NOTES

ACORN AND THE 2008 PRESIDENTIAL ELECTION CAMPAIGN: PERSPECTIVES ON ALLEGED THIRD-PARTY VOTER-REGISTRATION FRAUD

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The individual act of registering to vote is a first and exceedingly important step toward the full realization of each citizen's participation in our democracy. A person registering to vote may elect to do so by mail-in form, contemporaneous to completing an application for a driver's license, or by interaction with a representative of any number of voter-mobilization organizations active in this country. This Note focuses on the latter method of registration by examining third-party voter-mobilization organizations, with specific reference to allegations of fraud perpetrated by one such group, the Association of Community Organizations for Reform Now (ACORN). While acknowledging genuine instances of fraud, the Note seeks equally to address the function of partisanship in animating allegations of fraud and the deleterious impact that politically motivated allegations have on the franchise and our elections.

Part I begins with a historical survey of the voter-registration requirement in the United States. The section also introduces comparatively recent federal legislative initiatives designed to facilitate registration while ensuring integrity in the process. In Part II, the basic phenomenon of voter-registration fraud receives attention, accompanied by an effort to distinguish true fraud from

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partisan allegations of fraud. Third-party voter-mobilization organizations are the subject of Part III, including a more-detailed profile of ACORN. This section outlines some of ACORN's challenged registration activities, homing in on the controversies that marked the 2008 Presidential campaign season. The section concludes with an overview of the litigation—inspired in large part by voter-registration fraud allegations aimed at ACORN—brought by the Ohio Republican Party against the Ohio Secretary of State. Finally, Part IV recommends solutions designed to reduce the risk of error, discourage fraud, and blunt partisan combativeness with respect to third-party voter-registration activities.

I. VOTER REGISTRATION: A BRIEF HISTORY

Voting in the United States consists of more than visiting the polls on Election Day and casting a ballot for the candidate of one's choice. As one scholar suggests, voting in the United States requires a would-be voter to make at least three different decisions.[1] "Aside from deciding to vote and deciding for whom to vote, the prospective voter usually must also have registered to vote ahead of time."[2] This latter registration requirement, while seemingly benign, has been the subject of much historical ideological wrangling; indeed, the debate over the registration requirement continues to rage and lies at the heart of the tension between the oft-competing priorities of enhancing access to and preserving the integrity of the ballot.[3]

The majority of states did not adopt formal registration procedures until the final decades of the nineteenth century.[4] According to one authority, "The rationale for requiring voters to register and have their eligibility certified in advance of elections was straightforward: it would help to eliminate fraud and

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1. DONALD GRIER STEPHENSON, JR., THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW 21 (2004).

2. *Id.*

3. *See* SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION (2006). Professor Overton observes:

> The conflicting values of voter integrity and voter access increasingly frame today's debates about democracy. . . . [Republicans] call for measures that enhance integrity in the electoral process, such as . . . rigorous requirements for registering to vote. . . . Democrats, on the other hand, often prioritize widespread access to voting. They claim that the call for increased voter integrity serves as a pretext to create barriers that disproportionately exclude people of color and less-affluent voters.

Id. at 150–51.

4. *See* STEPHENSON, *supra* note 1, at 21.

also bring an end to disruptive election-day conflicts at the polls."[5] This rationale, however, was hotly contested between early advocates and opponents of registration. Not surprisingly, support or opposition typically fell along partisan lines, as the following account illustrates.

> In New Jersey, a state with a long and colorful history of electoral disputes, Republicans instituted registration requirements in 1866 and 1867. All prospective voters had to register in person on the Thursday before each general election: anyone could challenge the claims of a potential registrant, and no one was permitted to vote if his name was not on the register. In 1868, the Democrats gained control of the state government and repealed the registration laws, stating that they penalized poor men who could not afford to take time off from their jobs to register. In 1870, the Republicans returned to power and reintroduced registration . . . .[6]

This ideological tug-of-war inspired significant litigation, with most "[s]tate courts sanction[ing] the creation of registration systems, as long as they did not overtly narrow the constitutional qualifications for voting."[7] Subsequent twentieth-century Supreme Court rulings affirmed the basic constitutionality of the registration requirement.[8]

Voter registration is a function over which state legislatures traditionally have enjoyed primary jurisdiction.[9] Nevertheless, in the last fifty years, three key pieces of federal legislation have impacted the institution of voter registration in this country. In 1965, the Voting Rights Act (VRA),[10] a measure designed to "eliminate barriers to registration and participation among southern blacks," became law.[11] The Act empowered the Attorney General to intervene in designated southern states in order to halt disenfranchisement tactics, including suspending literacy tests.[12] The VRA was reauthorized as recently as 2006.[13]

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5. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 152.

6. *Id.*

7. *Id.* at 158.

8. *Id.* at 230.

9. *See generally* 25 AM. JUR. 2D *Elections* § 179 (2009) (discussing state legislatures' "power to enact reasonable provisions for the purpose of requiring persons who are electors and who desire to vote to show that they have the necessary qualifications, as by requiring registration . . . as a condition precedent to the right to exercise the privilege of voting.").

10. Voting Rights Act, 42 U.S.C. §§ 1973–1973aa-6 (2006).

11. Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 464 (2008).

12. *Id.* at 463.

13. *Id.* at 465. *See also* Civilrights.org,Voting Rights Act, http://www.civilrights.org/voting-rights/vra/ (last visited Sept. 5, 2009) ("The 2006 reauthorization renewed several key protections,

In the late 1980s, prompted by concerns over voter apathy, Congress again considered legislation designed to encourage voter registration and participation in elections.[14] During this period, various federal registration bills were advanced, only to succumb to filibuster on the Senate floor.[15] Finally, in 1993, Congress passed, and President Clinton signed into law, the National Voter Registration Act (NVRA).[16] NVRA required states to implement three procedures for registration in federal elections: (1) "by application made simultaneously with an application for a motor vehicle driver's license,"[17] (2) "by mail application,"[18] and (3) "by application in person" at designated "voter registration agencies," including "all offices in the State that provide public assistance."[19]

NVRA has had its share of both cheerleaders and critics. Supporters commend the legislation for establishing "more convenient voter-registration requirements" and increasing overall access to the ballot.[20] They dismiss charges that liberalized registration procedures beget fraud or the potential for fraud.[21] Nevertheless, opponents insist the law works to undermine the legitimacy of elections: "The lax standards for registration encouraged by [NVRA] have left the voter rolls in shambles in many states . . . . [T]he uncertainty surrounding the rolls breeds mistrust and can call the integrity of the whole system into question."[22]

The final piece of federal election administration legislation came in the wake of the debacle that was Election Day 2000. In October 2002, President George W. Bush signed into law the Help America Vote Act (HAVA).[23]

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providing for language assistance, Election Day monitors, and Justice Department pre-approval of voting changes. The protections are currently set to expire in 2031.").

14. *See* STEPHENSON, *supra* note 1, at 278.

15. *See* KEYSSAR, *supra* note 5, at 314. Keyssar relates that most of these early bills failed due to a coalition of Republicans and conservative Democrats who feared that easing registration requirements would invite fraud. *Id.* at 312–13.

16. National Voter Registration Act, 42 U.S.C. §§ 1973gg–1973gg-10 (2006). The law, which took effect on January 1, 1995, is more popularly referred to as the "Motor Voter" law.

17. 42 U.S.C. § 1973gg-2(a)(1).

18. 42 U.S.C. § 1973gg-2(a)(2).

19. 42 U.S.C. §§ 1973gg-2(a)(3) and 1973gg-5(a), respectively.

20. *See* OVERTON, *supra* note 3, at 128.

21. *See* LORRAINE C. MINNITE, THE POLITICS OF VOTER FRAUD 15 (2007), *available at* http://www.advancementproject.org/pdfs/alerts/PoliticsofVoterFraud.pdf.

22. JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY 25 (2004). Without mincing words, Fund exclaims, "Perhaps no piece of legislation in the last generation better captures the 'incentivizing' of fraud and the clash of conflicting visions about the priorities of our election system than the 1993 National Voter Registration Act." *Id.* at 23.

23. Help America Vote Act, 42 U.S.C. §§ 15301–15545 (2006).

> HAVA's mandates focused on four major requirements: (1) statewide computerized voter lists; (2) voter ID for individuals who register by mail but do not provide it when registering; (3) provisional ballots for voters whose names are missing from the registration rolls on Election Day; and (4) measures to make voting more accessible for voters with disabilities.[24]

Among the requirements imposed under HAVA, the most far-reaching with regard to voter registration is that states implement and maintain "a single, uniform, official, centralized, interactive computerized statewide voter registration list . . . that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State . . . ."[25] Finally, "HAVA created a new federal agency, the U.S. Election Assistance Commission (EAC), to oversee [distribution of] funding to states and to provide guidance on the best methods for states to implement . . . HAVA requirements."[26]

Similar to NVRA, HAVA has its boosters and detractors. Supporters hail the legislation as a step toward reform, applauding in particular the requirement that first-time voters who registered through the mail furnish some valid identification.[27] Opponents portray the law as embodying "restrictive interpretations of the rules governing voter qualifications."[28] Adopting a perspective somewhere in the middle, one commentator observed: "[HAVA] . . . enhances access by providing provisional ballots to registered voters whose names do not appear on the rolls. But the law also appease[s] the integrity hawks by requiring all first-time voters who registered by mail to provide identification when they arrive at the polls."[29]

As the foregoing account demonstrates, the matter of voter registration has consistently incited controversy. From the origins of the requirement to recent legislation refining registration procedures, two conflicting points of view have emerged. As the next section explains, much of the ideological

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24. BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 2 (2005), http://www1.american.edu/ia/cfer/report/full_report.pdf [hereinafter CFER REPORT].

25. *Supra* note 23, at § 15483. *See also* STEPHENSON, *supra* note 1, at 288.

26. Publius, *Securing the Integrity of American Elections: The Need for Change*, 9 TEX. REV. L. & POL. 277, 281 (2005). *See supra* note 23, at §§ 15322 and 15325, respectively (defining the scope of the EAC's "duties" and "powers").

27. *See* FUND, *supra* note 22, at 46. Fund and others of a like mind would have all voters show a photo ID at the polls, "thereby treating all voters equally and improving ballot security." *Id.*

28. MINNITE, *supra* note 21, at 16.

29. OVERTON, *supra* note 3, at 151.

disparity between advocates of ballot access and those of ballot integrity is fueled by the specter of fraud.

II. VOTER-REGISTRATION FRAUD: APPEARANCES OF THE REAL THING

Fraud in the context of elections is conduct that corrupts the process by which ballots are obtained, marked or tabulated; the process by which election results are canvassed and certified; or the process by which voters are registered.[30] While some scholars take pains to distinguish "election fraud" from "voter fraud," it is generally agreed that "corruption of the electoral process and corruption committed by elected or election officials, candidates, party organizations, advocacy groups or campaign workers fall under the wider definition of *election* fraud."[31]

Like so much else, "[f]raud has become a partisan issue."[32] In fact, even the question of whether most allegations of election fraud are genuine or fabricated has been thoroughly politicized. For instance, conservative *Wall Street Journal* columnist John Fund asserts, "Election fraud, whether it's phony voter registrations, illegal absentee ballots, shady recounts or old-fashioned ballot-box stuffing, can be found in every part of the United States . . . ."[33] Conversely, Barnard College Professor Lorraine Minnite, in a report commissioned by the left-leaning voter-mobilization organization Project Vote, counters, "The claim that voter fraud threatens the integrity of American elections is itself a fraud."[34] Another commentator—an ideological kindred spirit to Minnite—contends that allegations of "voter fraud [are] used as a pretext for a broader agenda to disenfranchise Americans and rig elections."[35]

Whether or not the numerous allegations of fraud that surface each election cycle actually prove to be true, it is difficult to deny that the

30. *See* CRAIG C. DONSANTO & NANCY L. SIMMONS, FEDERAL PROSECUTION OF ELECTION OFFENSES 2 (7th ed. 2007), *available at* http://www.usdoj.gov/criminal/pin/docs/electbook-rvs0807.pdf.

31. MINNITE, *supra* note 21, at 6.

32. David Schultz, *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 486 (2008).

33. FUND, *supra* note 22, at 5. Fund makes the rather hyperbolic claim that the United States has "a haphazard, fraud-prone election system befitting an emerging Third World country rather than the world's leading democracy." *Id.* Not to be outdone, Senate Republicans issued a report in 2005 claiming that "voter fraud continues to plague our nation's federal elections, diluting and canceling out the lawful votes of the *vast majority of Americans*." U.S. SENATE REPUBLICAN POLICY COMMITTEE, PUTTING AN END TO VOTER FRAUD 1 (2005) (emphasis added), *available at* http://rpc.senate.gov/public/_files/Feb1504VoterFraudSD.pdf.

34. MINNITE, *supra* note 21, at 5.

35. Schultz, *supra* note 32, at 486.

appearance alone of fraud threatens to undermine the franchise and the integrity of our elections by stoking partisan fires and encouraging the perception of illegitimacy. Specifically, in recent elections, allegations of voter-registration fraud have received abundant media attention and have been leveraged by candidates from both major political parties accusing their opponents of "stealing" elections. In his book on voter fraud, Fund offers examples of outrageous and much-publicized fraudulent registrations: an eight-year-old girl in Broward County, Florida; an elephant at the San Diego Zoo; a Springer Spaniel registered to vote in St. Louis for eight years; six dead people registered and on the rolls in Rapid City, South Dakota.[36]

Fund's ideological foil, law professor and author Spencer Overton, characterizes many of the accounts of fraudulent voter registration as "anecdot[al]" and calls for "comprehensive research" into and documentation of such accounts.[37] Overton's dismissive attitude toward the more eyebrow-raising allegations finds some support in a final report issued by the 2005 Carter-Baker Commission, a bipartisan initiative tasked with proposing federal election reforms. The Commission found that "[w]hile media attention focused on reports of fraudulent voter registrations with the names of cartoon characters and dead people," only 19 people were prosecuted in fact for voter-registration fraud stemming from the elections in 2004.[38] If one consensus has emerged, however, it is that the uptick in allegations—genuine and spurious—bears some correlation to the growth of third-party voter-mobilization organizations and their voter-registration campaigns.[39]

III. THIRD-PARTY VOTER-MOBILIZATION ORGANIZATIONS

Voter registration in this country is regularly conducted by overtly partisan[40] organizations such as the Democratic and Republican National

36. FUND, *supra* note 22, at 24, 65, and 80.

37. OVERTON, *supra* note 3, at 166.

38. CFER REPORT, *supra* note 24, at 46. The low figure is not for want of resources and enforcement capabilities. Indeed, the Report notes the exhaustive efforts of ten states in investigating voter-registration fraud accusations between October 2002 and July 2005. *Id.*

39. *Id.*

40. An undisputed authority on political jargon offers the following competing views on the term (and implications) of "partisan": "[B]asic to the two-party system, the adversary mode of arriving at clean, effective government; [conversely,] introducing unnecessary strife, placing party advantage above the public interest." WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 518 (Oxford University Press 2008) (1968).

Committees. However, it is the efforts of purportedly nonpartisan[41] (if admittedly interested) third-party organizations in registering would-be voters that is of particular concern to this Note. "Political party and nonpartisan voter registration drives generally contribute to the electoral process by generating interest in upcoming elections and expanding participation."[42] Competitive and contested elections increase incentives to recruit new voters. There has been an "upsurge in third-party voter-registration drive activity since the disputed 2000 presidential election," with nearly 12 million new voters on the rolls by 2004 as a result of such drives.[43]

While the "voter registration drives conducted by the[se] parties . . . account[] for a substantial portion of voters newly registering and updating their registration information,"[44] they also account for error as well as alleged fraud. Third-party organizations coordinating registration drives make mistakes. For example, these organizations may be faulted for failing to implement adequate quality control measures, inadvertently producing duplicate or improperly completed registration cards, and sometimes neglecting to submit registration forms in a timely manner.[45]

Naturally, of greater concern than inadvertent error are incidents of fraud. The Carter-Baker Commission addressed the issue of "abuse" in the context of third-party voter-registration activities. The Commission highlighted "reports in 2004 that some party activists failed to deliver voter registration forms of citizens who expressed preference for the opposing party."[46] As an illustration of this phenomenon, an activist with Voters Outreach of America, a third-party voter-mobilization organization "hired" by the Republican National Committee to register voters in Nevada, West Virginia, and Colorado, confessed to authorities that he withheld or discarded forms indicating Democrat under "choice of party."[47]

The Carter-Baker Commission further noted that the submission of dubious registrations by third-party organizations may be attributable to the

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41. *Id.* at 476. (defining "nonpartisan" as "[w]ithout apparent thought of party politics. In current usage . . . nonpartisan means areas of civic or patriotic interest where party or ideological difference never arises.").

42. CFER REPORT, *supra* note 24, at 34.

43. MINNITE, *supra* note 21, at 18. Minnite observes: "The number of low income drive registrants is three times the number of low income voters registering at public assistance agencies mandated by [NVRA] to provide registration opportunities." *Id.* at 19.

44. Tokaji, *supra* note 11, at 485.

45. *See id.* at 475. *See also* MINNITE, *supra* note 21, at 21.

46. CFER REPORT, *supra* note 24, at 34.

47. *See* Lillie Coney, *A Call for Election Reform*, 7 J.L. & SOC. CHALLENGES 183, 195 (2005).

fact that many activists gathering the registrations were "paid by the piece."[48] For example:

> There were . . . reports [in 2004] of groups that paid for each completed voter registration application, resulting in bogus registrations by individuals seeking compensation from the sponsors of the registration effort. In Colorado, this practice prompted the prosecution of a former employee of a voter registration drive. The employee was paid $3 for every Democrat or unaffiliated voter he registered, and was found to have forged nearly fifty voter registration cards.[49]

Many commentators are skeptical, if not scathingly critical, of paying activists "by the piece" rather than by the hour, insisting the practice incentivizes fraud.[50] There are, however, others who counter that the practice likely begets little actual fraud and hardly can be credited with skewing election outcomes.[51]

So who are the variously praised and pilloried third-party voter-mobilization organizations playing significant roles in registering voters in recent election cycles? Some are prominent with familiar names, while others fall below the radar of all but the most informed voter or "political junkie." Third-party special interest groups registering voters include the established, widely recognized League of Conservation Voters and the National Rifle Association. Groups whose *raison d'être* is registering voters and engaging in related "get out the vote" (GOTV) activities include the flourishing Rock the Vote campaign,[52] America Votes,[53] the Campaign for Working Families,[54]

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48. CFER REPORT, *supra* note 24, at 46.

49. Coney, *supra* note 47, at 195.

50. *See generally* FUND, *supra* note 22.

51. *See generally* OVERTON, *supra* note 3. "[V]oter registration workers might earn $2 for every registration collected, and a few bad apples might pad their wallets by inventing registrations for 'Mary Poppins' and other fictional persons . . . . Studies might find, however, that few of these false registrations result in people who show up at the polls posing as 'Mary Poppins' to cast a fraudulent vote . . . ." *Id.* at 166.

52. *See* Rock the Vote, http://www.rockthevote.com (last visited Sept. 5, 2009) ("Rock the Vote uses music, popular culture, and new technologies to engage and incite young people to register and vote in every election."). As this Note was going to press, the Rock the Vote organization was throwing its support behind the Obama Administration's health care reform efforts with a "We Demand Health Care" pledge initiative.

53. *See* America Votes, http://www.americavotes.org (last visited Sept. 5, 2009) (America Votes is "a coalition of over 40 of the most powerful national groups working together to increase progressive voter registration and turnout.").

54. *See* Campaign for Working Families, http://www.cwfpac.com/about.php (last visited Sept. 5, 2009) ("[Campaign for Working Families] is a non-partisan political action committee (PAC) dedicated to electing pro-family, pro-life and pro-free enterprise candidates to public offices."). As this Note was going to press (again, was going to? Should it be, *is* going to?), the Campaign was prevailing on its

as well as the seemingly *ad hoc* operation that is Voters Outreach of America.[55] The recent 2008 Presidential election brought particular notoriety to one group, the Association of Community Organizations for Reform Now, or "ACORN."

A. From Buckeyes to Acorns

ACORN self-identifies as a "non-profit, non-partisan" social justice organization; "ACORN is the nation's largest community organization of low- and moderate-income families, working together for social justice and stronger communities."[56] The group's goals are noble:

> ACORN members across the country work to raise the minimum wage or enact living wage policies; eliminate predatory financial practices by mortgage lenders, payday lenders, and tax preparation companies; win the development of affordable housing and community benefits agreements; improve the quality of and funding for urban public schools; rebuild New Orleans; and pass a federal and state ACORN Working Families Agenda, including paid sick leave for all full time workers.[57]

Among its initiatives, each election cycle, ACORN ratchets up its "voter engagement" activities, including registering to vote record numbers of "African Americans, Latinos, low-income citizens, and youth."[58] The organization boasted submission of "more than 1.68 million applications to register to vote [collected] in voter-registration drives leading up to the 2004 and 2006 elections," and an unprecedented submission of 1.3 million voter-registration applications in the period leading up to the 2008 Presidential election.[59]

Despite its ambitious registration drives, or, rather because of them, ACORN is no stranger to controversy. In the fall of 2008, as the Presidential campaign was heating up, so, too, was the rhetoric leveled at ACORN. In the first half of October, Senator John McCain's campaign flatly accused ACORN of committing "voter fraud by intentionally submitting invalid registration

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members to "tell [their] representative and senators to stop Obama's socialism and oppose ObamaCare."

55. *See* SourceWatch's Voters Outreach of America, http://www.sourcewatch.org/index.php?title=Voters_Outreach_of_America (last visited Sept. 5, 2009).

56. *See* ACORN, http://www.acorn.org (last visited Sept. 5, 2009).

57. *See* Who is ACORN?, http://www.acorn.org/index.php?id=12342 (last visited Sept. 27, 2009).

58. *See* ACORN: Voter Engagement Campaign, http://www.acorn.org/index.php?id=16845 (last visited Sept. 27, 2009).

59. *Id.*

forms . . . ."[60] Senator McCain explicitly sought to link his rival, then-Senator Barack Obama, to the organization that, by that point, had become a favorite "punching bag" of right-wing political operatives and media commentators. At an October 15th debate between the candidates, Senator McCain urged that, "We need to know the full extent of Senator Obama's relationship with ACORN, who is now on the verge of maybe perpetrating one of the greatest frauds in voter history in this country, maybe destroying the fabric of democracy."[61]

While Senator McCain may be faulted for exaggerating the scale of any alleged fraud on the part of ACORN, the group was indeed the target of multiple investigations in the weeks and months prior to the election. *The Wall Street Journal* reported, "State and federal authorities have opened investigations [into ACORN's voter-registration activities] in about a dozen states . . . ."[62] In one episode, Nevada's Democratic Secretary of State Ross Miller ordered a raid on ACORN's Las Vegas headquarters following accusations that the organization had submitted voter-registration forms with false and duplicate names.[63] It was in Ohio, though, that ACORN found itself square in the crosshairs.

ACORN came under investigation in various counties throughout Ohio as early as August 2008. In a much-publicized admission, ACORN acknowledged to Cuyahoga County officials that, despite its own internal screening,[64] it could not altogether eliminate the potential for fraud from its voter-registration operations.[65] This admission was enough to prompt

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60. Editorial, *The ACORN Story*, N.Y. TIMES, Oct. 17, 2008, at A32.

61. Michael Falcone, *Mortgages, Health Care, Free Trade and Truth*, N.Y. TIMES, Oct. 16, 2008, at A26. Senator McCain's campaign manager charged that Senator Obama had once "worked as ACORN's lawyer," conducted training events for its leaders, and made monetary contributions to Citizens Services, Inc., an ACORN affiliate. Senator Obama's campaign conceded he had represented the organization in a 1995 lawsuit that saw ACORN allied with the Justice Department. The campaign noted that the training events at issue consisted of just two hours of work, and that the February 2008 payment to Citizens Services had been disclosed in official campaign filings. Stephanie Strom, *On Obama, ACORN and Voter Registration*, N.Y. TIMES, Oct. 11, 2008, at A13.

62. Evan Perez, *Probes Focus on Advocacy Group's Voter Registration*, WALL ST. J., Oct. 15, 2008, at A13.

63. *Nevada: Group's Office Raided in Voter Fraud Case*, N.Y. TIMES, Oct. 8, 2008, at A19. Nevada's Clark County registrar of voters, Larry Lomax, reported that his workers identified "hundreds of potentially fraudulent registrations." Michael Falcone & Michael Moss, *Group's Tally of New Registered Voters was Vastly Overstated*, N.Y. TIMES, Oct. 24, 2008, at A1.

64. *See* Perez, *supra* note 62 (referencing ACORN's own anti-fraud program, "requiring all voter applications be reviewed by supervisors and then verified by call-center employees who make as many as three attempts to reach each voter signed up by a canvasser.").

65. Joe Guillen, *ACORN: Fraud is Possible, Voter-Registration Group Cites Lack of Resources*,

Republican Vice-presidential candidate Sarah Palin to rally campaign foot soldiers in Cincinnati by declaring, "You won't let them turn the Buckeye State into the ACORN State."[66] As the drama played out in the media and public forum, the Ohio Republican Party—provoked in considerable part by ACORN's allegedly fraudulent voter-registration practices—turned to the courts.

B. The Ohio GOP: Third-Party Crashers

The Ohio Republican Party brought an action in the United States District Court for the Southern District of Ohio, seeking a temporary restraining order mandating that Ohio Secretary of State Jennifer Brunner comply with HAVA's voter-registration verification requirements.[67] Specifically, the GOP alleged Secretary Brunner "failed to establish procedures for . . . [the] matching and verification . . . [required] at the moment of registration . . . [as well as the] matching and verification . . . [required to] occur[] before the absentee ballots of new voters are counted."[68] Secretary Brunner's initial challenges to the court's jurisdiction and plaintiff's standing failed, and the court addressed the merits of the claim with particular respect to counting the absentee ballots of new registrants.[69]

The court found that "HAVA requires matching for the purpose of verifying the identity and eligibility of [a] voter before counting that person's vote."[70] The court noted Brunner's concession that county boards of elections could not effectively isolate "mismatches," or instances in which registrants supplied applications bearing personal data that yielded a mismatch between information found in the Statewide Voter Registration Database (SWVRD) and Ohio's Bureau of Motor Vehicles' database.[71] As such, the verity of registrations remained in doubt; if registrations could not be verified, the very qualifications of new voters thus remained in doubt.

As the court saw it, plaintiffs, "represent[ing] millions of qualified electors across the state of Ohio," could suffer irreparable harm if potentially

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CLEV. PLAIN DEALER, Oct. 8, 2008, at B1. ACORN had turned in at least 65,000 registration cards to the Cuyahoga County Board of Elections throughout 2008. *Id.*

66. Amy Merrick, *Court Ruling Stokes Voter-Fraud Fight*, WALL ST. J., Oct. 18, 2008, at A1.

67. Ohio Republican Party v. Brunner, 582 F. Supp. 2d 957, 961 (S.D. Ohio 2008).

68. *Id.* at 962.

69. *Id.*

70. *Id.* at 963.

71. *Id.* at 963–64.

unqualified voters were permitted to cast votes.[72] The court then offered: "A specific example of the irreparable harm Plaintiffs will suffer if this Court does not act expeditiously involves the actions of [the] national voter-registration group, [ACORN]."[73] The opinion proceeded to recite some of the allegations against the organization reported in the *Cleveland Plain Dealer* and the *Columbus Dispatch*. In the end, the court indeed acted "expeditiously" and granted the temporary restraining order, directing the Secretary of State to ensure full compliance with HAVA's voter-registration verification procedures.[74]

The order of the District Court was vacated by a panel of the United States Court of Appeals for the Sixth Circuit the same day it was granted. Just four days later, the same court convened *en banc* and reinstated the order requiring Secretary Brunner to provide local election officials with meaningful access to registration mismatches identified in Ohio's SWVRD.[75] In the last phase of the litigation, the Secretary filed an application to stay the temporary restraining order with Justice Stevens as Circuit Justice for the Sixth Circuit; the Justice referred the matter to the United States Supreme Court.[76] In a unanimous decision, the Court declared that the Ohio Republican Party was "not sufficiently likely to prevail on the question whether Congress has authorized the District Court to enforce [HAVA's] Section 303 [relating to the maintenance of SWVRDs] in an action brought by a private litigant to justify issuance of a [temporary restraining order]."[77] Robert Bennett, the disgruntled Ohio Republican Party Chairman, criticized the Court for disposing of the case on a "technicality" rather than its merits.[78]

In December 2008, ACORN responded to the barrage of allegations and litigation that marked the election season.[79] The organization declared its voter-registration efforts a success despite "partisan attacks" and "inflammatory media reports."[80] ACORN's Executive Director outlined the organization's quality-control system:

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72. *Id.* at 964–65.
73. *Id.* at 965.
74. *Id.* at 966–67.
75. *See* Ohio Republican Party v. Brunner, 544 F.3d 711 (6th Cir. 2008).
76. *See* Brunner v. Ohio Republican Party, 129 S. Ct. 5 (2008).
77. *Id.* at 6. Section 303 addresses computerized statewide voter registration list requirements as well as requirements for voters who register by mail. 42 U.S.C. § 15483 (2006).
78. Merrick, *supra* note 66.
79. *See* STEVE KEST, ACORN'S VOTER REGISTRATION DRIVE: MYTHS AND REALITIES (2008), http://www.acorn.org/fileadmin/Vote/ACORNVoterRegistration.Myths_Facts.8pgs.pdf.
80. *Id.* at 1.

> Every single application collected was examined by independent staff for completeness and tagged and bundled so we could tell which crew member who [sic] gathered it. Registrations were entered into a database by an outside vendor, and call centers made several attempts to call each and every registrant to verify information. Where we were able to do so, ACORN worked to "cure" incomplete registrations by contacting voters to get information about missing or inaccurate entries . . . . ACORN turned applications in to [sic] election officials in three stacks with separate detailed cover sheets: those that ACORN believed were complete and ready for processing, those that required additional information and those that ACORN [deemed] . . . suspicious and should be carefully reviewed by election officials in order to verify the authenticity of the information on the application.[81]

The report concluded that trumped-up charges of voter-registration fraud were the result of a concerted effort by partisans to discredit ACORN and intimidate would-be voters.[82]

If one theme emerges from the foregoing narrative, it is that partisanship permeates, nay, poisons the dialogue surrounding the voter-registration efforts of third-party voter-mobilization organizations. Furthermore , there is a strong undercurrent of partisanship beneath the surface of many allegations of voter-registration fraud. ACORN and its counterparts, while ostensibly encouraging participation in the democratic process, are thus time-and-again embroiled in controversy and maligned by parties hurling these accusations of fraud. The animus is partisan; the allegations are partisan. Frankly, the motives of parties on both sides of the debate are partisan. In point-of-fact, ACORN, Voters Outreach of America, and organizations such as the NRA and the NAACP are, despite claims to the contrary, interested, partisan actors investing capital in our democracy inasmuch as they expect a return on that investment. The remainder of this Note is devoted to proposing solutions designed to reduce instances (actual or apparent) of voter-registration fraud attributed to third-party organizations.

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81. *Id.* at 2. The report reminds readers that voter-registration groups are "required either by state law, local election officials, or good legal judgment," to turn over every application to election officials *even* if the application is incomplete or manifestly fraudulent. *Id.* at 3. In the first round of litigation in Ohio, the District Court noted: "Regardless of what ACORN is doing internally, the Secretary of State stated that the group cannot withhold registration cards. So, all the cards, including those admitted to be fraudulent, are given to the county Boards of Elections . . . ." Ohio Republican Party v. Brunner, 582 F. Supp. 2d 957, 965 (S.D. Ohio 2008).

82. KEST, *supra* note 79, at 6.

IV. PROPOSED SOLUTIONS TO VOTER-REGISTRATION FRAUD

"Accomplishing voter-registration reform is fundamental to the improvement of the entire election system."[83] Reforms could fall along two lines. First, reforms might consist of a more dramatic and complete transformation of our voter-registration procedures, such as adopting election-day registration or instituting some variant of automatic, mandatory, or universal registration. Second, reforms might be more narrowly tailored to address specifically the issue highlighted herein, that is, the "problems" associated with the voter-registration efforts of third-party voter-mobilization organizations.

A. Remaking Voter Registration: Improbabilities and Impediments

Elected officials, academics, and even pundits periodically float proposals for overhauling this country's system of voter registration. To varying degrees, these proposals meet with resistance and are unlikely to take hold in the near future. One such proposal involves permitting "walk-up registration,"[84] also known as "election-day" or "same-day" registration.[85] At present, nine states allow voters to register and to vote at a polling station on Election Day.[86] The obvious advantage of election-day registration is that it eliminates registration

83. Coney, *supra* note 47, at 201.

84. *See* STEPHENSON, *supra* note 1, at 277.

85. *See* FUND, *supra* note 22, at 139.

86. Minnesota, dubbed an "election-day registration pioneer," conducts the process in accordance with MINN. STAT. § 201.061 Subdivision 3 "Election Day Registration." Minnesota's process has been summarized nicely by the Pew Center:

> When voters enter a polling place, they are directed either to a table for those who need to register to vote or a table for those who are pre-registered. A registration judge conducts [election-day registration]. . . .
>
> The judge first checks if the voter is in the correct precinct by examining a precinct map. . . . If not, they are re-directed.
>
> If in the correct precinct, the voter completes a new voter-registration card and provides identification. Acceptable forms include a Minnesota driver's license with a current address; a notice of late registration; a U.S. passport [or] a U.S. military photo ID card with a utility bill; an oath of a registered voter in a precinct (also known as vouching); or a student ID, registration, or fee statement with a current address.
>
> When the form is completed and the voter's identity has been verified, they are then asked to add their name, address, date of birth and signature to a blank line in the poll book. After this the voter is given a receipt and then directed to the ballot judge.

PEW CENTER ON THE STATES, ELECTION-DAY REGISTRATION: A CASE STUDY 7 (2007), *available at* http://www.pewcenteronthestates.org/uploadedFiles/Election Reform Briefing 16; Election-Day Registration A Case Study.pdf.

deadlines and any other practical impediments that accompany pre-registering. Election-day registration enhances access to the ballot of "those who become engaged in politics during the period just before Election Day."[87]

It might be tempting to posit that election-day registration would minimize voter-registration fraud to the extent that it would render the registration drives spearheaded by third-party groups almost unnecessary. If any citizen could register at his or her polling place on Election Day, organizations such as ACORN would be less inclined to solicit registrations on the street or from door-to-door. ACORN and similar groups could focus more of their energy and resources on GOTV activities such as calling would-be voters, providing transportation to the polls, and otherwise encouraging participation.

Nevertheless, election-day registration may beget more problems than it purports to solve. The notion that an unregistered, would-be voter, with nothing more than a utility bill or student ID in-hand, could verify his or her identity and eligibility to vote on *that* day at *that* polling station hardly taxes the imagination to conjure up opportunities for fraud. Much to the point, the *Wall Street Journal*'s John Fund characterizes election-day registration as a "gimmick"[88] and "not a reform at all but an added opportunity for mischief."[89] Gimmick or not, it is certain that time-consuming, labor-intensive, and costly safeguards would have to be in place to ferret out fraud.

Besides election-day registration, other recommendations include establishing either automatic or mandatory registration. An example of the former would be "register[ing] high school students automatically at the time of their graduation."[90] The notion of automatic registration is not particularly controversial; however, neither is it gaining much traction. Mandatory registration—to say nothing of mandatory voting—on the other hand, is typically resisted on the grounds that it is "undemocratic" or "un-American."[91] Barnard Professor Lorraine Minnite observes: "If voter registration were mandatory like paying taxes, voter-registration drives would not be necessary."[92] Be that as it may, it is implausible that Americans would be willing to sacrifice the autonomy and liberty that accompany the choice to

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87. Tokaji, *supra* note 11, at 499.

88. FUND, *supra* note 22, at 141.

89. *Id.* at 139. Fund recounts anecdotes about "vagrants" in Wisconsin and illegal aliens in other states registering and voting on the spot on Election Day. *Id.* at 140–41.

90. Tokaji, *supra* note 11, at 499.

91. *Id.* at 505 (noting that "mandatory registration and voting undoubtedly seem antithetical to core values of our democracy.").

92. MINNITE, *supra* note 21, at 19.

register and vote simply to eradicate the occasional fraud perpetrated at the hands of third-party voter-mobilization employees or volunteers.

Finally, there are frequent and vocal calls for universal voter registration. Universal registration would place the entire obligation for registering voters on the government. Automatic registration would be one component of universal registration, but the government would need to expand the scope of registration to reach all eligible citizens, not simply those graduating high school or renewing a driver's license. Universal registration is distinguishable from mandatory registration insofar as it would not likewise mandate voting. The foremost benefit of universal registration is that it facilitates participation by essentially conferring registered status on all citizens fit to vote. "Shifting the burden of registering voters to the government could also reduce or eliminate our dependence on private groups like ACORN and the League of Women voters . . . ."[93] True enough, but while universal registration is the practice in a number of European democracies,[94] there is no present momentum in either state legislatures or the Congress for putting into force such a program in the United States. This is not surprising, for the very idea of universal registration seems contrary to an American ethos predicated on individualism, liberty of choice, and a healthy skepticism of government.

B. Sensible, Effective Reforms Aimed at Third-Party Organizations

Third-party voter-mobilization organizations are now a permanent fixture in American politics and wield significant influence during elections. In principle, these groups perform a service to our society and contribute to our vibrant democracy. In practice, most groups live up to that principle and the lion's share of their efforts conform to a high standard of integrity. Nevertheless, there have been and may well continue to be instances of fraudulent behavior—including in the area of voter registration—in

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93. Tokaji, *supra* note 11, at 503. Overton agrees:

> The best way to curb fraud by voter-registration and voter-mobilization groups is for the United States to follow many other democracies and adopt universal voter registration. Rather than trying to distinguish fraudulent voter-registration groups from legitimate ones with excessive regulation, states should assume responsibility for registering all eligible individuals to vote.

OVERTON, *supra* note 3, at 166.

94. *See* EVE ROBERT, UNIVERSAL VOTER REGISTRATION: AN INTERNATIONAL PERSPECTIVE (2009), *available at* http://www.fairvote.org/rtv/Universal Voter Registration-4-21-09.pdf. The report "explores how other major well-established democracies (Canada, Australia, Sweden, Italy, New Zealand, and others) concretely manage to build comprehensive, inclusive, [and] accurate voting rolls" through their universal voter-registration programs. *Id.* at 1.

furtherance of partisan agendas. Perhaps more damaging than the sporadic occurrence of fraud is the pervasive perception, embodied in the words of Republican Presidential candidate John McCain, that groups such as ACORN are "maybe destroying the fabric of democracy."[95] This Note recommends sensible and effective regulations aimed at preventing error, discouraging fraud, and curbing the partisan rancor surrounding the activities of third-party voter-mobilization organizations.

Professor Overton opines, "[W]e need to carefully craft regulations to address suspected fraud by voter-registration and voter-mobilization groups."[96] Regulation of these organizations could be effectuated by states at the local level. As to the matter of state regulatory controls, HAVA itself declares, "The requirements established by this title are minimum requirements and nothing in this title shall be construed to prevent a State from establishing . . . administration requirements that are more strict than the requirements established under this title . . . ."[97] Importantly, though, states must be vigilant and guard against passing laws unduly infringing upon the exercise of otherwise constitutionally guaranteed rights.[98]

Arguably, states should consider legislation demanding increased transparency through reporting and auditing mechanisms. Under such a regime, third-party groups (as well as political parties) would be required to furnish detailed information to county boards of election regarding employees and volunteers, the times and places of voter-registration drives, and the quantum of registration forms requested and completed during drives. States might require third-party voter-mobilization employees or volunteers to participate in trainings designed to equip such persons with techniques for avoiding error and to counsel the same against commission of fraud. States

95. Falcone, *supra* note 61.

96. OVERTON, *supra* note 3, at 165. He is quick to follow with the caveat that complex regulations can be wielded as "political weapons to decrease grassroots activity and ultimately dampen voter participation." *Id.*

97. Help America Vote Act, 42 U.S.C. § 15484 (2006). "This, of course, is true only to the extent the more stringent state requiremens are neither 'inconsistent' with HAVA-ordained requirements nor subversive of other federal law." *Id.*

98. *See* League of Women Voters of Fla. v. Cobb, 447 F. Supp. 2d 1314 (S.D. Fla. 2006). The court held Florida's Third-Party Voter Registration Law "chilled" voter-mobilization groups' First Amendment free speech and association rights. The law regulated the handling and submission of registration forms and imposed oppressive fines for tardy submission. What is more, the law was not applied equally and fairly insofar as it pertained only to the voter-registration activities of third-party organizations and *not* political parties. *Id.* at 1335. The court enjoined enforcement of the problematic provisions. *Id.* at 1341. The Florida legislature subsequently reformed the law to soften fines and eliminate any distinction between third-party organizations and political parties. *See* Tokaji, *supra* note 11, at 489.

might mandate procedures for internal screening akin to those already ostensibly employed by ACORN.[99] In particular, all groups should be accountable for flagging "suspicious" registration forms and alerting election officials accordingly.[100] Finally, and more generally, states and local election officials should "develop good, cooperative working partnerships with third-party voter registration organizations,"[101] while overseeing "voter-registration drives to ensure that they operate effectively" and fairly.[102]

While incremental state regulations may prove helpful, it is almost certain that federal standards regulating third-party voter-registration activities would prove superior by virtue of their uniform application across all the states. While each state would retain fundamental control over the mechanics of elections, "[T]he federal government should seek to ensure that all qualified voters have an equal opportunity to exercise their right to vote. This will require greater uniformity of some voting requirements and registration lists that are accurate and compatible among states."[103] As one example, the Carter-Baker Commission suggested Congress amend HAVA to insist on the "interoperability" of the computerized state voter-registration databases originally required by the legislation.[104] Such a move would permit states to more thoroughly verify registrations, while specifically enabling election officials to isolate and expunge duplicate registrations of citizens registered to vote in multiple states. As noted earlier, duplicate registrations, whether the product of error or outright fraud, are a recurring problem and frequently attributed to third-party groups such as ACORN.

Other registration reforms should be embraced, and the HAVA-created Election Assistance Commission should be authorized to implement those reforms. As noted previously, the EAC was established to allocate funds and counsel the states on optimal means for implementing HAVA's directives. However, "the EAC's guidance is only voluntary and states can completely disregard it. . . . Congress prohibited the EAC from having 'any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government . . . .'"[105] HAVA should be amended to empower the EAC to take an active role in

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99. *See* KEST, *supra* note 79.

100. *Id.*

101. MINNITE, *supra* note 21, at 36.

102. CFER REPORT, *supra* note 24, at 34.

103. *Id.* at 2. "[G]reater uniformity in procedures for voter registration and identification is essential to guarantee the free exercise of the vote by all U.S. citizens." *Id.* at 10.

104. *Id.* at 10–15.

105. Help America Vote Act, 42 U.S.C. § 15329 (2006). *See* Publius, *supra* note 26, at 281.

policing the actions of third-party voter-mobilization organizations. From a federal platform, the EAC itself could conduct audits of such groups, design and coordinate trainings or certifications of employees and volunteers, or promulgate screening standards to be utilized by all third-party groups in capturing erroneous or fraudulent registrations.

As envisioned by the Carter-Baker Commission, the EAC should assume the lead in monitoring voter-registration drives and "tracking voter-registration forms to make sure they are all accounted for."[106] As part of monitoring such activities, the EAC should issue and enforce a rule proscribing the practice adopted by some voter-registration groups that involves paying employees for each completed registration form. Groups should either rely more on volunteers passionate about expanding the electorate or pay employees participating in voter-registration drives a fixed hourly wage or salary. To suggest that an economic incentive contingent on the number of completed registration forms does not at least potentially incentivize fraud is naïve, if not patently disingenuous.

Finally, the EAC should work to improve cooperation between the federal and state governments and to promote uniformity of procedures among the states. Federal uniform standards regarding voter-registration requirements, registration verification, and the very registration activities of third-party voter-mobilization organizations would undoubtedly be eminently better than fifty piecemeal approaches pursued by the states. In order to achieve cooperation and promote uniformity, the EAC should be permitted to condition the allocation of federal funds on states' conformity to issued, uniform rules and regulations.

V. CONCLUSION

Organizations such as ACORN are here to stay, and that is a good thing. In the area of voter registration, third-party groups fill a vacuum left by the major parties and inspire ordinary citizens to shed their apathy. At the same time, these organizations have "interests" that may tempt some of their members to indulge in fraud in furtherance of those interests. While actual occurrences of fraud are few, the perception of fraud is enough to incite partisan ire. This Note recommends simple, constructive solutions for regulating and monitoring the activities of third-party voter-mobilization organizations so that instances of error and fraud and the resultant partisan

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106. CFER REPORT, *supra* note 24, at 34.

indignation, as reflected in the 2008 Presidential campaign, are meaningfully reduced.