maryland gubernatorial primary elections may only be challenged within three days of the results being certified.<sup>44</sup> In South Carolina, elections may only be challenged “not later than noon five days” after the state board has canvassed votes.<sup>45</sup> Florida and Alaska both require that any challenge be filed within ten days of that election's certification.<sup>46</sup> Virginia, too, requires that a complaint challenging a primary or special election be filed within ten days of Election Day.<sup>47</sup>

Some states also require that any appeal concerning an election challenge also be filed within a very short time period. For example, in North Carolina, an “election protest” must be filed by the second business day after the board of elections has declared the results,<sup>48</sup> and a challenger must appeal a dismissal of her protest within ten days of the decision.<sup>49</sup>

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43. Professor Joshua A. Douglas champions this interest in swiftness and repose: “Strict deadlines help to promote quick finality, which is good for the legitimacy of the eventual winner and the process itself.” Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1, 46. [hereinafter Douglas, *Procedural Fairness*].

44. MD. CODE ANN., ELEC. LAW § 12-202(b)(2) (2018).

45. S.C. CODE ANN. § 7-17-260 (2018).

46. ALASKA STAT. ANN. §§ 15.20.540, .550 (2018); FLA. STAT. ANN. § 102.168(1), (2) (2018).

47. VA. CODE ANN. § 24.2-808 (2018).

48. N.C. GEN. STAT. ANN. § 163A-1177(b)(4)a-c (2018).

49. *Id.* § 163A-1183(b).

In New Hampshire, the only remedy available for election challengers is an application for a recount.<sup>50</sup> Candidates must file this application by the Friday following the election.<sup>51</sup> All recent New Hampshire elections have fallen on Tuesdays.<sup>52</sup> Candidates are therefore only allotted three days to discover a potential election failure, decide whether to challenge the election on that ground, gather enough evidence to do so, and prepare an application. If that application is denied, a challenger must appeal to another New Hampshire commission within three days.<sup>53</sup> If that commission's review is also unfavorable, the challenger must then appeal to the state supreme court within five days.<sup>54</sup>

In addition, some states employ much more expensive filing fees for election challenges than for other actions. Virginia charges the challenger as much as \$100 per challenged precinct,<sup>55</sup> putting a statewide election challenge at a cost of over \$270,000.<sup>56</sup> Alabama requires \$5,000 upon the filing of an election challenge as an upfront court cost.<sup>57</sup> When a challenger alleges election fraud in Oklahoma, she must pay \$5,000 per county allegedly affected.<sup>58</sup> Therefore, alleging statewide election fraud in Oklahoma costs \$385,000.

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50. See JACK MASKELL, CONG. RESEARCH SERV., LEGAL PROCESSES FOR CONTESTING THE RESULTS OF A PRESIDENTIAL ELECTION 4 (2016), <https://fas.org/sgp/crs/misc/R44659.pdf> [<https://perma.cc/GH8F-YUNG>] (“New Hampshire law does not appear to provide a specific statutory scheme for election contests relating to federal elections, but rather provides for a process for a recount and an appeal and hearing on such recount results.”).

51. *Id.* (citation omitted).

52. See N.H. SEC’Y OF STATE, 2018-2019 POLITICAL CALENDAR 1, <http://sos.nh.gov/WorkArea/DownloadAsset.aspx?id=8589972718> [<https://perma.cc/LG2C-HSNA>] (listing the dates for elections in 2018 and 2019).

53. N.H. REV. STAT. ANN. § 665:8 (2018).

54. *Id.* § 665:16.

55. VA. CODE ANN. § 24.2-803(B) (2018).

56. See 2016 Presidential General Election Precinct Results, VA. DEP’T OF ELECTIONS, <http://historical.elections.virginia.gov/elections/view/80871/> [<https://perma.cc/B3P2-DJUM>] (follow the “Download this Election” hyperlink, then follow the “Precinct Results” hyperlink) (listing a total of over 2700 precincts in Virginia).

57. ALA. CODE. § 17-16-63 (2017). In contrast, filing fees for other types of civil claims in Alabama state court do not exceed \$1297 for civil cases. See *id.* § 12-19-71.

58. OKLA. STAT. tit. 26, § 8-119 (2018). Filing suit in other kinds of civil cases costs, at most, \$232.14 in Oklahoma state court. *Id.* tit. 28, § 152.

*B. Extrajudicial Adjudication, Summary Proceedings, and Lack of Appellate Process*

Some states provide that an election challenger may not be heard in the state's judicial system at all. These states instead relegate determination of election challenges to an administrative agency or to a commission of executive officials and legislators. Even of those states that do allow challengers access to the state court system, some require that the proceedings be conducted in a summary manner.

In Colorado, state courts "hear and determine [election challenges] in a summary manner," and there is no jury.<sup>59</sup> In Kansas, a trial judge serves as factfinder over state legislative election challenges and then delivers her findings to the Legislature.<sup>60</sup> The Legislature, as a whole, chooses a winner.<sup>61</sup> Neither the trial judge's findings nor the Legislature's decisions are appealable.<sup>62</sup> Challengers of elections in New Hampshire must apply to the Secretary of State for a recount.<sup>63</sup> The Secretary's decision may be appealed, but only to the state's Ballot Law Commission.<sup>64</sup> Only on appeal from *that* decision is the challenger finally heard in court.<sup>65</sup> Virginia election challenges are held "before a special judicial panel" without a jury.<sup>66</sup> Depending on the size of an election, a North Carolina election challenger must either file her challenge with the county board of elections or with the State Board of Elections.<sup>67</sup> County board decisions must be reviewed by the State

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59. COLO. R. CIV. P. 100(b).

60. KAN. STAT. ANN. § 25-1451(a) (2018).

61. *Id.* § 25-1451(b).

62. *See id.* § 25-1450 (stating that "contests involving the office of state senator or representative" are not appealable).

63. N.H. REV. STAT. ANN. § 660:5 (2018).

64. *Id.* § 665:8.

65. *See id.* § 665:16 ("There may be an appeal to the supreme court from the decisions of the ballot law commission . . .").

66. VA. CODE ANN. §§ 24.2-805, -810 (2018).

67. *See* N.C. GEN. STAT. ANN. § 163A-1177 (2018) ("A protest concerning the conduct of an election may be filed with the county board of elections . . ."); *id.* § 163A-1178(d)(2)d (requiring that the county board order the protest and that the county board's decision be sent to the State Board if the county board determines that "[t]here is substantial evidence to believe that a violation of the election law or other irregularity or misconduct did occur, and might have affected the outcome of the election, but [that] the board is unable to finally determine the effect because the election was a multicounty election"); *id.* § 163A-1180 ("The State Board may consider protests that were not filed in compliance with [§ 163A-1177].").

Board of Elections.<sup>68</sup> Only then may State Board decisions be appealed in state court.<sup>69</sup>

Professor Joshua A. Douglas attests that “[b]y far, the most common mechanism states use for resolving contests for state house and senate seats is to leave the matter to each respective house in the legislature.”<sup>70</sup> In addition, he says that thirteen states require the legislature to decide gubernatorial and lieutenant gubernatorial election challenges.<sup>71</sup> In these states, the decision of the legislature is the first *and* final adjudication of the challenge, as no appeals are allowed.<sup>72</sup> And in three states, special legislative committees decide executive election challenges.<sup>73</sup>

### C. Confluence of Multiple Procedural Barriers

The concurrence of even two of the above procedural mechanisms<sup>74</sup> amplifies the risk of unfairness to election challengers. And it is not uncommon for states to adopt multiple procedural barriers.<sup>75</sup> Louisiana’s statutory scheme, in particular, has many components that work together to inhibit election challenges, including short deadlines, summary proceedings, and narrow discovery. While any one of these barriers alone could be prohibitive enough to thwart a meritorious challenge, the stacking of these barriers, and the interactions between them, compounds the difficulty for challengers.

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68. *See id.* § 163A-1180 (“The State Board may . . . intervene and take jurisdiction over protests pending before a county board . . .”).

69. *Id.* § 163A-1183(b).

70. Douglas, *Procedural Fairness*, *supra* note 43, at 5.

71. *Id.* at 12, n.72 (citations omitted).

72. *See id.* at 12 (“In these states there is no possibility of appeal; the legislature has the final say in who won the election.”).

73. *Id.* at 13 (citations omitted).

74. There are, of course, more types of procedural barriers to election challenges. For example, Maryland requires challengers to meet a clear and convincing standard. MD. CODE ANN., ELEC. LAW § 12-204(d) (2018). And New Hampshire does not allow election actions to be brought unless the initial vote count resulted in a slim margin between the top two candidates. N.H. REV. STAT. ANN. §§ 660:1, :7 (2018). The greater the margin between the candidates, the more a litigant must pay to challenge the election. *Id.* § 660:2.

75. Even in the limited survey provided here, several states employ multiple procedural barriers to election challenges. *See, e.g., supra* note 44 and accompanying text (Maryland); *supra* note 46 and accompanying text (Alaska); *supra* notes 47, 55–56, 66 and accompanying text (Virginia); *supra* notes 48–49, 67–69 and accompanying text (North Carolina); *supra* notes 50–54, 63–65 and accompanying text (New Hampshire); *supra* note 57 and accompanying text (Alabama); *infra* notes 117–21 and accompanying text (Alabama); *infra* note 87 and accompanying text (Louisiana).

In Louisiana, a candidate must file her election challenge “not later than 4:30 p.m. of the ninth day after the date of the election.”<sup>76</sup> The challenger must be able to present her case within four days of filing suit.<sup>77</sup> That proceeding is “tried summarily, without a jury.”<sup>78</sup> Summary proceedings in Louisiana, as in many other states, are to be “conducted with rapidity.”<sup>79</sup> In Louisiana, judges may choose to hear the challenge entirely “in chambers,” rather than having the case “be tried in open court.”<sup>80</sup> If the challenger wishes to appeal the decision reached through this summary process, she has *twenty-four hours* to appeal the decision.<sup>81</sup> She then has no more than five days before that appellate hearing.<sup>82</sup> After the appellate decision is rendered, a challenger has *forty-eight hours* to file an appeal to the Supreme Court of Louisiana.<sup>83</sup>

Louisiana’s narrow discovery rules for election challenges require that a litigant make an initial showing before she is able to conduct any discovery.<sup>84</sup> A litigant must file a sworn affidavit of a poll watcher or election official who has personally witnessed an election irregularity.<sup>85</sup> Candidates who are underfunded and understaffed often lack poll watchers on election days, so for many challengers, an affidavit from a state employee is the only way forward. The pressures of local politics make it unlikely that a public official would go on the record to challenge the integrity of the electoral process<sup>86</sup>—whether or not the affidavit assigns any blame for the election failure. An assemblage of voters might come forward, willing to testify about the electronic voting machine failures they experienced, but none of those voters can

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76. LA. STAT. ANN. § 18:1405(B) (2018).

77. *Id.* § 18:1409(A)(1) (2012).

78. *Id.*

79. LA. CODE CIV. PROC. ANN. art. 2591 (2018).

80. *Id.* art. 2595.

81. LA. STAT. ANN. § 18:1409(D).

82. *Id.* (D)–(F).

83. *Id.* (G).

84. *Id.* § 18:1415(C) (2018).

85. *Id.*

86. See Dana Chisnell & Whitney Quesenbery, CTR. FOR CIVIC DESIGN, SECURITY INSIGHTS AND ISSUES FOR POLL WORKERS 15 (2014), <https://civicdesign.org/wp-content/uploads/2014/09/Pollworkers-and-security-2014-1018c.pdf> [<https://perma.cc/S2QQ-Z7F2>] (“Relationships outside the polling place may make it easier [for poll workers] to conspire, or to let things go that should be checked and/or corrected.”).

themselves trigger discovery rights for the challenger, nor can they compel election officials to corroborate those voting experiences.<sup>87</sup>

Assuming that an election challenger *is* able to find a statutorily qualified state employee to attest to an Election Day malfunction, the discovery process triggered by that affidavit is still remarkably constrained.<sup>88</sup> Depositions are limited to election officials and their employees.<sup>89</sup> The challenger must wait until the standard time for ballot opening—three days after the election<sup>90</sup>—before she can gain access to the evidence therein.<sup>91</sup> This limits all meaningful, data-based discovery to a six-day window because no further discovery is allowed after the challenge has been filed.<sup>92</sup> These constraints leave challengers potentially unable to pinpoint exactly what caused the broken Election Day experiences of voters who come forward to report malfunctions. An election challenger is not allowed to seek a rehearing or new trial on the matter,<sup>93</sup> so her opportunities to add new evidence—even evidence that was previously unknown or unattainable—are nonexistent, unless the court “upon its own motion” decides to correct “manifest error.”<sup>94</sup>

It is not difficult to imagine that challenging an election under this set of rules would often be futile, even if the challenger’s allegations are grounded in an actual election malfunction or breach. Perhaps the only challengers who would be able to successfully navigate these requirements—an accelerated schedule, little access to election data, and reliance on either scarce poll watchers or the corroboration of state employees—are those already embedded in local political networks.

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87. See § 18:1415(C) (listing only poll watchers, election commissioners, and election officials as those whose affidavit can trigger discovery rights for an election challenger).

88. *Id.* § 18:1415(D).

89. *Id.*

90. *Id.* § 18:573(A)(1) (“The voting machines . . . shall remain locked or otherwise secured and . . . sealed until the third day after the election . . .”). This subsection also provides that this three-day waiting period could be shortened in the event of judicial intervention; however, the clear language of § 18:1415(D) seems to foreclose such a court order in the context of an election challenge.

91. *Id.* § 18:1405(B); § 18:1415(A), (D), (F) (providing, together, that discovery must occur between the third day after the election—the opening of the voting machines—and the ninth day after the election—the filing deadline).

92. *Id.* § 18:1415(F).

93. *Id.* § 18:1409(I).

94. *Id.*

## II. FEDERAL JURISPRUDENCE ON ELECTION LAW

Federal courts have historically avoided becoming embroiled in election disputes, matters which are both political in nature and generally left to the states. However, during the civil rights movement, the Supreme Court became more involved in enunciating the constitutional requirements states must uphold in administering elections. More recently, the Court has shown itself willing even to rule on the details of Election Day. This Part provides a historical background of federal involvement in elections; it describes the unique status of the right to vote, a first among constitutional equals; and it explores the current jurisprudence on procedural due process claims in the context of election challenges. In particular, while the Supreme Court has become more willing to intervene to protect the right to vote, the courts of appeals have remained aloof. They turn a blind eye when unfair state procedures make it difficult—or impossible—for challengers to prove and remedy election failures.

### A. *Elections and Federalism*

The U.S. Constitution expressly leaves elections—even elections for federal office—within the realm of state control, subject only to limited federal interference: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . .”<sup>95</sup> The Seventeenth Amendment reaffirms this designation of power, stating, “The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.”<sup>96</sup>

The Supreme Court has historically been leery of intruding upon state control over elections.<sup>97</sup> Cases about elections fall at the intersection of two fields the Court sparingly enters. First, the Court is generally hesitant to upset separation-of-powers principles by answering questions properly left to the “political branches” of the

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95. U.S. CONST. art. I, § 4, cl. 1; *see also id.* art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”); Hugh M. Lee, *An Analysis of State and Federal Remedies for Election Fraud*, 63 U. PITT. L. REV. 159, 164 (2001) (explaining that even for presidential elections, federal law makes limited intrusions into the states’ selection of electors).

96. U.S. CONST. amend. XVII.

97. *See, e.g.,* *Colegrove v. Green*, 328 U.S. 549, 552 (1946).



executive and the legislature.<sup>98</sup> Second, federalism values are implicated when federal courts interfere with what would otherwise be left to the states.<sup>99</sup> When asked to answer questions about elections, courts have cited the principle that the federal judiciary should avoid entering the “political thicket” at the intersection of these two prudential concerns.<sup>100</sup>

In *Colegrove v. Green*,<sup>101</sup> the Court eschewed “issue[s] . . . of a peculiarly political nature and therefore not meet for judicial determination.”<sup>102</sup> When asked to address malapportionment of electoral districts in Illinois, the Court said that it was not competent to redraw district maps.<sup>103</sup> “It is hostile to a democratic system,” the Court continued, “to involve the judiciary in the politics of the people.”<sup>104</sup> This insistence on remaining “aloof”<sup>105</sup> diminished over time as the Court acknowledged that the importance of preserving the right to vote overshadows prudential doctrines of avoidance.<sup>106</sup> By the time 2000 brought hanging chads and *Bush v. Gore*,<sup>107</sup> the Court’s willingness to become “embroiled . . . in partisan conflict” contrasted sharply with its stark refusal in *Colegrove*.<sup>108</sup> Professor Sam Issacharoff wrote about the new era that *Bush v. Gore* seemed to usher in—one of robust federal involvement in election administration, fully in the midst of the political thicket: “[T]he Supreme Court . . . has asserted a new constitutional requirement: to avoid disparate and unfair treatment of voters. And this obligation obviously cannot be limited to the recount process alone. . . . The [C]ourt’s new standard may create a more robust constitutional examination of voting practices.”<sup>109</sup>

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98. See *Baker v. Carr*, 369 U.S. 186, 210–11 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers. . . [and involves] [d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government.”).

99. *Colegrove*, 328 U.S. at 552.

100. *Id.*

101. *Colegrove v. Green*, 328 U.S. 549 (1946).

102. *Id.*

103. *Id.* at 553.

104. *Id.* at 553–54.

105. *Id.* at 553.

106. See *infra* Part II.B.

107. *Bush v. Gore*, 531 U.S. 98 (2000).

108. *Id.* at 157 (Breyer, J., dissenting).

109. Samuel Issacharoff, Opinion, *The Court in the Crossfire*, N.Y. TIMES (Dec. 14, 2000), <https://www.nytimes.com/2000/12/14/opinion/the-court-in-the-crossfire.html> [<https://perma.cc/D5AC-H6QX>].

B. *The Right to Vote*

The U.S. Constitution does not enumerate an express right to vote. However, once a state extends the franchise, that “fundamental political right” is constitutionally protected.<sup>110</sup> This right to vote—as central and fundamental as the right to bodily integrity—is “preservative of [all] other basic civil and political rights.”<sup>111</sup> Allow the right to vote to be infringed upon, and that deprivation will completely “undermine[] the legitimacy of representative government.”<sup>112</sup> When the right to vote is violated, the laws created and enforced by elected officials can no longer be considered an expression of citizens’ free choice and self-determination. As the Court said in *Wesberry v. Sanders*,<sup>113</sup> “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.”<sup>114</sup>

In *Reynolds v. Sims*,<sup>115</sup> the foundational decision on voting rights, the Supreme Court held that “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”<sup>116</sup> There, the plaintiffs challenged the apportionment of Alabama’s legislative districts, claiming that the existing districts deprived them of their right to vote under the Equal Protection Clause.<sup>117</sup> The district boundaries had not been adjusted to reflect population shifts and growth through the decades.<sup>118</sup> At the time of the hearing, one Alabama state senate district contained over 600,000 people, while another contained only 15,417 people.<sup>119</sup> The *Reynolds* plaintiffs had

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110. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). The fundamental right to vote, protected by the Equal Protection Clause, is also a liberty interest protected by the Substantive Due Process Clause. See U.S. CONST. amends. V & XIV; *United States v. Texas*, 252 F. Supp. 234, 250 (W.D. Tex. 1966) (three-judge District Court), *summarily aff’d*, 384 U.S. 155 (1966) (“[I]n . . . light of Supreme Court pronouncements describing it as our most ‘precious’ right, and . . . the ‘essence of a democratic society,’ it cannot be doubted that the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the [D]ue [P]rocess [C]lause.”).

111. *Reynolds*, 377 U.S. at 562.

112. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969).

113. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

114. *Id.* at 17.

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

116. *Id.* at 562.

117. *Id.* at 536–37.

118. *Id.* at 542–43.

119. *Id.* at 546.

been allowed to cast votes under the apportionment plan as it stood. Nevertheless, the Court held that the plaintiffs' right to vote had been impaired.<sup>120</sup> The right to vote, then, is not merely the right to cast a ballot, but also the right to have a “[f]ull and effective vote.”<sup>121</sup>

The Court in *Reynolds* elaborated that the right to vote encompasses one's right to “put a ballot in a box,” the right to be spared any destruction or alteration of the ballot once cast, the right to a ballot box that has not been stuffed fraudulently, the right to have one's vote counted, and the right to a vote that is undiluted by malapportionment.<sup>122</sup> This broad constitutional protection of voting rights runs the gamut of election administration. From the shaping of constituencies to the printing of electronic voting machine results, a state's policies impacting the right to vote are subject to constitutional boundaries. Primaries, local elections, and referendums are all encompassed within these constitutional protections.<sup>123</sup> If a citizen's vote is lost, changed, or even accidentally left out of a final tallying, that citizen's constitutional right has been violated, just as it would be if she were prevented from casting any vote at all.<sup>124</sup> A vote lost to a software breach or malfunction prevents the voter from participating in democracy by withholding from her the “political equality” that underlies the principle of “one person, one vote.”<sup>125</sup>

Since *Reynolds*, the Court's analysis of equal protection claims<sup>126</sup> concerning the right to vote has evolved.<sup>127</sup> The primary driver of that

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120. *Id.* at 566.

121. *Id.* at 565.

122. *Id.* at 554–57 (citations omitted).

123. See *Smith v. Allwright*, 321 U.S. 649, 661–62 (1944) (primary election); *City of Phoenix v. Kolodziejcki*, 399 U.S. 204, 209 (1970) (local tax bond); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628–29 (1969) (local tax bond); *United States v. Classic*, 313 U.S. 299, 319–20 (1941) (primary election).

124. See *Reynolds*, 377 U.S. at 555 (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

125. See *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (emphasizing that “the conception of political equality . . . can mean only one thing—one person, one vote”).

126. Substantive due process claims can be brought in conjunction with equal protection claims when an election failure has deprived someone of her full and effective vote. See, e.g., *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 474, 477–78 (6th Cir. 2008) (holding that plaintiffs brought valid equal protection and substantive due process claims where the state failed to prevent and correct election problems such as twelve-hour wait times at polling places, inadequate poll-worker training, voter rolls that lacked large swaths of voter names, and widespread misuse of provisional ballots that caused 22 percent of the ballots to be ineligible).

127. When a litigant brings a claim that her right to equal protection has been violated, she is essentially bringing a claim that the government has improperly treated her differently than those

evolution has been efficiency—because the right to vote is fundamental, every election law would trigger “strict scrutiny” under modern equal protection analysis.<sup>128</sup> The Court recognized in *Anderson v. Celebrezze*<sup>129</sup> that subjecting every election regulation to strict scrutiny would invalidate such large swaths of election codes that chaos would ensue.<sup>130</sup>

A new, “more flexible standard” was implemented by the Court in *Burdick v. Takushi*.<sup>131</sup> Now a state’s “precise” justifications for and the necessity of a burdensome rule are to be balanced against “the character and magnitude” of the alleged injury to the plaintiff’s constitutional rights.<sup>132</sup> When a plaintiff challenges state election laws, courts must apply a more rigorous standard of review the more the law burdens First and Fourteenth Amendments rights.<sup>133</sup> If a rule places a *severe* burden on those rights, it “must be *narrowly drawn* to advance a state interest of *compelling* importance.”<sup>134</sup> If a rule only restricts those rights in a *reasonable* and *nondiscriminatory* way, then *important* regulatory interests are usually enough to justify the rule.<sup>135</sup> For example, where state law prevents a candidate from listing more than one party affiliation on the ballot, the burden placed on voting rights is

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similarly situated to her. *Tennessee v. Lane*, 541 U.S. 509, 522 (2004). Modern equal protection analysis requires courts to apply different standards of judicial scrutiny for different kinds of government actions. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–41 (1985). Courts are skeptical of claims when the governmental action has neither infringed on a fundamental right nor differentiated between people on the basis of their race, national origin, ethnicity, or gender. *Id.* at 439–40. For these kinds of claims, the court merely applies “rational basis” scrutiny, making it almost certain that the challenged government action will be upheld. *Id.* On the other hand, when the challenged government action infringes on a fundamental right—such as the right to have one’s vote counted equally—the court applies a heightened level of scrutiny. *Id.* at 440. The highest standard, “strict scrutiny,” requires the most of a challenged government action. *Id.* Namely, strict scrutiny requires that the government’s action advance a compelling interest and that it be narrowly tailored to serve that purpose. *Id.* Challenged governmental actions are very unlikely to survive strict scrutiny. *Romer v. Evans*, 517 U.S. 620, 634 (1996).

128. See *Cleburne*, 473 U.S. at 440 (holding that “laws are subjected to strict scrutiny” when they “impinge on personal rights protected by the Constitution”).

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

130. *Id.* at 788; see also *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”).

131. *Burdick*, 504 U.S. at 434.

132. *Id.* (citing *Anderson*, 460 U.S. at 789).

133. *Id.*

134. *Id.* (emphasis added) (citation omitted).

135. *Id.*

not severe.<sup>136</sup> The state's interests in preventing voter confusion and ballot overcrowding are sufficiently weighty to justify the restriction.<sup>137</sup> On the other hand, where faulty voting machines prevent individuals' votes from being properly counted, the burden on the right to vote is severe.<sup>138</sup> This burden does not merely impact a "tangential aspect of the franchise"; it instead prevents some individuals from participating in the franchise altogether for reasons that are entirely outside of their control.<sup>139</sup> These severe vote deprivations cannot be justified by a state's interests in saving money, time, or administrative effort.<sup>140</sup>

### C. *Procedural Due Process Claims About Election Challenges*

When an election challenger uses state law vehicles to challenge elections and election policies, she has purportedly already been deprived of her most precious liberty interest.<sup>141</sup> Therefore, a state's procedure for addressing these alleged vote deprivations must comport with the fairness principles of the Due Process Clause.<sup>142</sup> In particular, procedural due process places requirements on governmental decisions that result in the deprivation of an individual's Fourteenth Amendment liberty interest.<sup>143</sup> In the case of an election failure, an individual's lost or miscounted vote is not a "final" deprivation of her liberty interest until she has exhausted her state's provided remedies to no avail. If an election challenger *is* successful in her state proceedings and the state appropriately responds to the election failure complained of—by conducting a recount, further investigation, or special election—there has been no deprivation of the right to vote. It is only when the state fails to act to correct an election failure *and* fails to provide an adequate remedy for election challengers that vote

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136. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) ("That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights.").

137. *Id.* at 367.

138. *Stewart v. Blackwell*, 444 F.3d 843, 860–62, 868–69 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007) (en banc).

139. *Id.* at 867.

140. See *id.* at 869 ("[T]he State's proffered justifications of cost and training are wholly insufficient . . . . Administrative convenience is simply not a compelling justification in light of the fundamental nature of the right.").

141. See *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws . . . .").

142. See U.S. CONST. amend. XIV ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .").

143. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

deprivation becomes a constitutional violation. This means that claims of vote tampering or voting machine software glitches are not justiciable in federal court until the election challenger has raised the issue through her state's particular process—be it summary, extrajudicial, or subject to rapid filing deadlines. Further, there is no common law basis for election challenges, so election challengers are limited to the statutory scheme supplied by the state legislature.<sup>144</sup>

1. *Procedural Due Process, Generally.* The Supreme Court has not yet fully delineated how claims about the unfairness of state election-challenge procedures should be adjudicated. However, the Court has supplied general guidelines for procedural due process claims. Central to the principle of due process is a requirement that an individual be allowed a full, open, and fair hearing before the government may deprive her of a liberty interest.<sup>145</sup> The Court has described this requirement as one that proceedings be “fundamentally fair,”<sup>146</sup> and that a litigant be given “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”<sup>147</sup>

In *Mathews v. Eldridge*,<sup>148</sup> the Court introduced a balancing test for determining whether a particular process is constitutionally sufficient in its fairness to litigants:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: *First*, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value . . . of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the

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144. See, e.g., *Parker v. Mount Olive Fire & Rescue Dist.*, 420 So. 2d 31, 33 (Ala. 1982) (citing “the well-settled principle that [e]lection contests are not of common law origin, but are creatures of statutes which prescribe the terms and conditions of their exercise” (alteration in original) (citation omitted)).

145. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (“An essential principle of due process is that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’” (citation omitted)); *Morgan v. United States*, 304 U.S. 1, 18 (1938) (“Those who are brought into contest with the Government . . . are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.”).

146. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 33 (1981).

147. *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

148. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>149</sup>

The Court went on to explain that “the *degree* of potential deprivation” is properly considered under the first factor.<sup>150</sup> The second factor—the “reliability” of current procedures and potential alternatives<sup>151</sup>—is broad in scope. In applying this second factor, the Court identified several fairness characteristics, including whether the plaintiff has access to crucial information in the state’s possession, whether she has the right to introduce relevant evidence and arguments, and whether she has ample time to do so. The Court emphasized that the plaintiff in *Mathews* had “full access to all information relied upon by the state agency.”<sup>152</sup> The plaintiff had also been given the opportunity “to submit additional evidence or arguments” and “to challenge directly the accuracy of information” submitted by the state agency.<sup>153</sup> And the plaintiff “always” had the right to “submit new evidence,” instead of being held to a strict discovery or filing schedule.<sup>154</sup>

In its opinion in *Mathews*, and in several opinions since, the Court cited Judge Henry J. Friendly’s formulation of procedural due process.<sup>155</sup> Judge Friendly prioritizes “elements of a fair hearing,” including an unbiased tribunal,<sup>156</sup> notice,<sup>157</sup> the right to present evidence (including the right to call witnesses),<sup>158</sup> the right to know

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149. *Id.* at 335 (emphasis added).

150. *Id.* at 341 (emphasis added).

151. *Id.* at 343.

152. *Id.* at 345–46.

153. *Id.* at 346.

154. *Id.* at 347.

155. *See id.* at 343, 348 (discussing procedural due process and citing Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975)); *see also* *Sims v. Apfel*, 530 U.S. 103, 110 (2000) (same); *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 325–26 (1985) (same); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (same); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (same).

156. *See* Friendly, *supra* note 155, at 1279; *see also* *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993) (“[D]ue process requires a ‘neutral and detached judge in the first instance.’” (citation omitted)).

157. *See, e.g.*, *Jones v. Flowers*, 547 U.S. 220, 234 (2006) (“[D]ue process requires the government to provide adequate notice of the impending taking.”).

158. *See* Friendly, *supra* note 155, at 1282; *see also* *Londoner v. City and Cty. of Denver*, 210 U.S. 373, 386 (1908) (“[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal.”).

opposing evidence, and the right to cross-examine adverse witnesses.<sup>159</sup> Like the notice requirement,<sup>160</sup> the “unbiased tribunal” requirement has been described as “the floor established by the Due Process Clause.”<sup>161</sup> A “fair trial in a fair tribunal” cannot be guaranteed, according to the Court, unless the adjudicator has “no actual bias against the [individual] or interest in the outcome of his particular case.”<sup>162</sup>

2. *Circuit Approaches to Procedural Due Process Claims About Election Challenges.* Federal courts of appeals have not followed the *Mathews* balancing test for procedural due process when hearing claims about election challenges. The circuits have tended to follow a more formalistic analysis of these claims, guided by notions of federalism<sup>163</sup> and judicial economy.<sup>164</sup> A common rendering comes from the First Circuit in *Griffin v. Burns*.<sup>165</sup> The *Griffin* court distinguished between cases in which federal courts should intervene, on the one hand, and on the other, cases that feature mere “garden variety election irregularities” and facially adequate state remedies.<sup>166</sup> *Griffin* treated the election process as “including as part thereof the state’s administrative and judicial corrective process.”<sup>167</sup> The court reported that federal courts do not, and should not, intervene in state

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159. See Friendly, *supra* note 155, at 1282–87 (discussing the rights to “[k]now the [e]vidence [a]gainst [o]ne” and to “[c]all [w]itnesses” as elements of a fair hearing).

160. Though notice is not in question when a private litigant initiates an election challenge, the reasoning behind the notice requirement is relevant in such a proceeding. The Court has explained that the purpose of the notice requirement is to allow individuals to adequately prepare for hearings. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978) (“The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending ‘hearing.’”). This rationale is informative in considering the harsh deadlines often featured in state election-challenge procedures. See *supra* Part I.A. The Due Process Clause, therefore, is implicated when deadlines are so short that election challengers cannot adequately prepare beforehand. See *Mathews*, 424 U.S. at 333 (requiring that a litigant be provided a “meaningful time” period (citations omitted)).

161. *Bracy v. Gramley*, 520 U.S. 899, 904–05 (1997) (citations omitted).

162. *Id.*

163. See, e.g., *Shannon v. Jacobowitz*, 394 F.3d 90, 97 (2d Cir. 2005) (“Absent a clear and unambiguous mandate from Congress, we are not inclined to undertake such a wholesale expansion of our jurisdiction into an area which, with certain narrow and well defined exceptions, has been in the exclusive cognizance of the state courts.”).

164. See *infra* notes 192–97 and accompanying text.

165. *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978).

166. *Id.* at 1076–77; see *Shannon*, 394 F.3d at 96 (citing *Griffin*’s “garden variety” election-dispute paradigm); *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. Unit B Sept. 1981) (referring to the *Griffin* framework for adjudicating election challenges).

167. *Griffin*, 570 F.2d at 1078.



election administration as long as “the alleged misconduct is lacking in ‘enormity’” and the available state remedy “appear[s] to be adequate.”<sup>168</sup> This standard allows for federal intervention only when the election process—including the “state corrective process”—rises to the level “of patent and fundamental unfairness.”<sup>169</sup>

The First Circuit only intervened in *Griffin* because the election challengers could demonstrate both that “a broad-gauged unfairness . . . infected the results of . . . [the] election” and that “the federal court was the *only* practical forum [available] for redress” because no state procedure existed for election challenges of the sort.<sup>170</sup> The court viewed this high bar as necessary, saying that the instant case was “one of the perhaps exceptional cases where a district court could properly exercise the limited supervisory role that such courts have in election cases.”<sup>171</sup> The Ninth Circuit has gone a step further than *Griffin*, saying that “garden variety election irregularities generally do not violate the Due Process Clause, even if they control the outcome of the vote or election.”<sup>172</sup>

The Seventh Circuit has also been hesitant to hear claims concerning election challenges, saying that “not every election irregularity . . . will give rise to a constitutional claim.”<sup>173</sup> The Seventh Circuit requires a showing that state officials purposefully, systematically, or willfully acted to deprive voters of their liberty interest in a meaningfully executed vote.<sup>174</sup> This extra requirement leaves federal courts impotent when election results are improperly impacted by electronic voting machine malfunctions, software misprogramming, a state official’s negligence, or even intentional tampering by private parties or foreign states. The Seventh Circuit went so far as to say that such election failures “fall far short of constitutional infractions” simply because they do not involve fraudulent or willful conduct of a state official.<sup>175</sup> The Second Circuit also requires a showing that intentional action by a state official caused

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168. *Id.* at 1077 (citations omitted).

169. *Id.* at 1077.

170. *Id.* at 1078–79 (emphasis added).

171. *Id.* at 1079.

172. *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998).

173. *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975).

174. *See id.* (“Infringements of voting rights found to have risen to a constitutional level include . . . purposeful or systematic discrimination against voters . . . and other willful conduct which undermines the organic processes by which candidates are selected . . .”).

175. *Id.*

the election failure.<sup>176</sup> That court has said that federal “[c]ourts may consider the adequacy and fairness of the state remedy *only after* they first conclude that” the election failure was caused “by intentional state action.”<sup>177</sup> The Eighth Circuit, too, requires intentional unlawful conduct on the part of state actors before becoming involved in a due process election claim.<sup>178</sup> The Eighth Circuit has further said that even when a state provides *no* forum for an election challenge, federal courts should not hear a procedural due process claim that does not allege intentional government wrongdoing.<sup>179</sup>

In the Second, Seventh, and Eighth Circuits, *Griffin*’s formalistic distinction has become more extreme: either an election problem was caused by “an intentional act on the part of the government or its officials,” or the election problem is merely “garden variety” and must be ignored by the federal courts.<sup>180</sup> Even massive election failures could fall within the latter, outcast category. In fact, the Second Circuit said that a malfunctioning electronic voting machine is “the paradigmatic example of a ‘garden variety’ election dispute” that federal courts should avoid.<sup>181</sup> The Second Circuit also identifies “mechanical and human error in counting votes” and “technical deficiencies in printing ballots” as beyond the ken of the Due Process Clause—presumably even if those failures impact the outcome of elections.<sup>182</sup>

In expressing its reluctance to intervene in cases about election challenges, the *Griffin* court cited a worry over the level of administrative oversight it would have to provide. The court imagined having to count ballots, examine their validity, and “enter into the details of the administration of the election.”<sup>183</sup> The Second Circuit, too, cited this concern of “henceforth be[ing] thrust into the details of virtually every election, tinkering with the state’s election machinery, reviewing petitions, registration cards, vote tallies, and certificates of

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176. See *Shannon v. Jacobowitz*, 394 F.3d 90, 97 (2d Cir. 2005) (describing a voting machine failure as a mere “unfortunate but unintended irregularity”).

177. *Id.*

178. See *Pettengill v. Putnam Cty. R-1 Sch. Dist.*, 472 F.2d 121, 122 (8th Cir. 1973) (refusing to intervene “in the absence of aggravating factors” such as intentional racial discrimination, fraudulent interference, or other affirmative unlawful acts by government actors).

179. See *id.* (“Appellants complain that the state courts of Missouri will not afford them a forum for their complaint [of an election failure]. The lack of a state remedy to appellants does not alone operate to give federal jurisdiction over their cause.” (citations omitted)).

180. *Shannon*, 394 F.3d at 96.

181. *Id.* (citation omitted).

182. *Id.* (citations omitted).

183. *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978).

election for all manner of error and insufficiency under state and federal law.”<sup>184</sup>

As discussed further below, the circuits’ reductive categories—“garden variety” errors, intentional government wrongdoing, errors with “enormity,” state challenge procedures that “appear” to be fair—are a departure from traditional notions of due process, constitutional protections of voting rights, and the tests established by *Burdick* and *Mathews*.

### III. DEMANDING MORE FROM ELECTION CHALLENGE PROCEDURES

Federal courts have improperly handled claims about the unconstitutional unfairness of state election challenges. This Part proposes a new analytical approach for these electoral due process claims—that is, claims that involve both alleged vote deprivations and fundamentally unfair state challenge procedures. This approach is faithful to both *Burdick* and *Mathews*.

#### A. *Uprooting “Garden Variety” Unfairness: The Brokenness of Circuit Approaches*

The procedural due process analysis currently employed by the circuits improperly undercuts the injuries—and rights—at stake in election challenges. First, the circuits have departed from proper *Mathews* procedural due process analysis in the context of election challenges. Second, the circuits have improperly avoided applying *Burdick* altogether, thwarting equal protection claims that should often be heard on the merits in federal court. Third, judicial concerns over micromanaging election administration are misplaced and should not be cited as a reason to evade claims of election failure.

First, while unfair challenge procedures can reach the level of a substantive burden on the right to vote, the Court has enunciated one test for analyzing claims about procedural unfairness and a distinct test for claims about substantive liberty-interest deprivations. The Circuits, however, have been hybridizing these two distinct steps, completely conflating a challenger’s vote deprivation and her procedural due process deprivation. The court in *Griffin* stated that “local election irregularities, including even claims of official misconduct, do not usually rise to the level of constitutional violations *where adequate state*

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184. *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970).

*corrective procedures exist.*”<sup>185</sup> That court also said that if an election process were “patent[ly] and fundamental[ly unfair],” that deprivation of the right to vote would merit intervention from a federal court *only* if the “state corrective process” is found inadequate.<sup>186</sup> But inadequacy is not the constitutional test for procedural fairness. *Mathews* provides a balancing test that accounts for the magnitude of the underlying deprivation. Mere labeling of a process as adequate is not a substitute for that constitutional analysis. A threshold question of adequacy gives state procedures and election laws a higher level of deference than they are owed under *Mathews* or *Burdick*.

Second, if federal courts continue to extend such deference to state challenge proceedings, litigants will never reach the merits of the vote-deprivation claim, and the extent of the underlying election failure will never be determined. If a challenge procedure truly is unfair, and if a challenger alleges procedural impossibility in federal court, then by her very admission and petition, she has not had the opportunity to gain access to the crucial evidence that would be needed to prove that the election failure was beyond a “garden variety” error. It is no wonder that federal courts so rarely grant relief under this model. Even the most extensive cybersecurity attack would not appear “that unfair” if no one has been allowed to look closely enough to know that it happened. *Griffin*’s offhand fashioning of conjunctive elements—broad-based unfairness in the election *and* a challenge process that is patently and fundamentally unfair—heightens pleading requirements for challengers. These challengers—who have already turned to the federal courts because of prohibitive procedural requirements—are thus *again* barred from having an opportunity for their claims of election failure to be fully heard and fairly tried.

The court in *Griffin*, and the circuits that have since followed suit, freely label alleged election injuries as “garden variety” unfairness. This formalistic category is inapposite for election administration in the digital age. If at the pleading stage, the court can only pinpoint a few dozen lost votes, it should not label the seemingly small loss a mere “garden variety” error or presume that those votes are the full extent of the election failure. If there are allegations of voting machine misprogramming or a cybersecurity breach, and if an election challenger has in-hand proof of even a few malfunctions at the pleading stage, then the integrity of the whole process should be carefully

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185. *Griffin*, 570 F.2d at 1077 (emphasis added).

186. *Id.*

inspected. The few vote deprivations that a challenger is able to detect during the short time period<sup>187</sup> before filing suit are likely the tip of the iceberg.

In addition, whatever level of scrutiny this “garden variety” formalistic labeling may be, it is certainly not the *Burdick* strict scrutiny that is triggered when a severe burden has been placed on the right to vote. In conflating substantive and procedural rights, which are analytically and ideologically distinct, the circuits have abandoned *Burdick* balancing, lowering the scrutiny for both claims to the forgiving level of deference courts apply in ordinary procedural due process claims.<sup>188</sup>

More worrisome yet is the requirement imposed by the Second, Seventh, and Eighth Circuits that election challengers raising procedural due process claims allege intentional wrongdoing by a state official.<sup>189</sup> Proving intent is notoriously difficult as it is.<sup>190</sup> But this requirement is also hopelessly outmoded for a digital age in which the largest risk of election failure is not poll-worker fraud, but foreign cybersecurity attacks that could be successfully staged by an amateur computer programmer within sixty seconds.<sup>191</sup> The liberty interest involved is so important, and the potential loss so large, that the intentionality of bad behavior by a state employee should not be a requisite for federal court intervention when things go wrong. If a state’s administration of elections allows election technology, systems, or databases to be compromised, unnoticed and uncorrected, this neglect itself deprives citizens of their votes. This level of culpability is sufficient to place the resulting election failures within the cognizance of the Due Process Clause—and of the federal judiciary.

Third, the court’s worry in *Griffin* about avoiding federal judicial micromanagement of tedious election details is unfounded. A federal

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187. See *supra* note 48 and accompanying text (noting North Carolina’s two-day filing deadline).

188. In an ordinary procedural due process claim—for instance, where property rights are at stake—the government’s interest in administrative ease fares well in the *Mathews* balancing test. See *supra* Part II.C.1. In the voting rights context, however, the interest and potential deprivation involved are so weighty as to overwhelm interests in efficiency or ease. See *generally supra* notes 131–40 and accompanying text.

189. See *supra* notes 180–82 and accompanying text.

190. See, e.g., *United States v. Marengo Cty. Comm’n*, 731 F.2d 1546, 1556, 1564–65 (11th Cir. 1984) (holding that proving discriminatory intent is not required under the Voting Rights Act (“VRA”), in part because that showing was so difficult to make that the U.S. Department of Justice had stopped bringing claims under the VRA).

191. See Newmarker, *supra* note 26.

court need not count ballots or “supervise the administrative details of a local election” to intervene when state challenge procedures violate due process.<sup>192</sup> An electoral due process claim does not force the federal court to control the detailed operations of elections. Rather, these claims ask the court to evaluate the fairness of procedures and burdens on federal rights—tasks the federal judiciary *is* competent to perform.

In cases where the federal court decides it must intervene, it can do so without itself performing the tasks of fashioning election administration policies anew or of investigating the credibility of each ballot cast. A federal court could, for instance, merely invalidate an unfair state procedural rule and then order the state to rehear the challenger’s claim in a fundamentally fair manner. Federal courts have the power to fashion any number of remedies—with varying levels of supervision—when procedural due process violations are found. Even an instruction to a state that it must rehear a challenger’s claim could give that litigant a better chance at fundamental fairness. This sort of involvement and oversight by the federal judiciary is not novel. For example, when voters challenge redistricting plans, federal courts do not shy away from finding malapportionment and redrawing district lines themselves.<sup>193</sup> Rather, courts reckon with the reality that would result from the perpetuation of the status quo, and they demand fairer policies from the states. Here, too, federal courts should be willing to become involved in election challenges so that they can require that state procedural rules assure voters that their votes are counted equally.

For the First Circuit to refuse *any intervention* in elections because of an unwillingness to engage in *total, detailed involvement* in the process, belies the degree of federal courts’ flexibility in fashioning remedies. For example, in *Duncan v. Poythress*,<sup>194</sup> the Fifth Circuit found fundamental unfairness in Georgia’s election process.<sup>195</sup> Instead of avoiding a due process analysis of the challenged state procedure like the *Griffin* court, the Fifth Circuit identified the unfair aspects of the election process and ordered the State of Georgia to abandon the

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192. *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978).

193. *See, e.g., Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 627, 629 (D.S.C. 2002) (rejecting all six proposed districting plans and drawing its own map in accordance with constitutional requirements).

194. *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. Unit B Sept. 1981).

195. *Id.* at 693, 708 (holding that the state’s refusal to hold a special election to replace a retiring state supreme court justice disenfranchised voters).

specific unfair practices so that Georgia voters would have a way to meaningfully participate in representative government: “The Georgia voters are not asking the federal courts to count ballots or otherwise ‘enter into the details of the administration of (an) election.’ Their request is far simpler and more basic: they ask for the election itself, as required by state law.”<sup>196</sup> In ordering Georgia to hold a special election, the federal court did not become responsible for administrative oversight of that election.<sup>197</sup> Nor did the court have to write a code to instruct Georgia precisely how it must hold the election. Rather, the court in *Duncan* enunciated a standard and allowed the state to manage the details of obeying the resulting order. Federal courts adjudicating electoral due process claims should not avoid analysis of the merits merely because of the looming need to fashion a remedy.

*B. Rebalancing Burdick: A New Approach for Electoral Due Process Claims*

When an election challenger seeks relief from a voting rights violation, or even seeks to determine whether that right has been intruded upon, that litigation is an extension of her right to vote. The election aftermath that verifies vote counts and affirms a victor is also a part of the election process.<sup>198</sup> When an equal protection question of vote deprivation intersects with a due process question of state election challenge fairness, federal courts should faithfully apply the test of *Mathews* and use the resulting balance to apply the *Burdick* test. Where federal rights intersect, the decisional rule that applies should provide rightsholders with more footholds, not fewer, though the truncated approaches of the circuits discussed above fail in this regard. This Section lays out an approach that is properly preservative of constitutional rights.

In brief, when a federal court encounters one of these intersectional electoral due process cases, it should first apply the procedural due process test from *Mathews* to determine just how unfair—that is, how burdensome—the state challenge procedure was for the plaintiff. Second, the court should calculate a “total burden”

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196. *Id.* at 703.

197. *See id.* at 708 (rejecting the argument that a federal court did not have a role to play in a state election).

198. *Cf. Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

that accounts for both the procedural unfairness burden from *Mathews* analysis and any burden that can be demonstrated through factual proof that an election failure occurred—for example, any data revealing a software glitch and any testimony about tampering. This total burden should be found severe whether the plaintiff faced an impossibly burdensome state process and as a result lacks compelling supporting evidence, or whether the plaintiff faced a moderately burdensome state process but was nevertheless able to muster meaningful evidence of an election failure. Third, if this total burden is severe, the court should ask, under the *Burdick* balancing test,<sup>199</sup> whether that infringement on the right to vote is justified by a state policy that is narrowly drawn to advance a compellingly important interest. Finally, if the constitutional infringement is not so justified under *Burdick*, the court should fashion an appropriate remedy to vindicate voters' rights.

1. *Applying Mathews: Calculating the Burden of Unfairness.* To review, the *Mathews* fairness test balances (1) the magnitude of the plaintiff's interest, (2) the state's interest in preserving the procedural status quo, and (3) the soundness of the process at issue, when considered in light of its inherent reliability and possible alternatives.

a. *The Plaintiff-Voter's Interest.* In electoral due process claims, the first *Mathews* factor should weigh strongly in favor of the plaintiff, as a categorical matter. The liberty interest at stake is that which is preservative of all others.<sup>200</sup> Without a meaningful right to vote, governance ceases to be self-determined by citizens, and all property interests and other liberty interests are vulnerable.<sup>201</sup> Accordingly, like the liberty interest in being free from imprisonment, the liberty interest in voting should be given the utmost weight. In addition, *Mathews* instructs that the "degree of potential deprivation" affects the weight given to this factor.<sup>202</sup> Where an election challenger alleges a failure like electronic voting machine misprogramming, the potential

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199. See *supra* notes 131–40 and accompanying text.

200. See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (holding that the right to vote is "preservative of other basic civil and political rights").

201. See *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("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.").

202. *Mathews v. Eldridge*, 424 U.S. 319, 412 (1976).



deprivation is not merely the loss of the individual challenger's right to an effective vote, but the total deprivation of an effective vote for the voters of *entire voting districts*.

In addition, each time a state ignores election failures, the resulting lack of transparency not only leaves past interference irreversible, but also incentivizes outcome-determinative election interference and shields election administrators from accountability that would deter future sloppiness.<sup>203</sup> These liberty-interest deprivations, then, harm past voters *and* future voters by making it systemically more likely that citizens will continue to be deprived of an equally effective vote.

Further, elections today, post-HAVA, are situated against a new backdrop of threats in which system-wide failure is more likely. Remote cybersecurity attacks were aimed at the majority of states during the 2016 election cycle, and these breaches were successful in an as-of-yet unknown number of jurisdictions.<sup>204</sup> As election technology has advanced, money allotted for the training of state election administrators has not, so even innocent mistakes have the potential to devastate election accuracy.

Because the interest involved in these cases is so weighty, and the potential deprivation so expansive, across voters and across time, the first *Mathews* factor strongly favors dismantling burdensome challenge procedures.

*b. The State's Interest in the Status Quo.* The next *Mathews* factor—the state's interest in continuing under the current procedural rules<sup>205</sup>—should uniformly be given little weight in these electoral due process claims. The potential state interests underlying the prohibitive

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203. Congressional researchers report:

Broadly speaking, defensive measures range from those aimed at prevention of an attack or other incident, to detection and response, to recovery after an attack . . . [I]t is now generally recognized among cybersecurity experts that preventive measures are insufficient by themselves . . . In many cases, successful attacks might not be discovered until months later, if at all . . . Such attacks could be especially serious if aimed at manipulating vote counts to change the outcome of an election. Effective defense requires ways of detecting, responding to, and recovering from successful intrusions.

BURRIS & FISCHER, *supra* note 28, at 17 (citation omitted).

204. *See supra* notes 10–11 and accompanying text.

205. *See Mathews*, 424 U.S. at 335 (“[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: . . . [third,] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

procedural burdens discussed in Part I include repose, finality, and minimized disruption of the election process.<sup>206</sup> These related justifications depend on two factual assumptions: that determinative election failures are relatively infrequent, and that the general populace has faith in the integrity of the election process.

Today, as discussed above, both of those assumptions are suspect. Repose of election-night returns has been lost—not by allowing election challenges, but by public knowledge of actual attacks aimed at American elections.<sup>207</sup> Finality becomes less important as a government interest when data shows that elections are more frequently tampered with, and that the candidate first declared winner is less likely to be the rightful one. And closing the gates on election challenges cannot preserve trust in a process that is already widely doubted. Americans lack faith in election integrity; that confidence has been declining since 2000.<sup>208</sup> The United States is the Western democracy with the lowest score on the 2016 Perceptions of Electoral Integrity index.<sup>209</sup> Voter distrust is also apparent in empty polling places on election days. Voter turnout is strongly correlated with trust in the accuracy of election outcomes,<sup>210</sup> and “[t]he United States has long had one of the lowest levels of voter turnout among all equivalent democratic states and developed economies.”<sup>211</sup> Rather than disrupting the public’s perception of election integrity, allowing election challenges a full and fair hearing would bring transparency that could

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206. See, e.g., Douglas, *Discouraging Election Contests*, *supra* note 34, at 1024 (“The system craves finality, particularly on election night . . . . A contested election undermines the notion that the winner has an electoral mandate.”).

207. See *supra* notes 9–24 and the accompanying text.

208. See Norris, *supra* note 23, at 22 (noting declining public confidence in elections since 2000).

209. Holly Ann Garnett, Max Grömping & Pippa Norris, *Why Don't More Americans Vote? Maybe Because They Don't Trust U.S. Elections*, WASH. POST (Dec. 26, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/26/why-dont-more-americans-vote-maybe-because-they-dont-trust-u-s-elections/> [https://perma.cc/UN3V-4VLU] (“The U.S. ranks 52nd out of 153 countries worldwide in the 2016 Perceptions of Electoral Integrity index, and at the bottom of equivalent Western democracies.”).

210. Norris, *supra* note 23, at 14 (“The results of the multivariate analysis confirmed that American perceptions of electoral integrity predicted significantly lower levels of reported voting turnout, even after controlling for several standard factors which are also associated with participation, including educational qualifications, age, sex, race, support for the winning presidential candidate and political interest.”).

211. Garnett et al., *supra* note 209. Norris reports that voter turnout in the United States has tended to be “about 10–20 points below equivalent European societies.” Norris, *supra* note 23, at 14.

give voters confidence that their votes *are* being accurately and effectively counted.

States could also argue that an interest in swift determination justifies truncated proceedings and short deadlines. There is an important government interest in ensuring that individuals entering elected office and engaging in governance are not dismantled midterm by a challenge that could have, and should have, been brought sooner. However, this interest loses its salience when states impose stringent deadlines months in advance of inauguration day.<sup>212</sup> For timeliness requirements to be narrowly tailored, they would have to be more directly connected to the dates of operation for the office in question—whether that timing be legislative sessions, judicial terms, or inauguration day. While it might still be unsettling for the public to have to wait for legal proceedings to confirm the victor of an election, it would be much more unsettling to swiftly insulate the victory of the wrong candidate. Better to wait two months to ensure the soundness of election results than to silence doubts and usher in a four- or six-year term of illegitimate governance. Further, the results of the 2016 presidential election were challenged in five states,<sup>213</sup> and America survived the discomfort of waiting for the results.<sup>214</sup>

*Mathews* did say that it is appropriate to consider governmental interests in efficient, economical processes, but this interest is only moderately persuasive in the electoral due process context. It is not clear how earlier filing deadlines or involvement of the state legislature as an extrajudicial decisionmaker would save states money or effort. If

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212. See Douglas, *Procedural Fairness*, *supra* note 43, at 36 (“A state’s process has resulted in a ‘failed election’ when its contest provisions still do not allow the state to identify a winner by the date on which the winner is to take office.” (citation omitted)).

213. See Tresa Baldas, Kathleen Gray, Paul Egan, Detroit Free Press, Jason Stein, Milwaukee Journal Sentinel, Jeff Burlew, Tallahassee Democrat & the Associated Press, *Election 2016 Recount: Where 5 States Stand*, DETROIT FREE PRESS (Dec. 6, 2016, 2:07 PM), <https://www.freep.com/story/news/nation/2016/12/06/election-2016-recount-where-5-states-stand/95037554/> [<https://perma.cc/K97W-TM6U>] (noting that Wisconsin, Michigan, Pennsylvania, Nevada, and Florida are “contending with requests for recounts of ballots cast in the [2016] presidential election”); see also *The Latest: 5 Nevada Counties to Recount Presidential Race*, WASH. POST (Nov. 30, 2016), [https://web.archive.org/web/20161201081843/https://www.washingtonpost.com/national/the-latest-stein-to-see-presidential-recount-in-michigan/2016/11/30/c760d82c-b724-11e6-939c-91749443c5e5\\_story.html](https://web.archive.org/web/20161201081843/https://www.washingtonpost.com/national/the-latest-stein-to-see-presidential-recount-in-michigan/2016/11/30/c760d82c-b724-11e6-939c-91749443c5e5_story.html) [<https://perma.cc/D7V5-FLTB>] (discussing Nevada’s recount effort).

214. See Steve Eder, *Stein Ends Recount Bid, But Says It Revealed Flaws in Voting System*, N.Y. TIMES (Dec. 13, 2016), [https://www.nytimes.com/2016/12/13/us/stein-ends-recount-bid-but-says-it-revealed-flaws-in-voting-system.html?\\_r=0](https://www.nytimes.com/2016/12/13/us/stein-ends-recount-bid-but-says-it-revealed-flaws-in-voting-system.html?_r=0) [<https://perma.cc/9YGF-HPYR>] (reporting that Jill Stein, the Green Party candidate in the 2016 presidential election, closed her recount effort on December 13, 2016).

anything, allowing election challengers to follow procedures more similar to those imposed on ordinary civil plaintiffs would improve administrability for judges, clerks, and other judicial staff, who would have to master fewer procedural eccentricities. It is conceivable that prohibitive state procedures could save states money; after all, the cheapest case for the government to defend against is a case that never makes it off the ground. But litigation always costs the government money, no matter how meritorious. Any savings that result from killing worthwhile claims should, as a principle of public policy, not count for much.

*c. The Reliability and Fairness of Procedures.* The final *Mathews* prong, unlike the other two, should be reweighed for each new procedural rule challenged through an electoral due process claim. Though the resulting fairness values for individual procedures will differ, this *Mathews* prong should always be applied in a way that honors traditional notions of fairness. That is, the right to be heard “at a meaningful time and in a meaningful manner” should be understood as requiring impartial factfinders, an opportunity to conduct meaningful discovery, and reasonable deadlines that allow for investigation and preparation.<sup>215</sup> Consider the following examples of state election challenge procedures, evaluated under this *Mathews* prong.

*i. Shortened Deadlines.* The Court has made clear that fairness in timing is a crucial element of procedural due process.<sup>216</sup> Many states, however, require that challenges be filed within a very short window following the election.<sup>217</sup> This accelerated schedule often also constricts the periods of time for discovery, for the hearing itself, and for appeals.<sup>218</sup> These tight deadlines make it less likely that election challengers will be able to adequately prepare before their hearing. If a challenger has two business days between uncovering the election

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215. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

216. *See Mathews v. Eldridge*, 424 U.S. 319, 333, 347 (1976) (holding that a litigant must be given “the opportunity to be heard ‘at a meaningful time,’” and noting approvingly a procedure that allowed plaintiffs to submit new evidence at any time (quotation omitted)); *see also supra* note 160 (discussing notice—the lynchpin of procedural due process—and its basis in the rationale that litigants should benefit from fairness in timing).

217. *See supra* Part I.A.

218. *See supra* Part I.

failure and the filing deadline<sup>219</sup>—and if her hearing follows just as quickly after filing—the timing of that hearing cannot be considered “meaningful.”<sup>220</sup> A litigant on that schedule has no reasonable opportunity to investigate, conduct discovery, prepare evidence, choose witnesses, or frame arguments. Therefore, shortened deadlines should be seen as adding to the procedural burden on plaintiff-voters.

*ii. Summary and Legislative Adjudication.* The most basic “element[] of a fair hearing” is an unbiased tribunal.<sup>221</sup> Nevertheless, most states leave election challenges concerning state offices to the state legislature.<sup>222</sup> For these challenges, the decision made by the state legislature is the first *and* final decision rendered on the matter, as no appeals process is available.<sup>223</sup> Election challenges are inherently political, and the result of successful challenges is usually the replacement of a public official with someone of the opposing party. These stakes render a state legislature a quite biased tribunal. A Republican-controlled state house will always be incentivized to resolve election challenges in favor of a Republican gubernatorial candidate. A majority-Democrat legislature will always be incentivized to resolve challenges in favor of a Democratic candidate for state senate. The incentive to secure another seat for the political party in power is an interest in the outcome of the case. Therefore, legislatures and commissions comprised of legislative and executive leaders are not “impartial and disinterested tribunal[s]” for the purposes of adjudicating election challenges.<sup>224</sup>

Further, states often have regulations or ethical rules concerning campaign donations to elected state judges made by litigants with cases

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219. See, e.g., *supra* note 48 and accompanying text (noting North Carolina’s two-day filing deadline).

220. See *Mathews*, 424 U.S. at 333 (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” (citations omitted)).

221. Friendly, *supra* note 155, at 1279. See *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 617 (1993) (“[D]ue process requires a ‘neutral and detached judge in the first instance’ . . . .”) (quoting *Ward v. Monroeville*, 409 U.S. 57, 61–62 (1972)).

222. See Douglas, *Procedural Fairness*, *supra* note 43, at 5 (“By far, the most common mechanism states use for resolving contests for state house and senate seats is to leave the matter to each respective house in the legislature.”).

223. See *id.*

224. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

on their dockets.<sup>225</sup> Legislators in these states, however, are not prohibited from accepting campaign donations from candidates whose fates they decide in election challenges.<sup>226</sup> Such a biased tribunal for an inherently partisan inquiry offends traditional notions of procedural due process. This sort of challenge process makes decision-making less likely to be reliable, and more likely to be based on the political party or the well-placed financial investments—that is, campaign contributions—of the litigants. Guaranteeing judicial processes for all election challengers would offer the same protections already established for ordinary civil litigants and criminal defendants alike—ethical rules and state campaign finance regulations.

Though the alignment of judges with a particular political party is considered by many to be a systemic ill, in cases where an election outcome hinges on a factual dispute, judicial involvement is the lesser evil. There is always a chance that judges will act in accordance with their ideological preferences—whether in criminal sentencing hearings or in claims of hate speech. The legal system, though imperfect, is equipped with safeguards to prevent arbitrary dispute resolution. Trials, unlike legislative votes, result in the creation of an evidentiary record that can serve as the basis of an appeal. Trial judges are subject to appellate review. They can be forced to provide reasoned opinions supporting their rulings. And judges, unlike legislators, are subject to ethical requirements that they remain independent and impartial. Even that aspirational commitment of judges, standing alone, makes them more likely to function as neutral, reliable decisionmakers than state legislators, who might feel a well-intentioned duty to represent the partisan interests of their constituents. Therefore, summary procedures and legislative adjudication should be seen as adding to the procedural burden on plaintiff-voters.

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225. For example, the Utah Code of Judicial Conduct requires that a judge disqualify herself if she “knows . . . that a party, a party’s lawyer, or the law firm of a party’s lawyer has within the previous three years made aggregate contributions to the judge’s retention in an amount that is greater than \$50.” UTAH CODE OF JUD. CONDUCT r. 2.11(A)(4) (2016). *See generally* CYNTHIA GRAY, NAT’L CTR. FOR ST. CTS. CTR. FOR JUD. ETHICS, JUDICIAL DISQUALIFICATION BASED ON CAMPAIGN CONTRIBUTIONS (Nov. 2016) (reporting that at least seventeen states have court rules, rules in the judicial code of conduct, or statutes that provide for judicial disqualification when a party has made sufficient past campaign contributions to the judge).

226. This author could not find any scholarship on the ethical implications of campaign contributions or expenditures benefiting a state legislator who is involved in the legislative resolution of an election challenge.

*iii. Restrictive Discovery and Evidentiary Rules.* The Court has said that fundamental fairness requires that a litigant be given “the opportunity to be heard . . . in a meaningful manner.”<sup>227</sup> This principle of fairness was fleshed out in *Mathews* when the Court emphasized that the plaintiff had “full access to all information relied upon by the state agency.”<sup>228</sup> The Court also noted that the plaintiff had been given the opportunity “to submit additional evidence or arguments” and “to challenge directly the accuracy of information” submitted by the state agency.<sup>229</sup> Judge Friendly, too, identifies elements of fairness related to discovery and the evidentiary aspects of a proceeding. He enshrines as traditional safeguards of due process the right to present evidence (including the right to call witnesses), the right to know opposing evidence, and the right to cross-examine adverse witnesses.<sup>230</sup>

When states severely circumscribe the challenger’s scope of discovery, as in Louisiana,<sup>231</sup> or destroy, as a matter of course, crucial voting machine data, as in Georgia,<sup>232</sup> a challenger loses her “opportunity to be heard . . . ‘in a meaningful manner.’”<sup>233</sup> A challenger effectively has no opportunity to make proofs, raise arguments, or challenge the state’s factual assertions if the state has exclusive possession of information central to the alleged election failure. Such a proceeding is less reliable because only one side of the adversarial process has access to the determinative evidence. Without a guarantee that relevant evidence will be preserved by the state and made available to challengers, election challenges are not full, fair, or open hearings. Therefore, restrictive discovery and evidentiary rules should be seen as adding to the procedural burden on plaintiff-voters.

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The private liberty interest at issue in election challenges is weighty, and the potential scope of deprivation encompasses entire voting districts. The government interests in continuing burdensome procedures like shortened deadlines and extrajudicial decision-making are spectacularly unconvincing when considered against a backdrop of

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227. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

228. *Id.* at 345–46.

229. *Id.* at 346.

230. *See supra* notes 155–59 and accompanying text.

231. *See supra* notes 84–87 and accompanying text.

232. *See supra* note 41 and accompanying text.

233. *Mathews*, 424 U.S. at 333 (quoting *Armstrong*, 380 U.S. at 552).

modern-day election failures and public distrust in elections. Therefore, just how burdensome a particular procedure is should be determined by the extent to which it appears unreliable and unfair, when considered in light of traditional due process notions and the possible alternatives.

2. *Applying Burdick: Balancing Burdens on the Right to Vote.* As discussed above, *Burdick* explained that equal protection claims regarding election law—that is, claims alleging infringements on the right to vote—should be analyzed using a balancing test: severe burdens on the right to vote “must be narrowly drawn to advance a state interest of compelling importance.”<sup>234</sup> This strict standard of review should replace the deferential treatment that state challenge procedures have been receiving in federal court.

To appropriately calculate the magnitude of a burden on the right to vote in electoral due process cases, federal courts should combine the procedural burden—determined under *Mathews*—and any evidence the plaintiff can offer that vote deprivation occurred. This total burden should be considered severe under a number of fact patterns. For instance, where a plaintiff-voter has faced a prohibitively unmanageable state challenge process, like that in Louisiana, that procedural burden, standing alone, is severe enough to warrant the strictest judicial scrutiny—whether or not the plaintiff can offer persuasive evidence that an election failure actually occurred. Likewise, where a plaintiff has faced a state process that was only moderately unfair—perhaps one in which discovery rules and deadlines allowed her to adequately investigate, but in which a partisan legislative committee rendered an unappealable decision—her burden should be considered severe if she can also show persuasive evidence that votes were affected.

Where the tipping point of severity is reached—by whatever combination of procedural and actual burdens on the right to vote—*Burdick* requires that the state muster a compelling interest in its challenged policy. At this stage in the analysis, this “policy” should be taken to encompass the election administration itself, the process the state offers challengers, *and* the state’s decision not to remedy the alleged vote deprivation. Here, as in the *Mathews* component of the

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234. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992)).



analysis,<sup>235</sup> potential state interests in the procedural status quo categorically fall short. Because the state “policy” challenged at this stage also includes conducting a potentially faulty election, any proposed interests feel even less compelling and are certainly less narrowly tailored. Therefore, any burden found “severe” under this intersectional *Mathews-Burdick* test should categorically be found to fail this version of strict scrutiny. That is, in these electoral due process cases, any severe burden—procedural, factual, or a combination thereof—on the right to vote should be considered a per se constitutional deprivation. Such a deprivation warrants, and indeed compels, federal court intrusion into the political thicket for the sake of preserving equally representative democracy.

Federal courts should enjoy flexibility in fashioning remedies to these voting rights deprivations. As discussed above, even minimalist rulings can incentivize improvement in state election administration and challenge procedures. Where a federal court’s finding of a severe burden is based more on unfair state challenge procedures than on proof of Election Day problems, it might be more appropriate for the court to avoid factual issues, declare a state procedure facially unconstitutional, and require the state to rehear the plaintiff’s challenge. Where the plaintiff’s showing of a severe burden includes compelling factual evidence, but perhaps not a patently unfair challenge procedure, it might be more appropriate for the federal court to rule the election a failure, order a recount or special election, and allow the state legislature a chance to amend any unfair procedural rules.

## CONCLUSION

Many state election codes, as they stand now, have the cumulative effect of requiring wealth, favor with local political establishments, and near omnipotence before a challenger can succeed in obtaining a recount or a new election.<sup>236</sup> The unforgiving weight of these procedures—requirements like two-day filing deadlines,<sup>237</sup> twenty-four-hour appeal deadlines,<sup>238</sup> and bars to engaging in discovery<sup>239</sup>—is

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235. See *supra* Part III.B.1.b.

236. See *supra* Part I.

237. See, e.g., *supra* note 48 and accompanying text.

238. See, e.g., *supra* note 81 and accompanying text.

239. See, e.g., *supra* notes 84–94 and accompanying text (discussing discovery rules for election challenges in Louisiana).

nearly impossible for all but the most advantaged. The magnitude of these procedural burdens is compounded by the reality of this new digital age; risks like election malfunctions, software irregularities, and foreign interferences are greater now in scope and in probability. This seems to be exactly the sort of unfairness, and exactly the sort of threat, that federal courts are best suited to address.

If federal courts exercise greater oversight of state challenge procedures to address severe burdens on the right to vote, federalism will not be offended, but preserved. Federal courts asking more of state procedure is the slightest of intrusions into the political thicket. Finding unfairness or vote deprivation more readily would not replace state values or state authority with federal. Instead, it would incentivize states to innovate—to amend their own laws and to provide their own solutions. If anything, demanding more navigable, evenhanded state challenge procedures now would forestall even more intrusive federal action in the future, such as through updated funding conditions on a new HAVA rollout or through further federal investigations of state elections.<sup>240</sup>

In addition, federal courts have traditionally valued private attorneys general—litigants who willingly take on the expense and effort of detecting and deterring harmful behavior in order to protect the rights of the public through litigation.<sup>241</sup> Private litigants who voluntarily accept this burden in the face of potential election failures should be supported in the doing. States should facilitate, not obstruct, the self-funded investigations of private election challengers who could sniff out potential software glitches or system breaches and thereby get to the truth underlying public doubts in the election system. These challengers, after all, have constitutional rights to fully effective votes, and these rights extend beyond Election Day to the process of election verification and election challenges. If a fair election challenge ultimately reveals that the feared election failure did not impact the results, then so much the better for public trust in election integrity.

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240. See, e.g., Norris, *supra* note 23, at 21–22 (suggesting an administrative agency to carry out centralized “electoral management” in the United States).

241. The D.C. Circuit observed:

Congress was well aware that “the Nation would have to rely in part upon private litigation as a means of securing broad compliance” with Title II [of the Civil Rights Act of 1964], given the obvious impossibility of the federal Government identifying and prosecuting every violation. Indeed, . . . a private party bringing a civil rights suit “does so not for himself alone but also as a private attorney general, vindicating a policy that Congress considered of the highest priority.”

*Shelby Cty. v. Lynch*, 799 F.3d 1173, 1179 (D.C. Cir. 2015) (citations omitted).

There is valuable transparency to be gained through election challenges and electoral due process claims about them. Ensuring that challengers are afforded fair hearings will ultimately illuminate where state election codes should be changed, when recounts are necessary, and how our most precious right can be safeguarded.