

**The *National Voter Registration Act of 1993*  
Preemption of State Election Law for Federal Elections?  
New York State, A Case Study**

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The purposes of The *National Voter Registration Act (NVRA) of 1993* “are to establish procedures which will increase registration of eligible citizens in elections for Federal office ... to protect the integrity of the political process; and to assure an accurate and current voter registration roll.”<sup>1</sup> In other words, the bill sponsors’ goal was to make registration simpler for prospective federal election voters by requiring states to provide uniform mail-in voter registration cards and to make motor vehicle offices, schools, libraries, and other locations available for registering voters.

The origin of the act can be traced to a bill entitled the *Universal Voter Registration Act of 1989* introduced by Senator Alan Cranston and Representative John Conyers. It included a provision for Election Day voter registration that was immediately opposed on the basis that “...a great number of unqualified, ineligible persons would participate in the election process...”<sup>2</sup> Its opponents called the act “...an example of unnecessary federal bureaucratic infringement into an area within the purview of the states.”<sup>3</sup> The 1991 version of the act that eventually passed in 1993 did not include the Election Day voter registration provision.

To collect data and information, I conducted library research, accessed Internet sources, and interviewed knowledgeable election officials. Library research included congressional hearing reports on the *Universal Voter Registration* and the *National Voter Registration Acts* as well as reading pertinent New York State statutes, administrative rules, legislative proposals, regulations, and requesting an examination of New York State voter registration records. I focused on opposition to versions of the bill introduced from 1987 to 1993 to observe if the opposition is similar to recent opposition to federal electoral reform bills proposed by U.S. Representative Rush Holt of New Jersey

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<sup>1</sup> *The National Voter Registration Act of 1993*, PL 103-31, 107 Stat. 77, 42 U.S.C. §1973gg.

<sup>2</sup> *Voter Registration Hearings Held Before The Subcommittee on Elections of the Committee on House Administration, House of Representatives*. One Hundredth Congress, Second Session (April 19, May 10, 1988, Washington, DC; May 27, 1988, Los Angeles, CA) GPO Number 1018-A and B 1 1993; and *Voter registration: Hearing before the Subcommittee on Elections of the Committee on House Administration, U.S. House of Representatives, One Hundred Third Congress, first session, January 26, 1993, Washington, DC: U.S. GPO 1993.*

<sup>3</sup> Kansas Secretary of State Bill Graves in a November 16, 1987, letter to US Representative Charles Patrick (Pat) Roberts

attempting to ensure public verifiability of election results accuracy.<sup>4</sup>

## **OPPOSITION TO ENACTING *THE NATIONAL VOTER REGISTRATION ACT***

Officials opposing the NVRA bill in 1993 included the members of the Illinois County Clerk and Recorder's Association; Theresa Petrone, a member of the Illinois Board of Elections; Governor James Edgar of Illinois; and Governor Tommy George Thompson of Wisconsin.<sup>5</sup> Opponents employed three major arguments, voter fraud, costly unfunded mandate, and ineffectiveness.

### **VOTER FRAUD**

Congressional opponents, mostly Republicans, argued the bill would “guarantee voter fraud” as the bill was “an open invitation to voter fraud.”<sup>6</sup> Representative Robert Livingston of Louisiana said: “This motor-voter, auto-fraudo, democracy for the dead law could well mean high election day turnout by illegal alien[s].”<sup>7</sup> Representative Martin Hoke of Ohio and Representative Thomas W. Ewing of Illinois were convinced that the NVRA would inhibit the ability of election officials to verify the eligibility of voters because it “does not allow for address verification,” mandates registration without

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<sup>4</sup> Opposition to current election reform efforts by Representative Rush Holt and to the NVRA are similar in the sense that most congressional opponents were members of the Republican Party who were joined by state and local election officials, primarily county-level election administrators, who oppose mandates that would increase their responsibilities. There is more highly organized opposition by state and local election officials and state legislatures to recent election reform proposals by Representative Rush Holt. The increase in current opposition to federal election reform is due in part to an influential group of well-known muckraking election integrity activists, including Bev Harris of BlackBoxVoting, Brad Friedman of Bradblog, Nancy Tobi of Democracy for New Hampshire, the former John Gideon of Daily Voting News, and others, who took steps to mobilize over 3,300 local US election officials as well as to mobilize their own followers to voice opposition to Holt's federal election reform bills that would require the disclosure of voting-specific computer programs, the use of auditable voter-marked paper ballot voting systems, and manual post-election audits. The Holt bills formerly had broad support in the House of Representatives, but its support has been dwindling. Recently Representative Holt and 17 other representatives wrote a letter to Eric Holder of the Justice Department to ensure the viability of voting systems and that votes are counted as cast. <http://blog.verifiedvoting.org/2010/08/16/746>  
[http://www.holt.house.gov/index.php?option=com\\_content&task=view&id=581&Itemid=18](http://www.holt.house.gov/index.php?option=com_content&task=view&id=581&Itemid=18)

<sup>5</sup> Representative Robert ("Bob") Linlithgow Livingston Jr. of Louisiana, “Motor-Voter Registration is Bad for America”. *Congressional Record*, January 27, 1993: H288-01; and Representative Robert H. Michel of Illinois, “Voter Fraud Bill of 1993”, *Congressional Record*, February 16, 1993: p. E-325.

<sup>6</sup> Representative Martin R. Hoke of Ohio, “Auto-Fraudo: An Open Invitation to Fraud”, *Congressional Record*, February 4, 1993: p. H490-01.

<sup>7</sup> Representative Robert ("Bob") Linlithgow Livingston Jr. of Louisiana, “Motor-Voter Registration is Bad for America”. *Congressional Record*, January 27, 1993: p. H288-01.

verification” and “seriously restrict[s] the ability of the county clerks...to keep their voter lists up to date.”<sup>8</sup>

Representative Livingston accused the bill’s Democratic supporters of plotting to obtain illegal votes: by “giving illegal aliens greater opportunity to vote” thus “trampling the Constitution, trampling on the principle of federalism, [and] trampling upon the very notion of American citizenship.”<sup>9</sup>

#### A COSTLY UNFUNDED MANDATE

Opponents complained that the act was an unfunded mandate. Governor Jim Edgar of Illinois wrote: “The motor-voter bill will require a massive statewide voter registration program at all state offices without providing for the administrative costs of this service”.<sup>10</sup> State of Illinois Board of Elections Member Theresa Petrone claimed that the bill’s requirements would necessitate a computer network costing approximately \$40,000,000, and a signature retrieval system costing \$12,000,000, placing an unnecessary financial burden on the state. Ewing said it was estimated that “\$40,836,378 ... [would be] necessary for start-up costs alone for the Illinois State government ... and \$3 million the year thereafter”.<sup>11</sup>

A common theme, espoused by Livingston and Ewing was “...this bill provides no money at all. It just gives them a lot of ... mandates” that would “increase your taxes” and negatively impact social programs: “these costs will come out of our Illinois budget for education, children and family services.”<sup>12</sup> Representative Gary Condit of California agreed, adding: “We in Washington have got to

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<sup>8</sup> Representative Martin R. Hoke of Ohio, “Auto-Fraudo: An Open Invitation to Fraud”. *Congressional Record*, February 4, 1993: p. H490-01; Representative Thomas W. Ewing of Illinois, “Vote Against the National Voter Registration Act”. *Congressional Record*, February 4, 1993: p. H530-06.

<sup>9</sup> Representative Robert Linlithgow Livingston Jr. of Louisiana, “Motor-Voter Registration is Bad for America”. *Congressional Record*, January 27, 1993: p. H288-01.

<sup>10</sup> Representative Thomas. W. Ewing of Illinois, “Vote Against the National Voter Registration Act”. *Congressional Record*, February 4, 1993: H530-06.

<sup>11</sup> Representative Thomas. W. Ewing of Illinois, “Vote Against the National Voter Registration Act”, *Congressional Record*, February 4, 1993: H530-06.

<sup>12</sup> Representative Robert Linlithgow Livingston Jr. of Louisiana, “Motor-Voter Registration is Bad for America”. *Congressional Record*, January 27, 1993: p. H288-01; and Representative Thomas W. Ewing of Illinois. “Vote Against the National Voter Registration Act”, *Congressional Record*, February 4, 1993: p. H530-06.

stop mandating policies without the funds necessary to implement them...the \$26 million that this bill will cost...will come from further cuts in social services, welfare, and public safety.”<sup>13</sup>

#### INEFFECTIVENESS AND INCONVENIENCE

Representative Ewing claimed the bill would have “...no significant effect on participation rates” and would “increase the waiting time for all applicants for state services.”<sup>14</sup> Representative Jack Kingston of Georgia maintained that the bill coerces people into registering to vote.<sup>15</sup>

Illinois County Clerk and Recorder’s Association requested changes to the bill “to require that the individual indicate his desire to be registered to vote rather than have it be automatic” and “to specifically provide that the ... election officer may screen for duplicate registration and purge all but the most recent.” The Illinois Association also requested the elimination of a universal registration card, and the elimination of attorney’s fees associated with any liability, which may be “incurred by our office as a result of negligence by any registration agent over which we have no authority.”<sup>16</sup>

Despite the opposition, Congress enacted the bill in May 1993 and President William J. Clinton signed it into law on May 21, 1993 with a January 1, 1995 effective date in most states. 238 House Democrats and 20 Republicans voted for the bill, and 14 Democrats and 150 Republicans voted “No”. In the Senate 56 Democrats and 6 Republicans voted “Yes”, and 36 Republicans voted “No”. State compliance became mandatory in 1995.

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<sup>13</sup> Representative Gary A. Condit of California “In Opposition to the Conference Report on H.R.2”, *Congressional Record*, May 5, 1993: p. E-1215-01.

<sup>14</sup> Representative Thomas W. Ewing of Illinois. “Vote Against the National Voter Registration Act”, *Congressional Record*, February 4, 1993: p. H530-06.

<sup>15</sup> Representative Jack Kingston of Georgia. “Floodwaters of Increased Regulation Descending”, *Congressional Record*, February 4, 1993: p. H490-06.

<sup>16</sup> Representative Robert Livingston of Louisiana. “Motor-Voter Registration is Bad for America”, *Congressional Record*, January 27, 1993: p. H288-01.

## THE HELP AMERICA VOTE ACT OF 2002

Reacting to problems counting punch-card ballots printed on sub-standard paper provided by Sequoia Voting Systems in Palm Beach County, Florida in the 2000 election, Congress enacted the *Help America Vote Act (HAVA) of 2002* to replace punch card and lever machines with electronic voting machines.<sup>17</sup> HAVA mandates at least one accessible voting machine per polling location for voters with disabilities to vote privately and independently in Federal elections. Responding to Florida's felony disenfranchisement laws where botched (some say manipulated) database mismatching caused thousands of eligible Floridians with no criminal records to be purged from voter registration rolls, HAVA required states to develop a single, uniform, centralized, electronic statewide voter registration database administered at the State level, requiring the database to be coordinated with other agency databases within the state. Although HAVA requires the removal of ineligible voters and duplicate names from voter registration rolls, it also mandates that voters in Federal elections be able to cast provisional ballots if their names do not appear on the registration list or if they do not have identification (ID).

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<sup>17</sup> Sequoia voting machine company sent punch-card ballots printed on sub-standard paper not meeting its own specifications specifically to Palm Beach County, allegedly to promote selling its touch-screen voting machines when Palm Beach county experienced problems with the paper punch-cards. "The Trouble with Touch Screens", Dan Rather Reports, HD.net, August, 2007. The transcript is at: [http://election-reform.org/dan\\_rather.html#bad\\_paper](http://election-reform.org/dan_rather.html#bad_paper); and The *Help America Vote Act of 2002, US Public Law 107-252*, Oct. 29, 2002, Full Title: "An act to establish a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes." See <http://www.gpo.gov/fdsys/pkg/PLAW-107publ252/content-detail.html>

Republicans insisted upon new voter identification requirements as the price for their support of the HAVA bill. Thus, HAVA provides no state may accept a voter registration form for an election for Federal office unless the application includes "in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number or, if they do not have a driver's license, the last four digits of their Social Security number (if they have one).<sup>18</sup> If the state can verify these numbers against social security or motor vehicle databases, new voters who registered by mail would not have to show ID at the polls.<sup>19</sup> However, since 1993, despite the lack of evidence of voter fraud, many states enacted new laws requiring voters to also show ID when they vote at the polls.<sup>20</sup>

### VOTER REGISTRATION ROLLS AS DATA SOURCE

Voting behavior researchers employ registration-based sampling (RBS) for survey research or investigate voter demographics using voter registration rolls. However, voter registration rolls are non-uniform as to the type of demographic information recorded by the various states. Gender, ethnic group, or political party may or may not be recorded. Furthermore, scholars are unable to obtain voter registration rolls in some states, or may be able to obtain voter registration roll data, but not voter history file data.<sup>21</sup>

Voter registration roll data has several sources of bias including *deadwood*, *purging*, and missing and erroneous data.<sup>22</sup> Deadwood, or persons who no longer live at an address because they moved or died but remain on the voter registration files, inflate the number of registered voters out of

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<sup>18</sup> 42 U.S.C.A. § 15483. (a) (5) (A)

<sup>19</sup> Miles Rapoport, "Beyond Voting Machines: HAVA and Real Election Reform". *Alternet*. (July 30, 2003). <http://www.alternet.org/story/16490/>.

<sup>20</sup> Wang, Tova Andrea. "A Rigged Report on U.S. Voting?" *The Washington Post*, August 30, 2007, Columns section. <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/29/AR2007082901928.html>

<sup>21</sup> McDonald reported, "In 2004, 35 states including DC maintained and allowed academic use of statewide voter registration databases." Michael P. McDonald, "The True Electorate: A Cross-Validation of Voter Registration Files and Election Survey Demographics". *Public Opinion Quarterly* 71 (4) (2007): 588-602.

<sup>22</sup> Persons who have moved or died are removed by election officials from voter rolls through a process known as purging. Green, Donald P. and Alan S. Gerber, "Can Registration Based Sampling Improve the Accuracy of Midterm Election Forecasts?" *Public Opinion Quarterly* 70 (2) (2006): p. 202; and McDonald, Michael P., "The True Electorate: A Cross-Validation of Voter Registration Files and Election Survey Demographics". *Public Opinion Quarterly* 71 (4) (2007): 588-602.

the voting age population. Consequently, some states' total registration as a percentage of the voting-eligible population is greater than 100%, and thus the proportion of survey respondents who report being registered is smaller than recorded registration rates.<sup>23</sup> Election officials purge persons from the voter rolls who have moved or died, causing the total number of reported ballots cast to be greater than the total number of registrants listed as having voted in a prior election. Professor Michael McDonald of George Mason University found that purging often continues even while voting records from the prior election are updated. Up to 5% of voters had already been purged by the time he could obtain the updated voter files for 11 states. South Carolina was the only state in his sample that maintains a complete record of all registrants' voting history for a given election.<sup>24</sup>

### **HAVE THE GOALS OF THE ACT BEEN ACHIEVED?**

According to reports by state election officials, voter registration rates out of an estimated voting age population (VAP) increased from 69.5% in 1994 to 81.7% in 2008.<sup>25</sup> These numbers are not precisely accurate because VAP includes many ineligible voters, voter registration numbers are susceptible to 'deadwood', and states remove or "purge" ineligible voters from voter registration rolls at differing rates.<sup>26</sup> However, voter registration rates increased significantly following NVRA's enactment due to the ease of mail-in and in-person registration at motor vehicle, welfare, Medicaid, and other agencies.<sup>27</sup>

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<sup>23</sup> Brace, Kimball and Michael P. McDonald. *Report to the Election Assistance Commission Day Survey*. Washington DC: U.S. Election Assistance Commission (2005).

<sup>24</sup> McDonald found that age was the only demographic data available in all voter roll files in the 11 states in his sample. He used age to evaluate the likely validity of the voter data National Election Poll (NEP exit poll) and the current population survey (CPS) and concluded that the NEP data in 2004 over-represents younger voters, and weakly also suggests a bias towards nonwhite voters as compared to voter roll and CPS data.

<sup>25</sup> U.S. Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2007-2008, A Report to the 111th Congress*, (Washington DC, June 30, 2009). See [http://www.eac.gov/research/national\\_voter\\_registration\\_act\\_studies.aspx](http://www.eac.gov/research/national_voter_registration_act_studies.aspx)

<sup>26</sup> Michael P. McDonald, "Voter Turnout", The Elections Project, Department of Public and International Affairs, George Mason University (2009) [http://elections.gmu.edu/voter\\_turnout.htm](http://elections.gmu.edu/voter_turnout.htm)

<sup>27</sup> Frances Fox Piven and Richard A. Cloward, "Northern Bourbons: A Preliminary Report on the National Voter Registration Act" *Political Science and Politics* 29, March, 1996, p. 39-42.



## HAS THE INCREASE IN VOTER REGISTRATION RATES INCREASED VOTER TURNOUT?

It is difficult to estimate both the numerator and the denominator of voter turnout rates. Decreasing the numerator, some states report the number of votes counted rather than the number of voters who cast ballots.<sup>28</sup> The extent of voter participation is always greater than the number of votes counted because voters may “under-vote” by choosing not to cast a vote in a particular contest or by not filling out a ballot in a machine-readable format, or may “over-vote” by selecting too many candidates for a contest, or a voter may neglect to sign an absentee ballot envelope, or may cast a provisional ballot in the wrong precinct and have their entire ballot deemed ineligible.<sup>29</sup> McDonald used states that report the number of ballots cast to estimate the rate of under-votes, over-votes and ballots judged not to be eligible, to increase the accuracy of voter participation rates by inflating the number of votes cast in other states by about 2.1%.

Voter turnout rates using estimated voting age population as a base do not adjust for non-citizens, recent movers, the mentally incompetent, or overseas citizens. According to McDonald, persons ineligible to vote who inflate the denominator of voter turnout rate include an estimated 17.8 million non-citizens in the country (7.9% of the population) who cannot vote, about 3.2 million persons who cannot vote due to felony status, an estimated 300,000 recent movers who cannot vote, plus about 250,000 persons living in nursing homes and found mentally incompetent by a court of law who cannot vote.<sup>30</sup> To further confuse the calculation by depressing the denominator, a crudely estimated 3.2 million overseas citizens today can vote but are not included in VAP numbers.

McDonald noted: “When measured correctly, voter turnout is not declining... If we calculate turnout rates for everyone of voting age in the United States, there is an unmistakable downward trend

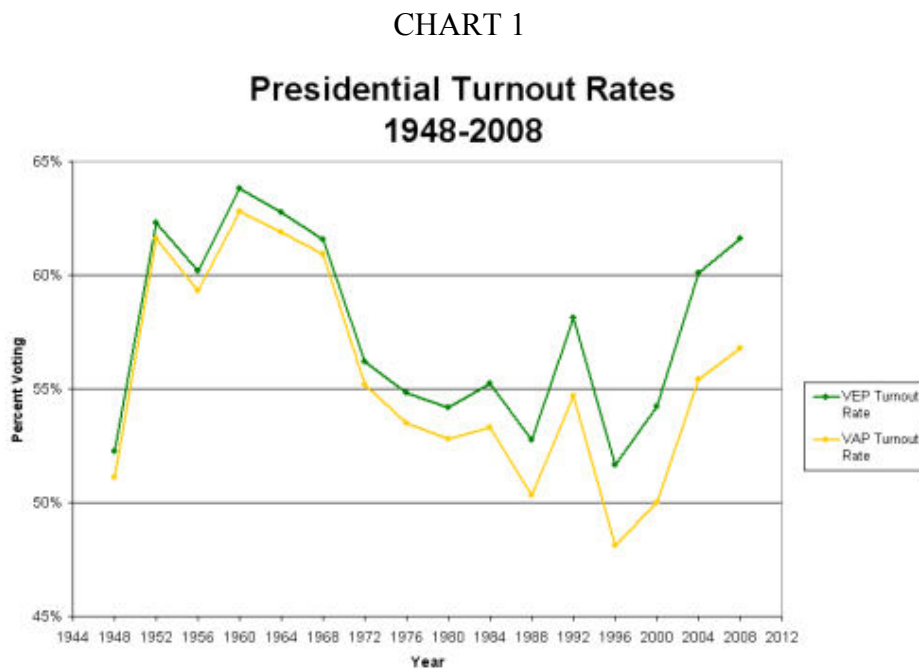
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<sup>28</sup> Many who study voter turnout rely on the number of votes counted in presidential elections.

<sup>29</sup> In most states, federal and state-level contests are not counted on ballots cast in the correct county but the wrong precinct, even if some of the fault lies with poll workers who neglected to inform voters of their correct precincts. The reasoning for not counting these contests for which the voter is eligible is based on the limitations or design flaws of current electronic vote-counting equipment.

<sup>30</sup> McDonald estimated that in 2004, non-citizens were 7.9% of the population. McDonald, Michael P., “Every Eligible Voter Counts: Correctly Measuring American Turnout Rates” *The Brookings Institution*, (September, 2004) <http://www.brookings.edu/views/papers/20040909mcdonald.pdf>

since the 1960s.”<sup>31</sup> However, the proportion of ineligible population, not the nonvoting, has been increasing. Thus, if we base the turnout rate on those persons eligible to vote, there is no decline and the 2004 and 2008 voter turnout rates exceed the 1992 turnout rate. Using McDonald’s adjusted voter turnout estimates out of voting *eligible* population (VEP) shown in Chart 1, voter turnout rates increased since 1994 from about 52% to about 62% in the 2008 presidential election.



*Source: Estimated Presidential Voter Turnout Rates from 1948 to 2008. Michael P. McDonald, Voter Turnout, The Elections Project, Department of Public and International Affairs, George Mason University (2009) [http://elections.gmu.edu/voter\\_turnout.htm](http://elections.gmu.edu/voter_turnout.htm)*

Based upon McDonald’s estimates, the U.S. Election Assistance Commission reported an overall 2008 voter turnout rate of 62.7% of the citizen voting age population (CVAP).<sup>32</sup> Thus, there is an approximately 10% increase in voter turnout rates since the NVRA was enacted in 1993. This

<sup>31</sup> Michael P. McDonald and Samuel L. Popkin, “The Myth of the Vanishing Voter”, *The American Political Science Review* 95 (Dec., 2001): pp. 963-74.

<sup>32</sup> U.S. Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2007-2008, A Report to the 111th Congress* June 30, 2009: Table 30, pp. 28—30.

improvement agrees with findings by scholars who predicted turnout would increase modestly or be “about nine percentage points higher” if every state had permissive voter registration laws.<sup>33</sup>

### **A CASE STUDY: NEW YORK STATE’S RESPONSE**

The original goal of my research was to investigate and evaluate the relationship between the requirement for public access to Federal electoral records that *The National Voter Registration Act* (NVRA) requires and its potential to meet its stated Congressional purposes to “to protect the integrity of the electoral process, and to ensure accurate and current voter registration rolls are maintained...” and to make a case based on my research findings that a similar federal requirement for public access to additional electoral records not covered by *The NVRA* is necessary to provide sufficient information to judge the accuracy of election outcomes.

I interviewed New York State Board of Elections Co-Chair Douglas K. Kellner; New York State Board of Elections Director of Public Information John Conklin; Democratic Commissioner of the Albany County Board of Elections Matthew Clyne; New York State Board of Elections Director of Elections Operations, Anna Svizzero; and New York State Department of State, Director of the Committee on Open Government, Robert Freeman.

New York’s Freedom of Information Law, enacted in 1974,<sup>34</sup> and later its election law, made board of elections records open to public inspection prior to NVRA.<sup>35</sup> Hence, NVRA’s public access requirements did not preempt New York State statutes. However, the registration provisions of Article II of the *New York State Constitution* were amended in 1995 to conform with NVRA requirements and there was also a corrective amendment to Article II, §6 ratified in 2001.<sup>36</sup>

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<sup>33</sup> Highton 1997; Rosenstone and Wolfinger 1978.

<sup>34</sup> *New York Public Officers Law*, Art. 6, §§84-90 became a law in 1974.

<sup>35</sup> *New York State Election Law* Art. 3—Election Officials, Title II. Board of Elections, § 3–212.3. ‘Records and photostats; preservation and sale’ requires, “The records of the board, and all papers and books filed in its office are public records.”

<sup>36</sup> §5. [Registration and election laws to be passed] Laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established, and for the registration of voters; which registration shall be completed at least ten days before each election. Such registration shall not be required for town and village elections except

My interviews with New York State Board of Elections Co-Chair Douglas Kellner, Albany County Board of Elections Commissioner Matthew Clyne, and New York Department of State, Committee on Open Government Executive Director Robert Freeman confirmed that the NVRA reinforced, but did not preempt, New York State laws as far as public access to voter registration records. Prior to 1993, New York State was already notifying voters of the disposition of voter registration applications, having the department of health and courts notify election officials of death certificates and felony convictions to update voter rolls, and providing provisional ballots to voters who were not listed on polling place voter rolls on election day.<sup>37</sup> However, for federal (and therefore, due to economic pressures, state) elections, the NVRA requires New York State motor vehicle and social services departments to provide and accept voter registration applications or lose federal funds. The *Help America Vote Act of 2002* (HAVA) mandates, for federal elections, an electronic state-wide voter registration database, new voting systems to replace New York's lever machines, and accessible ballot marking devices for voters with disabilities.<sup>38</sup>

To protect registrants from identity theft, Albany County Commissioner Matthew Clyne reported that New York redacts voters' social security numbers and motor identification numbers prior to providing voter registration records in response to public requests, but does not redact dates of birth. Other states, such as Utah, redact social security numbers and birth dates.

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by express provision of law. "Formerly §4. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 1951; further amended by vote of the people November 8, 1955; November 8, 1966; November 7, 1995"; §6. [Permanent registration] The legislature may provide by law for a system or systems of registration whereby upon personal application a voter may be registered and his or her registration continued so long as he or she shall remain qualified to vote from an address within the jurisdiction of the board with which such voter is registered. "New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 7, 1995; November 6, 2001"; and According to my telephone Interview with Douglas A. Kellner, Democratic Co-Chair of the New York State Board of Elections (November 15, 2009) the principal New York law implementing NVRA is P.L. 1994, chapter 659. Technical corrections were enacted in P.L. 1996, chapter 200.

<sup>37</sup> Anna Svizzero, Director of Elections Operations for the NYS Board of Elections recollected these things in an August, 2010 telephone interview. Prior to the NVRA, voters had to return voter registration cards placed at New York State motor vehicle and social services departments to county elections offices.

<sup>38</sup> Federal election preemption requirements, also informally preempts state and municipal election requirements because it would be too administratively burdensome to operate separate voter registration and elections systems for federal and local elections. Operating two separate systems would be particularly burdensome when federal and state-level contests are decided in the same election. When no federal elections occur (in odd-numbered years without a special federal election) jurisdictions may use election systems that are not compliant with HAVA requirements.

Another problem with providing public access to voter registration records is potential violation of New York State law prohibiting commercial use of the voter data.<sup>39</sup> Clyne stated New York open records laws do not permit officials to verify the identity of persons making open records request, making it difficult to prevent or make accountable illegal commercial use of electronic voter registration rolls.

John W. Conklin, New York State Board of Elections Director of Public Information, said New York City does not comply with HAVA's legal requirements to keep the New York State electronic voter registration records updated.<sup>40</sup> Conklin attributed the failure to lack of trust between the two major political parties, which each worry that the other party's election commissioner might overwrite and thus erase its own voter registration data unless the system is specifically designed to prevent it.<sup>41</sup>

## IMPEDIMENTS TO PUBLIC OVERSIGHT OF ELECTORAL INTEGRITY

In addition to interviews, I also read on-line news articles reporting problems that occurred during the 2009 November elections and used state and county web sites to gather information. I uncovered eight electoral practices that impede the ability of the public to oversee New York's electoral integrity.

First, New York provides no public notification of the time and place of its post-election audits and the public is not permitted to observe the canvassing process or post-election audits unless appointed by a candidate or political party to be a "watcher" or is a candidate's attorney.<sup>42</sup> The *New York election law* allows at most two watchers to be nominated by "Each political party or independent

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<sup>39</sup> Article 3—Election Officials. Title I. Statewide Provisions. §3-103. "Computerized record keeping; sharing information in database states": "The information contained in the statewide voter registration list shall not be used for non-election purposes."

<sup>40</sup> Telephone interview with John Conklin, Director of Public Information, New York State Board of Elections, November 25, 2009.

<sup>41</sup> Telephone interview with John Conklin, Director of Public Information, New York State Board of Elections, November 25, 2009.

<sup>42</sup> Interview with Albany County Board of Elections Commissioner Matthew Clyne, 32 N Russell Rd # 1, Albany, New York.

body duly nominating or entitled to nominate candidates for offices.”<sup>43</sup> On the other hand, Commissioner Kellner described the entire canvass process as “public to the watchers and candidates’ attorneys. While the final certification is reported by election district, anyone can obtain the components for each election district, and, indeed, can look at the individual paper ballots.”<sup>44</sup>

Second, no manual inspection of ballots is required by statute during “recounts”. Instead, local boards of elections may elect to trust the proprietary counts of private corporations without manual checks. However, Commissioner Kellner says, “there is a mandatory 100% re-canvass of all ballots, [required by Election Law] §9-208, and for all practical purposes, any candidate can get a hand count of paper ballots in a close race.”<sup>45</sup>

Third, no statewide detailed election results data by election district is available on New York State Board of Elections web site, and New York’s counties do not publicly post election results by election district. Such failure to publicly post statewide precinct-level election results on a state’s election web site during the canvass period is the exception today rather than the norm. Thus, anyone trying to evaluate New York election results patterns must make public records requests to as many as 52 counties and New York City separately and may receive the information in different file formats, with some counties omitting certain data items, only after the canvass period ends.

Forth, election district tallies for each county are aggregated prior to being publicly reported on county web sites, and are not reported separately for absentee, early, provisional, or Election Day ballot types. Aggregating election results into one overall tally for each precinct hides evidence of problems particular to any one type of voting system or ballot type, including evidence produced by certain types of vote and voter fraud. For instance absentee ballot votes may be padded for one candidate while polling place votes are not recorded for an opposing candidate. When these two troublesome tallies are summed, as long as the amount of vote padding does not exceed the number of undervotes, the

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<sup>43</sup> New York Election Law §5-206

<sup>44</sup> Email message from New York State Board of Elections Commissioner Douglas A. Kellner to Kathy Dopp (Nov. 29, 2009), mentioning E.L. §3-222.

<sup>45</sup> Ibid.

evidence of both problems cancels. Aggregating vote tallies similarly may hide evidence of voters who vote without signing poll books. Such voters may or may not be eligible to vote.

An investigator of New York's November 2008 detailed election results in U.S. House district 23 reported finding patterns in Madison, Oneida, Jefferson, and Oswego Counties, such as negative numbers of blank ballots, consistent with possible vote padding or a large number of voters voting without signing into the poll books.<sup>46</sup> The web sites of counties reported to exhibit these anomalous patterns omitted the column for "blank ballots" reported by other New York counties, raising suspicions that problems were being covered up.<sup>47</sup> In July 2010, a whistleblower came forward alleging Rensselaer County and City of Troy public officials conspired to file dozens of fraudulent absentee ballots. According to the Times Union, nine officials, including a County board of Elections Commissioner are being investigated.<sup>48</sup> If New York State required its counties to report disaggregated election results data by ballot type, it would facilitate timely detection of problems, and possibly deter certain types of voter fraud, vote fraud, and poll worker negligence.<sup>49</sup>

Fifth, according to New York Board of Elections administrative rules, discrepancies found during post-election audits are not used to correct the initial reported vote counts unless the manual audit is expanded to a 100% count.

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<sup>46</sup> Richard Hayes-Phillips, "False Vote Counts in Four Counties in NY-23", *The Gouverneur Times* (December 8, 2009).

<http://tinyurl.com/yepoxdf>

<sup>47</sup> Reporting initial impossible tallies (more votes than voters who cast ballots in certain types of ballots) in the November 2009 election in counties that used new optical scan paper ballot systems for the first time raises the possibility that the higher undervote rate of lever machines used prior to New York State's switch to optical scan paper ballot systems may have been used to hide evidence of vote-padding problems in those counties in the reported aggregated vote tallies.

<sup>48</sup> Brendan J. Lyons, Senior Writer, "9 Targeted in Vote Conspiracy", *Times Union*, Albany, NY, (July 29, 2010).

<http://www.timesunion.com/local/article/9-targeted-in-vote-conspiracy-594751.php>

<sup>49</sup> After New Mexico Governor Bill Richardson encouraged all local election officials to cooperate with investigators collecting detailed statewide election data in 2004, New Mexico recently implemented a system of online public election results reporting by ballot type and precinct during the canvass period.

If a complete audit is conducted, the results of such audit shall be used by the canvassing board in making the statement of canvass and determinations of persons elected and propositions approved or rejected. The results of a partial audit shall not be used in lieu of voting machine or system tabulations, unless a voting machine or system is found to have failed to record votes in a manner indicating an operational failure.<sup>50</sup>

In addition, according to Albany County Commissioner Matthew Clyne, discrepancies between the machine and manual audit results caused by voter error are not reported as discrepancies found during the manual audit and are not considered when making a decision as to whether or not to expand the audit sample sizes, even in close elections. Voters thus lose the right to have their vote counted, despite its intent being clear, except to the optical scanner, and a close election outcome could be certified where voters want a different outcome. Optical scanners' ability to read various inks and types of voter marks varies widely. The practice of not adjusting the official election results to reflect the manual counts means that the public has insufficient information about patterns of "voter error" to evaluate if voter education or machine adjustments are needed. This practice obscures the actual winning margin between candidates, as determined by voter intent, from candidates and the public.

Sixth, absentee and overseas ballots comprise about 10% of the ballots cast in Albany County and presumably statewide. Yet, according to Albany County Commissioner Matthew Clyne, New York State Board of Elections regulations exempt absentee ballot tallies from manual post-election auditing, increasing the risk of undetected, miscounted absentee ballots. Thus, county election officials count absentee and overseas ballots, using trade secret software, on central count optical scanning machines without any independent accuracy checks of reported tallies.

Seventh, New York State election statute has not been updated to require preservation of paper ballots cast in polling locations following the replacement of lever machines with optical-scan voting

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<sup>50</sup> Proposed Amendment to Subtitle V of Title 9 of the *Official Compilation of Codes, Rules and Regulations of the State of New York*, Repealing Part 6210.18 and Adding thereto a new Part, to be Part 6210.18 Three-Percent (3%) Audit. <http://www.elections.state.ny.us/NYSBOE/Law/6210.18Regulations.pdf>



systems. Article 3. Title II. §3–222 of the election statute requires only preservation of, “...protested, void and wholly blank ballots, packages of unused ballots and all absentee and military, special federal, special presidential and emergency ballots and ballot envelopes, if any, opened or unopened, ... for two years after the election.”<sup>51</sup>

Eighth, New York State had one of the highest rates of uncounted provisional ballots as a percentage of total ballots cast in 2008, about 1.5% of all ballots cast. Nearly 600,000 U.S. ballots cast at the polls in 2008 were cast provisionally and not counted.<sup>52</sup> About 88,000 of these ballots were rejected because they were cast in the wrong precincts or county, which could be the fault of election officials and poll workers failing to inform voters of their correct polling locations or precincts within polling locations.

TABLE 1

	provisional cast as a % of ballots	provisional % not counted	provisional cast and not counted as a % of ballots
AZ	6.6%	29.3%	1.9%
DC	5.5%	28.3%	1.6%
NY	2.7%	54.9%	1.5%
CA	5.9%	17.7%	1.0%
KS	3.3%	30.9%	1.0%
UT	4.5%	16.2%	0.7%
OH	3.6%	19.3%	0.7%
MD	1.9%	33.5%	0.7%

The 2008 provisional ballot rates. The Pew Center on the States (July 2009).

## FINDINGS AND CONCLUSIONS

Voter turnout rate out of estimated voting eligible population (VEP) has risen approximately 10% since the National Voter Registration Act (NVRA) was enacted in 1993. While NVRA preemptive mandates could be considered costly for a mere 10% increase in turnout rate, NVRA also

<sup>51</sup> Douglas Kellner, NYS Board of Elections Commissioner, agreed in a May 18, 2010 email to me, “Kathy, I think you are correct about a technical reading of the statute, but everyone understands that all ballots must be preserved for at least two years.”

<sup>52</sup> “Provisional Ballots: An Imperfect Solution”, The Pew Center on the States, *Pew Charitable Trusts*, Washington DC, July 2009: p. 2.

increases public verifiability of the integrity and currency of voter registration records, enabling researchers to detect evidence of certain types of administrative failure, registration fraud, voter fraud, and ballot box stuffing.<sup>53</sup> However, lack of uniform handling of voter registration databases continues to complicate efforts to compare voter registration numbers of the various localities and states. If the National Voter Registration Act had not been enacted, it is possible that extant voter turnout rates among certain demographic groups might be lower.

New York State was already meeting several National Voter Registration Act provisions prior to 1993.<sup>54</sup> However, the NVRA mandated new interactive voter registration systems within New York State motor vehicle and social services departments.

New York State is still struggling with federal mandate requirements pertaining to federal elections, particularly with respect to the *Help America Vote Act of 2002*. The mandates of the *Help America Vote Act of 2002* (HAVA) for federal elections include an electronic state-wide voter registration database, voting systems to replace punch-card and lever voting machines, and accessible ballot marking devices for voters with disabilities.<sup>55</sup> Various state election officials, state legislators, and election integrity interest groups are concerned with possible mishandling of the new electronic voter registration databases required by HAVA, including concerns with privacy, identity theft, and erroneous purging of eligible voters. Unlike NVRA's requirement for public access to voter registration records, HAVA lacks any requirement for public access to electoral records necessary to judge the

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<sup>53</sup> Public access to voter registration records, including poll books, allows investigators to uncover voter fraud, voter registration fraud, cases when poll workers allow voters to vote without signing them in, or cases of gross ballot box padding when the number of ballots cast is greater than the number of voters recorded as having voted. There are many other types of vote fraud that cannot be detected by investigating voter registration records, including ballot substitution, ballot tampering or spoiling, vote-switching, electronic vote tampering, ballot absconding, failing to count votes for particular candidates or political parties, etc.

<sup>54</sup> According to Kellner, and Svizzero, NYS was already providing public access to voter registration records, notifying people of the status of their voter registration applications, and providing provisional ballots for voters whose names did not appear on the polling place voter rolls.

<sup>55</sup> Federal election preemption requirements, also informally preempts state and municipal election requirements because it would be too administratively burdensome to operate separate voter registration and elections systems for federal and local elections. Operating two separate systems would be particularly burdensome when federal and state-level contests are decided in the same election. When no federal elections occur (in odd-numbered years without a special federal election) jurisdictions may use election systems that are not compliant with HAVA requirements.

integrity and accuracy of election results, thus leaving vote tabulation accuracy out of reach of public oversight and open to undetectable vote fraud, at the discretion of the various state legislators and local election administrators.

New York State is one of many states not providing sufficient access to information to enable public evaluation of the integrity and accuracy of reported election outcomes. Public oversight over ballot reconciliation, security, vote tally, and auditing processes would enhance the capacity to detect and expose problems in a timely fashion by increasing transparency in the electoral process. Yet voters want their privacy rights and their right to cast an anonymous ballot protected, requiring a careful balance of reforms.

## RECOMMENDATIONS

Due to the trend in recent decades to privatize vote-counting, and in many states vote-casting, processes and the failure of states to enable public oversight over the integrity of election outcomes, additional federal mandate preemption is merited in order to protect the rights of voters in federal elections. The following recommendations draw upon my prior discussions with computer scientists with expertise in voting systems and with election integrity advocates, to obtain their perspective and reasoning on what electoral records and procedures are necessary to judge the accuracy and currency of the electoral process given current voting systems and election procedures throughout the United States.

Eleven changes to federal law for federal elections could be made to increase voter participation, protect voter privacy, and enable the public to help ensure Federal elections are fair and accurate.

(1) Public access to all electoral records necessary to judge the accuracy and currency of the tallying process, in addition to records pertaining to the voter registration process, as provided by the NVRA, *is necessary* in order to enable the public to judge the accuracy and currency of the entire electoral process, including tallying. Federal law could require:<sup>56</sup>

Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying or electronic copies at a reasonable cost, all records concerning the implementation or programs and activities conducted for the purpose of ensuring the accuracy and currency of Federal election results except to the extent that such records would reveal how voters' voted or increase the risk of identity theft to voters.<sup>57</sup>

(2) Congress could require the requester of sensitive voter information such as voter registration records provide personal identification documents, and sign an affidavit swearing to not use the information for commercial purposes and to not make identifying voter registration information

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<sup>56</sup> 42 USC§1973gg-6(i)(1)

<sup>57</sup> Release of voter records, including birth dates, social security numbers, and other information can pose a risk of identity theft.

publicly available in order to protect voters' privacy by deterring misuse of voter registration records for commercial purposes.

(3) Current election procedures and technology do not preserve the right to cast an anonymous ballot. For instance, modern digital recording electronic (DRE) voting machines violate voters' right to cast an anonymous ballot by electronically storing and also printing voter-verifiable ballot records with time stamps in the same order as voters cast them. Federal law could

1. prohibit the following two practices from occurring simultaneously
  - a. storing ballot records or ballots with time stamps or sequentially in the same order in which voters cast them, and
  - b. keeping sequential poll book records of when voters sign in to vote; and
2. prohibit poll-workers from handling voters' ballots that are not protected by a privacy envelope, except at the request of a voter who needs assistance;
3. prohibit the use of an identifier that can be traced back to the voter being printed on the paper or electronic ballot records;
4. require mail-in ballots to be handled by election officials in public view in two stages: first remove the privacy envelope containing the ballot from the postal envelope containing the voter registration information, and later remove the ballot from the privacy envelope and count the ballots; and
5. require that provisional ballots are cast on paper ballots with a privacy envelope inside the voter registration envelope, rather than on DRE machines.

(4) Congress could require state election offices to collect and publicly release detailed unofficial and official election results data on a web site for each election district, including the number of normal and provisional voters processed, the number of ballots cast, counted, and not counted, and the vote tallies for each candidate for each election contest for each ballot type, including identifiers for the voting machines which produced each tally. Public release of detailed data would deter certain types of

vote and voter fraud, and allow the public to view detailed election results, enabling more accurate calculation of voter turnout rates and timely detection of certain types of vote miscount.<sup>58</sup>

(5) Congress could require local jurisdictions to publicly post polling place totals on Election Night at the polls when polls close, including the number of voters processed at the polls, and the number of cast, counted, and uncounted ballots so that these tallies can be reconciled with later tallies reported by election officials. This would help ensure polling place totals are accurately tallied and not lost or substituted in transit during Federal elections.

(6) Federal law could require each county to publicly publish ballot security and chain-of-custody procedures and ballot transportation plans for Federal elections, including ways for the public to assist and participate in verifying procedures are followed before, during, and after elections. Public notice and 60 days public comment could be required on proposed ballot security and chain of custody procedures prior to implementation. Ballot security procedures include all measures to prevent used and unused ballots from tampering, addition, subtraction, and substitution, beginning prior to the election and ending after post-election auditing. Most states, with the possible exception of the state of California under Secretary of State Debra Bowen, do not provide a public right to oversee ballot security and transportation.<sup>59</sup> Many election officials adhere to the discredited principle of “security by obscurity” by keeping ballot security procedures secret from the public and known only to administrators and staff.

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<sup>58</sup> For instance, upon examination of detailed November 2004 New Mexico election results, researchers found there were over 4,000 more absentee ballots counted than voters who cast them, and that the rate of undervotes cast in on Election Day DRE voting machines was suspiciously high and exhibited a partisan pattern. (See Ellen Theisen and Warren Stewart, “Summary Report on New Mexico State Election Data” January 2005.

<http://www.votersunite.org/info/NewMexico2004ElectionDataReport-v2.pdf> ) When these two separate tallies are aggregated, whenever there is less vote padding than the number of undervotes, any evidence of both problems is hidden. Similarly, when New York State first switched to paper ballots, a few counties reported anomalous initial patterns of votes that were consistent with a pattern of vote padding that would be hidden by the large rate of undervotes that naturally occurs on lever machines due to their tendency to fail to record votes when the mechanical device has difficulty rolling over from the 9’s to the 0’s. Yet New York continues to report aggregated vote totals, as do all states except now New Mexico, which, under Governor Bill Richardson’s guidance, began publicly posting disaggregated election results by ballot type.

<sup>59</sup> In October, 2008, California Secretary of State Debra Bowen conditioned approval of county voting systems on a requirement for California’s county registrars of voters to submit plans for the ballot security process including public involvement. <http://www.sos.ca.gov/elections/ccrov/pdf/2008/october/08296rm.pdf>

(7) Modern digital recording electronic (DRE) voting machines do not permit the accuracy of reported election tallies to be independently verified. Congress could prohibit the use of electronic ballots in federal elections, except as a secondary backup for voter-marked paper ballots, in order to ensure that vote tallies may be checked for accuracy independent of the software.

(8) By conflating the concept of a voter's right to cast an anonymous ballot with an inferred right to keep anonymous ballots secret from the public, currently most states infer a special right for election officials and private companies to secretly count anonymous ballots without public scrutiny or public manual accuracy checks. Congress could make it clear that the right to cast an anonymous ballot that does not identify the voter does not create a special right for segments of the population to count ballots secretly without public verification of the accuracy of the tallies.

(9) Congress could require independently administered post-election audits to be conducted during the canvass period by manually counting a sufficient number of randomly selected publicly reported vote tallies to ensure that at most, say, 1% of initial incorrectly reported federal election outcomes would be certified to limit the risk that tallying errors cause incorrect winners to be certified. The National Institute of Standards and Technology could be tasked with creating guidelines for conducting risk-limiting post-election audits. Rough estimates are that such audits would require manually auditing approximately 3% of federal election districts or precincts overall in U.S. House and Senate contests, and cost approximately \$20 million dollars nationwide per federal election.<sup>60</sup>

(10) Federal law could require states to reinstate voting rights in federal elections to persons who have served time for a felony, after the time is served, and also require that states allow recent movers to vote in federal election contests. Today, voting rights policies for such persons vary widely among

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<sup>60</sup> Kathy Dopp., *Federal Election Audit Proposals - Which is Best?* (June, 2007)  
<http://electionmathematics.org/ucvAnalysis/US/paper-audits/ComparisonFederalElectionAuditProposals.pdf>

states. A requirement to provide voting rights to ex-felons and recent-movers would give approximately 3.5 million additional persons a right to vote in 2008<sup>61</sup>.

(11) Federal law could mandate that a snapshot of statewide voter registration databases during all federal elections be preserved and made publicly available. Currently, no record of voter registration records existing at the time of federal elections is preserved in most states due to continuous purging of voters who become ineligible after elections are held.

## AREAS FOR FUTURE RESEARCH

While voter registration roll records are usually available to the political parties for election campaign purposes, this study did not test their availability for research purposes by requesting voter registration rolls and voter history files. Information requests could be made according to each state's open records laws to test the availability of voter registration records. It would be possible to study some instances when voter registration records are denied in New York State by studying the records of the New York Department of State, Committee on Open Government and individual county records.

Questions remain regarding the rights of the public in New York State to observe the election canvass and auditing processes; and whether or not there is a right to have manual recounts that check the accuracy of the private machine tallies in close contests. More research is needed on New York State electoral statutes, regulations, and practices to answer the following question: "To what degree does the public have the right to oversee the integrity and accuracy of electoral outcomes?" An in-depth evaluation of the efficiency and the effectiveness of New York State election audits and its election results reporting practices could produce benefits by helping inform its election commissioners.

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<sup>61</sup> Michael P. McDonald, *Voter Turnout, The Elections Project*, Department of Public and International Affairs, George Mason University (2009) [http://elections.gmu.edu/voter\\_turnout.htm](http://elections.gmu.edu/voter_turnout.htm)



It would be possible to investigate the efficiency and effectiveness of New York's current post-election auditing procedures, beginning in November 2009, and evaluate what confidence-level they provide that specific election outcomes are accurate.

Implementation costs of state-wide voter registration systems required by the NVRA and the Help America Vote Act of 2002 could be studied and compared to earlier projections of both the U.S. Government Accountability Office and prior opponents of these acts.

Laws pertaining to public access to electoral records vary widely from state to state. Both state and NVRA public records laws compliance varies widely among sub-state jurisdictions. A nation-wide study could be conducted to study each state's statutes pertaining to electoral records access and compliance tested by making public electoral records requests to the approximately 3,300 local election jurisdictions in the United States. A report comparing the 50 states with respect to the amount of public access to electoral records would allow an expansion of the polity index used to measure democracy by evaluating the level of public oversight and transparency of election processes in the United States.

Information could be gathered on current opposition to federal electoral reform legislation to compare both the players who are opposing current legislation and the arguments against current legislation, with the players and arguments made against the *National Voting Rights Act* and the *National Voter Registration Act's* passage. Survey methods could be employed to learn more about the rationales of election officials and voting vendors who oppose federal election reform measures. Experimental educational treatments could be tried to determine what educational approaches would effectively assist persons lacking in computer science education such as election administrators, to understand why pre-election "logic and accuracy" testing does not ensure election results accuracy, and why independent oversight and checks of machine tallied outcomes are as important to deter and detect fraud and errors in the election industry as independent audits are to the financial and business industries.

Surveys could evaluate the relative importance of reasons why voters do not vote from possible reasons that may have not previously been investigated to learn additional causes for continued low to moderate voter turnout among the United States voting eligible population.

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## INTERVIEWS

Telephone Interview with Douglas A. Kellner, Democratic Co-Chair of the New York State Board of Elections, November 15, 2009.

In-person Interview with Matthew J. Clyne, Democratic Commissioner of the Albany County Board of Elections, November 18, 2009.

In-person Interview with Robert J. Freeman, Executive Director, New York Department of State, Committee on Open Government, November 19, 2009.

Telephone Interview with John W. Conklin, Director of Public Information New York State Board of Elections, November 25, 2009.

Telephone Interview with Anna Svizzero, Director of Elections Operations New York State Board of Elections, August 18, 2010.

## APPENDIX A: A FEW NEWS ARTICLES ON NEW YORK STATE 2009 ELECTION

### **Spring Valley lawmaker kicked off voter rolls**

NEW CITY — County Legislator Jacques Michel, D-Spring Valley, has been kicked off the voter registration rolls following an investigation by the Rockland Board of Elections. The move has put Michel's status as an elected official in question because the County Charter, which governs county government, requires county legislators to be registered voters and to be living in their election district. For example, just 27 percent of voters surveyed who preferred ranking also agreed that they would be upset if they would not be allowed to rank candidates in the future.

<http://www.lohud.com/article/20091202/NEWS03/912020396/-1/newsfront/Spring-Valley-lawmaker-kicked-off-voter-rolls>

### **False Vote Counts in Four Counties in NY-23**

Richard Hayes Phillips, Ph.D.

02 December 2009 CANTON, NY – It is now widely known that zero votes were initially reported for Doug Hoffman in numerous election districts in New York's 23rd Congressional District. What has not been previously reported is that these votes were shifted to other candidates. While most of these counts were corrected during recanvassing, they never should have been reported in the first place.

<http://tinyurl.com/yepoxdf>

### **Letter to the Editor on NY-23 Results**

Richard Hayes Phillips, Ph.D. Monday, 30 November 2009

It was reported last week that the St. Lawrence County Board of Elections had certified impossible numbers for the special election in New York's 23rd Congressional District.

...

The author has since learned that only the cumulative results for each contest, not the results for each election district, are actually certified to the State. Thus it is not strictly correct that these negative numbers appeared in the certified results. But they did appear in the district (precinct) totals from which the certified cumulative results were derived.

### **NYS Senate Elections Committee Testimony**

Bo Lipari. November 29 2009 Testimony on the voting machine pilot I gave at the New York State Senate Election Committee's hearing on November 30, 2009.

...We know what went wrong – a bug caused some machines to hang on certain vote combinations in multiple candidate elections. As a retired software engineer, I seriously question vendors' in-house testing, which absolutely should have turned up a simple defect like this. It also indicates that the state's certification testing has some big holes, something which the State Board needs to be looking at very closely.

<http://www.bolipari.com/boblog/2009/11/nys-senate-elections-committee-testimony/>

## Appendix B: Emails from NYS Board of Elections Co-Chair Doug Kellner

from Douglas A. Kellner <dkellner@elections.state.ny.us>

to Kathy Dopp <kathy.dopp@gmail.com>

date Sun, Nov 29, 2009 at 6:37 PM

11/29/09

subject Re: Doug, Draft of my research design for studying NYS election audit efficiency and effectiveness

Kathy,

With all due respect, your comment shows a complete lack of familiarity with the NY canvass process.

You wrote:

"New York state seems to be continuing the practice of aggregating election results for all ballot types prior to publicly reporting the vote counts by election district. This practice of only publicly reporting aggregated election district vote totals enables the evidence to disappear whenever votes are padded in one ballot type (say absentee ballots) for one candidate and votes are not counted (undervotes occur) for an opposing candidate in a different ballot type (say Election Day.)"

This is simply nonsense. The entire canvass process is "public" to the watchers and candidates' attorneys. While the final certification is reported by election district, anyone can obtain the components for each election district, and, indeed, can look at the individual paper ballots. EL § 3-222.

You should also be aware that scanners in NY are still required to print out the results separately for each election district.

And another later email:

The counties and municipalities are creatures of the state government. Both the Constitution and the NYS Election Law give the State Board of Elections the responsibility of supervising the county boards' conduct of elections.

This is the provision of the Election Law governing audits:

§ 9-211. Audit of voter verifiable audit records. 1. Within fifteen days after each general or special election, and within seven days after every primary or village election conducted by the board of elections, the board of elections or a bipartisan committee appointed by such board shall manually audit the voter verifiable audit records from three percent of voting machines or systems within the jurisdiction of such board. Voting machines or systems shall be selected for audit through a random, manual process. At least five days prior to the time fixed for such selection process, the board of elections shall send notice by first class mail to each candidate, political party and independent body entitled to have had watchers present at the polls in any election district in such board's jurisdiction. Such notice shall state the time and place fixed for such random selection process. The audit shall be conducted in the same manner, to the extent applicable, as a canvass of paper ballots. Each candidate, political party or independent body entitled to appoint watchers to attend at a polling place shall be entitled to appoint such number of watchers to observe the audit.

2. The manual audit tallies for each voting machine or system shall be compared to the tallies recorded by such voting machine or system, and a report shall be made of such comparison which shall be filed in the office of the state board of elections.

3. The state board of elections shall, in accordance with subdivision four of section 3-100 of this chapter, promulgate regulations establishing a uniform statewide standard to be used by boards



of elections to determine when a discrepancy between the manual audit tallies and the voting machine or system tallies shall require a further voter verifiable record audit of additional voting machines or systems or a complete manual audit of all machines or systems within the jurisdiction of a board of elections. Any board of elections shall be empowered to order that any such audit shall be conducted whenever any such discrepancy exists.

4. If a complete audit shall be conducted, the results of such audit shall be used by the canvassing board in making the statement of canvass and determinations of persons elected and propositions rejected or approved. The results of a partial voter verifiable record audit shall not be used in lieu of voting machine or system tallies.

6. Notwithstanding subdivision four of this section, if a voting machine or system is found to have failed to record votes in a manner indicating an operational failure, the board of canvassers shall use the voter verifiable audit records to determine the votes cast on such machine or system, provided such records were not also impaired by the operational failure of the voting machine or system.

## Appendix C: Additional Quotes by Opponents of the NVRA

### Voter Fraud:

... will guarantee voter fraud”<sup>62</sup>, “increases the potential for vote fraud...It’s an invitation to fraud.”<sup>63</sup>, “invites serious voter fraud.”<sup>64</sup>, “...will invite election fraud.”, “...contribute significantly to voter fraud.”<sup>65</sup>, “...will increase voter fraud.”<sup>66</sup>, “...invites fraud...”<sup>67</sup>. “It allows people who should not vote to vote, if they want to.”

“This bill prevents notarization or verification of people who send in their names on postcards.”<sup>68</sup>, “...expressly forbids States from seeking notarized or other types of verification.”<sup>69</sup>, “...as everyone knows, the single easiest piece of identification for an illegal alien or for anybody else to obtain is a driver’s license.”

Representative Martin Hoke of Ohio warned, “every dead person’s vote, every illegal alien’s vote, and every multiple vote by a party hack dilutes the voice of law-abiding Americans...”<sup>70</sup>

### Mandate:

the NVRA is “...an unfunded mandate.”<sup>71</sup>, “contains an unfunded mandate.”<sup>72</sup>, “...we are imposing tremendous mandates, with no money...”<sup>73</sup>, Representative Helen Bentley of Maryland said it

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<sup>62</sup> Representative Martin R. Hoke of Ohio. “Auto-Fraudo: An Open Invitation to Fraud”, *Congressional Record*, 103rd Congress, First Session, (February 4, 1993): p. H490-01.

<sup>63</sup> Representative Doug Bereuter of Nebraska. “Motor-Voter A Burden on State”, *Congressional Record*, 103rd Congress, First Session, (March 1, 1993): p. E464-03.

<sup>64</sup> Representative Thomas W. Ewing of Illinois. Vote Against the National Voter Registration Act , 103rd Congress, First Session, (February 4, 1993): p. H530-06.

<sup>65</sup> Ibid

<sup>66</sup> Representative Martin R. Hoke of Ohio. “Auto-Fraudo: An Open Invitation to Fraud”, *Congressional Record*, 103rd Congress, First Session, (February 4, 1993): p. H490-01.

<sup>67</sup> Representative Helen Delich Bentley of Maryland. “Vote Against H.R. 2, A Flawed Motor-Voter Bill”, *Congressional Record*, 103rd Congress, First Session, (February 4, 1993): p. H493-06.

<sup>68</sup> Representative Nick H. Smith of Michigan. “Voter Registration Act Passes Costs on to Others”, *Congressional Record*, 103rd Congress, First Session, (February 4, 1993): p. H491-02.

<sup>69</sup> Representative Helen Delich Bentley of Maryland. “Vote Against H.R. 2, A Flawed Motor-Voter Bill”, *Congressional Record*, 103rd Congress, First Session, (February 4, 1993): p. H493-06.

<sup>70</sup> Representative Martin R. Hoke of Ohio. “Auto-Fraudo: An Open Invitation to Fraud”, *Congressional Record*, 103rd Congress, First Session, (February 4, 1993): p. H490-01.

<sup>71</sup> Representative Jack Kingston of Georgia. “Floodwaters of Increased Regulation Descending”, *Congressional Record*, 103rd Congress, First Session, (February 4, 1993): p. H490-06.

<sup>72</sup> Representative Thomas W. Ewing of Illinois. “Vote Against the National Voter Registration Act,” *Congressional Record*, 103rd Congress, First Session, (February 4, 1993): p. H530-06.

“...requires the States to implement this costly mandate without Federal funding” (H493), Representative Gary Condit of California said, “...should not have to absorb another financial hit from the Federal Government...” (E1215) “... not taking the responsibility to fund the ideas we have”<sup>74</sup> (Robert ("Bob") Linlithgow Livingston Jr. of Louisiana), Representative Kingston said, “No more unfunded mandates. They are killing the States and the local governments.”<sup>75</sup>

NYS Code:

...the board of elections shall send notice by first class mail to each candidate, political party and independent body entitled to have had watchers present at the polls in any election district in such board's jurisdiction and to the State Board. Such notice shall state the time and place fixed for such random selection process. Such random selection process shall not occur until after election day. Each candidate, political party or independent body entitled to appoint watchers to attend at a polling place shall be entitled to appoint such number of watchers to observe the random selection process and the subsequent audit.<sup>76</sup>

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<sup>73</sup> Representative Nick H. Smith of Michigan. “Voter Registration Act Passes Costs on to Others”, *Congressional Record, 103rd Congress, First Session*, (February 4, 1993): p. H491-02.

<sup>74</sup> Representative Robert ("Bob") Linlithgow Livingston Jr. of Louisiana “Voter Registration Act Passes Costs on to Others”, *Congressional Record, 103rd Congress, First Session*, (February 4, 1993): p. H491-02.

<sup>75</sup> Representative Jack Kingston of Georgia. “Floodwaters of Increased Regulation Descending”, *Congressional Record, 103rd Congress, First Session*, (February 4, 1993): p. H490-06.

<sup>76</sup> Proposed Amendment to Subtitle V of Title 9 of the *Official Compilation of Codes, Rules and Regulations of the State of New York*, Repealing Part 6210.18 and Adding thereto a new Part, to be Part 6210.18 Three-Percent (3%) Audit <http://www.elections.state.ny.us/NYSBOE/Law/6210.18Regulations.pdf>