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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Nos. 14, 15, 17, 18 and 19 MAP 2022

DOUG McLINKO,
Petitioner/Appellee,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, *et al.*,
Respondents/Appellants.

TIMOTHY R. BONNER, *et al.*,
Petitioners/Appellees/Cross-Appellants,

v.

LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, *et al.*,
Respondents/Appellants/Cross-Appellees,

On Appeal from the January 28, 2022, Orders of the Commonwealth Court
Nos. 244 MD 2021 and 293 MD 2021

BRIEF OF APPELLEES/CROSS-APPELLANTS

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STATEMENT OF JURISDICTION

Petitioners'/Appellees'/Cross-Appellants' Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief ("Bonner Petition") was filed in the Commonwealth Court pursuant to 42 Pa.Cons.Stat. § 761(a)(1). This Court has jurisdiction pursuant to 42 Pa.Cons.Stat. § 723(a) to the extent that this Court deems the Commonwealth Court's January 28, 2022 Order a final order.

ORDER IN QUESTION

Petitioners/Appellees/Cross-Appellants Bonner, *et al*. ("Bonner Petitioners") appeal from the following Order ("the Order"):

ORDER

> AND NOW, this 28th day of January, 2022, it is ORDERED that the application for summary relief filed by Petitioners Timothy R. Bonner and 13 other members of the Pennsylvania House of Representatives in the above-captioned matter is GRANTED, in part. Act 77 is declared unconstitutional and void ab initio. Petitioners' request for injunctive relief, nominal damages and reasonable costs and expenses, including attorneys' fees, is DENIED.
>
> The application for summary relief filed by Respondents Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and the Department of State is DENIED.

(R.1908a-R1909a.)[1] The cross appeal relates to the failure of the lower court to act on Bonner Petitioners' federal claims, pursuant to Article I, §§ 1, 2

[1]For the purposes of their cross appeal, Bonner Petitioners adopt the Reproduced Record filed by Respondents/Appellants.

and 4, and the 14th and 17th Amendments of the U.S. Constitution and 42 U.S.C. §§ 1983, 1988.

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Does this Court have jurisdiction over this appeal given the interlocutory nature of the Orders appealed in this consolidated case which failed to dismiss or grant relief as to all the claims?

Answer Below: Not addressed below

Suggested Answer: No

2. Did the Commonwealth Court err in failing to grant declaratory relief, injunctive relief, nominal damages, and reasonable costs and expenses, including attorneys' fees to Bonner Petitioners under federal law?

Answer Below: No

Suggested Answer: Yes

3. Did the Commonwealth Court properly exercise jurisdiction over the Petitioners'/Appellees'/Cross-Appellants' claims pursuant to 42 Pa.Cons.Stat. § 761(a)(1), where Act 77, Section 13 (Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77 ("Act 77") vested this Court with exclusive jurisdiction to adjudicate constitutional challenges to that statute for the first 180 days after October 31, 2019, and Petitioners' actions were commenced after 180 days had elapsed?

Answer Below: Yes

Suggested Answer: Yes

4. Did the Commonwealth Court correctly hold that Act 77 was unconstitutional under the Pennsylvania Constitution?

Answer Below: Yes

Suggested Answer: Yes

5. Should this Court follow the tenets of *stare decisis* by applying its precedents in *Chase v. Miller*, 41 Pa. 403 (1862) and *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924) to the substantially identical facts and Pennsylvania Constitution provisions at issue herein?

Answer Below: Yes

Suggested Answer: Yes

COUNTER-STATEMENT OF THE CASE

I. Form of the action and brief procedural history.

Bonner Petitioners filed the Bonner Petition in the Commonwealth Court on August 31, 2021, seeking declaratory and injunctive relief against the unconstitutional no-excuse mail-in voting enabled under Act 77. The Bonner Petition explained that Act 77 violates the Pennsylvania Constitution because it enables no-excuse mail-in voting by all Pennsylvania electors and Act 77 further violates the U.S. Constitution, which requires state legislatures to prescribe the time, place and manner of federal elections in accordance with state constitutions. This case does not involve a policy question as to whether no-excuse mail-in voting should be established in Pennsylvania. That is a question for Pennsylvania voters to decide if the General Assembly follows the required constitutional amendment process. Rather, this case turns on what the Pennsylvania and United States Constitutions require in the event that the General Assembly and Pennsylvania electorate want no-excuse mail-in voting in Pennsylvania.

Unlike the petitioners in *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020) (*per curiam*), the Bonner Petitioners seeks no retrospective relief. They only seek to rectify Act 77's violations of the Pennsylvania and United States constitutions going forward and to restore to the people of Pennsylvania the right to vote on any constitutional amendment enabling no-excuse mail-in voting.

The Bonner Petition contains three counts; the Commonwealth Court entered a final order only as to Count I. Counts II and III of the Bonner Petition raise federal claims under the United States Constitution and 42 U.S.C. § 1983. The Bonner Petition requests three forms of relief: (1) a declaration that Act 77's provisions enabling no-excuse mail-in voting are unconstitutional under both the Pennsylvania and the United States constitutions; (2) an injunction prohibiting, administration of no-excuse mail-in ballots in future state and federal elections in Pennsylvania; and (3) nominal damages and reasonable costs of suit, including attorneys' fees.

The Commonwealth Court consolidated the Bonner case with the McLinko case and decided the cases on an expedited basis. (R. 470a-471a). Bonner Petitioners and Respondents filed cross applications for summary relief. (R. 87a-92a; 507a-516a; 642a-689a) The Commonwealth Court allowed the Democratic National Committee and Pennsylvania Democratic Party to intervene on the side of the government, and permitted the Republican Committees of Butler, York, and Washington Counties to intervene on the side of Petitioners. (R. 1485a-1488a). No party identified any disputed issues of material fact that would preclude summary disposition of the cases.

The Commonwealth Court, *en banc*, heard oral argument in the consolidated cases on November 17, 2021. On January 28, 2022, the Commonwealth Court

entered the Order granting in part and denying in part Bonner Petitioners' application for summary relief and denying Respondents' application for summary relief. (R.1908a-R1909a.) The Commonwealth Court's January 28, 2022 Opinion relating to the Bonner Petitioners ("the Opinion") states that Bonner Petitioners' federal claims were not considered: "Given our grant of declaratory relief to Petitioners, we need not address the federal claims." (R. 1921a, footnote 12). That same footnote denied Bonner Petitioners' request for nominal damages and the costs of suit. *Id*. The Order and Opinion declined to grant any summary relief as to the Bonner Petitioners' claims for relief under the United States Constitution and 28 U.S.C. § 1983. The Commonwealth Court did not grant summary relief to Respondents or dismiss the federal claims, but only denied both sides summary relief on those claims.

On February 2, 2022, this Court noted probable jurisdiction over Respondents' Notice of Appeal in the consolidated cases. To the extent that this Court retains jurisdiction, the Bonner Petitioners appeal the denial of their requests for relief under Counts II and III of the Bonner Petition.

II. Statement of Facts.

Petitioners/Appellees/Cross-Appellants Timothy R. Bonner, P. Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron J. Bernstine, Timothy F. Twardzik, Dawn

W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook (hereafter referenced by their last names) are Pennsylvania citizens who are registered electors residing in Pennsylvania and are elected members of the Pennsylvania House of Representatives ("the House"). (R. 262a-265a, ¶¶ 3-16). Bonner was elected to the House on March 17, 2020, and took office on April 6, 2020, after the House passed Act 77. (R. 262a, ¶ 3). Twardzik was elected to the House in the fall of 2020, and took office on January 5, 2021, after the House passed Act 77. (R. 264a, ¶ 12). Zimmerman voted against Act 77. (R. 262a, ¶ 5). Jones, Jozwiak, Rapp, Maloney, Gleim, Brooks, Bernstine Keefer, Moul, Ryan and Cook voted in favor of Act 77. (R. 262a-265a, ¶¶ 4, 6-11, 13-16). Each of the Petitioners are past and likely future candidates for office and registered Pennsylvania voters. (R. 265a, ¶ 17).

Although Article VII, § 4 of the Pennsylvania Constitution generally provides that "All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved," the General Assembly recognized that such general legislative power did not extend to amending or eliminating the constitutional prerequisites for absentee voting, as are specifically set forth in Article VII, § 14. On March 19, 2019, the General Assembly introduced a joint resolution to amend Article VII, §

14 of the Pennsylvania Constitution to permit no-excuse absentee voting. *See* S.B. 411, 2019 (incorporated into Senate Bill 413).

The legislative history set forth in the Co-Sponsorship Memorandum of the proposed constitutional amendment (such memoranda accompany all proposed legislation) recognized that "Pennsylvania's current Constitution restricts voters wanting to vote by absentee ballot to [specific] situations…" Sen. Folmer & Sen. Schwank, Co-Sponsorship Memoranda to S.B. 411 (Jan. 29, 2019), https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20190&cosponId=28056. The constitutional amendment proposed to "eliminate these limitations, empowering voters to request and submit absentee ballots for any reason—allowing them to vote early and by mail." *Id*.

S.B. 413, amending Article VII, § 14 of the Pennsylvania Constitution, was passed by both chambers and filed with the Office of the Secretary of the Commonwealth on April 29, 2020. If S.B. 413 passed both chambers again in the next legislative session, it would have been presented to the Pennsylvania electorate for a vote on whether to amend Article VII, § 14 to allow any voter, for any reason, to vote by mail ballot as follows:

> (a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors may vote, and for the return and canvass of their votes in the election district in which they respectively reside. A law under this

> subsection may not require a qualified elector to physically appear at a designated polling place on the day of the election.

S.B. 413 was not approved by General Assembly in two consecutive legislative sessions, so it was not submitted to the qualified electors of Pennsylvania as a ballot question. The Commonwealth instead proceeded to implement no-excuse mail-in voting through Act 77 without amending the Pennsylvania Constitution. *See, e.g.*, Press Release, Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting, Governor Tom Wolf (Oct. 31, 2019); Act 12 of 2020, § 1(z.6) (amending Act 77's definition of a "qualified mail-in elector" to include all qualified voters, except for "person[s] specifically prohibited from being a qualified absentee elector undersection 1301."). The 2020 and 2021 primary and general elections were conducted using Act 77's no-excuse mail-in voting, as extensively modified through unlawful guidance documents issued by the Secretary of the Commonwealth. *See, e.g.*, Pa. Dep't State, *Provisional Voting Guidance* (Mar. 5, 2020) (denying counties from accepting provisional ballot in all situations where a voter is marked as having returned a mail ballot).

SUMMARY OF ARGUMENT

Should this Court proceeds to adjudicate this interlocutory appeal, then this Court should grant the relief requested in the federal claims in the Bonner Petition. Act 77 violates the U.S. Constitution because it exceeds the powers granted to the

Pennsylvania General Assembly, failing to exercise the delegated authority to conduct federal elections in accordance with the Pennsylvania Constitution, and by failing to prescribe places for all of the votes cast in federal elections as required by Article 1, § 4 of the U.S. Constitution.

The Commonwealth Court properly exercised jurisdiction over the Bonner Petitioners' claims. Section 13 of Act 77 can only be read to give this Court exclusive jurisdiction over constitutional challenges to Act 77 from October 31, 2019 (enactment) through April 28, 2020 (180 days later), and not to divest the entire judiciary of jurisdiction over such claims in perpetuity thereafter. The General Assembly lacks the power to shield its legislation from substantive constitutional challenges by inserting a time bar provision to that effect into the law because. A law enacted contrary to the Constitution is void *ab initio* and therefore no provision within it can shield it from judicial review. In addition, doing so would violate the separation of powers in our tripartite system of government and impermissibly infringe on the power of judicial review to check acts or omissions by the other branches in derogation of constitutional requirements. Enforcing Section 13 of Act 77 as if it were a 180-day statute of limitations would be especially unreasonable with respect to this case because of the difficulty of establishing the harm necessary to support standing within the 180-day period.

A minimum two-year statute of limitations applies to Bonner Petitioners' federal claims under § 1983 beginning from the date the constitutional injury was recognizable. The Bonner Petitioners filed their claims in August 2021, less than two years after the enactment of Act 77 on October 31, 2019.

The Commonwealth Court correctly held that Act 77 was unconstitutional under the Pennsylvania Constitution because Act 77 eliminates, without enumerated excuse, the qualification of in-person voting. Act 77 is a major change in the Election Code in direct conflict with this Court's precedents in *Chase v. Miller* and *Lancaster City*, which held that voting in person at the polling place is a qualification for voting under Article VII, § 1 of the Pennsylvania Constitution. The no-excuse mail-in voting provisions of Act 77 also conflict with Art. VII, § 1 of the Pennsylvania Constitution because they: (1) do not require the ballots to be sent from the election district where the voter resided for at least 60 days immediately prior to the election or in an election district in which the voter was qualified to vote but from which that voter removed his or her residence within 60 days preceding the election and (2) do not require the ballot to be sent to that district to be counted. In effect, Act 77 impermissibly attempts to amend the Commonwealth's constitutional in-person voting and place requirements. Because of Act 77's anti-severability provisions, Act 77 must be stricken entirely as unconstitutional.

This Court should follow the tenets of *stare decisis* by applying the conclusions reached in *Chase v. Miller* and *Lancaster City* to the substantially identical facts and Pennsylvania Constitution provisions at issue in this case. Article VII, §§ 1 and 4 of the Pennsylvania Constitution (previously numbered as Article VIII, §§ 1 and 4) remain materially the same today as they were when this Court struck down an absentee ballot statute in *Lancaster City*. The no-excuse mail-in provisions of Act 77 provide for voting "by ballot," not by some "other method." What is new in those provisions is not the method of voting but rather that they purport to do away with the requirement of offering to vote by ballot *in propria persona* or in any particular place and effectively expand the categories of permissible absentee voting to every registered voter.

The Respondents cite no special justification that would justify this Court overturning its precedents. This Courts' prior decisions rested on sound reason, and their truth and reason has not depreciated with age or been successfully challenged by cases subsequently decided in other states. As it stands today, Article VII, § 14 not only allows but also requires the General Assembly to provide for absentee voting for certain categories of voters. Those categories were adopted, changed and expanded by earlier Pennsylvania constitutional amendments that provided what types of absentee voting the General Assembly "may" allow in 1949, 1953, and 1957. Respondents effectively ask this Court to find that those amendments served

no purpose and had no operative effect because Article VII, § 4 already permitted the General Assembly to allow mail-in voting for any reason or for no reason at all. Respondents' attempt to smear this Court's decision in *Chase v. Miller* as racist and anti-democratic is baseless. Change to the Pennsylvania Constitution must be through amendment, not reinterpretation contradictory to the original intent and meaning of its terms and longstanding precedent.

ARGUMENT

I. This Court lacks jurisdiction over this appeal because the court below failed to dismiss or grant relief as to all of the claims of all of the parties.

Pursuant to Pa.R.A.P. 341, "A final order: (1) disposes of all claims and of all parties." The Order failed to dispose of all claims and is therefore not final. The Order granted only partial summary relief to Bonner Petitioners and denied summary relief to the Respondents. Footnote twelve of the Opinion makes the interlocutory nature of the Order clear, stating: "Given our grant of declaratory relief to Petitioners, we need not address the federal claims. Additionally, Petitioners' request for nominal damages, attorneys' fees and costs is denied." Accordingly, the Bonner Petitioners' independent federal claims remain pending in the Commonwealth Court because they were not dismissed or decided in favor of any party.

A decision that Act 77 violates the Pennsylvania Constitution does not answer the question of whether Act 77 violates provisions of the U.S. Constitution governing state regulation of federal elections. Nor does declaring Act 77

unconstitutional under the Pennsylvania Constitution address the scope of relief to which Bonner Petitioners are entitled under 42 U.S.C. § 1983 for having been deprived of federal rights, privileges, and immunities secured by federal law. For their claims arising out of the United States Constitution and federal law, the Bonner Petitioners seek injunctive and declaratory relief, nominal damages, attorney fees, and costs. To dismiss such federal claims, a court would have to address their merits. Simply ignoring the federal claims as if it were not necessary to reach them violates the Supremacy Clause of the U.S. Constitution and federal case law governing § 1983 claims brought in Pennsylvania (and other state) courts.

The Respondents disregarded the required procedures for seeking an appeal of an interlocutory order and instead filed a notice of appeal as if they were appealing a final order. While this Court may dispense with those requirements and choose to exercise jurisdiction over this appeal, it should quash the appeal until the required procedures for an interlocutory appeal are followed or until the Commonwealth Court enters a final order as to all claims and all parties.

II. The Commonwealth Court erred in failing to grant the Bonner Petitioners' requested relief for the Commonwealth's violation of federal law.

The Commonwealth Court erred in failing to grant declaratory relief, injunctive relief, nominal damages, and reasonable costs and expenses, including attorneys' fees to the Bonner Petitioners under federal law. If this Court proceeds

to adjudicate this interlocutory appeal, then this Court should grant the relief requested as to the federal claims in the Bonner Petition. The questions presented are pure questions of law and the Orders under review only granted and denied summary relief. As such this Court's applicable standard of review is *de novo*, the scope of its review is plenary, and this Court should reverse the order of the trial court only where "the court committed an error of law or clearly abused its discretion." *See Minn. Fire & Cas. Co. v. Greenfield*, 855 A.2d 854, 860 (Pa. 2004) (citations omitted).

Act 77 violates the U.S. Constitution because it exceeds the powers granted to the Pennsylvania General Assembly under Article I, § 2;[2] Article I, § 4; Article II, § 1;[3] and the 17th Amendment of the U.S. Constitution[4] and violates the express requirement that the General Assembly prescribe the "Times, Places, and Manner of holding Elections for Senators and Representatives." *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05 (1995) ("It is surely no coincidence that the context of federal elections provides one of the few areas in which the Constitution

[2]Article I, § 2 provides, in relevant part: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."
[3]Article II, § 1 provides, in relevant part: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."
[4]U.S. Const. Amend. XVII provides, in relevant part: "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

expressly requires action by the States….") (emphasis added); *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000).

The U.S. Constitution delegates the authority to make laws for federal elections to the states' legislative bodies. See U.S. Const. Art. I, § 2; U.S. Const. Art. I § 4; U.S. Const. Art. II, § 1; U.S. Const. Amend. XVII. A state is restricted to exercising this federal delegation of authority in accordance with the provisions of its Constitution delegating the legislative power. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892) ("What is forbidden or required to be done by a state is forbidden or required of the legislative power under the state constitutions as they exist."); *Smiley v. Holm*, 285 U.S. 355, 369 (1932) (citing *McPherson* and noting that state legislatures are constrained by restrictions imposed by state constitutions on their exercise of the lawmaking power, even when enacting election laws pursuant to U.S. Constitutional authority); *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015) (holding that redistricting is a legislative function to be performed in accordance with a state constitution's prescriptions for lawmaking, which may include referendums).

> In the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.

Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000). When a state legislature violates its state constitution, purportedly in furtherance of its plenary authority to regulate federal elections and appoint electors, it also necessarily violates the U.S. Constitution.

State constitutions may delegate legislative power to the people, for example through a referendum process, or in part to the Governor through, *e.g.*, the veto power. *See, e.g., Arizona State Legislature,* 576 U.S. 787; *Smiley,* 285 U.S. 355; *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *McPherson*, 146 U.S. 1. Because the legislative changes enabling no-excuse mail-in voting in Pennsylvania require a Pennsylvania constitutional amendment, and because the Pennsylvania Constitution has delegated to its citizens the right to vote on proposed amendments, Act 77 violates the U.S. Constitution's delegation to states of the lawmaking power for federal elections.

Additionally, Article 1, § 4 of the U.S. Constitution requires that "The Times, **Places** and Manner of holding Elections for Senators and Representatives, **shall** be prescribed in each State by the Legislature thereof …" (emphasis added). The no-excuse mail-in voting provisions of Act 77 allow any registered voter to vote from anywhere in the world, failing to prescribe any required place at all for voting in federal elections to occur. Thus, even if Act 77 did not violate the Pennsylvania Constitution, it would independently violate Article 1, § 4 of the U.S.

Constitution because of its failure to prescribe places for all of the votes cast in federal elections.

A violation under the Due Process Clause of the Fourteenth Amendment will be found upon a plaintiff showing "(1) that the state deprived him of a protected interest in … liberty… and (2) that the deprivation occurred without due process of law." *Burns v. Pa. Dep't of Correction*, 544 F.3d 279, 285 (3rd Cir. 2008) (citing *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989); *Reynolds v. Wagner*, 128 F.3d 166, 179 (3d Cir.1997)).

The Fourteenth Amendment further prohibits a state, by arbitrary and disparate treatment, from diluting the weight of the vote of its citizens. The court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Title 42 of the U.S. Code, § 1983, prohibits any person acting under color of law to subject or cause to be subjected any other person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The right

to vote in lawful elections is a right "of the most fundamental significance" protected by the U.S. Constitution. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Allowing mail-in ballots to be counted which exceed the limitations for permitted absentee voting under the Pennsylvania and United States Constitutions can deny the right to vote "by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," in violation of 14th Amendment Due Process and Equal Protection guarantees. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964); U.S. Const. Amend. XIV.

Acting Secretaries Degraffenreid and Chapman, in their official capacities and acting under color of state law have implemented and continue to implement the unlawful provisions of the Pennsylvania Election Code that permit no-excuse mail-in voting in Pennsylvania state and federal elections from anywhere in the world. These practices have had the impact of disenfranchising the Bonner Petitioners and other registered Pennsylvania voters in previous elections and such policies will continue to disenfranchise voters unless relief is granted. Accordingly, this Court should grant the relief requested in the federal claims in the Bonner Petition.

III. The Commonwealth Court properly exercised jurisdiction over the Bonner Petitioners' claims pursuant to 42 Pa.Cons.Stat. § 761(a)(1).

The Commonwealth Court properly exercised jurisdiction over the Bonner Petitioners' claims pursuant to 42 Pa.Cons.Stat. § 761(a)(1). The Commonwealth

Court was unanimous in rejecting Respondents' jurisdictional and timeliness objections. Respondents argue that Section 13 of Act 77 functions as a statute of limitations on constitutional challenges to Act 77. It does not, nor could it without violating the separation of powers by limiting the Judiciary's power of judicial review. Section 13 is an exclusive jurisdiction provision, granting exclusive original jurisdiction to the Supreme Court of Pennsylvania for certain claims for a period of 180 days from the effective date of Act 77 (October 31, 2019). Section 13 expired and is no longer operative. As a result, the Commonwealth Court had original jurisdiction over this action pursuant to 42 Pa.Cons.Stat. § 761(a)(1) ("Against the Commonwealth government, including any officer thereof, acting in his official capacity").

Section 13 of Act 77 does not state that challenges to Act 77 "must be commenced within 180 days" of the effective date of Act 77. Rather, Section 13 of Act 77 provides that "[a]n action under paragraph (2)" must be commenced within 180 days of the effective date of this section (the effective date was October 31, 2019). Paragraph (2) of Section 13 of Act 77, in turn, provides as follows:

> The Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1). The Supreme Court may take action it deems appropriate, consistent with the Supreme Court retaining jurisdiction over the matter, to find facts or to expedite a final judgment in connection with such a challenge or request for declaratory relief.

Although *per curiam* orders have no *stare decisis* effect (*Commonwealth v. Dickson*, 918 A.2d 95, 108 n. 14 (Pa. 2007)) this Court's *per curiam* decision and Justice Wecht's concurring statement in *Delisle v. Boockvar*, 95 MM 2020 (Pa. 2020) are instructive. In *Delisle,* this Court clarified that Section 13 is an exclusive jurisdiction provision and not a statute of limitations. That case also involved a constitutional challenged to Act 77. The petition for review in *Delisle* was filed in this Court. This Court dismissed the action and transferred the matter to the Commonwealth Court, explaining that "[t]he petition for Review was filed out-side of the 180-day time period from the date of enactment of Act No. 2019-77 during which this Court had exclusive jurisdiction to decide specified challenges to Act No. 2019-77 … the case is immediately transferred to the Commonwealth Court." In his concurring statement, Justice Wecht expounded further stating, "[t]he statute that conferred exclusive original jurisdiction upon this Court to hear constitutional

challenges revoked that jurisdiction at the expiration of 180 days, and there is no question that Petitioners herein filed their petition outside that time limit."[5]

Thus, while Act 77 did initially confer exclusive jurisdiction on this Court to address constitutional challenges to certain provisions therein, that exclusive jurisdiction terminated on April 28, 2020, 180 days after Act 77 was passed. Paragraph (3) of Section 13 of Act 77 (which contains the 180-day limit) specifically applies only to paragraph (2).

Although *Delisle* involved an as-applied challenge to Act 77 rather than a facial challenge, this Court made no mention of that fact in its brief order in that case and Section 13 of Act 77 makes no distinction between facial and as-applied constitutional challenges. While enforcing Section 13 of Act 77 as if it were a 180-day statute of limitations would be arguably even more unreasonable with respect to some as-applied challenges, doing so would also be unreasonable with respect to facial challenges because of the difficulty of establishing the harm necessary to support standing within that time period. The 180-day period expired before any election was even completed utilizing the no-excuse mail-in ballot provisions of

[5]The Commonwealth Court also found Section 13 of Act 77 to be an exclusive jurisdiction provision in *Crossey v. Boockvar*, Pa. Commw. No. 266 MD 2020, a case that involved a challenge to Sections 1306 and 1306-D of the Election Code. There, the Commonwealth Court noted in its Recommended Findings of Fact and Conclusions of Law that "the Supreme Court had exclusive jurisdiction if a challenge was brought within 180 days of Act 77's effective date." *Id*. at 2 n.3.

Act 77. Had the Bonner Petitioners brought an action sooner, Respondents would have characterized any harms that the Bonner Petitioners claimed as too speculative to support standing. For the same reason that standing was lacking in *In re Gen. Election 2014*, No. 2047 CD 2014, 2015 WL 5333364 (Pa.Commw.Ct. Mar. 11, 2015) and *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970), the Bonner Petitioners also lacked standing to assert their claims at least until after millions voted utilizing the no-excuse mail-in provisions of Act 77 and the vote totals were announced.

Despite criticizing reliance upon *Delisle* because it was a *per curiam* order, the Respondents encourage reliance on *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020), which is another *per curiam* decision of this Court. Respondents suggest that, in the *Kelly* case, this Court held that "Section13(3) 'provid[es] for a 180-day period which constitutional challenges may be commenced.'" This Court held no such thing. In the referenced footnote 4, this Court was clearly merely noting that the Commonwealth had made the argument in that case also that Section 13(3) of Act 77 provided for a 180-day period in which constitutional challenges may be commenced but, because this Court relied on the doctrine of laches as the basis for dismissal, this Court expressly chose not to speak to the Commonwealth's additional asserted basis for dismissal. This Court's decision in *Kelly* is not in any way instructive on the issue of whether Section 13(3) operates

as a time bar on constitutional challenges asserted after the expiration of the 180-day period.

The suggestion that a petitioner would ever be precluded from challenging the constitutionality of a statute because of a provision included in legislation would be an interpretation that is both "absurd," 1 Pa.Cons.Stat. § 1922(1), and violative of "the Constitution of the United States [and] this Commonwealth". *Id*. § 1922(3). As this Court noted in *William Penn School District v. Pa. Dep't of Ed.*, 170 A.2d 412, 418 (Pa. 2017):

> It is settled beyond peradventure that constitutional promises must be kept. Since *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L.Ed. 60 (1803), it has been well-established that the separation of powers in our tripartite system of government typically depends upon judicial review to check acts or omissions by the other branches in derogation of constitutional requirements. That same separation sometimes demands that courts leave matters exclusively to the political branches. Nonetheless, "**[t]he idea that any legislature ... can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions**." *Smyth v. Ames*, 169 U.S. 466, 527, 18 S.Ct. 418, 42 L.Ed. 819 (1898).

(emphasis added); *see also Robinson Twp., Wash. Cty. v. Commonwealth*, 83 A.3d 901, 927 (Pa. 2013) ("[I]t is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts.") (citation omitted). If the judiciary, upon review, determines that there are defects in the enactment of a statute, procedural or substantive, the court

will void that enactment. *See Glen-Gery Corporation v. Zoning Hearing Board of Dover Township,* 907 A.2d 1033 (Pa. 2006) (holding that a statute requiring an ordinance challenge to be brought within 30 days of the effective date where there were procedural defects in the enactment of the ordinance was unconstitutional and void). While, consistent with and pursuant to the Pennsylvania Constitution, the General Assembly can set the jurisdiction of the courts, it has no authority to limit the window of time in which the constitutionality of a law can be challenged. Moreover, where a statute was *void ab initio* because it was unconstitutional, provisions within that statute are not operable to put time limitations on actions challenging it.

None of the cases cited by Respondents address the issue of whether a legislature can put a statute of limitations within a statute that functions to time bar facial constitutional challenges to the statute itself. The few cases cited by Respondents that even involved provisions within statutes themselves purporting to limit the time within which the very same law could be constitutionally challenged were all federal cases that put time limits on constitutional challenges to federal laws that waived sovereign immunity. Federal courts are courts of limited jurisdiction, meaning they can only hear cases authorized by the United States Constitution or federal statutes. Waivers of sovereign immunity are voluntary, not mandatory. Analyzing statutes of limitations on the jurisdiction of federal courts to

hear constitutional challenges to federal statutes waiving sovereign immunity presents a different issue than the validity of a time limit on challenging a change to Pennsylvania election laws in conflict with its Constitution. To enforce such a statute of limitations would effectively allow amendment of the Pennsylvania Constitution by a new means not prescribed therein: by legislation and the mere passage of time.

Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 275-277 (1983) confronted the question of whether the 12-year statute of limitations for bringing actions under the Quiet Title Act of 1972 applied to actions brought under that Act by states. The Quiet Title Act of 1972 functioned as a waiver of sovereign immunity by the United States, allowing actions to adjudicate title disputes involving real property in which the United States claims an interest. *Id*. In the course of the decision, the United States Supreme Court noted that "A constitutional claim can become time-barred just as any other claim can." *Id.* at 292 (citing *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) (applying a statute of limitations to a bar a 42 U.S.C. § 1983 claim contesting the denial of a waiver of a state licensing exam requirement for chiropractors) and *Soriano v. United States*, 352 U.S. 270 (1957) (applying a statute of limitations to bar a claim for compensation for property taken by Philippine guerrilla forces during World War II)). Those cases involved statutes of limitations barring compensation for

constitutional violations, in which types of cases laches and other time bars are relevant. Respondents do not cite any cases supporting a statutory time bar to future and ongoing facial constitutional violations. Nor do they cite any cases stating that a legislature can restrict judicial review by imposing a time limit as to when constitutional challenges to the statute itself can be brought.

The statute that the *Block* court contemplated waived immunity for a certain period of time, and once that waiver expired, it deprived the court of jurisdiction to hear claims premised on that waiver. The *Block* decision did not bar a constitutional claim at all, much less bar one on the basis of a statute of limitations. Rather, the decision merely barred a quiet title action, which bar did not apply to any constitutional claims as to an unconstitutional taking of the property at issue. *Id*. at 291-292.

Turner v. People of State of New York, 168 U.S. 90, 92 (1897) involved the constitutionality of a statute of limitations requiring challenges to sale of lands for non-payment of taxes to be brought within two years. *Dugdale v. U.S. Cust. and Border Protec.*, 88 F. Supp. 3d 1, 8 (D.D.C. 2015) involved enforcing a 60-day jurisdictional time limit for actions by aliens challenging the constitutionality of an expedited removal statute, not a statute of limitations on such actions. *Greene v. Rhode Island*, 398 F.3d 45, 53–55 (1st Cir. 2005) involved enforcing a 180-day jurisdictional time limit on actions challenging the constitutionality of the Rhode

Island Indian Claims Settlement Act ("Settlement Act"). Neither *Dugdale* nor *Green* addressed the validity of such jurisdictional time limits as a general matter, but rather simply applied the limitations periods without questioning their validity. *Native Am. Mohegans v. United States*, 184 F. Supp. 2d 198, 217-218 (D. Conn. 2002) involved the same Settlement Act as *Greene* and analyzed the reasonableness of 180 days from a due process perspective, but did not consider, as a general matter, the validity of a legislature's limit of the time within which to bring a substantive constitutional challenge to a law by way of a provision within the law itself.

Section 13 of Act 77 would also be invalidated by future amendments to the Pennsylvania Election Code, such as occurred with Act 12 of 2020. *See* Act of Mar. 27, 2020, Section 1, P.L. No. 41, No. 12 (hereinafter "Act 12"). Act 12, *inter alia*, amended Section 1302, which is noted in Act 77 as being subject to the 180-day exclusive jurisdiction period. Respondents' reading of Section 13 of Act 77 would limit any judicial review of the constitutionality of changes made to Act 77 by Act 12 to a period of 1 month (*i.e.*, from March 27, 2020 to April 28, 2020) and would effectively preclude judicial review of any future amendment to those provisions because such review would not be within the 180-day initial window ending on April 28, 2020. To limit constitutional challenges in such a manner

would be an "absurd," "unreasonable," and unconstitutional reading of the statute. 1 Pa.Cons.Stat. § 1922(1), (3).

In addition, a separate analysis must be applied to the timeliness of Bonner Petitioners' claims under the U.S. Constitution. The analysis for determining whether and what state statute of limitations *could potentially* apply in the context of federal constitutional rights being enforced through a § 1983 claim in state court must consider uniformity in federal law across the nation. *Wilson v. Garcia*, 471 U.S. 261, 269-271 (1985) ("Even when principles of state law are borrowed to assist in the enforcement of this federal remedy, the state rule is adopted as 'a federal rule responsive to the need whenever a federal right is impaired.' *Sullivan v. Little Hunting Park, Inc.*,396 U.S. 229, 240, 90 S.Ct. 400, 406, 24 L.Ed.2d 386 (1969).").

There is no specific statute of limitations governing § 1983 claims – "a void which is commonplace in federal statutory law." *Wilson*, 471 U.S. at 266 (quoting *Board of Regents v. Tomanio*, 446 U.S. 478, 483 (1980)). In cases where Congress has not established a time limitation for a federal cause of action, the "settled practice" is to use a state law time limitation as federal law "***if it is not inconsistent with federal law or policy to do so***." *Id.*at 266-267 ("In 42 U.S.C. § 1988, Congress has implicitly endorsed this approach with respect to claims enforceable under the Reconstruction Civil Rights Acts.").

Under 42 U.S.C. § 1988, courts are directed to follow a three-step process in determining the rules of decision applicable to federal civil rights claims:

> First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.' [42 U.S.C. § 1988.] If no suitable federal rule exists, courts undertake the second step by considering application of state 'common law, as modified and changed by the constitution and statutes' of the forum state. *Ibid.* A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.' *Ibid." Burnett v. Grattan,* 468 U.S. 42, 47–48, 104 S.Ct. 2924, 2928, 82 L.Ed.2d 36 (1984).

Wilson, 471 U.S. at 267. When looking at the appropriate state law to apply under this process, the Court adopts the most analogous, generally applicable rules for a given cause of action. The United States Supreme Court, and on remand the Third Circuit, has already had the occasion to determine the statute of limitations for §1983 claims involving Pennsylvania law:

> "[A]ll § 1983 claims should be characterized for statute of limitations purposes as actions to recover damages for injuries to the person." *Springfield Township School District v. Knoll,* [471] U.S. at [289], 105 S.Ct. at 2065. ***The Supreme Court thus adopted a bright-line approach to the problem of determining what statute of limitations should be applied in § 1983 actions***. In *Wilson v. Garcia,* the Court held that even though constitutional claims alleged under § 1983 encompass numerous and diverse topics and subtopics, the state statute of limitations governing tort actions for the recovery of damages for personal injuries provides the appropriate limitation period. 471 U.S. at ——, 105 S.Ct. at 1948. The Court believed that Congress in 1871 would have characterized § 1983 as conferring a general remedy for injuries to personal rights. *Id*. at ——, 105 S.Ct. at 1948. The Court expressly rejected the possibility that states' residuary statutes of limitations be applied in § 1983 actions: "The relative

> scarcity of statutory claims when § 1983 was enacted makes it unlikely that Congress would have intended to apply the catchall periods of limitations for statutory claims that were later enacted by many States." *Id*. at ——, 105 S.Ct. at 1948.
>
> Pennsylvania has a two-year limitations period for actions to recover damages for personal injuries. 42 Pa.Cons.Stat. § 5524 (Purdon Supp.1984). The statute provides in relevant part:
>
> The following actions and proceedings must be commenced within two years:
>
> (1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.
>
> *Id.*

Knoll v. Springfield Tp. School Dist., 763 F.2d 584 (3rd Cir. 1985) (emphasis added); *accord* 42 Pa.Cons.Stat. § 5524.

Accordingly, a two-year statute of limitations applies to the federal claims in this case beginning from the date the constitutional injury was recognizable. The earliest date on which the constitutional injury was recognizable was upon the passage of Act 77 on October 31, 2019. The Bonner Petitioners filed their claims less than two years later (in August 2021). Accordingly, the Bonner Petitioners timely filed their federal claims under § 1983. Holding otherwise would break the national uniformity with similar facial constitutional challenges brought in other states and federal districts involving elections and voting rights protected by the

U.S. Constitution. For all of the foregoing reasons, this Court should find that the Commonwealth Court properly exercised jurisdiction over the Bonner Petitioners' claims and that the claims are not time barred.

IV. The Commonwealth Court correctly held that Act 77 was unconstitutional under the Pennsylvania Constitution.

The Commonwealth Court correctly held that Act 77 was unconstitutional under the Pennsylvania Constitution. In challenging the constitutionality of Act 77 under Pennsylvania state law, Bonner Petitioners bear the burden of establishing that Act 77 "clearly, palpably and plainly" violates the Constitution. *Pennsylvanians Against Gambling Expansion Fund ("PAGE") v. Commw.*, 877 A.2d 383, 393 (Pa. 2005) (*citing Pa. Sch. Bds. Ass'n v. Commw. Ass'n of Sch. Adm'rs*, 805 A.2d 476, 479 (Pa. 2002)). Pursuant to Pa.R.A.P. 1532(b), the trial court can grant summary relief "if the right of the applicant thereto is clear." Because the contents of Act 77 and the relevant legislative history are a matter of public record, there was no need for discovery, and this case presents a pure question of law. The Bonner Petitioners' right to relief on their Pennsylvania constitutional claims was clear, and summary adjudication was appropriate.

The no-excuse mail-in voting provisions of Act 77 violate the Pennsylvania and U.S. Constitutions because they purport to eliminate the qualification of in-person voting in the Pennsylvania Constitution through *ultra vires* legislation without the required Pennsylvania constitutional amendment approved via

referendum by the people. No legislative enactment may contravene the requirements of the Pennsylvania Constitution. Under this Court's precedents, voting in person at the polling place is a qualification for voting under the Pennsylvania Constitution. *See* Pa. Const. Art. VII, § 1; *Chase v. Miller*, 41 Pa. 403, 418-19 (1862); *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 134-35, 126 A. 199 (1924) (hereinafter *Lancaster City*).

To be a "qualified elector," and therefore generally entitled to vote, the Pennsylvania Constitution requires the following:

1. 18 years of age.
2. A Citizen of the United States for at least one month.
3. Residence in Pennsylvania for the 90 days immediately preceding the election.
4. Residence in the "election district where he or she ***shall offer to vote*** at least 60 days immediately preceding the election …."

Pa. Const. Art. VII, § 1 (emphasis added).

Interpreting the same portions of Article VII, §§ 1 and 5 that exist today, this Court explained as follows:

> To "offer to vote" by ballot is to present one's self, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. ***The ballot cannot be sent by mail or express***, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicil. ***We cannot be persuaded that the Constitution ever contemplated any such mode of voting***, and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage. ***The Constitution meant, rather, that the voter, in propria persona, should offer his vote in an***

> ***appropriate election district,*** in order that his neighbors might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.

Lancaster City, 126 A. 199, 200 (Pa. 1924) (quoting *Chase v. Miller*, 41 Pa. at 418-19) (emphasis added).

Respondents argue that Article VII, § 1 addresses only who may vote and not how they may vote. However, Article VII, § 1 clearly addresses not only who may vote but also where a voter may vote, and one cannot determine if the voter is voting in the correct place unless and until "he or she shall offer to vote" in a specific place. "Offer to vote," as used in Article VII, § 1, has always been understood to mean to present one's vote *in propria persona*.[6]

The no-excuse mail-in voting provisions of Act 77, in conflict with Art. VII, § 1 of the Pennsylvania Constitution, do not require the ballots to be voted from within the election district where the voter resides or in which they are qualified to vote, nor do they require the ballot to be sent to that district. Instead, Act 77 allows a voter to send his or her ballot by mail from anywhere in the world to the relevant county board of election, regardless of whether that county board is situated within the proper district for that voter. *See* 25 Pa.Stat. § 3150.16(a) (requiring ballots to

[6]Moreover, every definition of the qualifications of voters refers to what a person has done as well as to what he or she is. *See Blair v. Ridgely*, 41 Mo. 63, 163 (Mo. 1867).

be sent "by mail, postage prepaid" or to deliver it in person to "said county board of election").

In effect, Act 77 impermissibly attempts to amend the Commonwealth's constitutional in-person voting and place requirements. Elections in Pennsylvania, and in many other states, have always occurred at a time and at a place. The 1776 Pennsylvania Constitution outlined a "time **and place** for electing representatives in general assembly," the twelve members of the supreme executive council, the governor, sheriffs, and coroners (emphasis added). The 1789 Pennsylvania Constitution identified that there would be times and places for electing the same list of officers in the 1776 Constitution, and added that "Senators shall be chosen… at the same time, in the same manner, and **at the same places**, where [the citizens] shall vote for Representatives. Pa. Const., Art. I, Sec. V (1790) (emphasis added), https://www.paconstitution.org/texts-of-the-constitution/1790-2/. The 1838 Pennsylvania Constitution retained the language requiring voting at a "place" of election, and further added a qualification that citizens must reside in the district **where** they will offer their vote for at least the 10 days immediately preceding the election. Pa. Const. Art. III, § 1 (1838) (emphasis added). And from the 1874 Pennsylvania Constitution through the current 1968 Pennsylvania Constitution, including every amended version in between, the Pennsylvania Constitution has retained the "place" of election language relating to the election of officials and the

requirement for citizens to reside in the district pertaining to the place where they will offer their vote.

Article VII, § 14 authorizes four excuses under which an elector can vote absentee at an election:

1. absent from the municipality of their residence, because of occupational duties;
2. illness or physical disability;
3. religious reasons; and
4. election day duties, in the case of a county employee.

For these enumerated reasons only, the legislature is required to provide a "time ***and*** a place," a way to vote at that place, and a way to "return and canvass" such votes in the election district where the voter resides. Pa. Const. art. VII, § 14 (emphasis added); *accord Lancaster City*, 126 A.2d. at 201 (noting the legislative power "can confer the right to vote only upon those designated by the fundamental law, and subject to the limitations therein fixed.").

Act 77 unconstitutionally expands the scope of absentee voting to all electors and also fails to prescribe the times and places for voting required by Art. VII, § 14. *See* 25 Pa.Stat. § 3150.11. Absentee voting is defined in 25 Pa.Stat. § 3146.1, which outlines a variety of categories of eligibility that are each consistent with Article VII, § 14 of the Pennsylvania Constitution.

Act 77, as amended, defines a "qualified mail-in elector" as "a qualified elector." 25 Pa. Stat. § 2602(z.6). A "qualified elector" is "any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election." *Id*. § 2602(t). In short, Act 77 qualifies all electors as mail-in electors. "Absentee" voting is simply relabeled as "mail-in" voting without any distinction, which eliminates the purpose and effect of Art. VII, § 14 and contradicts the "offer to vote" physical presence requirement without following the constitutional amendment process.

The Military Absentee Act of 1839, which allowed for establishing places to vote outside of Pennsylvania led to the first legal challenge to absentee voting under the Pennsylvania Constitution. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 497 (2003) (citing Pa. Const. Article III, § 1 (1838)) (provided in Appendix A hereto). Analyzing the constitutionality of the Military Absentee Act of 1839 under the 1938 Pennsylvania Constitution, this Court held the Act was unconstitutional because the purpose of the 1838 constitutional amendment was to require in-person voting in the election district where a voter

resided at least 10 days before the election. *Chase v. Miller*, 41 Pa. at 418-19. From 1864 to 1949, only qualified electors engaged in actual military service were permitted to vote by absentee ballot under the Pennsylvania Constitution. *See* Josiah Henry Benton, Voting in the Field: A Forgotten Chapter of the Civil War, at 199 (1915); Pa. Const. art. VIII, § 6 (1864).

In 1924, *Lancaster City* struck down as unconstitutional the Act of May 22, 1923 (P.L. 309; Pa. St. Supp. 1924, §9775a1, *et seq*.), which enabled absentee voting for civilians. *Lancaster City* reaffirmed *Chase v. Miller*'s analysis of the Pennsylvania Constitution's in-person voting requirements. *Lancaster City*, 281 Pa. at 135. This Court held the Act of May 22, 1923 unconstitutional because the Pennsylvania Constitution still required electors to "offer to vote" in the district where they reside, and that those eligible to "vote other than by personal presentation of the ballot" were specifically named in the Constitution (*i.e.*, active military). *Id*. at 136-37. This Court relied on two primary legal principles in its ruling:

> [1] 'In construing particular clauses of the Constitution it is but reasonable to assume that in inserting such provisions the convention representing the people had before it similar provisions in earlier Constitutions, not only in our own state but in other states which it used as a guide, and in adding to, or subtracting from, the language of such other Constitutions the change was made deliberately and was not merely accidental.' *Com v. Snyder*, 261 Pa. 57, 63, 104 Atl. 494, 495.
> * * *

> [2] The old principle that the expression of an intent to include one class excludes another has full application here…. 'The residence required by the Constitution must be within the election district where the elector attempts to vote; hence a law giving to voters the right to cast their ballot at some place other than the election district in which they reside [is] unconstitutional.'

Id. This Court went further to note that "[h]owever laudable the purpose of the Act of 1923, it cannot be sustained. If it is deemed necessary that such legislation be placed upon our statute books, then an amendment to the Constitution must be adopted permitting this to be done." *Id*. at 138. This principle was affirmed between 1864 and 1924 in many other states with similar constitutional provisions, both with regard to absentee voting by regular citizens as well as by soldiers away from home. *Id*. at 135 (citations omitted).

Section 11 of Act 77 contains a non-severability clause, which requires that the entire act be rendered void if certain provisions of Act 77 are held invalid. Act of October 31, 2019, P.L. 552, No. 77, at § 11. Several of the provisions noted in the non-severability clause of Act 77 include changes to the Election Code relating to no-excuse mail-in voting, including § 8, which contains most of the provisions for the new mail-in voting system. *Id*. at § 8. Because § 8 and other sections of Act 77 containing provisions for the mail-in ballot system are invalid, Act 77 must be struck down in its entirety.

V. This Court should follow the tenets of *stare decisis* by applying its precedents in *Chase v. Miller* and *Lancaster City* to the substantially identical facts and Pennsylvania Constitution provisions at issue in this case.

This Court should follow the tenets of *stare decisis* by applying the conclusions reached in *Chase v. Miller* and *Lancaster City* to the substantially identical facts and Pennsylvania Constitution provisions at issue in this case. Holdings, "once made and followed, should never be altered upon the changed views of new personnel of the court." *In re Burtt's Estate*, 44 A.2d 670, 677 (Pa. 1945) (cited by *In re Paulmier*, 937 A. 2d 364 (Pa. 2007)). This Court has adopted the policy decision that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." *In re Roca*, 173 A.3d 1176, 1187 (Pa. 2017) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S. Ct. 443, 447 (1932) (Brandeis, J., dissenting)). Justice Wecht noted in his concurring opinion in *Morrison Informatics, Inc. v. Members 1st Fed. Credit Union*, "[w]hat we decide, we can undecide. But *stare decisis* teaches that we should exercise that authority sparingly." 139 A.3d 1241, 1249 (Pa. 2016) (quoting *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2415 (U.S. 2015). "Great consideration should always be accorded precedent, especially one of long standing and general acceptance . . ." *Olin Mathieson Chemical Corp. v. White Cross Stores, Inc.*, 199 A.2d 266, 268 (Pa. 1964).

This Court has recognized that overruling precedent demands special justification that must exceed just a belief that the precedent was wrong. *Commonwealth v. Reid*, 235 A.3d 1124, 1168 (Pa. 2020). The need for special justification extends to constitutional cases where *stare decisis* is ordinarily at its weakest. *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S. Ct. 2305 (1984); *see also Dickerson v. U.S.*, 530 U.S. 428 (2000) ("While *stare decisis* is not inexorable command, particularly when interpreting the Constitution, doctrine of *stare decisis* carries such persuasive force, even in constitutional cases, that departure from precedent must be supported by some special justification.") (internal citations omitted).

This Court considers several factors when determining whether to override existing precedent including the "workability" of the existing standard and "the antiquity of the precedent, the reliance interests at stake, and . . . whether the decision was well reasoned." *Commonwealth v. Alexander*, 243 A.3d 177, 212 (Pa. 2020) (Dougherty, J., dissenting) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009)). An argument that a court erred "even a good argument to that effect – cannot by itself justify scrapping settled precedent." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015).

The material facts of this case are identical because the text, meaning and purpose of "offer to vote" remains identical in all versions of the Pennsylvania

Constitution subsequent to *Chase v. Miller* and *Lancaster City*. The meaning must remain the same and, for the sake of consistency, this Court should reaffirm that those terms require voting to be in person. There is no special justification that would justify injecting instability into settled law by overturning *Chase v. Miller* and *Lancaster City*, much less allow this Court to ignore binding precedent.

The Respondents' attempts to distinguish or undermine binding precedents are unavailing. Article VII, §§ 1 and 4 of the Pennsylvania Constitution (previously numbered as Article VIII, §§ 1 and 4) remain materially the same today as they were when this Court in *Lancaster City* struck down "Act May 22, 1923" (P. L. 309; Pa. St. Supp. 1924, § 9775a1, *et seq*.) and invalidated the illegal mail-in ballots cast thereunder. Article VII, §1 has been altered in three ways since the 1924 case: (1) the voting age requirement was changed to 18, from 21; (2) the state residency requirement was lowered from 1 year, to 90 days; and (3) Clause 3 of Article VII, § 7 was amended to allow a Pennsylvania resident who moves to another county within 60 days of an election to vote in their previous county of residence. These changes to Article VII, § 1 are not relevant to the Court's reasoning in *Lancaster City*. The current language of Article VII, § 4 remains identical to the language that this Court interpreted in *Lancaster City*.

Respondents are reduced to arguing that this Court simply failed to take sufficient account of language of Article VII, § 4 that this Court quoted in

Lancaster City: "All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved." The no-excuse mail-in provisions of Act 77 do not take advantage of some previously unrealized legislative power to prescribe some method other than "by ballot" as a method for voting. The no-excuse mail-in provisions of Act 77 provide for voting "by ballot," not by some other method. What is new in those provisions is not the method of voting but rather the fact that they purport to do away with the requirement of offering to vote by ballot *in propria persona* or in any particular place and effectively expand the categories of permissible absentee voting to every registered voter.[7]

Completely ignoring the consistent cases from other state's high courts that this Court cited in *Lancaster City*, 281 Pa. at 135, Respondents point to five high court decisions in other jurisdictions in an attempt to undermine this Court's precedents. A similar attempt was made, relying on the very same five cases, to persuade the Supreme Court of New Mexico to overturn its precedents, which were in line with *Chase v. Miller* and *Lancaster City*. In *Chase v. Lujan*, 149 P.2d 1003

[7]In so doing, Act 77 also drastically weakens secrecy, as Pennsylvania voters can now be solicited or pressured to mark their ballots this way or that prior to mailing them, in ways that are prohibited at polling places. "Voters who vote away from the polling place do not have the same protections as those at the polling place. In particular, these voters do not have a secret ballot, as any ballot cast without a drawn curtain behind oneself is potentially subject to coercion, vote buying and fraud." Appendix A at 483; *see also In re Second Legislative District Election*, 4 Pa. D. & C. 2d 93, 95 (1956) ("[T]he cornerstone of honest elections is secrecy in voting. A citizen in secret is a free man; otherwise, he is subject to pressure and, perhaps, control.").

(N.M. 1944), just as this Court should do in this case, the New Mexico Supreme Court declined to reverse its holding in its prior cases. In *Thompson v. Scheier*, 57 P.2d 293. 302-4 (N.M. 1936) and *Baca v. Ortiz*, 61 P.2d 320, 321 (N.M. 1936), that court had held that the New Mexico Constitution's requirement that the voter "offer a vote" in his home precinct precluded absentee balloting.

In *Chase v. Lujan*, the New Mexico Attorney General sought to persuade the court to overturn *Thompson* and *Baca*. The language at issue was in Article 7, § 1 of the New Mexico Constitution, which provided in relevant part:

> Every male citizen of the United States, who is over the age of twenty-one years, and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he *offers to vote* thirty days, next preceding the election *** shall be qualified to vote at all elections for public officers. ***
>
> The legislature shall have the power to require the registration of the qualified electors as a requisite for voting, and shall regulate the manner, time and places of voting. The legislature shall enact such laws as will secure the secrecy of the ballot, the purity of elections and guard against the abuse of elective franchise.

(emphasis added by court). The court held that the personal presence of the voter was contemplated in making the "offer to vote" as that language is used in the above-quoted section. 149 P.2d at 1005. The court noted that, in its prior decision in *Thompson*, it had found "that insofar as such language had been construed at all by the courts of sister states, it invariably had been held to require a personal appearance of the voter and the manual delivery of his ballot to the election

officials." *Id*. at 1005, citing *Chase v. Miller*, and *People v. Blodgett*, 13 Mich. 127 (Mich. 1865). Quoting its prior decision in *Thompson*, the court noted that:

> The Constitutional Convention adopted a provision, the language of which had been construed by some of the ablest courts of America, and its terms were invariably held to require the voter to personally deliver his ballot at the precinct polls of his residence; and only since the adoption of the New Mexico Constitution has any court decided differently. *Jenkins v. State Board of Elections*, 180 N.C. 169, 104 S.E. 346, 14 A.L.R. 1247; *Jones v. Smith*, 165 Ark. 425, 264 S.W. 950; *Straughan v. Meyers*, 268 Mo. 580, 187 S.W. 1159.

Id. The court found that its prior decisions rested on sound reason, that their truth and reason had not depreciated with age and had not been successfully challenged by cases subsequently decided in other states. *Id*. at 1007. The court praised this Court's decision in *Chase v. Miller* as one of three cases that were "decided by great courts with personnel of eminent judges" and noted that "exhaustive opinions were written which reflect profound consideration of every question decided." *Id*.[8] The court further explained:

> No case since decided has even approached these earlier decisions in either the deep understanding displayed of the questions decided or the logic with which such questions were resolved. Nevertheless, they merely justify as precedents the correctness of a conclusion which

[8]*See also Morrison v. Springer*, 15 Iowa 304 (Iowa 1863) (referring to *Chase v. Miller*): "The decision … and the comments of the learned justice delivering the opinion upon this particular point of the case were undoubtedly correct." Similarly, the California Supreme Court struck down an absentee voting law based on a similar constitutional provision in the California Constitution in *Bourland v. Hildreth*, 26 Cal. 161, 215-224 (Ca. 1864) (Sawyer, J., concurring) (analyzing "offer to vote" and every similar phrase in each state constitution existing in 1864 and agreeing that such language demands the voter to physically offer the vote in person) and the concurring Justice Sawyer noted "I am not aware that the correctness of the decision in *Chase v. Miller* has been questioned by any Court."

> seemed obvious when we came to find meaning for the words "offers to vote" in the light of their historical background. Our faith in the correctness of these older precedents remains unshaken.

Id.

Similar to what the Respondents urge here, it was "strongly urged" upon the court in *Chase v. Lujan* "that the express delegation of authority to the legislature in the second paragraph of Art. 7, § 1, to 'regulate the manner, time and places of voting,' gives it into the hands of the legislature to permit absentee voting whenever it so elects." *Id*. at 1008. In rejecting that argument, the court observed that the New Mexico Constitution prescribed the time of holding general elections as the first Tuesday after the first Monday in each even numbered year and Article 7, § 1 fixed the place of election as the precinct of the voter's residence, and the legislature was powerless to change either of those. *Id*. Likewise, the court held that the legislature could not change the constitutional requirement that only those can vote at elections who are otherwise qualified electors and are personally present in the precinct of their residence offering to vote in person. *Id*. at 1008-1009. The court further explained:

> … the circumstance that confirmation of this legislative power appears in § 1 of Art. 7 after the framers in the first paragraph had finished describing the attributes of those who are entitled to vote, strongly indicates all this language means is that the legislature shall regulate the method and mechanics of voting by those who are otherwise qualified electors offering to vote in person.

Id. at 1009.

In regard to the term "qualified elector," the court noted that it is not dependent upon whether the elector has exercised the right of elective franchise or not, but further noted that, realistically "one may have all of the other qualifications of an elector and yet if he does not appear in person in the precinct of his residence on election day and offer to vote, he has failed to fulfill one of the conditions necessary to entitle him to vote." *Id*. at 1009. Thus, "the conditions precedent which must exist in order to 'allow' one otherwise qualified, to vote, were not left to the legislature to change or alter under the guise of a power to regulate manner of voting." *Id*. at 1010.

Respondents suggest that the lack of successful challenges (due to procedural hurdles) to some provisions of the Election Code allowing categories of voters not technically within Article VII, § 14 to vote absentee means shows that Article VII, § 14 implies no limit on the categories of allowable absentee voters. *See* Initial Brief of Appellants, p. 55. For example, the Respondents cite to the fact that spouses of military members were allowed to vote absentee when the amendment only allowed for military members. *Id*.[9]

Put simply, the Respondents argue that because some legislation does not adhere to the strictest interpretation of Article VII, § 14, the General Assembly has

[9]They ignore that this is a requirement imposed by federal, not state law. *See* Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20310(c), § 20302(a)(1).

free reign to interpret § 14 out of existence, as Act 77 does. This argument strains credulity; Act 77 classifies virtually everyone as an absentee voter, which is not a mere interpretation of some enumerated exception. Moreover, the failure of prior legal challenges on unrelated grounds does not somehow operate as a waiver as to future challenges by parties aggrieved by separate constitutional violations.

The Respondents cite no interpretive principle for their argument that the change of the word from "may" in distinct earlier absentee provisions in the Pennsylvania Constitution to "shall" in Article VII, § 14 indicates that "Article VII, § 14 sets a floor for when absentee voting must be allowed; it does not establish a ceiling defining when it is forbidden." Initial Brief of Appellants, p. 54. Article VII, § 1 clearly states that the limitations are "subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact," providing discretion to the General Assembly to enact laws as they see fit. No similar discretionary language is present in Article VII, § 14. An affirmative "shall" cannot give the legislature more discretion than "may." Amending Article VII, § 14 from permissive to mandatory would certainly be a strange way of attempting to change the meaning of "offer to vote" in Article VII, § 1, but that is in effect what Respondents are arguing was the intent and effect of that change to Article VII, § 14.

While Article VII, § 14 now not only allows but also requires the General Assembly to provide for absentee voting for certain categories of voters, earlier Pennsylvania constitutional provisions that provided what types of absentee voting the General Assembly "may" allow in 1949, 1953, and 1957 served no purpose and had no operative effect if Respondents' floor/ceiling constitutional analysis is correct. According to Respondents, even without those amendments, the Pennsylvania Constitution already permitted the General Assembly to allow mail-in voting for any reason or for no reason at all.

Over time, exceptions to in-person voting have been added to the Pennsylvania Constitution through valid constitutional amendments, which includes specific exceptions for military personnel, disabled veterans, religious observations, out of town work duties, and county employees who cannot vote due to election day duties. Article XI, § 1 of the Pennsylvania Constitution establishes the mandatory procedural requirements that must be strictly followed to amend the Constitution. *See, e.g., Kremer v. Grant*, 606 A.2d 433, 439 (Pa. 1992) ("[T]he failure to accomplish what is prescribed by Article XI infects the amendment process with an incurable defect"); *Sprague v. Cortes*, 145 A.3d 1136, 1153 (Pa. 2016) (holding that matters concerning revisions of the Pennsylvania Constitution require "the most rigid care" and demand "[n]othing short of literal compliance with the specific measures set forth in Article XI.") (citation omitted).

The history of amendments to the Pennsylvania Constitution demonstrates a necessity to provide specific constitutional authority for each expansion of methods of voting beyond *in propria persona* voting, because of the strict requirement for in person voting. Absent such restriction, amendments allowing for military voting and absentee voting under Article VII, § 14 and its predecessor provisions was redundant.

In 1949, the Pennsylvania Constitution was amended to allow bedridden or hospitalized war veterans the ability to vote absentee. Pa. Const. Art. VIII, § 18 (1949). In 1957, Pennsylvania went through the formal amendment process to amend the Pennsylvania Constitution to allow civilian absentee voting in instances where unavoidable absence or physical disability prevented them from voting in person. Pa. Const. Art. VII, § 19 (1957). In 1967, following a constitutional convention, the Pennsylvania Constitution was reorganized and Article VII, § 19 was renumbered to Article VII, § 14.

In 1985, the citizens of Pennsylvania approved another amendment to Article VII, § 14 of the Pennsylvania Constitution, which added religious observances to the list of permissible reasons for requesting an absentee ballot (the "1985 Amendment"). The 1985 Amendment began as HB 846, PN 1963, which would have amended the Pennsylvania Election Code to provide absentee ballots for religious holidays and for the delivery and mailing of ballots. *See* Pa. H. Leg. J.

No. 88, 167th General Assembly, Session of 1983, at 1711 (Oct. 26, 1983) (considering HB 846, PN 1963, entitled "An Act amending the 'Pennsylvania Election Code,' …further providing for absentee ballots for religious holidays and for the delivery and mailing of ballots."). However, the legislative history recognized that because the Pennsylvania Constitution specifically delineates who may receive an absentee ballot, a constitutional amendment was necessary to implement these changes. HB 846, PN 1963 was thus changed from a statute to a proposed amendment to the Pennsylvania Constitution. *Id.* (statement of Mr. Itkin) ("[T]his amendment is offered to alleviate a possible problem with respect to the legislation. The bill would originally amend the Election Code to [expand absentee balloting] …. Because it appears that the Constitution talks about who may receive an absentee ballot, we felt it might be better in changing the bill from a statute to a proposed amendment to the Pennsylvania Constitution.").

In 1997, the citizens of Pennsylvania approved another amendment to Article VII, § 14 of the Pennsylvania Constitution, which expanded the ability to vote by absentee ballot to qualified voters who were outside of their *municipality of residence* on election day, where previously absentee voting had been limited to those outside of their *county of residence* (the "1997 Amendment"). *See* Pa. H. Leg. J. No. 31, 180th General Assembly, Session of 1996 (May 13, 1996). The legislative history of the 1997 Amendments recognized the long-known concept

that there existed only two forms of voting: (1) in-person, and (2) absentee voting and that the 1997 Amendment would not change the status quo; namely that "people who do not work outside the municipality [or county] or people who are ill and who it is a great difficulty for them to vote but it is not impossible for them to vote, so they do not fit in the current loophole for people who are too ill to vote but for them it is a great difficulty to vote, they cannot vote under [the 1997 Amendment]." *Id.* at 841 (statement of Mr. Cohen). The Pennsylvania Constitution has not been amended to allow for other categories of absentee voting since 1997.

If Respondents' arguments were correct, all of those prior absentee balloting amendments after 1901 were pointless surplusage, because in 1901 the Pennsylvania Constitution was amended to include Article VIII, § 4 ("Method of Conducting Elections. Secrecy") which provided that "All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved."[10] Presuming that the General Assembly by 1901 would have been familiar with the common law understanding expressed in *Chase v. Miller* that an "offer to vote" contemplated a personal appearance of the voter in connection with such offer, had it been the desire of the General Assembly to use Article VIII, § 4 to authorize no-excuse mail-in voting or any type of

[10]Article VIII, § 4 was later renumbered to the current Article VII, § 4.

absentee voting as a permissible "method" of voting, it would have been easy to choose language making clear the intention to do so.

Respondents also note that Pa. Const. Art. VII, § 14 only applies to "qualified electors," and argue that, if Pa. Const. Art. VII, § 1 required a Pennsylvanian to vote in person to be a "qualified elector," that would render Section 14 a nullity because "qualified electors" by definition would only retain that status if they vote in person. Initial Brief of Appellants, pp. 44-45. But consistent with the understanding that to "offer to vote" by ballot, as the phrase is used in Pa. Const. Art. VII, § 1, means to present one's self, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it, Pa. Const. art VII, § 14 requires the Legislature to provide not just a manner and time, but also a "place" "outside the municipality of their residence" where "qualified electors" meeting the criteria of that section "may vote, and for the return and canvass of their votes in the election district in which they respectively reside." Pa. Const. art VII, § 14 requires the Legislature to specify other places where voters may vote, outside the normal polling times and/or places where voters would normally "offer to vote" under Pa. Const. art VII, § 1, because certain voters for specified reasons may be absent from the municipality of their residence on election day or be unable to vote at their normal polling place on election day. Pa. Const. art VII, § 14 would not

need to authorize or require the Legislature to specify other places to vote if Pa. Const. art VII, § 1 did not require voters to otherwise "offer to vote" at the normal places appointed.

Surprisingly, Respondents attempt to smear this Court's decision in *Chase v. Miller* as racist and reflective of the "anti-democratic sentiments of its era." *See* Initial Brief of Appellants, p. 64. Noting that the constitutional definition of a voter grew "more exact" over time, as this Court did in *Chase v. Miller*, 41 Pa. at 426-427, is not any form of "celebrating" racist restrictions on who may vote. There is nothing "anti-democratic" about concerns for the prevention of fraudulent voting, which this Court expressed throughout its opinions in both *Chase v. Miller* and *Lancaster City*. To the contrary, vigilance against voting fraud is essential the preservation of any democratic form of government. Convenience is a legitimate interest but not the only interest of concern in a democratic election system.

The Intervenor Respondents argue that "Today's system is … nothing like the one *Chase* and *Lancaster City* confronted … after years of experience with voting by mail, both in Pennsylvania and around the country, it is clear that fraud in mail voting is exceedingly rare." *See* Brief of Intervenor Respondents, p. 42. The Intervenor Respondents' attempt to undermine this Court's precedents are also unavailing. Valid concerns regarding absentee voting persist to this day. For example, in a New York Times article entitled "Error and Fraud at Issue as

Absentee Voting Rises," Oct. 6, 2012, the author noted that, in the absentee system, "fraud and coercion have been documented to be real and legitimate concerns" because fraud is easier via mail. *See* Appendix B hereto (also noting issues with "granny farming," issues with buying and selling mail-in votes, and other serious issues with mail-in votes); *see also* Appendix A at 484-485 ("As casting ballots away from the polling place becomes more widespread, the possibilities for fraud and coercion expand.").

If it was completely unnecessary, then there is no good explanation for why the General Assembly began the process of amending the Pennsylvania Constitution Article VII, § 14 of the Pennsylvania Constitution to permit no-excuse absentee voting. *See* S.B. 411, 2019 (later incorporated into S.B. 413). The way to change the Pennsylvania Constitution is through amendment, not reinterpretation contradictory to the original intent and meaning of its terms and longstanding precedent.

CONCLUSION

For the aforementioned reasons, the Bonner Petitioners respectfully urge this Court to (1) affirm the Commonwealth Court's declaration that Act 77 violates Article VIII, § 1 of the Pennsylvania Constitution; (2) declare that Act 77 further violates Article I, § 2, Article I, § 4, Article II, § 1, and the 24th and 17th Amendments of the U.S. Constitution and, pursuant to 28 U.S.C. § 1983; (3) enjoin Respondents from distributing, collecting, and counting no-excuse mail-in ballots in future state and federal elections; (4) award the Bonner Petitioners' nominal damages, reasonable costs and expenses of this action, including attorneys' fees and costs; and (5) provide such other and further legal and equitable relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that this brief contains 13,637 words, as determined by the word-count feature of Microsoft Word.

Date: February 25, 2022

Gregory H. Teufel, Esq.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Date: February 25, 2022

Gregory H. Teufel, Esq.

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Articles
John C. Fortier [a1] Norman J. Ornstein [aa1]

THE ABSENTEE BALLOT AND THE SECRET BALLOT: CHALLENGES FOR ELECTION REFORM

Reforms in the recently enacted federal election reform legislation primarily address improving voting at a polling place, but there is a growing share of the electorate who vote away from the polling place through increased use of absentee ballots and vote-by-mail systems. Voters who vote away from the polling place do not have the same protections as those at the polling place. In particular, these voters do not have a secret ballot, as any ballot cast without a drawn curtain behind oneself is potentially subject to coercion, vote buying and fraud.

This Article looks at the tension between the Australian Ballot and absentee voting. Both the Australian Ballot and the Absentee Ballot were electoral reforms of previous generations. The Australian Ballot was instituted by almost all of the states in the 1880s and 90s to combat abuses at the ballot box such as vote buying and coercion by party machines. There were two major periods of absentee ballot reform. In both periods of absentee ballot reform, there was recognition of the dangers of casting a ballot away from a home polling place. Since these early periods of adoption of absentee voting laws, there has been a significant rise in voting away from the polling place. In addition, many of the safeguards implemented by early legislation have been repealed. There are a number of advocates for easier absentee balloting, vote by mail, or even voting over the Internet. Although they emphasize the convenience of such measures, these advocates do not seem to appreciate the privacy concerns that the originators of the absentee ballot did. To the extent that election reform legislation is to be successful in improving the electoral system, it must take note of the trend toward voting away from the polling place and consider the importance of the secret ballot as well as convenience.

Introduction

While it did not sweep through the political process like a tidal wave as predicted after the 2000 election controversy, election reform legislation at the Federal level finally made its way through Congress two years after the Florida brouhaha. Along the way, there were certainly partisan differences between Democrats and ***484** Republicans as to the content of election reform legislation, over issues such as the scope of federal standards and the nature of anti-fraud rules. [1] But almost unnoticed in the recent debate is an even more fundamental divide between two visions for the future of American elections. Advocates of one vision see the traditional polling place as the focal point of voting in America, and seek to improve its accessibility, ease of use, integrity and openness to all voters. Those who hold the other vision see the traditional polling place as an inefficient and costly obstacle that discourages voting. They promote convenience voting away from the polling place through "no-excuses absentee ballots," [2] and hold out the promise for Internet voting. The clash between these visions flared only occasionally during the congressional debates on election reform, [3] and has not been the subject of widespread, robust political debate. Underlying the debate over election reform was a vast gulf between two distinct visions--one a traditional veneration of the act of voting as a civic responsibility, a collective judgment made as neighbors gather together, making supremely individual judgments in the

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privacy of a curtained voting booth, and the other a sense of voting as a burden, with new technologies available to ease that burden and expand the franchise to more citizens.

There is little doubt that in the past thirty years, the country has moved in the direction of convenience voting and away from the traditional polling place and its safeguards. Many election officials have focused their efforts on reducing barriers to voting and as the complications and costs of maintaining numerous election-day polling places for longer hours have risen, have been attracted by the lower administrative costs of absentee voting, vote-by-mail and early voting. Election officials have also been motivated by the criticism of low turnout rates in America and view absentee voting in its various forms as a way to increase turnout, even though evidence of a correlation between voter turnout and easy absentee voting is limited at best. It is our concern that this shift has altered the proper balance between convenience and the protections of the secret ballot, with too much focus on ease of voting and not enough on protecting the privacy of the voter. As casting ballots away from the polling place becomes more widespread, the ***485** possibilities for fraud and coercion expand, and the importance of a civic election day is diminished.

Perhaps not surprisingly, given the Florida-related impetus behind reform, recently passed election reform legislation focuses primarily on improvements at the polling place, including strengthening the protection of the secret ballot, reducing the number of spoiled ballots, securing the availability of accurate voter registration information at the polling place so that qualified voters are not turned away, deterring fraud, and increasing access for all to the polling place. [4] We are supportive of these legislative changes, but it is worth noting that most of the reforms are less relevant to voting away from the voting booth. In fact, advocates of voting by mail made a concerted effort to exempt their system from reforms aimed at combating identity fraud and reducing the number of spoiled ballots. [5]

Much of federal election reform legislation focuses on reforming the election day polling place, and since of the trend is toward voting away from the polling place, [6] a substantial percentage of voters will not receive the full benefit of these reforms. It would be wise for reformers to consider the effects of this trend to keep vote by mail and no-excuses absentee voting from opening the door to the kind of electoral fraud and corruption that was prevalent in the late 19th century. [7] There is a natural tension between the concern for privacy and absentee voting. Privacy cannot be guaranteed unless it is mandatory for voters to vote behind a curtain out of sight of those who might seek to influence a vote. Absentee ballots, by definition, are ballots cast without the privacy protections of the polling place. While absentee ballots have become a necessity, we believe that voting away from the polling place should only be granted in cases of significant need, and not simply for convenience.

This Article focuses on some of these issues first by tracing the history of several reforms in American elections, particularly on the introduction of the Australian ballot at the end of the nineteenth century. The reform was widely and swiftly adopted in response to widespread vote buying, fraud, and partisan coercion ***486** that became increasingly evident and embarrassing in the 1880s and 1890s. Second, this Article documents the rise of absentee and mail voting in the United States, indicating how its early advocates championed these reforms in order to enfranchise those who could not vote at their home polling place, but also instituted significant safeguards out of fear that absentee voting might compromise the secrecy and anti-fraud protections of the Australian ballot. Third, we address some of the potential problems with voting outside a polling place and examine recent cases of absentee ballot fraud. Finally, this Article looks at proposed improvements to polling place voting from which vote by mail advocates have tried to exempt themselves.

I. The Origins of the Australian Ballot

While the Constitution gives Congress the power to regulate the times, places and manner of federal elections, [8] voting in this country has always been a decentralized activity. Typically, local administrators have conducted elections, with guidance and oversight from state and federal officials. In the 19th century, election practices varied widely, but by the end of the century there was growing concern about widespread fraud and coercion. [9] Between 1888 and 1892, 38 states adopted the Australian ballot, a reform consisting of a standard ballot and private voting booth, and not long thereafter all states had implemented the reform. [10] It was remarkable how quickly and universally the reforms were adopted, especially as it was adopted voluntarily by each of the states.

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The modern American polling place is still very much defined by the events of that revolution in voting. For example, Americans take for granted that voting will take place in private, with a curtain protecting us from the wandering eyes of election officials, party operatives, and nosy neighbors. Such was not the case in the period before the reforms. It was not uncommon in the 19th century for party machines to pay voters for their vote, which could be determined easily because ballots were color-coded and party workers followed voters to the voting booth. [11]

***487 A. The Australian Ballot**

The Australian ballot originated in the colonies of Australia. In 1856, the colony of Victoria passed the first Australian ballot law. The law provided for a private room or booth for the voter to cast his ballot, a system for ensuring that voters only cast one ballot, and an official ballot provided by the state. The ballot contained a list of all the candidates for office, and the voter would cast a vote by crossing off the names of all of the candidates not voted for. Later that year, another Australian colony, South Australia, passed a secret ballot law that was very similar to that of Victoria, but required the voter to mark a cross next to the chosen candidate rather than crossing off unwanted names. [12]

By most accounts, the reform was successful in achieving clean and orderly elections in the Australian colonies. [13] The success of the secret ballot in the Australian colonies gave momentum to a reform movement in England. [14] There were, however, prominent opponents of such a procedure. Foremost among the critics was John Stuart Mill, who argued that an important part of citizenship was a public declaration of the views of citizens:

> In any political election . . . the voter is under an absolute moral obligation to consider the interest of the public, not his private advantage, and give his vote to the best of his judgment, exactly as he would be bound to do if he were the sole voter, and the election depended upon him alone. This being admitted, it is at least a prima facie consequence that the duty of voting, like any other public duty, should be performed under the eye and criticism of the public; every one of whom has not only an interest in its performance, but a good title to consider himself wronged if it is performed otherwise than honestly and carefully. [15]

Despite the opposition of critics like Mill, an English reform movement for a secret ballot, which had stalled in the first half of ***488** the century, began to gain steam. [16] Ultimately, the Ballot Act of 1872 instituted the Australian Ballot in England.

The term "Australian ballot" is now used interchangeably with "secret ballot." Indeed, the central thrust of the Australian ballot is to allow a voter to express his or her preferences in private without fear of coercion from others. However, simply providing a private voting booth, although necessary to privacy, does not guarantee a secret ballot. There are a number of ways that the secrecy of the ballot can be violated. Ballots supplied or pre-printed by the parties can be handed to a voter at the polling place. Ballots can be color coded or given distinguishing marks so that party observers can view from afar which party the voter is choosing. Ballots can also be altered so that they only contain the names of certain candidates.

In order to prevent such violations of secrecy, the Australian ballot included four essential protections: 1) the ballots were printed and distributed at public expense; 2) they contained the names of all the candidates duly nominated by law, either by party convention or petition of voters (a "blanket ballot"); 3) they were distributed only by election officers at the polling place ("exclusive" or "official ballot"); and 4) there were detailed provisions for compartments and other physical arrangements to ensure secrecy in casting the vote. [17]

B. Practices that Led to the Adoption of the Australian Ballot in the United States

By the second half of the 19th century, political parties had assumed the leading role in American elections. The parties produced ballots for the polling place, often printing them in distinctive colors and sizes so voters could easily distinguish them (and, perhaps more importantly, so that voters would vote the party line). The ballot would be filled out with the names of the party

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candidates. A voter would merely need to deposit the ballot in a box, usually in full view of party operatives. [18] City machines would often condition jobs on the submission of the proper ballot, or they might pay money for the confirmed deposit of the proper ballot.

***489** The practice of using written ballots had become widespread in the United States by the middle of the 19th century. [19] The earliest elections in the pre-Revolutionary colonies were conducted by a voice vote or voting by depositing corn or beans in a jar. [20] Over time, the colonies began to adopt a written ballot. [21] Individuals made their own ballots, writing the names of candidates for whom they voted on a piece of paper and brought the paper to an official location. [22] By the time of independence, nearly all the new states had adopted a written ballot. [23] The use of printed ballots began in the 1820s. [24] Parties began to produce straight ticket ballots, which they distributed to voters at the polling booths, [25] a practice that was upheld by the Massachusetts Supreme Court in 1830. [26]

The introduction of the written ballot was, in some sense, a reform. It created a record of how votes were cast. Even the idea of color-coded ballots or ballots with recognizable party symbols served the purpose of allowing illiterate or non-English speaking people to vote for the party of their choice.

The written ballot alone, without the protections of the Australian reform, however, was susceptible to significant fraud. As the government did not produce the ballots, there was no accounting of how many ballots had been cast, and it was possible to stuff the ballot box. [27] Furthermore, the use of color-coded or otherwise recognizable ballots made it simple for ballot peddlers or district captains to buy, and confirm, votes. [28] According to a study conducted by Professor J.J. McCook in 1892, an average of sixteen percent of Connecticut voters was up for sale at prices ranging from two to twenty dollars. [29]

The practice of parties printing ballots for their members was itself prone to fraud. Some political operatives engaged in the practice of "knifing." If local party bosses had cut deals with the opposition or they did not like a particular party candidate, they would "knife" select candidates, or remove their names from the ***490** party-printed ballot before handing them out, so that the party ticket was voted except for the "knifed" candidates. [30] Also, parties sometimes duplicated the color and distinctive markings of an opposing party's ballot, substituting the names of their own candidates, in order to trick voters. [31]

Finally, the lack of secrecy in the ballot and the practice of tying government jobs and other political favors to votes meant that voters could not vote across the party line. As the pre-printed ballots of each party were of a distinctive color, election observers could determine the party for which the voter had cast a vote. Since big city political machines doled out jobs to loyal supporters, voters knew that their jobs and other political favors depended on voting according to the local party bosses' wishes. [32]

C. The Australian Ballot Movement in the United States

All of these practices inspired a reform movement in the states in the late 19th century. Kentucky enacted the first Australian ballot reform law in 1888, but it was limited to the elections in Louisville. [33] Massachusetts enacted the first statewide Australian ballot law later that year. [34] By 1910, almost all states had adopted the Australian ballot. [35]

There were a number of variations in these laws, but the major two types that developed were the Massachusetts model, which listed individual candidates by office, and the Indiana model, which allowed both the "party column ballot," option, or voting a straight ticket with a single vote, as well as the option to vote by individual office. Purist reformers objected to the Indiana model because the ease of straight ticket voting discouraged split ticket voting, and furthermore because of the model's potential to tip off party workers when one was not voting the straight ticket. [36]

***491** The passage of these Australian ballot laws did not simply eliminate all fraud and corruption from elections. In New York, for example, party workers abused the provision that voters unable to vote by themselves could be "assisted" by poll

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workers. [37] On the whole, however, the effects of the Australian ballot law were salutary and dramatic. Some of the evidence for its success is anecdotal. After the first election in Louisville conducted under Kentucky's law, a citizen wrote a letter published in the Boston newspapers noting that

> [i]t can hardly be possible that there is a city in the Union where open corruption has been more generally practiced than in Louisville. . . . [I]t is an undeniable fact that in the late election there was, except in one place, no corruption successful, and but little attempted, and that with this evidence of its successful working the chances have greatly lessened that bribery will be tried. [38]

Another letter to the editor of The Nation noted that the Kentucky election was "the first municipal election I have ever known which was not bought outright." [39] Fredman notes that the Massachusetts law that took effect for the 1889 election was an undoubted success. "It was generally agreed that the voting was fair and orderly, and there were more and better candidates." [40] In addition to the anecdotal evidence of the success of the Australian ballot legislation, there is empirical evidence of a substantial change in voting. In the period following the adoption of Australian ballot laws, there was a large decline in voter turnout rates. There is no debate in the political science community that such a decline occurred, but there is some controversy as to the reason why. Most commentators give some credence to the idea that the adoption of the secret ballot lowered turnout, either indirectly by diminishing the role of local party bosses, or more directly by weeding out fraudulent or ineligible voters from the statistics. [41]

***492** The period of the quick adoption of the Australian ballot was followed by another set of reforms in the early twentieth century, the move toward the absentee ballot. Advocates of the absentee ballot saw the justice in expanding the franchise to those who were unable to cast their ballots at their local polling places, but they were also cognizant of the tension between the reforms that led to the Australian ballot and the absentee ballot, which was voted away from the polling place without its privacy protections.

II. The Origins of Absentee Balloting

Expanding the franchise and ensuring that all who were eligible to vote are able to vote have long been goals in American democracy. The absentee ballot was intended to accomplish those goals. The early impetus behind absentee balloting was war: making sure that soldiers on the battlefield were not disenfranchised by their military service. The Civil War inspired the first major effort for absentee balloting in the United States. [42] Even then, however, the movement was controversial.

The development of the absentee ballot, like the adoption of the Australian ballot, quickly swept through the states. The major wave of reform that introduced absentee voting to civilians occurred between 1911 and 1924, when 45 of the 48 states adopted some form or another of absentee voting. [43] The first laws were often limited to certain elections or certain classes of people, but as one observer noted, as more states adopted such laws, access to absentee ballots was generally broadened. [44] In this early reform period, however, reformers recognized that absentee balloting could be in tension with the Australian ballot which had been adopted a generation before. As absentee voting took place away from the voter's home voting booth, there were serious questions about fraud and coercion, the same kind of concerns that had been the impetus behind the move to adopt the Australian ballot. Accordingly, many states built in elaborate provisions to safeguard ***493** voter privacy and the integrity of the ballot. [45] Courts struck down a number of state laws for violating state constitutional provisions that protected the right to a secret ballot or required voting in person. [46]

The reform period in the early part of the twentieth century produced laws that are the precursors of our contemporary absentee voter laws. Since that period, all states have had some form of absentee voting for civilians as well as military personnel. There was, however, an earlier era of absentee voting largely disconnected from the modern era.

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A. Military Absentee Voting During the Civil War

During the Civil War, many states adopted absentee voting laws to allow soldiers to vote in the field. These laws applied only to military voting, and most were discontinued after the end of the war.[47] These laws pre-date the movement to adopt the Australian ballot, and thus do not directly implicate the tensions between absentee voting and the secret ballot. Nonetheless, a brief look at the adoption of military voting laws during the Civil War is instructive for four reasons. First, it indicates some of the initial reasons for opposing absentee voting. Second, there were a significant number of constitutional clashes, with absentee voter laws coming into conflict with provisions in state constitutions. Third, a number of states that passed absentee voting laws took care to deal with the issues of fraud and secrecy that potentially arise with the introduction of absentee voting. Finally, the period reveals some of the early methods of conducting absentee voting.

During the Civil War, nineteen of twenty-five states in the Union[48] and seven of eleven states in the Confederacy[49] provided for some form of absentee voting for soldiers in the field. The hurdles to the passage of absentee voting legislation were political, practical, and constitutional. In the Union states, there was a clear political divide over absentee voting legislation. Republicans ***494** supported measures to provide for voting in the field, and Democrats opposed them.[50] These differences caused significant battles over these pieces of legislation. Opposition to absentee voting prevailed in a number of states, and in a number of others, efforts to pass legislation were thwarted initially and passed only later in the war.[51] Republicans supported absentee voting because they believed that soldiers should have the right to vote and, since Republicans supported Lincoln's war efforts, they believed that the soldiers would vote Republican. Union Democrats, however, disapproved of how Lincoln was prosecuting the war, and therefore feared that the soldiers would support Republicans and drive Democrats out of office.[52]

While the debate over absentee voting for Civil War soldiers divided largely along party lines, opponents also raised practical concerns over the possibilities for fraud, corruption and the lack of privacy in voting. First, opponents were concerned that the regular provisions against fraud would not be enforced, as the voting would take place outside of state lines. A majority report of the Committee on Elections in the Michigan House of Representatives expressed this view:

> [W]hat power or authority is there to prevent these persons who are not qualified voters, from coming forward and offering to vote, and if objected to, from swearing their votes in? . . . The person so offending, being at the time neither within the jurisdiction of this State, nor in its service, could commit no crime against the State. There being no power to enforce the election laws, the ballot boxes might be stuffed or destroyed by a disorderly rabble, either of soldiers or of people, in the towns through which the commissioner would have to pass on his return to this State . . . .[53]

A similar sentiment was expressed by opponents of absentee ballot legislation in the New Jersey House of Representatives. A majority report from the Committee on Elections asked: "Should illegal votes be cast, judges swear falsely, voters be intimidated, or the ballot box be tampered with by partisan officers, how could the offenders be arrested or the crime punished?"[54]

***495** Another objection was that the chain of control of the ballot was insecure and beyond the voter's control. In New York, a proposed absentee ballot law enabled soldiers to vote by proxy by providing their ballots to persons at home who would cast the soldiers' ballots at a local voting place.[55] The governor, in vetoing this bill in 1863, noted that the military officers before whom the soldier would prove his vote were not representatives of the state; and the bill did not require the messengers to be sworn, or to deliver the proxies, "but permit[ted] him to destroy or change the proxies and ballots . . . ."[56] The governor also faulted the bill for failing "to protect the secrecy of the ballot . . . ."[57] The ballot could be seen or tampered with by a number of intermediaries who transported the ballot from the field to the polling place. The governor's veto message went on to warn against the potential for fraud: "This brief statement will be sufficient to satisfy all of the many opportunities this bill affords for gross frauds upon the electors in the army and upon the ballot box at home."[58]

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The New Jersey Committee on Elections' majority report noted another practical concern over the possibility of manipulation or coercion of a soldier's votes by the military authority:

> The soldiers know that an opportunity for a free, full and fair exercise cannot be had in the army while in the midst of an active campaign, even if the Constitution did not forbid. Not a day's notice of the place of voting could be given, because none could foresee where the exigencies of the service would require the men to be on election day. The military authorities could exclude from the camp any papers or documents they saw fit; they could if they thought best, admit certain persons to distribute one class of tickets and refuse passes to other persons; they could on election day, order certain men on duty away from the place of voting; and, in fact, if so disposed, they could in many ways prevent a full and free ballot. [59]

The concerns about fraud and coercion in the absentee ballot system were borne out in one prominent example in New York. The 1864 elections were the first conducted under New York's new absentee voting law. As Democrat Governor Horatio Seymour had ***496** been a staunch opponent of voting in the field, the bill's Republican sponsors had vested the power of enforcing the new law in the Republican Secretary of State. [60] This development, however, did not deter Seymour from acting; he appointed agents and inspectors to each army corps to collect Democratic ballots from soldiers from New York. [61] The Republican State Committee of New York followed suit by appointing agents and inspectors to collect Republican ballots. [62] Allegations of fraud soon arose regarding the Democratic inspectors and agents' conduct in the hospitals of Washington and Baltimore where many New York soldiers had been admitted. [63]

In late October of 1864, Democratic inspectors in Baltimore and Washington were arrested and charged with:

> falsely personating and representing officers and soldiers in the United States service, and with falsely and fraudulently signing and forging names of such officers and soldiers . . . [and] blanks issued under the authority of the State of New York for taking the soldiers' votes, for the purpose of transmitting the votes of the soldiers to be used at the general election . . . . [64]

The accused were brought before military commissions. In Baltimore, one of the accused pled guilty to forging names, and he and another defendant were found guilty and sentenced to life in prison. [65] The men arrested in Washington were held and tried, but ultimately acquitted, apparently because much of the potential evidence had been destroyed. [66]

The political opposition and practical objections to absentee voting for soldiers in the field were significant, but the form which most of the debates took was constitutional. In many states attempts to pass legislation to provide for voting in the field clashed with state constitutional provisions requiring that the votes be cast where the voter resided. [67] These constitutional issues shaped the political debate and caused a number of states to adopt ***497** constitutional amendments. [68] The central issue was that many state constitutions explicitly or implicitly required voting in person at a local polling location. New York's constitution, for example, stated that an elector "shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere." [69] Out of the constitutional debate arose a number of state court cases and advisory opinions that shaped the path of absentee voting legislation. This section highlights a few significant cases.

The state constitutional questions were raised largely in the Union states. In the Confederate states, constitutional provisions were not significant barriers to passage of absentee voting legislation, as these states had scrapped their old constitutions after seceding. A number of states, such as Virginia, whose pre-secession constitution had provisions requiring voting in person, passed ordinances at their secession conventions authorizing absentee voting for soldiers. [70] Others passed legislation without controversy. [71]

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In the Union states, at the beginning of the war, only one state permitted absentee voting by soldiers. Pennsylvania had passed the Military Absentee Act in 1813 to allow members of the state militia and those in the service of the United States to vote as long as the company the soldier was serving was more than two miles from his polling place on election day. [72] Subsequently in 1838, Pennsylvania amended its constitution to include a provision that required voters to reside "in the election district where he offers to vote, ten days immediately preceding such election." [73] Shortly thereafter, in 1839, the Military Absentee Act was reenacted in substantially the same form as the original 1813 Act. [74] While the constitutional provision for in-person voting and the Act's provisions for military absentee voting were in conflict, the issue was not resolved until the early part of the Civil War.

Pennsylvania soldiers voted under this 1839 act in the 1861 elections. In 1862, the Pennsylvania Supreme Court ruled in Chase v. Miller that the military absentee voting statute was unconstitutional ***498** because it violated the constitution's requirement for voters to cast their ballots in their election district. [75] The court's opinion indicated that the purpose of the 1838 constitutional amendment requiring in-person voting in local precincts was to further a registry law of 1836, which sought to "identify the legal voter, before the election came on, and to compel him to offer his vote in his appropriate ward or township, and thereby to exclude disqualified pretenders and fraudulent voters of all sorts." [76] The court ascribed the conflict between the 1839 act and the constitution to "careless legislation." [77] The Act had been a small part of a large report that had been written in 1834 and was not passed into law until 1839, after the constitution had been amended. The court also noted that there had been no debates as to the constitutionality of the 1839 military absentee voting statute. [78]

In a number of states, the proponents of military absentee ballot legislation recognized the conflict between this legislation and constitutional provisions for in person voting, and undertook to amend their state constitutions in order to pass appropriate legislation.

In response to Chase, Pennsylvania amended its constitution in August of 1864, and enacted a new soldiers' voting bill to allow voting in the field in the 1864 election. [79] In several states, the proponents of absentee voting legislation recognized hurdles in their state constitutions and sought to amend those state constitutions. In Connecticut, the original legislation for absentee voting contained a provision that the legislation would not go into effect until it was submitted for review to the justices of the state supreme court. The court subsequently declared Connecticut's legislation unconstitutional, which led the proponents of the legislation to amend the constitution itself. [80] Kansas [81], Maine [82], New York [83], and Rhode Island [84] amended their constitutions to allow military absentee voting and enacted accompanying legislation in time to allow troops to vote in the election of 1864. Maryland adopted a new constitution that took effect in November of 1864 that included a provision to allow military absentee voting, and ***499** troops from Maryland were also able to cast votes in the 1864 election. [85] Nevada, which entered the Union during the war, adopted voting in the field in several ways. Congress had provided by law that a committee of delegates submit a constitution to the people. [86] In enacting the constitution, the delegates included provisions for soldiers in the field to vote on the constitution. [87] In addition, the ordinance specified that the same provisions for voting in the field would continue for future elections until the legislature adopted election laws. [88] In Indiana and Massachusetts, proponents of absentee voting tried to amend their constitutions, but failed; consequently, soldiers from these states were unable to vote by absentee ballot during the Civil War. [89] Efforts to amend the New Jersey Constitution failed as well, but New Jersey did adopt a constitutional amendment after the war, in 1875. [90] In Iowa, Wisconsin, Ohio and New Hampshire, the constitutionality of the absentee voting laws was challenged, but their state supreme courts upheld the laws. [91]

In a number of other states, courts struck down absentee voter laws. In Vermont, for example, the military absentee voter law included a provision requiring review by the state supreme court. The court held that absentee voter laws were constitutional as they related to presidential electors and federal elections, but were unconstitutional as they related to state and local elections, because they ran afoul of the state's in-person voting requirement. [92] Such a distinction was adopted in other states as well. [93]

The constitutional discussions in the states were extensive and centered around the state constitutional requirements for in-person voting, many of which were instituted in an attempt to register voters and cut down on fraud. These early constitutional

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clashes took place before the institution of the Australian ballot, but they still illustrate some of the difficulties inherent in absentee ***500** balloting. To the extent that it is easier to recognize fraud at a controlled polling place, absentee balloting avoids those safeguards.

B. Methods of Voting

There were two chief methods of absentee voting during the Civil War. Soldiers would either cast their votes directly or by proxy. In direct voting, soldiers would typically vote at a polling site set up by officers, personally depositing their ballots in a voting box, which would then be sent to the home precinct. [94] In proxy voting, a soldier would designate a proxy to cast his vote in his home precinct. Proxy voting was used by some states to circumvent the requirements for voting in person in the home election district.

Many states instituted stringent rules and regulations to protect against fraud, such as rules governing the procedures for setting up a ballot box and for transporting the ballots. [95] Even with such stringent precautions, however, the opponents of absentee balloting still objected that the practice would open the way for fraud.

C. How Many Absentee Ballots were Cast during the Civil War?

There are significant challenges to making an accurate estimate of how extensive absentee voting was during the Civil War. Some records are lost or incomplete. In some states, absentee ballots were not separated out in the vote count. [96] Despite these difficulties, Benton attempted to quantify absentee voting in the Civil War. On the Union side, there were 2.9 million enlisted soldiers. Accounting for those who were not of voting age, duplicates, those who served in their home precincts and other voting disqualifications, Benton estimates that just over 1.3 million soldiers in the field were eligible voters who could not vote at their home precincts because of their service. [97] Of these 1.3 million, by extrapolating from the states that kept accurate records, Benton concluded approximately 230,000 soldiers, or one out of ever six ***501** or seven soldiers, cast votes in the field. [98] These votes were part of over 4 million cast for president. Subtracting out 1 million votes from states where there was no voting in the field, Benton determined that, where absentee votes were permitted, 7 % of votes cast were absentee votes. [99] Benton noted that the soldier vote made no difference in most elections with one notable exception: by 475 votes, Maryland adopted a new constitution that abolished slavery, and the soldier vote was decisive in this case. [100]

D. The Fate of Military Absentee Ballot Laws after the Civil War

Many military absentee ballot laws disappeared after the Civil War. As of 1915, when Benton surveyed the laws, he found that only Michigan, Kansas, Maine, New York, Nevada and Rhode Island retained military voting statutes. [101] He also noted that many, but not all states retained the changes to their constitutions. [102] While a few provisions for military absentee balloting remained in force, they were obviously not applied, in the absence of a major military conflict in the post-Civil War period.

E. Civilian Absentee Balloting

Despite the prevalent use of absentee voting in the military context in the Civil War, nearly fifty years elapsed before a major move to institute absentee voting for civilians began. Before the reform period beginning in 1911, there were two minor civilian absentee voting statutes passed in Vermont and Kansas, [103] but both were quite limited in scope. In Vermont, if voters found themselves away from their home precinct, but within the same congressional district, they could vote in their new location after filing a certificate indicating that they were on the list of voters in their former place of residence. [104] The Vermont law applied only to the election of ***502** state officers, the congressional representative and presidential electors, all of whom would appear on the ballot across the congressional district. [105] The Kansas law was even more limited, applying only to railroad employees. [106]

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From 1911 to 1913, three states--Kansas, Missouri, and North Dakota--enacted civilian absentee ballot laws, which prompted a movement among nearly all the states to adopt similar legislation. [107] By today's standards, these acts and many other early absentee voter laws may seem restrictive in that they were limited to certain elections and to certain classes of voters. But these laws were the first to provide for statewide absentee balloting for a large class of voters.

Even in these earliest measures, there were two distinct methods of absentee voting. Kansas and Missouri adopted a system whereby a voter who was absent from his home polling location but within the state could present himself at another polling location and cast a ballot. That ballot would then be mailed to the voter's home precinct and counted there. [108] North Dakota's act more closely resembled modern absentee voting arrangements: a voter who anticipated his absence from his regular polling place would apply to the county auditor for an absentee ballot, which could be cast in front of an official notary public at any location (even outside the state) and mailed to the home polling place. [109]

The varying state approaches can be ascribed to differences in their constitutions. [110] In particular, North Dakota, unlike Kansas and Missouri, had an explicit provision in its constitution that "all elections by the people shall be by secret ballot." [111] The lack of any secrecy-in-voting clauses in the Kansas and Missouri constitutions made it possible to adopt a very simple system of voting by mail for intra-state voters. [112] By contrast, the North Dakota legislation required an elaborate set of procedures for the voter and the official who witnessed the casting of the absentee ballot. The voter was required to apply for an official absentee ballot from the county auditor. [113] The ballots were to resemble regular election ballots except for the tint. [114] Prior to the closing of the polls on election day, ***503** the voter would appear "before some official having a seal and authority to administer oaths." [115] The voter would have to show the official authority his unmarked ballot, and then mark it in the sole presence of this official, ensuring that the official could not see for whom the voter had voted. [116] The voter then was to fold his ballot and place it in an envelope that had been provided by the county auditor. [117] The official certified that all of these procedures have been followed, and the envelope was mailed to the county auditor, who then sent the envelope to the voter's home polling place. [118] The ballot was to arrive at the polling place and be opened before the polls closed on election day. [119] The local official at the polling place compared the signature on the outside of the envelope with the signature on file for the application for the absentee ballot; if the signatures matched, the envelope was opened, the folded ballot was placed into the ballot box and the voter's name was crossed off the rolls. [120]

The procedures required under the North Dakota statute bring into stark relief the potential conflicts between the secret ballot and absentee balloting. In particular, there are no safeguards for the voter in the absentee ballot system to ensure he or she is not coerced or paid to vote a certain way. As there is no curtain of secrecy, another person might see the completed ballot. By requiring an official to witness that there was a blank ballot, to watch the voter fill out the ballot without seeing the substance of the vote, and to ensure that the voter casts his ballot with no one else watching, North Dakota attempted to recreate the protections of the polling place. Of course, an unscrupulous official might swear to having followed the procedures without having done so, but this possibility does not detract from the fact that the law provided for procedures to preserve the secrecy of the ballot away from the polling place.

Interestingly, P. O. Ray, a political scientist who catalogued the adoption of absentee ballot laws, notes that even in Kansas and Missouri, which did not have explicit constitutional requirements for a secret ballot, "a reasonable degree of secrecy has nevertheless been insured." [121] Under the Kansas and Missouri system, when the ***504** voter appeared at a polling place away from this home precinct, after swearing an affidavit as to his voting status, he entered a voting booth and marked his ballot there. Voting officials endorsed the folded ballot and sent it to voting officials in the voter's home county. The one lapse in secrecy was that the voter's name and the endorsement would appear on the ballot itself, rather than on a separate envelope that would be discarded, so that those who opened and counted the ballot could learn the identity of the voter casting it. But to avoid the appearance of impropriety, stringent penalties were prescribed for officials who disclosed how the voter cast his ballot. [122] Ray, whose writings in the American Political Science Review in the early part of this century are generally favorable towards the development of absentee voting, takes care to highlight the provisions in the absentee ballot laws that tried to guarantee a secret ballot. His position might be summarized as follows: Absentee voting is a welcome development allowing voters, whose

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circumstances make it difficult for them to cast their ballot in their home precinct to exercise their rights to vote. But absentee balloting, while in tension with the secret ballot, need not undermine secrecy if proper safeguards are enacted. [123]

The adoption of absentee voting laws occurred at a remarkable pace. When Ray surveyed the state laws in the August 1914 edition of the American Political Science Review, he could count three enacted laws. [124] When he later surveyed the laws enacted through 1917, he found that 24 of the then 48 states had enacted absentee ballot laws. [125] The reasons for such a rapid adoption can be traced to the increased mobility of American workers, particularly among traveling salesmen and railway mail clerks who were necessarily absent from their places of residence on election day. [126] The United States' participation in World War I provided additional impetus for the passage of absentee ballot legislation. [127] By 1924, there were only three states without absentee ballot legislation. [128]

Most of these laws were limited in scope. States limited eligibility to select categories of people. Most states allowed absentee voting by members of the military, reflecting both the history of such voting during the Civil War and the more immediate conflict in the ***505** First World War. Some states extended eligibility to other transient professions such as railroad workers or specified categories such as university students. [129] A few states allowed voting for illness or inability to reach a polling place. [130]

States varied on where these absentee votes could be cast. Some, such as Vermont limited them to the same county as the voter's home voting precinct. [131] Others required voting within the state, yet others required that the voter could only cast votes if he was out of state. [132] Despite the impetus of the First World War for the adoption of absentee voting, almost all states required that the ballots be cast in the United States. [133] There was also a great variety in the types of elections in which eligible voters were allowed to cast absentee ballots. Some states limited absentee voting to presidential elections, while others included other federal elections, primaries, local elections, and so forth. [134]

There was even an experiment in voting by mail in Nevada that prefigures Oregon's mail voting system. Ray notes that Nevada was the first state to authorize voting by mail by voters who were neither absent from their home precincts nor kept from the polls by sickness or physical disability. [135] Such voting was limited to precincts with fewer than twenty voters and its purpose was "to avoid the trouble and expense involved in establishing polling places and appointing election officers in the sparsely settled portions of the state." [136]

As stated above, the two broad types of absentee voting were the Kansas/Missouri model and the North Dakota model. In the Kansas/Missouri model, a voter within the state presented himself at any polling place and cast a ballot, which was then mailed back to the home precinct. [137] In the North Dakota model, a voter made an application for an absentee ballot, which was mailed to him or her; the voter then took the ballot to a notary public, filled out the ballot and mailed it to the home jurisdiction. [138] In the early years of the adoption of absentee ballot legislation, both models enjoyed ***506** support. In 1917, 10 states had adopted the Kansas/Missouri model and 14 the North Dakota model. [139] But states began to favor the North Dakota model, as it allowed for voting out of state, and because states began to allow absentee voting for local office, which would differ from precinct to precinct. By 1938, only Oklahoma used the Kansas/Missouri style plan exclusively, and only five other states used it as an alternative method of absentee voting. [140] The remainder had adopted the North Dakota system. [141]

III. Constitutional Challenges to Absentee Voting

As was the case with military absentee voting during the civil war, there remained constitutional questions surrounding absentee voting. There was still the central issue of whether absentee voting conflicted with state constitutional requirements of in person voting, which were often related to the introduction of registration systems and other safeguards to combat election fraud. In addition, since the Civil War, the states had adopted Australian ballot laws, and a number of state constitutions included provisions that explicitly provided for a "secret ballot." The secrecy provisions in state constitutions and laws made it hard to

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justify a system of absentee ballots where a voter did not have the protection of the curtain in the polling place to keep secret his voting selections.

These potential conflicts between absentee voting laws and state constitutions resulted in a number of state constitutional amendments and several cases striking down these laws. Notably, Michigan,[142] Maryland,[143] New York[144] and California[145] amended their constitutions to allow for absentee voting. The California amendment, for example, allowed for voting by "those who by reason of their occupations, are required to travel," and those "engaged in the military and naval service of the United States."[146]

There were several significant cases in which absentee ballot laws were found to have conflicted with state constitutions. In 1921, the Kentucky Supreme Court found a 1918 absentee ballot law ***507** inconsistent with section 147 of the Kentucky Constitution, which provided that "[a]ll elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, . . . and then and there deposited."[147] This provision had been adopted in 1891, during the height of the Australian ballot reform movement.

In Pennsylvania Lancaster's Fifth Ward Election,[148] the Pennsylvania Supreme Court relied on the constitutional provision that a voter reside in the election district "where he offers to vote" in order to declare a 1923 civilian absentee ballot act unconstitutional.[149] Recall that in Chase v. Miller, the same court had struck down an act providing for military absentee voting because it violated the "offer to vote" provision of the constitution. In response to this decision, Pennsylvania had amended its constitution to allow for military absentee balloting. The court in Pennsylvania Lancaster's noted that no such amendment had been made to allow for civilian absentee voting, which indicated to the court that the only class permitted to do so was military voters.[150] The court found that the violation of the "offer to vote" provision was sufficient to declare the act unconstitutional, but it also noted that the act might run afoul of another provision of the constitution, which had been adopted since Chase. Article VIII, section 4 of the Pennsylvania Constitution of 1874 included a provision that guaranteed the secrecy of the ballot: article VIII section 4 guaranteed the secrecy of the ballot.[151] The court noted that objections to the validity of the act had been raised with regard to this provision, but that a "detailed discussion [was] unnecessary."[152] It did, however, add that:

> [i]t may well be argued that the scheme of procedure fixed by the Act of 1923, for the receipt, recording and counting of the votes of those absent, who mail their respective ballots, would end in the disclosure of the voter's intention, prohibited by the amendment of 1901 to section 4 of article VIII of the Constitution,--undoubtedly the result if but one vote so returned for a single district. Though this provision as ***508** to secrecy was likely added in view of the suggestion of the use of voting machines, yet the direction that privacy be maintained is now part of our fundamental law.[153]

In New Mexico, the state supreme court in Thompson v. Scheier[154] held an absentee ballot law unconstitutional. The court held that the New Mexico Constitution's requirement that the voter "offer a vote" in his home precinct precluded absentee balloting. New Mexico had passed a constitutional amendment in 1920 to allow for military absentee balloting, but had not authorized the same practice for civilians. In a case later that year, Baca v. Ortiz,[155] the court found that military absentee balloting was also unconstitutional because the amendment in question, which had garnered a simple majority, should have been ratified by a three-quarters vote statewide and by a two-thirds vote in each county. The court therefore applied the Thompson ruling to military absentee voting statutes as well, and found them unconstitutional.[156]

While today all states have absentee ballot legislation, the constitutional amendments and the court decisions above illustrate that the absentee ballot, while a good and necessary avenue of voting for certain voters, is sometimes inconsistent with other goods in the electoral arena. To the extent that a state's constitution explicitly embraces in-person voting to combat fraud or protect the secrecy of the ballot, it must carve out exceptions for absentee balloting.

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A. Procedural Safeguards on Absentee Voting

As early advocates of absentee ballot legislation recognized the tensions between the absentee system and anti-fraud and secrecy provisions, most early laws contained significant procedures to ensure, as much as possible, an untainted and private absentee ballot. The procedures covered the whole process from when the voter applies for an absentee ballot to when the ballot is counted. Political scientist Paul Steinbicker, writing retrospectively at the end of the reform period, noted the extent of such precautions. Steinbicker did not see all of the precautions as justified, such as ***509** the regulations in four New England states, which required that the voter "swear that his choices of candidates have been unsubscribed, undictated, and unbought." [157] But while he argued against excessive precautions that may inconvenience the voter, he was quite insistent that absent ballot laws include "adequate safeguards to prevent abuse." [158] He noted with approval that the states "are generally careful to prevent fraud and dishonesty in absentee voting." [159]

His observations are striking today, as most of what he considered common and necessary to prevent fraud has been abandoned by the states in the name of convenience. First, he noted, "the absentee ballot is nearly always accompanied by an affidavit blank, usually on the envelope in which the ballot is to be sealed, which must be filled out and attested before a notary or other official authorized to administer oaths." [160] Second, he remarked that the laws almost invariably provided that "the voter shall mark his ballot in the presence of the attesting official, although in such a manner that the latter cannot know for whom or for what it is marked. Usually, the attesting official must himself make a jurat to the effect that this has been done." [161]

Steinbicker notes two exceptions to the generally stringent privacy protections--in Idaho and Michigan. Idaho only required affirmation that "the law had been complied with, and that the ballot has been 'marked, folded, and sealed in private and secretly.'" [162] Michigan required a similar affirmation and the signatures of two witnesses. [163] These provisions garner Steinbicker's scorn as "deserv[ing] criticism on the ground of too easy abuse." [164]

B. Absentee Balloting Today

If the reformers who instituted the absentee ballot could witness today's absentee ballot system, they would be pleased at its success, but shocked at how it has been implemented. They would see that their efforts to extend voting privileges to those who are unable to ***510** vote at local polling places have expanded beyond their wildest dreams. The classes of people who are eligible to vote in absentia have expanded enormously. In the early period, many states limited the absentee vote to certain professions, and allowed very limited reasons for absence. [165] Today, absentee ballot laws are loose and generous in their scope. Nearly any eligible voter can vote in absentia in a given election. Correspondingly, the percentage of ballots cast by absentee voters has skyrocketed. [166] However, the early day reformers would be stunned to learn that the many provisions they viewed as essential to a well-functioning absentee ballot system have been stripped away in the name of voter convenience. [167]

C. The Rise of Absentee Voting

The percentage of absentee voters at the national level is hard to calculate accurately due to different voting methods, reporting categories, and variations in voter participation in elections at different levels and in different cycles. It is even more difficult to compare such numbers over time. Yet an upward trend is apparent. Steinbicker estimated that in the presidential election year of 1936, 2% of the 45 million votes cast nationwide were absentee ballots. [168] In the 2000 presidential election, 14% of all votes were cast before election day. [169] While this number is still relatively modest, the percentage is on the rise, and is driven by a few Western states where absentee ballot rates are extremely high: in Oregon, which has an all mail voting system, every voter must by necessity cast a ballot away from the polling place; [170] but in recent elections several other states have high percentages of votes cast away from the ***511** traditional polling place, including Washington (66%), [171] California (25%), [172] Colorado,

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Nevada, and Arizona (all about 35%). [173] The rise in California's absentee voting is instructive. Between the 1962 and 2000 general elections, absentee ballots increased from 2.6% of all votes to 24.6%. [174]

Equally striking is the change in the procedures for casting absentee ballots. It is much more convenient for voters to cast absentee ballots, but many of the safeguards viewed as essential by early reformers have been abandoned. While nearly all of the first civilian absentee voting statutes required the voter to appear before a notary public, [175] no state requires that today. The notary requirement is an option in nine states, [176] but the notary can be dispensed with if there are one or two witnesses. [177] Only five other states require a witness in all circumstances, although a good number require a witness if the voter was assisted in voting. [178] Twenty-one states have no requirements for a notary public or a witness. [179]

IV. The Implications of Convenience Absentee Balloting

Advocates of Oregon's all mail voting system trumpeted its positive effects on voter turnout. The theory is that there are obstacles to voting which mail voting removes. The evidence for such a claim, however, is shaky. First, there is not enough data to make definitive judgments about vote by mail. Second, there is dispute in the scholarly community if vote-by-mail increases voter turnout. A University of Michigan study showed a small increase (6%) in turnout in one election, although it notes that vote-by-mail does not entice non-voters to cast ballots and makes it slightly more ***512** likely that habitual voters will cast ballots in a given election. [180] Another political scientist argues that vote-by-mail depresses turnout, possibly because it de-emphasizes traditional get-out-the-vote mechanisms. [181] He notes that in the same Oregon election that the Michigan study examined that Oregon's rate of voter turnout was not historically high, nor relatively higher than the rate in other elections of that election cycle. [182]

Easy absentee voting has also caused the political parties to become much more involved in promoting their use. Where once there were strong prohibitions forbidding anyone but the voter from procuring an absentee ballot and equally strong restrictions against assistance in filling out absentee ballots, many of these provisions are no longer in effect. This looseness in the laws allowed the parties to become much more directly involved in the absentee ballot process, as it is in the parties' interest to “lock in” their loyal voters before election day.

A. Modern Cases of Abuse of the Absentee Ballot

The rise in absentee voting, the ease of obtaining absentee ballots, and the role of the parties in the process could easily lead to increased fraud and the loss of protections of the secret ballot. Proponents of such developments are quick to downplay the idea that fraud of the type that occurred before the implementation of the Australian ballot could occur again. It is certainly true that elections are much “cleaner” now than they once were, but the opportunity for mischief exists because of the lack of precautions in the use of the absentee ballot. What is to stop an employer, church, union, club, or family from viewing the voter's ballot? Similarly, there are opportunities for unscrupulous partisans to cast ballots for the feeble or unaware. Unlike ballots cast in person, which are in the hands of election officials only for a matter of hours until they are counted, and then usually in the presence of observers ***513** from both parties, absentee ballot applications and absentee ballots are in the physical possession of local election officials, often partisans themselves, for weeks or months and are out of the physical view of any outsiders.

There have been a number of serious absentee ballot scandals in recent years that demonstrate the opportunity for fraud in the absentee ballot system. The most dramatic example was the Miami mayoral election of 1997. Many absentee ballots were shown to be forged, coerced, stolen from mailboxes, or fraudulently obtained. [183] Problems were not peculiar to military ballots; Republican Party officials in Seminole County were accused of inappropriately adding voter identification numbers to thousands of absentee ballot applications. [184] The fraud was so pervasive that Florida courts threw out all of the absentee ballots, overturned the election, removed the declared winner, Xavier Suarez, from office, and installed Joe Carollo instead. [185] In another case in Florida, absentee ballot irregularities in the 1993 Hialeah mayoral contest prompted a judge to order a new election. [186] Absentee ballot fraud in Florida led officials to tighten their standards, but it was precisely those tighter standards--

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clear postmarks, signatures, dates, voter identification numbers, witnesses--that tripped up so many absentee ballots in the election controversy in 2000. Fraud has not been exclusive to Florida. Other absentee ballot fraud cases have occurred in recent years in Alabama, [187] Connecticut, [188] Indiana, [189] New York, [190] and Pennsylvania. [191]

***514 B. Election Reform Legislation in Congress and Absentee and Mail Voting**

The differences between voting at the polling place and absentee and mail voting were made clear during the election reform debate in Congress last year. The legislation passed by Congress focused primarily on improving the polling place experience with reforms such as improved voting machines, provisional ballots, computerized state-wide registration systems accessible at every polling place, accessibility to the polls and error checking were aimed at the traditional polling place. [192] Strikingly, in the debate on election reform in the Senate, the advocates of the Oregon mail voting system twice sought to have absentee and mail voting systems exempt from provisions of the election reform bill. In particular, they sought exemptions from election reform requirements for error checking of ballots and for a requirement that voters who have registered by mail show a form of identification when voting. [193] The latter provision was so contentious that it threatened to destroy a bipartisan compromise on the bill. [194] Election reformers hope that reform succeeds in lessening the over-vote and under-vote rates and reducing fraud at the polling place. To the extent that the voting experience at the polls improves in ways that are hard to duplicate in an absentee voting setting, we may very well come to have two distinct kinds of voting.

Conclusion

There has been a movement in our country toward voting away from the polling place. The percentage of such votes has risen over the years, and a number of election officials in Western states have been aggressive proselytizers of the view that vote by mail or increased use of absentee ballots is a reform that makes voting more convenient and raises voter turnout. There is no sign that this trend will disappear, and it is not farfetched to imagine the world sketched out by some technologists that voters will cast their votes at their own homes over the Internet.

Convenience of voting is an important goal, but not one that should triumph absolutely over other goals. Convenience of voting ***515** must be balanced with privacy and the secrecy of the ballot. The fact that some people need absentee ballots should not lead us to the conclusion that voting away from the polling place is good for all of us. In addition, increased absentee voting or vote-by-mail are not the only ways to make voting more convenient. There are many ways of making the traditional polling place more accessible, welcoming, efficient and convenient.

The issue with the rise of absentee balloting is not just the greater possibilities for fraud. The vote, in many ways, epitomizes democracy. It should be a meaningful experience, where citizens congregate with their neighbors and affirm their joint commitment to society, where the experience of entering a private, curtained voting booth reaffirms their commitment to individual liberty and the right to choose their leaders. Reducing the vote to the equivalent of filling out a Publishers' Clearinghouse lottery cheapens the experience. In a highly mobile society, absentee ballots are a necessity, but they should remain an option designated for those who are unavoidably absent from their homes on election Day, not as a regular substitute for voting at the polls.

If there must be a more widespread alternative to election Day voting at the polls, early voting at a city hall or other official office at least preserves the sanctity of privacy for a voter, and partially replicates the collective experience of voting. But early voting has a serious downside. A system in which many or most voters cast their ballots before election Day changes the whole nature of a campaign. For better or worse, most citizens do not pay close attention to an election until shortly before the election itself. Not surprisingly, the whole nature of the campaign, including the candidates' strategies and messages, change during the final days and weeks. In the home stretch, the pressure is greater and revelations often emerge, which changes the context of the contest and the voters' evaluation of the candidates. So early voters, by definition, are comparatively uninformed. Voting early is like voting on the outcome of a basketball game at the end of the third quarter.

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The desire to reduce barriers to voting, and to make voting more pleasant than burdensome an experience is commendable. Indeed, it is and should be an obligation of a democratic society to make voting perceived positively, while also ensuring against abuse or fraud. Election reform should focus its energies and resources on making election Day work better, which means extending polling hours, perhaps even over a 24 hour period or on a weekend; more and better informed poll workers; more voting machines and ***516** booths to reduce lines; a streamlined and centralized voter registration system in each state to reduce fraud and prevent wrongly turning away duly registered voters. All of these things cost money, and both the federal government and the states should step up and provide the necessary resources.

The absentee ballot was an important reform when it was introduced for military voters in the 19th century and civilian voters in the 20th. But the introduction of the Australian ballot was likewise a significant reform. These two reforms are in tension with one another. The privacy of the vote guaranteed by the Australian ballot system is compromised by the absentee ballot. Early advocates of the absentee ballot understood its value, but also the tension with the Australian ballot. Accordingly, they instituted important safeguards in absentee ballots that sought to preserve some aspects of the secret ballot. In our rush to introduce more voting away from the polling place we forget these safeguards and the abuses that plagued an earlier era. Election reformers would be wise to recall the history of earlier electoral reforms. If they do not do so, the lure of convenience will become even more powerful--until we reach a level of fraud comparable to the 19th Century, and start a new cycle of reform.

Footnotes

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1 See, e.g., Robert Pear, Bill to Overhaul System of Voting is Seen in Danger, N.Y. Times, Sept. 7, 2002, at A1.

2 This term refers to laws that do not require the voter to supply a reason for obtaining an absentee ballot or vote by mail.

3 Karen Foerstel, Balloting System Revamp Sags in Senate over I.D.'s: Chances Dim for Fall Potency, CQ Weekly, Mar. 9, 2002, at 637.

4 See generally Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002).

5 Foerstel, supra note 3.

6 See infra Part III.C.

7 Corruption was so prevalent that the Australian ballot was introduced to combat it. See e.g., L.E. Fredman, The Australian Ballot: The Story of an American Reform 30-31 (1968).

8 U.S. Const. art. I, §4, cl. 1.

9 Fredman, supra note 7, at ix.

10 Id.

11 Id. at 22; Allen Thorndike Rice, The Next National Reform, 148 N. Am. Rev. 386 at 83 (1889).

12 Fredman, supra note 7, at 3-9.

13 Id. at 10.

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14 Id. at 11-12.

15 John Stuart Mill, On Liberty and Considerations on Representative Government 232-33 (1946). Some early American progressives echoed Mill's sentiment, but as mounting evidence of corruption in the polling place emerged, progressives came to support the Australian ballot reform. See Fredman supra note 7, at 38.

16 Id. at 11-12.

17 Id. at 46.

18 Jerrold G. Rusk, The Effect of the Australian Ballot Reform on Split Ticket Voting: 1876-1908, 64 Am. Pol. Sci. Rev. 1220, 1221 (1970).

19 Fredman, supra note 7, at 20.

20 Id. Kentucky continued the practice of oral voting well into the 19th century. Id.

21 Id.

22 Id.

23 Id.

24 Id. at 21.

25 2 James Bryce, The American Commonwealth, 493-94 (1888).

26 Henshaw v. Foster, 26 Mass. (9 Pick.) 312, 317-20 (1830) (holding that a Massachusetts constitutional provision addressing written ballots included printed ballots, as the provision was meant merely to forbid voting by voice).

27 Fredman, supra note 7, at 21-22.

28 Id. at 22; Rice, supra note 11, at 83.

29 See The Nation, May 19, 1892, at 369; see also Fredman, supra note 7, at 23.

30 Alan Ware, Anti-Partism and Party Control of Political Reform in the United States: The Case of the Australian Ballot, 30 Brit. J. Pol. Sci. 1, 14 (2000); see also Fredman, supra note 7, at 28.

31 Ware, supra note 30, at 11.

32 See Fredman, supra note 7, at ix; Henry George, Money in Elections, 316 N. Am. Rev. 15, 209 (1883).

33 John H. Wigmore, The Australian Ballot System as Embodied in the Legislation of Various Countries 22 (1889).

34 1888 Mass. Acts. 436; see also Wigmore, supra note 33, at 25-26.

35 Fredman, supra note 7, at 98.

36 Id. at 47-48.

37 Id. at 85.

38 Letter from Abram Flexuer to Editor, Boston Globe, Jan. 11, 1889, at 6, quoted in Wigmore, supra note 33, at 23.

39 Letter from F. to Editor, The Nation, Dec. 13, 1888, at 476.

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40 Fredman, supra note 7, at 39.

41 See J.C. Heckelman, The Effect of the Secret Ballot on Voter Turnout Rates, 82 Pub. Choice 107, 107 (1995); see also Phillip E. Converse, Change in the American Electorate, in The Human Meaning of Social Change 276-79 (Angus Campbell & Phillip E. Converse eds., 1972).

42 See generally Josiah Henry Benton, Voting in the Field: A Forgotten Chapter of the Civil War (1915).

43 All but Rhode Island, Connecticut, and Kentucky. P. Orman Ray, Absent-Voting Legislation, 1924-1925, 20 Am. Pol. Sci. Rev. 347, 347 (1926). Kentucky had enacted an absentee voting law in 1918, but the Kentucky Supreme Court held that it was inconsistent with the state constitution. Clark v. Nash, 192 Ky. 594 (1921).

44 Paul G. Steinbicker, 32 Am. Pol. Sci. Rev. 898, 898-90 (1938). For example, Kansas adopted an absentee ballot law limited to railroad workers in 1901 but broadened it in 1911 to cover "any qualified elector." Id. at 898, n.5.

45 Id. at 905.

46 See, e.g., Clark, 192 Ky. at 594.

47 Benton, supra note 42, at 314-15. The few that survived fell into disuse in the absence of military conflict. Id.

48 All but Indiana, Illinois, Delaware, New Jersey, Oregon, and Massachusetts. See Benton, supra note 42, at 312-13.

49 All but Texas, Arkansas, Louisiana, and Mississippi. See id. at 27-28.

50 Id. at 306-10.

51 Id. at 12-14.

52 Id. at 308.

53 1863 Mich. Journal of the House, pt. 2, at 1031.

54 Majority Report of Committee on Elections, Minutes of the House, at 364 (N.J. Mar. 8, 1864), quoted in Benton, supra note 42, at 274.

55 Id. at 132-34.

56 1863 N.Y. Assembly Journal, at 1277.

57 Id.

58 Id.

59 Majority Report, supra note 54, at 364, quoted in Benton, supra note 42, at 274-75.

60 Benton, supra note 42, at 158.

61 Id. at 160.

62 Id.

63 New York World, Oct. 28, 1864, Headline

64 Id.

65 New York World, Oct. 29, 1864, Headline

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66 Benton, supra note 42, at 167. For a full account of the incident, see id. at 157-70; see also David G. Croly, Seymour and Blair, Their Lives and Services, with an Appendix Containing a History of Reconstruction 131-37 (1868).

67 Benton, supra note 42, at 5.

68 Id. at 8-14.

69 N.Y. Const. of 1846, art. II, §1 (1894).

70 Benton, supra note 42, at 27.

71 Id. at 28. As Benton notes, the seven Confederate states that passed provisions for absentee voting did so during or shortly after their secession. Id.

72 Act of Mar. 29, 1813, ch. 171, 1813 Pa. Laws 213-14. New Jersey also passed legislation in 1815 to allow soldiers to vote in the field, but it repealed the law in 1820. Act of Feb. 16, 1815, §1, 1815 N.J. Laws 16-18(repealed 1820).

73 Pa. Const. of 1838, art. III, §1 (1838).

74 Chase v. Miller, 41 Pa. 403, 417 (1862).

75 Id. 428-429.

76 Id. at 418.

77 Id. at 423.

78 Id. at 417-18.

79 Benton, supra note 42, at 200-01.

80 Id. at 174-78.

81 Id. at 110-11.

82 Id. at 121.

83 Id. at 153.

84 Id. at 186.

85 Id. at 248-49.

86 Act of Mar. 21, 1864, ch. 36, 13 Stat. 30.

87 Nev. Const. of 1864, Election Ordinance, §2 (1866); see also Benton, supra note 42, at 171.

88 Id. at 171-73.

89 Id. at 281-92, 293-304.

90 Id. at 269-80.

91 Morrison v. Springer, 15 Iowa 304 (1863); State ex rel. Chandler v. Main, 16 Wis. 398 (1863); Lehman v. McBride, 15 Ohio St. 573 (1863). New Hampshire's law was upheld in an advisory opinion. Constitutionality of the Soldiers' Voting Bill, 45 N.H. 595 (1864).

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92 1865 Vt. House Journal, Extra Sess., at 376-81.

93 See, e.g., Twitchell v. Blodgett, 13 Mich. 127 (1865); Bourland v. Hildreth, 26 Cal. 161 (1864).

94 Benton, supra note 42, at 15.

95 See, e.g., Benton, supra note 42, at 54 (citing Wisconsin's provisions).

96 New York, Connecticut, Minnesota, West Virginia and Missouri did not separate out absentee ballots. Id. at 319.

97 Id. at 311.

98 Id. at 312-13.

99 Id. at 313.

100 Id.

101 Id. at 315.

102 For example, Missouri in 1875 and Maryland in 1867 omitted the constitutional provisions for military absentee voting when they adopted new constitutions. Id. at 314-15.

103 P. Orman Ray, Absent Voting, 11 Am. Pol. Sci. Rev. 116, 116 (1917).

104 Id.

105 Id.

106 Id.

107 P. Orman Ray, Absent Voters, 8 Amer. Pol. Sci. Rev. 442, 442 (1914).

108 Id. at 443.

109 Id. at 444.

110 Id. at 443-44.

111 N.D. Const. of 1889, art. 5, §129 (1950).

112 Ray, supra note 107, at 443.

113 Id. at 444.

114 Id.

115 Id.

116 Id.

117 Id.

118 Id.

119 Id.

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120 Id. at 444-45.

121 Id. at 443.

122 Id.

123 See, e.g., id. at 442-45.

124 Kansas, Missouri and North Dakota had enacted such laws. Id. at 442.

125 P. Orman Ray, Absent-voting Laws, 1917, 12 Am. Pol. Sci. Rev. 251, 251 (1918).

126 Charles Kettleborough, Absent Voting, 11 Am. Pol. Sci. Rev. 320, 320 (1917).

127 Steinbicker, supra note 44, at 898.

128 This includes Kentucky, which had passed legislation that was later declared unconstitutional. Ray, supra note 43, at 347.

129 Steinbicker, supra note 44, at 899-900.

130 Id. at 899.

131 Ray, supra note 103, at 116.

132 Steinbicker, supra note 44, at 899.

133 Id.

134 Id. at 900.

135 P. Orman Ray, Absent-voting Laws, 18 Am. Pol. Sci. Rev. 321, 324 (1924); see also 1923 Nev. Stat. 207.

136 Ray, supra note 135, at 324.

137 Ray, supra note 107, at 443.

138 Id. at 444.

139 Ray, supra note 125, at 251.

140 Steinbicker, supra note 44, at 901.

141 Id.

142 John A. Lapp, Absent Voting, 10 Am. Pol. Sci. Rev. 114, 114-15 (1916).

143 P. Orman Ray, Recent Primary and Election Laws, 13 Am. Pol. Sci. Rev. 264, 269-70 (1919).

144 Ray, supra note 135, at 321.

145 Id.

146 Ray, supra note 43, at 348; 1923 Cal. Stat. 283

147 Ky. Const. §147 (1891). Kentucky's 1891 Constitution is still in force as amended.

148 126 A. 199 (Pa. 1924).

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149 Id. at 200.

150 Id. at 201.

151 Pa. Const. of 1874, art. VIII, §4 (amended 1901) ("All elections by the citizens shall be by ballot or by such other method as may be prescribed by law; Provided, That secrecy in voting be preserved").

152 Pennsylvania Lancaster's, 126 A. at 201.

153 Id. at 201; see also Ray, supra note 43, at 348 (discussing Clark and Pennsylvania Lancaster's).

154 57 P.2d 293, 302-04 (N.M. 1936).

155 61 P.2d 320, 321 (N.M. 1936).

156 Id.

157 Steinbicker, supra note 44, at 903.

158 Id.

159 Id. at 905.

160 Id.

161 Id.

162 Id.

163 Id.

164 Id.

165 Ray, supra note 135, at 323-24.

166 See infra Part III.C.

167 National Conference of State Legislatures, Absentee Ballots, at http://www.ncsl.org/programs/legman/elect/taskfc/absentee.htm (last visited April 18, 2003).

168 Steinbicker, supra note 44, at 898.

169 U.S. Census Bureau, Voting and Registration in the Election of November 2000 10 (Feb. 2002) (on file with the University of Michigan Journal of Law Reform). Note: this figure does not include overseas military personnel.

170 Oregon Secretary of State, Vote-by-Mail: Frequently Asked Questions, at http://www.sos.state.or.us/executive/policy-initiatives/vbm/faq.html (last visited April 9, 2003).

171 Washington Secretary of State, Absentee Statistics for the 2002 General Election, at http://www.secstate.wa.gov/elections/absentee_stats.aspx (last visited Apr. 18, 2003).

172 California Secretary of State, Historical Absentee Ballot Use in California, at http://www.ss.ca.gov/elections/hist_absentee.htm (last visited April 7, 2003).

173 U.S. Census Bureau, supra note 169, at 10.

174 See California Secretary of State, supra note 172.

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175 Steinbicker, supra note 44, at 905.

176 Alabama, Alaska, Florida, Louisiana, Maine, Minnesota, New Jersey, Oklahoma, and Rhode Island. National Conference of State Legislatures, supra note 167.

177 Id.

178 Mississippi, North Carolina, South Carolina, Virginia, and Wisconsin require one or two witnesses in all circumstances. Id.

179 Id.

180 Adam J. Berinksy et al., Who Votes by Mail? A Dynamic Model of the Individual-Level Consequences of Vote-By-Mail Systems, 65 Pub. Opinion Q. 178, 190-91 (2001); see also Michael Traugott, Alternative Methods of Voting: Mail, Internet, Unrestricted Absentees, Address at United States Congressional Briefing: The Mechanics of Electoral Reform: From Registration to Results (Mar. 16, 2001), at http://www.decadeofbehavior.org/policyseminars/er_transcript-traugott.pdf (last visited May 14, 2003)

181 See Curtis Gans, Comments on Report by Voting Procedures Working Group 6 (June 6, 2001) (unpublished report, on file with the University of Michigan Journal of Law Reform).

182 Id. at 7.

183 David D. Porter, A Dirty Little Secret of Politics, Orlando Sentinel, Feb. 23, 2002, at A19.

184 Jacobs v. Seminole Cty. Canvassing Board, 773 So.2d 519, 521 (2000).

185 In Re The Matter of the Protest of Election Returns and Absentee Ballots in The November 4, 1997 Election for the City of Miami, Fla., 707 So.2d 1170 (Fla. Dist. Ct. App. 1998); Donald P. Baker, Appeals Court Reinstates Ex-Mayor of Miami: Ruling Invalidates Court Order for New Race After Widespread Fraud, Washington Post, Mar. 12, 1998, at A3.

186 Catherine Wilson, Judge Orders New Election in Hialeah, Tampa Tribune, Nov. 8, 1994, at 6.

187 Associated Press, Final Four Sentenced in Winston County Voter Fraud Case, July 19, 2001.

188 Tom Puleo, Tighter Control Sought on Absentee Ballots; Charges in Garcia Case May Prompt Action, Hartford Courant, June 27, 1996, at A3.

189 Associated Press, Martinsville Mayor, City Council Member Charged with Election Fraud, Jan. 6, 2000.

190 Associated Press, Cattaraugus County Legislator Charged with Filing False Ballots, Sept. 17, 1999.

191 Marylynne Pitz, Murphy Arraigned on Vote-Fraud Charges, Pittsburgh Post Gazette, May 25, 1999, at B1.

192 Help America Vote Act of 2002, supra note 4.

193 S.565, 107th Cong. Amends. 2874, 2937 (2002).

194 Foerstal, supra note 3, at 637.

36 UMIJLR 483

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The New York Times | https://nyti.ms/R2EbfO

Error and Fraud at Issue as Absentee Voting Rises

By Adam Liptak

Oct. 6, 2012

TALLAHASSEE, Fla. — On the morning of the primary here in August, the local elections board met to decide which absentee ballots to count. It was not an easy job.

The board tossed out some ballots because they arrived without the signature required on the outside of the return envelope. It rejected one that said "see inside" where the signature should have been. And it debated what to do with ballots in which the signature on the envelope did not quite match the one in the county's files.

"This 'r' is not like that 'r,' " Judge Augustus D. Aikens Jr. said, suggesting that a ballot should be rejected.

Ion Sancho, the elections supervisor here, disagreed. "This 'k' is like that 'k,' " he replied, and he persuaded his colleagues to count the vote.

Scenes like this will play out in many elections next month, because Florida and other states are swiftly moving from voting at a polling place toward voting by mail. In the last general election in Florida, in 2010, 23 percent of voters cast absentee ballots, up from 15 percent in the midterm election four years before. Nationwide, the use of absentee ballots and other forms of voting by mail has more than tripled since 1980 and now accounts for almost 20 percent of all votes.

Yet votes cast by mail are less likely to be counted, more likely to be compromised and more likely to be contested than those cast in a voting booth, statistics show. Election officials reject almost 2 percent of ballots cast by mail, double the rate for in-person voting.

"The more people you force to vote by mail," Mr. Sancho said, "the more invalid ballots you will generate."

Election experts say the challenges created by mailed ballots could well affect outcomes this fall and beyond. If the contests next month are close enough to be within what election lawyers call the margin of litigation, the grounds on which they will be fought will not be hanging chads but ballots cast away from the voting booth.

In 2008, 18 percent of the votes in the nine states likely to decide this year's presidential election were cast by mail. That number will almost certainly rise this year, and voters in two-thirds of the states have already begun casting absentee ballots. In four Western states, voting by mail is the exclusive or dominant way to cast a ballot.

The trend will probably result in more uncounted votes, and it increases the potential for fraud. While fraud in voting by mail is far less common than innocent errors, it is vastly more prevalent than the in-person voting fraud that has attracted far more attention, election administrators say.

In Florida, absentee-ballot scandals seem to arrive like clockwork around election time. Before this year's primary, for example, a woman in Hialeah was charged with forging an elderly voter's signature, a felony, and possessing 31 completed absentee ballots, 29 more than allowed under a local law.

The flaws of absentee voting raise questions about the most elementary promises of democracy. "The right to have one's vote counted is as important as the act of voting itself," Justice Paul H. Anderson of the Minnesota Supreme Court wrote while considering disputed absentee ballots in the close 2008 Senate election between Al Franken and Norm Coleman.

Voting by mail is now common enough and problematic enough that election experts say there have been multiple elections in which no one can say with confidence which candidate was the deserved winner. The list includes the 2000 presidential election, in which problems with absentee ballots in Florida were a little-noticed footnote to other issues.

In the last presidential election, 35.5 million voters requested absentee ballots, but only 27.9 million absentee votes were counted, according to a study by Charles Stewart III, a political scientist at the Massachusetts Institute of Technology. He calculated that 3.9 million ballots requested by voters never reached them; that another 2.9 million ballots received by voters did not make it back to election officials; and that election officials rejected 800,000 ballots. That suggests an overall failure rate of as much as 21 percent.

Some voters presumably decided not to vote after receiving ballots, but Mr. Stewart said many others most likely tried to vote and were thwarted. "If 20 percent, or even 10 percent, of voters who stood in line on Election Day were turned away," he wrote in the study, published in The Journal of Legislation and Public Policy, "there would be national outrage."

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happening — and why it matters.

The list of very close elections includes the 2008 Senate race in Minnesota, in which Mr. Franken's victory over Mr. Coleman, the Republican incumbent, helped give Democrats the 60 votes in the Senate needed to pass President Obama's health care bill. Mr. Franken won by 312 votes, while state officials rejected 12,000 absentee ballots. Recent primary elections in New York involving Republican state senators who had voted to allow same-sex marriage also hinged on absentee ballots.

There are, of course, significant advantages to voting by mail. It makes life easier for the harried, the disabled and the elderly. It is cheaper to administer, makes for shorter lines on election days and allows voters more time to think about ballots that list many races. By mailing ballots, those away from home can vote. Its availability may also increase turnout in local elections, though it does not seem to have had much impact on turnout in federal ones.

Still, voting in person is more reliable, particularly since election administrators made improvements to voting equipment after the 2000 presidential election.

There have been other and more controversial changes since then, also in the name of reliability and efficiency. Lawmakers have cut back on early voting in person, cracked down on voter registration drives, imposed identification requirements, made it harder for students to cast ballots and proposed purging voter rolls in a way that critics have said would eliminate people who are eligible to vote.

But almost nothing has been done about the distinctive challenges posed by absentee ballots. To the contrary, Ohio's Republican secretary of state recently sent absentee ballot applications to every registered voter in the state. And Republican lawmakers in Florida recently revised state law to allow ballots to be mailed wherever voters want, rather than typically to only their registered addresses.

"This is the only area in Florida where we've made it easier to cast a ballot," Daniel A. Smith, a political scientist at the University of Florida, said of absentee voting.

He posited a reason that Republican officials in particular have pushed to expand absentee voting. "The conventional wisdom is that Republicans use absentee ballots and Democrats vote early," he said.

Republicans are in fact more likely than Democrats to vote absentee. In the 2008 general election in Florida, 47 percent of absentee voters were Republicans and 36 percent were Democrats.

There is a bipartisan consensus that voting by mail, whatever its impact, is more easily abused than other forms. In a 2005 report signed by President Jimmy Carter and James A. Baker III, who served as secretary of state under the first President George Bush, the Commission on Federal Election Reform concluded, "Absentee ballots remain the largest source of potential voter fraud."

On the most basic level, absentee voting replaces the oversight that exists at polling places with something akin to an honor system.

"Absentee voting is to voting in person," Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit has written, "as a take-home exam is to a proctored one."

Fraud Easier Via Mail

Election administrators have a shorthand name for a central weakness of voting by mail. They call it granny farming.

"The problem," said Murray A. Greenberg, a former county attorney in Miami, "is really with the collection of absentee ballots at the senior citizen centers." In Florida, people affiliated with political campaigns "help people vote absentee," he said. "And help is in quotation marks."

Voters in nursing homes can be subjected to subtle pressure, outright intimidation or fraud. The secrecy of their voting is easily compromised. And their ballots can be intercepted both coming and going.

The problem is not limited to the elderly, of course. Absentee ballots also make it much easier to buy and sell votes. In recent years, courts have invalidated mayoral elections in Illinois and Indiana because of fraudulent absentee ballots.

Voting by mail also played a crucial role in the 2000 presidential election in Florida, when the margin between George W. Bush and Al Gore was razor thin and hundreds of absentee ballots were counted in apparent violation of state law. The flawed ballots, from Americans living abroad, included some without postmarks, some postmarked after the election, some without witness signatures, some mailed from within the United States and some sent by people who voted twice. All would have been disqualified had the state's election laws been strictly enforced.

In the recent primary here, almost 40 percent of ballots were not cast in the voting booth on the day of the election. They were split between early votes cast at polling places, which Mr. Sancho, the Leon County elections supervisor, favors, and absentee ballots, which make him nervous.

"There has been not one case of fraud in early voting," Mr. Sancho said. "The only cases of election fraud have been in absentee ballots."

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Efforts to prevent fraud at polling places have an ironic consequence, Justin Levitt, a professor at Loyola Law School, told the Senate Judiciary Committee September last year. They will, he said, "drive more voters into the absentee system, where fraud and coercion have been documented to be real and legitimate concerns."

"That is," he said, "a law ostensibly designed to reduce the incidence of fraud is likely to increase the rate at which voters utilize a system known to succumb to fraud more frequently."

Clarity Brings Better Results

In 2008, Minnesota officials rejected 12,000 absentee ballots, about 4 percent of all such votes, for the myriad reasons that make voting by mail far less reliable than voting in person.

The absentee ballot itself could be blamed for some of the problems. It had to be enclosed in envelopes containing various information and signatures, including one from a witness who had to attest to handling the logistics of seeing that "the voter marked the ballots in that individual's presence without showing how they were marked." Such witnesses must themselves be registered voters, with a few exceptions.

Absentee ballots have been rejected in Minnesota and elsewhere for countless reasons. Signatures from older people, sloppy writers or stroke victims may not match those on file. The envelopes and forms may not have been configured in the right sequence. People may have moved, and addresses may not match. Witnesses may not be registered to vote. The mail may be late.

But it is certainly possible to improve the process and reduce the error rate.

Here in Leon County, the rejection rate for absentee ballots is less than 1 percent. The instructions it provides to voters are clear, and the outer envelope is a model of graphic design, with a large signature box at its center.

The envelope requires only standard postage, and Mr. Sancho has made arrangements with the post office to pay for ballots that arrive without stamps.

Still, he would prefer that voters visit a polling place on Election Day or beforehand so that errors and misunderstandings can be corrected and the potential for fraud minimized.

"If you vote by mail, where is that coming from?" he asked. "Is there intimidation going on?"

Last November, Gov. Rick Scott, a Republican, suspended a school board member in Madison County, not far from here, after she was arrested on charges including absentee ballot fraud.

The board member, Abra Hill Johnson, won the school board race "by what appeared to be a disproportionate amount of absentee votes," the arrest affidavit said. The vote was 675 to 647, but Ms. Johnson had 217 absentee votes to her opponent's 86. Officials said that 80 absentee ballots had been requested at just nine addresses. Law enforcement agents interviewed 64 of the voters whose ballots were sent; only two recognized the address.

Ms. Johnson has pleaded not guilty.

Election law experts say that pulling off in-person voter fraud on a scale large enough to swing an election, with scores if not hundreds of people committing a felony in public by pretending to be someone else, is hard to imagine, to say nothing of exceptionally risky.

There are much simpler and more effective alternatives to commit fraud on such a scale, said Heather Gerken, a law professor at Yale.

"You could steal some absentee ballots or stuff a ballot box or bribe an election administrator or fiddle with an electronic voting machine," she said. That explains, she said, "why all the evidence of stolen elections involves absentee ballots and the like."

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