

EXPERT REPORT

One Wisconsin Institute, Inc. et al.

v.

Judge Gerald C. Nichol, et al.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
Case No.: 15-cv-324

December 10, 2015

Barry C. Burden, Ph.D.

Madison, Wisconsin



Barry C. Burden

12/10/15

Date

Summary of Opinions

I closely monitored the development and implementation of new election laws in the state of Wisconsin between 2011 and 2014. Among other changes, the state has reduced the number of days, hours, and fail-safes for absentee voting, placed new restrictions on voter registration, made residency requirements stricter, and instituted a strict photo identification requirement.

The federal Voting Rights Act (VRA) bears directly on the election laws adopted in Wisconsin between 2011 and 2014. First passed in 1965, the VRA's Section 2 prohibits voting practices that discriminate on the basis of race, color, or language group.

It is my considered opinion that the specific changes to Wisconsin election law challenged by plaintiffs in this litigation, both individually and jointly, implicate the Senate Report factors in ways that demonstrate how the state's black and Latino voters are more likely than other voters to be deterred or prevented from voting by the challenged provisions and thus have less opportunity to participate in the electoral process. The dramatic disruption of voting practices resulting from the challenged provisions is likely to negatively affect minority voters more than white voters.¹

The challenged changes to Wisconsin election law also disproportionately affect several other groups: young people, people of lower socioeconomic status, and supporters of the Democratic Party. The challenged laws inhibit the opportunity to participate based on political views, age, and other seemingly arbitrary voter characteristics.

As I elaborate below, the disproportionate harm to these groups occurs for several reasons. Compared to whites, older residents, people of higher socioeconomic status, and Republican Party supporters, members of these groups generally have less well-established voting habits. As a result, disruptions to existing ways to participate in the political process have more significant effects on them. Furthermore, members of these groups generally have fewer of the resources that facilitate voter participation in the face of administrative and other barriers.

Wisconsin has a long history of facilitating voter participation and generally administering elections effectively. The challenged changes in election law are as a general manner an abrupt and unjustified interruption of the state's success in administering elections.

Background and Qualifications

I am a Professor of Political Science at the University of Wisconsin-Madison. I earned my Ph.D. at The Ohio State University in 1998. From 1999 to 2006 I was a faculty member in the Department of Government at Harvard University. I have been on the faculty as a full professor at the University of Wisconsin-Madison since 2006. A copy of my curriculum vitae is attached. I am being compensated \$300 per hour for my effort.

¹ I use the terms Hispanic and Latino interchangeably in this report. Wherever possible the terms white and black refer to non-Hispanic whites and blacks. I use the term "minority" to refer to people who are black and/or Latino.

My expertise lies generally in American politics with a focus on elections and voting, public opinion, representation, partisanship, and research methodology. I teach courses on these topics at both the undergraduate and graduate levels. I am author of the book *Personal Roots of Representation* (2007 Princeton University Press), co-author of *Why Americans Split Their Tickets* (2002 University of Michigan Press), and co-editor of *The Measure of American Elections* (2014 Cambridge University Press). I have also published articles in respected scholarly peer-reviewed journals such as the *American Political Science Review*, *American Journal of Political Science*, *Electoral Studies*, *Public Opinion Quarterly*, *Legislative Studies Quarterly*, *Public Administration Review*, *Election Law Journal*, and *Political Analysis*. I serve on the editorial boards of *Electoral Studies* and *Election Law Journal*, and have served as a manuscript reviewer for many academic journals. I am a member of the American Political Science Association and have been active in the profession, giving presentations at many conferences and universities. My research has been supported by grants won from sources including the Pew Charitable Trusts, National Science Foundation, and Dirksen Congressional Center.

I have particular expertise in elections and election administration. I am Director of the Elections Research Center at the University of Wisconsin-Madison. One of the Center's foci is election administration. I have testified before state officials and the bipartisan Presidential Commission on Election Administration and provided expert advice to the Government Accountability Office. I conducted the first independent evaluation of the Electronic Registration Information Center (ERIC), a state-based initiative designed to modernize voter registration systems. I am frequently contacted by journalists and civic organizations to speak about election administration. In recent years I have been quoted in several national media outlets such as *USA Today*, *The Wall Street Journal*, and *The New York Times* as well as many print, radio, and television outlets in Wisconsin.

I have provided expert reports and testified in three federal cases concerning changes in election law. One of those cases was the *Frank v. Walker* case addressing the acceptability of Wisconsin's 2011 photo identification requirement under the Voting Rights Act.² In each case my testimony was cited in the district judge's opinion.³

Materials Reviewed

To establish an expert opinion in this case, I reviewed an array of materials from academic, governmental, legal, and media sources. Building on my existing knowledge, expertise, and experience, I consulted scholarly research on the general causes and effects of changes in state election laws. My review also included data sources and statutes made available by agencies in

² *League of United Latin American Citizens of Wisconsin et al. v. Judge David G. Deininger et al.*, case 12-cv-00185, U.S. District Court, Eastern District of Wisconsin (2013).

³ See *N.C. State Conf. of NAACP v. McCrory*, 997 F. Supp. 2d 322, 349-50, 356 (M.D.N.C.), *aff'd in part, rev'd in part, and remanded*, 769 F.3d 224 (4th Cir.), *mandate stayed*, 135 S. Ct. 6 (2014), *cert. denied*, 135 S. Ct. 1735 (2015); *Frank v. Walker*, 17 F. Supp. 3d 837, 850-51, 862, 873, 876-78 (E.D. Wis.), *rev'd*, 768 F.3d 744 (7th Cir.), *rehearing en banc denied by an equally divided court*, 773 F.3d 783 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015); *Veasey v. Perry*, 71 F. Supp. 3d 627, 636-38, 641, 655, 666-67, 676, 697 (S.D. Tex. 2014), *aff'd in part, vacated in part, and remanded*, 796 F.3d 487 (5th Cir. 2015).

Wisconsin government and the federal government, as well as the legislative history of the challenged changes. I also reviewed news coverage of changes in election law and administration between 2011 and 2015. The sources on which I relied are cited in footnotes throughout this report.

The following two sections outline two prominent scholarly frameworks – “the calculus of voting” and the importance of voting as a habit – that inform my analysis in this case.

The Calculus of Voting

The likely effects of changes to Wisconsin election laws may be understood using the “calculus of voting.” The “calculus of voting” is the dominant theoretical framework used by scholars to study voter turnout. The theory dates back at least to Anthony Downs’s seminal 1957 book, *An Economic Theory of Democracy*. Under this theory, researchers conceptualize the likelihood of voting as a formula. A person votes if the probability of one’s vote determining the outcome multiplied by the net psychological benefit of seeing one’s preferred candidate win the election is greater than the “costs” of voting. These costs include the effort needed to become informed about the candidates and issues. But they also include the time, resources, and activity needed to overcome the administrative requirements and other barriers to registering to vote and successfully casting a ballot.⁴ The state plays a crucial role because election laws directly affect the costs of voting.

The “calculus of voting” framework suggests that for many individuals small changes in benefits or costs may alter the likelihood of voting dramatically. The decision to vote is sensitive enough to costs that even election day weather has been shown to depress turnout.⁵ Costs are especially consequential for individuals with less education, fewer resources, and less of a voting habit. For these individuals the complications of registering, finding the correct polling place, and making the time to vote are frequently quite costly.

Factors such as formal education and income facilitate participation in part because they provide the skills and resources that assist a person in navigating the actions that are needed to vote. For example, higher levels of literacy make it easier to read instructions for registering to vote and how to cast an absentee ballot properly. Higher income (or wealth) makes it easier to afford transportation, documentation, postage, and other financial costs related to voting. It follows logically that citizens who possess fewer of these resources face more difficulty in participating in elections.

Research has demonstrated how costs of voting depress turnout especially for racial and ethnic minorities. Voter registration, for example, has been shown to decrease overall voter turnout by several percentage points, but it has a larger suppressive effect on the voting likelihoods of those

⁴ Some formulations add a “duty” term to indicate the positive effect of norms supporting the democratic system. Aldrich shows that this is not necessary because the cost term can be viewed as the net costs that encompass one’s sense of duty. See John H. Aldrich (1993), “Rational Choice and Turnout,” *American Journal of Political Science* 37:246-78.

⁵ Thomas G. Hansford and Brad T. Gomez (2010), “Estimating the Electoral Effects of Voter Turnout,” *American Political Science Review* 104:268-88.

with less education, who are disproportionately black or Latino.⁶ A nationwide study of the 2000 election showed that increasing the costs of voting by shortening polling hours and not mailing sample ballots decreased turnout by four percentage points among whites, 4.8 points among blacks, and 6.8 points among Latinos.⁷ A recent study by the Government Accountability Office found that imposing a strict photo ID law decreased turnout overall by two to three percentage points, but the negative effect was 1.5 to 3.7 percentage points larger among blacks than among whites.⁸ Thus, what may appear to be “equal” costs imposed by a restriction on voting practices are in fact often more acute for blacks, Latinos, young people, lower income people, and supporters of Democratic candidates. These groups are doubly burdened because they possess fewer of the resources needed to overcome those costs as a result of ongoing effects of historical discrimination in the state.

Considering the “calculus of voting” theory and related research on how election practices affect turnout among blacks and Latinos in particular, it is clear that multiple “Senate factors” indicate how the changes in Wisconsin election law challenged in this litigation will predictably and disproportionately depress black and Latino voting. Those new laws will also generally have disparate effects on young people, lower income people, and supporters of Democratic candidates. Before discussing those factors, the following section explains how research on voter habit informs my analysis.

The Effect of Habit

Political science research demonstrates that voting participation is largely a product of habit. As long as the habit is not disrupted, voting in an election actually makes voting in the next election more likely. Once a person becomes a voter, he or she tends to remain a regular voter, at least in major federal elections.⁹ The power of habit comes in part from the fact that once having voted, the costs of participating again are much lower. A successful voter has already figured out where, how, and when to register and where, how, and when to cast a ballot. If one of these parameters is altered, it is a disruption that adds new and unexpected costs to the voting calculus.

As professor Donald Green and Ronald Shachar’s study of the voting habit explains, the foreignness of the voting experience can itself deter participation. They explain that, “[t]he registered non-voter may regard going to the polls with a certain amount of apprehension. Will I know how to work the voting machine? Will the poll workers treat me respectfully? Will I know

⁶ Benjamin Highton (1997), “Easy Registration and Voter Turnout,” *Journal of Politics* 59:565-75.

⁷ Raymond E. Wolfinger, Benjamin Highton, and Megan Mullin (2005), “How Postregistration Laws Affect the Turnout of Citizens Registered to Vote,” *State Politics & Policy Quarterly* 5:1-23.

⁸ United States Government Accountability Office (September 2014), “Issues Related to State Voter Identification Laws,” Report to Congressional Requesters, GAO-14-634, Washington, D.C.

⁹ Alan S. Gerber, Donald P. Green, and Ron Shachar (2003), “Voting May Be Habit-Forming: Evidence from a Randomized Field Experiment,” *American Journal of Political Science* 47:540-50. Eric Plutzer (2002), “Becoming a Habitual Voter: Inertia, Resources, and Growth in Young Adulthood,” *American Political Science Review* 96:41-56. Alexander Coppock and Donald P. Green (forthcoming), “Is Voting Habit Forming? New Evidence from Experiments and Regression Discontinuities,” *American Journal of Political Science*.

where to go and which line to stand in?”¹⁰ There would be a similar set of concerns for a potential voter interested in registering to vote. Apprehension is lowered if the voting process is predictable, allowing the “costs” paid in the past to facilitate participation in the future. Changes in voting processes naturally inhibit the reliance on habit and sunk costs.

Disruptions to voting habits raise costs and deter participation. It is little surprise, then, that a modest change to election procedures is enough to deter voting.¹¹ A more significant change or a series of changes would have even greater potential to raise the costs for voting. People who moved recently are significantly less likely to vote, in part because it entails updating or initiating a new registration.¹² Changing polling places has been shown to decrease turnout by several percentage points.¹³ Mandating (rather than simply offering) vote-by-mail has been shown to reduce turnout.¹⁴ Implementing new registration requirements deters turnout.¹⁵ Drawing new legislative district lines also depresses voter participation.¹⁶

This pattern highlights an asymmetry in the effects of election laws. Scholarly research has shown that introducing additional convenience for registering or voting has mixed effects on turnout and does not necessarily or immediately increase voter participation.¹⁷ This is largely because voting behavior is habitual and can be slow to respond to new opportunities. In contrast, the studies cited in the previous paragraph demonstrate that removing options consistently reduces participation, especially among those with fewer resources to navigate the disruption. This is what happened under the changes in Wisconsin election law challenged in this litigation.

¹⁰ Donald P. Green and Ron Shachar (2000), “Habit Formation and Political Behaviour: Evidence of Consuetude in Voter Turnout,” *British Journal of Political Science* 30:561-73, p. 570.

¹¹ Henry E. Brady and John E. McNulty (2011), “Turnout Out to Vote: The Costs of Finding and Getting to the Polling Place,” *American Political Science Review* 105:1-20. John E. McNulty, Conor M. Dowling, and Margaret H. Ariotti (2009), “Driving Saints to Sin: How Increasing the Difficulty of Voting Dissuades Even the Most Motivated Voters,” *Political Analysis* 17:435-55. Moshe Haspel and H. Gibbs Knotts (2005), “Location, Location, Location: Precinct Placement and the Costs of Voting,” *Journal of Politics* 67:560-73.

¹² Peverill Squire, Raymond E. Wolfinger, and David P. Glass (1987), “Residential Mobility and Voter Turnout,” *American Political Science Review* 81:45-65. Richard J. Timpono (1998), “Structure, Behavior, and Voter Turnout in the United States,” *American Political Science Review* 92:145-58.

¹³ Brady and McNulty (2011). McNulty, Dowling, and Ariotti (2009). Hapsel and Knott (2005).

¹⁴ Elizabeth Bergman and Philip A. Yates (2011), “Changing Election Methods: How Does Mandated Vote-By-Mail Affect Individual Registrants?,” *Election Law Journal* 10:115-27.

¹⁵ Barry C. Burden and Jacob R. Neihsel (2013), “Election Administration and the Pure Effect of Voter Registration on Turnout,” *Political Research Quarterly* 66:77-90.

¹⁶ Danny Hayes and Seth C. McKee (2009), “The Participatory Effects of Redistricting,” *American Journal of Political Science* 53:1006-23.

¹⁷ Adam J. Berinsky (2005), “The Perverse Consequences of Electoral Reform in the United States,” *American Politics Research* 33:471-91. Barry C. Burden, David T. Canon, Kenneth R. Mayer, and Donald P. Moynihan (2014), “Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform,” *American Journal of Political Science* 58:95-109. Melanie J. Springer (2012), “State Electoral Institutions and Voter Turnout in Presidential Elections, 1920-2000,” *State Politics & Policy Quarterly* 12:252-83. I note that the Burden et al. (2014) study does not focus on Wisconsin specifically or analyze differences across racial and ethnic groups.

An informative study by professors David Brady and John McNulty examined the effects of relocating polling places in California.¹⁸ Using a natural experiment in which polling places in Los Angeles County were consolidated, the authors estimated how much the moves affected turnout. On average polling place turnout fell by 3.03 percentage points and was only partially offset by a 1.18 point increase in absentee voting, for a net decline of 1.85 points. Older voters were most likely to overcome the shift in polling places by substituting with absentee ballots; younger voters were more likely not to vote. Turnout among Democrats was more sensitive than turnout among Republicans to the changes in polling places.

The disruptions to the voting process introduced by the challenged changes in Wisconsin election law are likely to deter participation by groups of residents who have more fragile voting habits and fewer resources to overcome the disruptions to those habits. Generally speaking, blacks, Latinos, young people, lower income people, and Democratic supporters display less regular voting habits and possess fewer resources for adjusting to the imposition of new costs.

Background on Voter Turnout Rates in Wisconsin

Because habit is an important background condition determining how election laws affect voter turnout, it is helpful to examine turnout rates for various subpopulations within the Wisconsin electorate. State election officials do not record the race and ethnicity of voters, or report levels of turnout by income, age, or partisanship. As a result, I largely rely on government surveys to estimate these quantities.

The Census Bureau provides widely used estimates of voter turnout, based on the Voting and Registration Supplement to the Current Population Survey (CPS) administered in November of each federal election year. Because of the high response rates, careful administration, and large sample sizes, the CPS data are among the most trusted sources of information about voter participation.¹⁹

Because the CPS surveys rely on samples and self-reporting by respondents, the data have some limitations that are common to surveys of this type. In addition, in the official estimates it reports, the CPS adopts idiosyncratic coding conventions that are not widely used by survey researchers. In particular, non-respondents have been coded as non-voters; standard practice among survey researchers is to code them as missing data. Professor Michael McDonald has examined these issues and suggested statistical adjustments to correct for them.²⁰ His

¹⁸ Brady and McNulty (2011).

¹⁹ R. Michael Alvarez, Lonna Rae Atkeson, and Thad E. Hall (2013), *Evaluating Elections: A Handbook of Methods and Standards*, New York, NY: Cambridge University Press. Barry C. Burden and Charles Stewart III, ed. (2014), *The Measure of American Elections*, New York, NY: Cambridge University Press.

²⁰ Michael P. McDonald, "2012 Turnout: Race, Ethnicity, and the Youth Vote," *The Huffington Post*, May 8, 2013, available at http://www.huffingtonpost.com/michael-p-mcdonald/2012-turnout-race-ethnicity_b_3240179.html (last visited November 4, 2015). Michael P. McDonald (2014), "What's Wrong with the CPS?", paper presented at the annual meeting of the Midwest Political Science Association, Chicago, IL, April 3-6.

recommendations build on those offered by Aram Hur and Christopher Achen about how to weight the data to conform with actual election outcomes.²¹ I make use of software code provided by Professor McDonald to implement the corrections that he and Achen and Hur recommend.²²

The corrected CPS data are reported in Table 1 for whites, blacks, Latinos, young people, and older people for the four most recent federal elections in Wisconsin.

Table 1. Voter Turnout in Recent Federal Elections in Wisconsin

| | 2014 | 2012 | 2010 | 2008 |
|--------------------------|-------|-------|-------|-------|
| White non-Hispanic alone | 59.5% | 78.9% | 53.0% | 73.2% |
| Black alone | 48.2% | 81.9% | 49.2% | 83.5% |
| Hispanic (of any race) | 30.7% | 40.3% | 35.1% | 41.6% |
| Age 18 to 24 | 29.9% | 60.5% | 21.2% | 59.0% |
| Age 25 and older | 59.7% | 79.5% | 58.7% | 74.1% |

The table suggests that turnout among blacks and Latinos fell between 2010 and 2014 while white turnout increased. These differences across elections are generally not statistically significant by conventional standards given the modest sample sizes and accompanying margins of error. Based on data from a government source that is both high quality and widely used, it is more likely than not that black and Latino turnout fell and white turnout rose over the time period when the challenged provisions were enacted and (mostly) implemented.

The Census Bureau does not report turnout by income levels by state. However, other evidence strongly suggests that Wisconsinites of lesser means are less likely to vote in every election. Copious research has demonstrated that demographic factors such as income and education – generally referred to as “socioeconomic status” – is strongly related to turnout. For example, the 2014 CPS indicates that turnout rates in Wisconsin were 39.3% among those with less than a high school diploma, 44.6% for high school graduates, 57.0% for those with some college coursework, 68.8% among college graduates, and 76.3% for those with an advanced degree. A recent comprehensive study of demographic differences in voter participation concludes that “the relationships among income, education, and voter turnout are quite strong: the probability of a highly educated or wealthy individual casting a ballot is much, much higher than the probability of a less-educated or poorer individual casting a ballot.”²³

Whites generally have more established voter turnout habits than do blacks and Latinos. Older people also have much more robust voting habits than younger people. Black turnout temporarily surpassed that of whites in 2008 and 2012, but these are anomalous elections in Wisconsin history. They are the result of the nationwide increase in black turnout surrounding the candidacy

²¹ Aram Hur and Christopher H. Achen (2013), “Coding Voter Turnout Responses in the Current Population Survey,” *Public Opinion Quarterly* 77:985-93.

²² “CPS Vote Over-Report and Non-Response Bias Correction,” available at <http://www.electproject.org/home/voter-turnout/cps-methodology> (last visited November 4, 2015).

²³ Leighley and Nagler (2014), pp. 45-46.

of Barack Obama, the first black candidate to be nominated for President by a major political party. Substantial disparities exist between whites and minorities in midterm elections and presidential elections prior to 2008. Indeed, 2008 and 2012 might be the only elections in state history in which black turnout exceeded white turnout.

The most relevant comparison in Table 1 is between the 2010 and 2014 elections, as indicated by the shaded columns. These are the two midterm elections that bracketed the implementation of the provisions challenged in this litigation. The CPS data indicate that the disparity in turnout between blacks and whites grew during that period from 3.8 percentage points in 2010 to 11.3 points in 2014. The disparity between Latinos and whites grew from 17.9 points in 2010 to 28.8 points in 2014.

The Senate Factors

The federal Voting Rights Act bears on this case. Section 2 of the VRA generally prohibits voting practices that discriminate on the basis of race, color, or language group. The VRA was amended in 1982 with overwhelming votes in both chambers of Congress and signed into law by President Ronald Reagan. The amendments made clear that discriminatory intent is not necessary for the law to be violated; only discriminatory results are necessary.

Under the language of Section 2, a violation “is established if, based on the totality of the circumstances, it is shown that the political processes...are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” The U.S. Senate Committee on the Judiciary issued a report at the time, identifying an illustrative list of seven “Senate factors” and two unenumerated factors for courts to consider when evaluating the “totality of the circumstances.” The Senate Judiciary Committee report notes that the factors are “neither exclusive nor exhaustive” and that “a plaintiff need not prove any particular number or a majority of these factors in order to succeed in a vote dilution claim.”

I have examined the Senate factors, drawing upon my expertise and training as a scholar of electoral politics. It is my considered opinion that the Senate Factors indicate that the challenged changes in Wisconsin election law will disproportionality deter or prevent black and Latino residents from voting. The following sections outline how the challenged provisions interact with social and economic conditions affecting racial minorities in Wisconsin in a way that disproportionately interferes with their opportunity to participate in the political process and to influence the outcome of elections.

Senate Factor One considers whether there is history in the jurisdiction of “official voting-related discrimination.” Because this issue overlaps considerably with the criteria in Factor Three, it will be discussed there.

Senate Factor Two addresses whether voting is “racially polarized.” In *Thornburg v. Gingles* (1986), the U.S. Supreme Court defined racial polarization as a “consistent relationship between [the] race of the voter and the way in which the voter votes.”

Racial polarization in voting patterns is easily observed in Wisconsin. Media exit polls from the 2008 presidential election show that 91% of blacks voted for the Democratic ticket while 54% of whites did so, a gap of 37 percentage points.²⁴ Exit polls show that in the 2012 presidential election in Wisconsin, support for the Democratic ticket was 94% among blacks, 66% among Latinos, and 48% among whites, an even wider race gap than four years earlier.

High levels of racial polarization are not limited to the 2008 and 2012 elections in which a major party candidate happened to be black. The black-white gap in Democratic voting in Wisconsin was of a similar magnitude in the 2004 general election as in 2008. It thus appears that racial polarization is not dissipating with time.

Moreover, racial polarization in voting extends beyond presidential elections. In the 2010 Wisconsin gubernatorial election the gap was 44 percentage points. In the 2012 U.S. Senate election the gap between blacks and whites was also 44 points. In the 2012 gubernatorial recall election the gap was 51 points. In the 2014 election the gap was 48 points. These large disparities far exceed other demographic comparisons including religion, income, education, and sex. Racial polarization in voting patterns is sizable and enduring in Wisconsin.

Racially polarized voting is more than a simple reflection of partisanship. This can be seen in data from primary elections. In a primary partisanship is not a factor because all of the candidates share a common party label. Because black voters overwhelmingly vote Democratic, it is possible to examine Democratic primary voting patterns for signs of polarization that transcend party. In the 2008 Democratic presidential primary in Wisconsin, exit polls showed that 91% of blacks voted for Barack Obama while 54% of whites did so, a gap that mimics that seen in general elections where party differences are salient. In 2004, when the leading Democratic presidential primary candidates were all white, the black-white gap was nonetheless 18 percentage points in favor of John Kerry and 22 points against fellow partisan John Edwards, a net difference of 40 points.

Senate Factor Three concerns whether voting practices have “enhanced the opportunity for discrimination” against minority groups. Wisconsin has a long history of election practices that facilitate discrimination.

Outright discrimination against minority voters was common in the 19th century. The original state constitution only permitted blacks to vote if a majority of the public voted to approve the practice. Such a measure was put on the statewide ballot as a referendum in 1849, 1857, and 1865. It received a majority of votes cast in 1849, but less than half of voters who participated in the election actually voted on the measure. In 1857 and 1865 it was defeated outright. Black males earned the right to vote only after Milwaukee resident Ezekiel Gillespie won a state Supreme Court ruling in 1866 that determined that the 1849 vote was in fact sufficient to provide black suffrage.

²⁴ Exit polls are conducted by the National Election Pool (NEP), a consortium of major media outlets. Results for Latinos are not reported because the group was too small for exit pollsters to produce reliable estimates of voting patterns.

The 20th century saw a different form of voter discrimination. From 1913 to 2006, state law required voters to register if they lived in municipalities with more than 5,000 residents. This “5,000 rule” meant that registration was more likely to be required in municipalities where minority group members were larger shares of the population. Out of 1,850 municipalities statewide, only 171 fell under the voter registration requirement in 2006. Compared to municipalities without the requirement, the mean percentage of the black population was 6.2 times greater and the Latino population was 2.4 times greater.²⁵ Stated differently, in 2006 approximately 98% of blacks and 91% of Latinos lived in municipalities where registration was required. In contrast, only 68% of whites lived in these municipalities.

This is consequential because a registration requirement lowers voter turnout, especially among those with fewer resources. Research on the “calculus of voting” cited above shows that a registration requirement depresses turnout. Consequently, the “5,000 rule” contributed to lower turnout by blacks and Latinos because they were more likely to face the registration requirement. Moreover, because minority groups have lower levels of educational attainment (as documented below) and less established voting habits, registration compounds the problem of applying the law unevenly. This system of unequal election practices persisted for nearly a century in Wisconsin. Importantly, it was ended by the passage of the federal Help America Vote Act (HAVA), not by any action initiated by policy makers in the state.

Despite a rapidly growing Latino population, ballots were not provided in Spanish anywhere in Wisconsin until February 2012. In late 2011 the U.S. Department of Justice ordered the city of Milwaukee to provide ballots and other election materials in Spanish. This was the first time in the history of this state that a community was required to do so under the VRA. As with the “5,000 rule,” federal intervention was required to make this change. Research shows that Spanish-language ballots increase voter turnout among those with limited English skills.²⁶ This suggests that Latino voter turnout in Milwaukee would have been higher in past elections had Spanish-language ballots been provided by the city.

Few counties or municipalities outside Milwaukee even provide materials such as voter registration forms in languages other than English, let alone ballots. For example, the official web sites for the Rock County Clerk and Beloit City Clerk do not offer information in Spanish or even mention the availability of Spanish-language materials.²⁷ This is despite the fact that the state Government Accountability Board makes such materials readily available for clerks at no cost.²⁸ The absence of Spanish-language materials in the Beloit area is surprising because Census data show that speaking Spanish at home occurs in 6.2% of Rock County households and 14.9% of Beloit City households.²⁹ Spanish language materials are also missing from the clerk web sites

²⁵ Some municipalities with fewer than 5,000 people voluntarily implemented voter registration. They also had larger black and Latino populations than municipalities that did not require registration.

²⁶ Daniel J. Hopkins (2011), “Translating into Votes: The Electoral Impacts of Spanish-Language Ballots,” *American Journal of Political Science* 55:814-30.

²⁷ See <https://www.co.rock.wi.us/election-information> and http://www.beloitwi.gov/index.asp?Type=B_BASIC&SEC={5580A350-606C-4F3F-8CEE-0A9ECCD63528}&DE= (last visited December 1, 2015).

²⁸ <http://www.gab.wi.gov/forms/voters> (last visited November 4, 2015).

²⁹ American Community Survey 2008-2012 5-Year Estimates.

in Kenosha County (10.6% Spanish speaking) and the city of Kenosha (7.7% Spanish speaking), as well as other communities where there are significant numbers of Spanish speakers.

Senate Factor Five assesses the extent to which “minority group members bear effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process.” Stemming in large part from historic legacies of unequal treatment, segregation, and discrimination, blacks, Latinos, and whites in Wisconsin experience radically different outcomes in these areas. Wisconsin’s history of racial discrimination and disparities bears directly on the impact that voting practices have on the opportunity for minority voters to participate in the political process and influence the outcomes of elections. As the U.S. Supreme Court has noted, Section 2 of the VRA is violated when a voting practice “interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” Several of the challenged provisions in Wisconsin election law act in this way.

Black migration to Wisconsin came later than in other states, especially when comparing the black population in Milwaukee to that in other northern industrial cities. Statewide in 1910 there were just 2,900 black residents, or 1.2% of the state total. By 1960 that had risen to 74,546, or 1.9% of the population. Due to rapid post-World War II population increases, today blacks comprise roughly 6.6% of the population.³⁰ The Latino population arrived in Wisconsin later and its population has increased more quickly. It was only 1.9% of the state in 1990 but has grown quickly to reach a similar 6.5% of the population.

As blacks moved into Milwaukee at higher rates in the 1960s and 1970s, white-dominated suburbs quickly developed as the result of “White flight” from the city. White flight was largely a response to school desegregation prompted by *Brown v. Board of Education* and the passage of open housing laws in the 1960s. The 1968 adoption of an open housing law in Milwaukee only occurred after repeated efforts by the Common Council’s one black member and over 200 nights of public marches in the city. Even with the passage of the federal Fair Housing Act that same year, discriminatory real estate practices such as biased appraisal practices, redlining, and racial “steering” nonetheless continued to constrain blacks’ housing choices to the inner city.³¹ An analysis of data collected by the Department of Housing and Urban Development in 1977 indicated that Milwaukee real estate brokers treated white homebuyers more favorably than black homebuyers.³² The use of exclusionary land zoning rules in incorporated municipalities near the city of Milwaukee further helped to reinforce racial segregation.³³

The black and Latino populations in Wisconsin are highly geographically concentrated. Milwaukee, where two-thirds of the state’s black residents reside, has been identified by

³⁰ Census QuickFacts, available at <http://quickfacts.census.gov/qfd/states/55000.html> (last visited December 8, 2015).

³¹ Greg J. Carman (2010), “Wall of Exclusion: The Persistence of Residential Racial Segregation in Metropolitan Milwaukee,” doctoral dissertation, University of Wisconsin-Milwaukee.

³² Harriet B. Newburger (1989), “Discrimination by a Profit-Maximizing Real Estate Broker in Response to White Prejudice,” *Journal of Urban Economics* 26:1-19.

³³ Carman (2010).

demographers as one of the most segregated cities in America. Evaluating 102 metropolitan areas, demographer William Frey ranked Milwaukee as having the highest level of black-white segregation and the ninth highest level of Latino-white segregation.³⁴

Today the minority population in the Milwaukee metropolitan area remains one of the least suburbanized in the country. Research from the University of Wisconsin-Milwaukee indicates that the “suburbanization gap” between black and white males in Milwaukee was the largest of 40 metropolitan areas studied.³⁵ A recent study documents that even at its high point Milwaukee had 75% less black suburbanization than comparable cities such as Cleveland and Detroit. In 2000 the Milwaukee metropolitan area had the lowest number of black suburbanites among all metropolitan areas with over one million people, with just 1.6% of blacks living in suburbs.³⁶ Much of the black population today remains confined to the “Inner Core,” which was created in large part by restrictive housing covenants in place as late as the 1940s.³⁷

Blacks living in the “Inner Core” often lack the resources and the need to own an automobile and to hold a driver’s license. According to 2000 U.S. Census data on the population of Milwaukee, whites comprised 51% of residents but only 37% of public bus riders.³⁸ Conversely, blacks and Latinos comprised roughly 49% of the city’s residents, but 63% of public bus riders. These statistics indicate that minorities are less likely to have a car available (and a driver’s license) to take advantage of when polling places are open. Data from the 2005 American Community Survey for Milwaukee County indicate that the rate at which households lack access to a vehicle is 9% for whites, 14% for Latinos, and 25% for blacks. Similar disparities in transportation exist in Dane County, where 7% of white households lack access to a vehicle compared to 12% for Latinos and 25% for blacks.³⁹ Restrictions in the dates and hours available to vote and additional requirements for documentation to register and vote will be disproportionately burdensome for these groups.

Racial segregation and animosity have been enduring parts of Milwaukee’s history. For these reasons the city has been called the “Selma of the North.” The 1960s were a particularly hostile era because of blacks’ recent arrival into the city. Public disputes over educational and housing

³⁴ Tables available at <http://www.psc.isr.umich.edu/dis/census/segregation2010.html> (last visited November 4, 2015).

³⁵ Marc C. Levine (2012), “Race and Male Employment in the Wake of the Great Recession: Black Male Employment Rates in Milwaukee and the Nation’s Largest Metro Areas,” University of Wisconsin-Milwaukee Center for Economic Development.

³⁶ Carman (2010).

³⁷ Joseph A. Ranney, “Looking Further Than the Skin: A History of Wisconsin Civil Rights Law,” *Wisconsin Lawyer*.

³⁸ “Transportation Equity and Access to Jobs in Metropolitan Milwaukee” (2004), University of Wisconsin-Milwaukee Center for Economic Development.

³⁹ See http://www.apl.wisc.edu/publications/Dane_County_Demographics_Brief_2014.pdf (last visited December 1, 2015).

discrimination boiled to riots, including one that resulted in four deaths in 1967.⁴⁰ One historian summarizes that unequal treatment of blacks was generally illegal in Wisconsin from the Civil War until the 1960s, “but de facto segregation and discrimination were common.” Fowler’s history of Wisconsin elections states that in parts of Wisconsin “it wasn’t until after World War II that it was safe for black Americans to be anywhere in evidence after dark.”⁴¹

A more recent era of contentious racial debates in Milwaukee occurred under Mayor Henry Maier, who served from 1960 to 1988. One historian documents that Maier “was out of touch with the city’s blacks...his position on civil rights accurately represented the majority of his white constituency, and he probably believed he could safely ignore black voters.”⁴²

In 1976 Milwaukee schools were found by a federal judge to be illegally segregated. The case was appealed to the U.S. Supreme Court and eventually settled in 1979 when the Milwaukee school board agreed to implement a five-year plan to desegregate – fully 25 years after *Brown v. Board of Education*. The contentious debate among parents, advocates, minority communities, and the Milwaukee Public Schools continued through the development of private school voucher programs in the 1990s.

Blacks and whites in Wisconsin also experience radically different economic outcomes. Unemployment is a more severe problem for blacks than for whites nationally, but the gap is more acute in Wisconsin. The Bureau of Labor Statistics reports that the official annual unemployment rate in Wisconsin in 2014 was 19.9% for blacks, 9.1% for Latinos, and 4.3% for whites.⁴³ This represents a black-white disparity of 15.6 points and Latino-white gap of 4.7 points. In Milwaukee in 2010, 77.4% of white males were employed while only 44.7% of blacks were. This gap of 32.7 points was the largest of 40 metropolitan areas studied by researchers at the University of Wisconsin-Milwaukee. Racial disparities in employment are not improving; this represents almost a tripling of the gap since 1970.⁴⁴ A recent study indicates that Wisconsin has the highest black unemployment rates in the country, almost twice the national rate.⁴⁵

There are significant differences among blacks, whites, and Latinos in terms of income. A recent study shows that both black and Latino earnings in Wisconsin are 30 percentage points lower than those of whites.⁴⁶

⁴⁰ See Jack Dougherty’s (2009) chapter in *Perspectives on Milwaukee’s Past*, ed. Margo Anderson and Victor Greene, University of Illinois Press and Patrick D. Jones (2009) *The Selma of the North: Civil Rights Insurgency in Milwaukee*, Harvard University Press.

⁴¹ Robert Booth Fowler (2008), *Wisconsin Votes: An Electoral History*, University of Wisconsin Press.

⁴² William F. Thompson, *The History of Wisconsin*, Volume 6, p. 378.

⁴³ *The State of Working Wisconsin 2014*. Center on Wisconsin Strategy.

⁴⁴ Marc C. Levine (2012), “Race and Male Employment in the Wake of the Great Recession: Black Male Employment Rates in Milwaukee and the Nation’s Largest Metro Areas,” University of Wisconsin-Milwaukee Center for Economic Development.

⁴⁵ John Schmid (2015), “Wisconsin Tops Nation in Black Joblessness, Study Finds,” *Milwaukee Journal-Sentinel*, March 26.

⁴⁶ *The State of Working Wisconsin 2014*. Center on Wisconsin Strategy.

The poverty rate in Wisconsin in 2013 was 7% for whites, 32% for Latinos, and 39% for blacks. The Latino-white and black-white disparities in Wisconsin are both much greater than the national average.⁴⁷ Dane County displays stark disparities in poverty rates, with 54% of blacks but just 9% of whites living below the poverty line in 2011.⁴⁸

Disparities in income cannot be treated as incidental. Research by economists and psychologists shows that discrimination is partly to blame. Research using experiments – the social scientific gold standard for demonstrating causal relationships – demonstrates that employers discriminate against job applicants with names that most clearly indicate black or Latino identification. Résumés sent to hundreds or thousands of employers randomly varied the names such as “Greg” (to imply a white candidate) and “Jamal” (to imply a black candidate). Applicants presumed to be black with equivalent qualifications as those presumed to be white were about half as likely to be called or offered a job.⁴⁹ Follow-up research estimates that, at a minimum, one third of the wage gap between blacks and whites is due to racial discrimination.⁵⁰ A recent review of the scholarly literature shows evidence of discrimination against black and Latino consumers in the areas of employment, housing, purchasing, and lending.⁵¹

These discriminatory patterns were made clear in a study by professor Devah Pager. Her experiment sent matched pairs of black and white applicants to apply for jobs advertised in the Milwaukee area during the summer of 2001. One of the two applicants was randomly assigned a fictional criminal record; otherwise the only meaningful difference between them was race. The study found that callbacks occurred for 34% of whites without a criminal record, 17% of Whites with a record, 14% of blacks without a record, and just 5% of blacks with a record. That is, the callback rate was higher for white applicants with criminal records than for equivalent black applicants without records. She concluded that “employers, at least in Milwaukee, continue to use race as a major factor in their hiring decisions” and that blacks “may also be more strongly affected by the impact of a criminal record.”⁵²

⁴⁷ <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?state=WI> (last visited November 4, 2015). See also Marc V. Levine (2013), “Perspectives on the Current State of the Milwaukee Economy,” University of Wisconsin-Milwaukee Center for Economic Development.

⁴⁸ “Race to Equity: A Baseline Report on the State of Racial Disparities in Dane County,” Wisconsin Council of Children and Families, October 2013.

⁴⁹ Marianne Bertrand and Mullainathan Sendhil (2004), “Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination,” *American Economic Review* 94:991-1013. Devah Pager, Bruce Western, and Bart Bonikowski (2009), “Discrimination in a Low-Wage Labor Market: A Field Experiment,” *American Sociological Review* 74:777-99.

⁵⁰ Roland G. Fryer, Jr., Devah Pager, Jörg L. Spenkuch (2013), “Racial Disparities in Job Finding and Offered Wages,” *Journal of Law and Economics* 56:633-89.

⁵¹ Devah Pager and Hana Shepherd (2008), “The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets.” *Annual Review of Sociology* 34:181-209.

⁵² Devah Pager (2003), “The Mark of a Criminal Record,” *American Journal of Sociology* 108:937-75.

Infant mortality rates for black and Latinos in Wisconsin are higher than those of whites. The rate for blacks is almost three times that of whites.⁵³ These disparities are more severe than for the rest of the nation and have generally worsened over time.⁵⁴ The disparities reflect in part the lack of responsiveness by public health systems. A 2010 state report concluded that “Wisconsin’s rank based on African American infant mortality has fallen from among the best rates in the country to among the worst.”⁵⁵ That same year the state legislature created the Special Committee on Infant Mortality. After two years of hearings, studies, and data collection by the committee, the legislature failed to pass a bill to address its recommendations.

Educational disparities between minorities and whites are substantial and enduring. Recent federal data indicate that high school graduation rates in Wisconsin were 66% for blacks, 78% for Latinos, and 93% for whites.⁵⁶ The 27 percentage point gap between black and whites is the largest in the nation. In Madison the disparities are even greater than the statewide average. Recent data show that the share of students graduating on time was 84% for whites but only 50% for blacks.⁵⁷

Disparities are also relatively severe when it comes to student achievement. National mathematics test scores for fourth grade students showed a gap between black and white students of 38 points in Wisconsin, placing it third worst in the country and well above the national gap of 26 points. For eighth graders the black-white gap in Wisconsin grew to 45 points, second worst in the country and above the national average of 31 points. Similar disparities appear in reading scores. For students in the fourth grade, the Wisconsin gap of 38 points ranked second worst nationally. For eighth grade students Wisconsin had the largest gap between blacks and whites in the country.⁵⁸ Dane County typically displays even more severe disparities in student proficiency by race.⁵⁹

Wisconsin is among the states with the greatest disparity in incarceration rates for black and white residents. A typical analysis showed that as of 2002 blacks in Wisconsin were incarcerated at a rate of 3,953 per 100,000 residents whereas whites showed a rate of 341. The ratio thus indicates that blacks were incarcerated at nearly 12 times the rate of whites. This disparity ranks

⁵³ “Wisconsin Health Facts: Racial and Ethnic Disparities in Infant Mortality,” Wisconsin Department of Health Services, November 2012.

⁵⁴ See <http://kff.org/other/state-indicator/infant-mortality-rate-by-race-ethnicity/?state=WI> (last visited November 5, 2015).

⁵⁵ “Wisconsin Health Facts: Racial and Ethnic Disparities in Infant Mortality,” Wisconsin Department of Health Services, January 2010, p. 5.

⁵⁶ Annysa Johnson and Kevin Crowe, “Wisconsin’s Graduation Rate Gap Widens to Largest in U.S.,” *Milwaukee Journal-Sentinel*, October 23, 2015.

⁵⁷ “Race to Equity: A Baseline Report on the State of Racial Disparities in Dane County,” Wisconsin Council of Children and Families, October 2013.

⁵⁸ *Achievement Gaps: How Black and White Students in Public Schools Perform in Mathematics and Reading on the National Assessment of Educational Progress*. 2009. U.S. Department of Education.

⁵⁹ “Race to Equity: A Baseline Report on the State of Racial Disparities in Dane County,” Wisconsin Council of Children and Families, October 2013.

Wisconsin worse than 41 other states.⁶⁰ An updated analysis based on 2001 data showed that Wisconsin had the highest black incarceration rate in the country at 4,058 per 100,000. The second highest state had a rate of just 3,302 and the national average was 2,209. The racial disparity in Wisconsin was nearly twice the national average.⁶¹ A more recent analysis of the 2010 U.S. Census found that nationwide black males were incarcerated at 5.1 times the rate of whites males (6.7% versus 1.3%). In Wisconsin the ratio was 10.7 times (12.8% versus 1.2%). Wisconsin's incarceration rate for black men was the highest in the country.⁶² Research shows that ex-felons are further discouraged from voting even after they are "off papers" due to the social stigma of a criminal record, financial consequences or incarceration, and lack of support from the state in reactivating their voting rights.⁶³

Concerns about racial discrimination in traffic stops prompted the passage of Act 28 in 2009. The act required collection of data on the races of those involved in traffic stops and searches. The program was discontinued in 2011 by Wisconsin Act 29, making the assembly of statewide data on racial disparities in traffic stops impossible. Data from Dane County and Milwaukee County showed that blacks and Latinos were 2.2 to 3.8 times more likely to face traffic stops. Black and Latinos were also more likely to have their vehicles searched and were more likely to be ticketed even though they were no more likely than whites to have weapons, drugs, or stolen goods.⁶⁴

These glaring disparities in outcomes have a direct bearing on the impact of state election laws on minority voting. Decades of political science research shows that voter participation is significantly affected by these same demographic factors. Numerous studies have shown that educational attainment is the single best predictor of whether an individual votes.⁶⁵ This is largely because education lowers the "costs" of voting by providing language skills, direct information about the electoral process, and confidence that facilitate participation.

The racial and ethnic disparities in education naturally produce disparities in voter participation. Income also affects voter participation. Individuals with lower household incomes are significantly less likely to vote because it is comparably more burdensome for them to make time

⁶⁰ "Rates of Incarceration Per 100,000 State Residents by Race." Human Rights Watch Press Backgrounder, February 22, 2002. Table 1. Figures based on data from the 2000 U.S. Census.

⁶¹ "Prison and Jail Inmates at Midyear 2001." Bureau of Justice Statistics. U.S. Department of Justice.

⁶² John Pawasarat and Lois M. Quinn. 2013. "Wisconsin's Mass Incarceration of African American Males: Workforce Challenges for 2013." University of Wisconsin-Milwaukee Employment and Training Institute.

⁶³ Jeff Manza and Christopher Uggen (2006), *Locked Out: Felon Disenfranchisement and American Democracy*, New York, NY: Oxford University Press. Erika Wood and Rachel Bloom (2008), *De Facto Disenfranchisement*, American Civil Liberties Union and Brennan Center for Justice.

⁶⁴ Ben Poston, "Racial Gap Found in Traffic Stops in Milwaukee," *Milwaukee Journal Sentinel*, December 3, 2011.

⁶⁵ Steven J. Rosenstone and John Mark Hansen (1993), *Mobilization, Participation and Democracy in America*, Macmillan. Sidney Verba, Kay Lehman Schlozman, and Henry E. Brady (1995), *Voice and Equality: Civic Volunteerism in American Politics*, Harvard University Press. Rachel Milstein Sondheimer and Donald P. Green (2010), "Using Experiments to Estimate the Effects of Education on Voter Turnout," *American Journal of Political Science* 54:174-89.

to do so. Education and income are predictive in large part because they lower the “costs” of voting.

Finally, recent research shows that health influences voter participation. General health is clearly related to vote turnout, such as a person moving from “excellent” to “poor” health is estimated to be 12 percentage points less likely to vote.⁶⁶ A disability makes the average person approximately 20 percentage points less likely to vote, likely because it increases the burdens and costs associated with voting.⁶⁷ Data from the Centers for Disease Control and other sources demonstrate that blacks and Latinos are generally in poorer health than whites.⁶⁸

In summary with regard to Senate Factor Five, Wisconsin displays substantial and enduring racial disparities in areas such as education, income, employment, criminal justice, and health. These disparities are frequently larger than those in the rest of the United States. The racial and ethnic gaps are highly relevant to Section 2 analysis because demographic markers are strongly associated with the likelihood of an individual being deterred from voting by introduction of a newly restrictive voting practice that raises costs and disrupts voting habits.

Senate Factor Six assesses “the use of overt racial appeals in political campaigns.” Although statewide and federal elections in Wisconsin rarely feature a black or Latino candidate, various campaigns have displayed racial appeals that are both implicit and explicit.

In the rare case where a minority candidate runs for a prominent office, racial messages are even more prominent. The case of Louis Butler is instructive. In 2004 Butler was appointed to the Supreme Court by Governor Jim Doyle to fill a vacancy. Butler had been a public defender, municipal court judge, Milwaukee County circuit court judge, and lecturer at Marquette University Law School. He became the state’s first black Supreme Court Justice. In 2008 Butler became the first Supreme Court incumbent defeated since 1967. Prior to Butler, only five incumbents had lost an election in the 159-year history of the Court.⁶⁹

The election was marked by a controversial television ad aired by the campaign for candidate Michael Gableman. The ad concerned the case of Reuben Lee Mitchell. Mitchell had been convicted of child rape and was represented in his appeal by Butler, who was a public defender at the time. It claimed that Butler found a loophole to free Mitchell, who later molested another child.⁷⁰ The ad concluded with the question “Can Wisconsin families feel safe with Louis Butler

⁶⁶ Julianna Pacheco and Jason Fletcher (2015), “Incorporating Health into Studies of Political Behavior: Evidence for Turnout and Partisanship,” *Political Research Quarterly* 68:104-16.

⁶⁷ Lisa Schur, Todd Shields, Douglas Kruse, and Kay Schriener (2002), “Enabling Democracy: Disability and Voter Turnout,” *Political Research Quarterly* 55:167-90.

⁶⁸ Centers for Disease Control (2013), *Summary Health Statistics for the U.S. Population: National Health Interview Survey, 2012*. U.S. Department of Health and Human Services: Washington, DC.

⁶⁹ Eric Ostermeier, “The Incumbency Advantage in Wisconsin Supreme Court Elections,” Smart Politics, University of Minnesota, <http://editions.lib.umn.edu/smartpolitics/2011/04/11/the-incumbency-advantage-in-wi/> (last visited November 8, 2015).

⁷⁰ Because of concerns about the factual content of the ad, Gableman was also subject to an ethics complaint filed by the Wisconsin Judicial Commission. The Wisconsin Supreme Court later voted 3-3 to dismiss the case and the Judicial Commission ended its prosecution.

on the Supreme Court?” The ad used black and white images that put Mitchell’s mug shot next to an image of Butler’s face. To many observers this suggested an implicit racial message. In its endorsement of Butler, the *Milwaukee Journal-Sentinel* declared that “The ad is misleading, a blatant attempt to play on fears and amounts to race-baiting.”⁷¹

A column in the *Minneapolis Star-Tribune* described the ad this way: “In a reprise of the 1988 Willie Horton gambit, one vile ad for Gableman pictured Butler and a photo of a rapist whom Butler had defended while working as a public defender. No mention was made of any constitutional right to an attorney. Instead, the race-baiting ad made a visceral appeal to the worst elements of backwoods justice: Rapist? Black. Supreme Court justice? Black. Get it?”⁷²

The Wisconsin Judicial Campaign Integrity Committee, a group of eight citizens appointed by the Wisconsin Bar Association, called the ad “highly offensive and deliberately misleading” with the “race-baiting style of the Willie Horton spot from the 1988 presidential race.”⁷³

The Latino community is also subject to critical treatment in some campaign discourse. In the 2006 gubernatorial election in Wisconsin, candidate Mark Green aired a television ad against Governor Jim Doyle claiming that “As illegal aliens stream in, [Doyle] actually wants to give them welfare and subsidized home loans” and “even wants to give illegal aliens in-state tuition breaks at the [University of Wisconsin], while Wisconsin kids are being turned away.” WISC-TV in Madison conducted a “Reality Check” of the ad and found parts of it misleading.⁷⁴

This ability of these sorts of advertisements to foster racial polarization has been demonstrated by professor Tali Mendelberg. Using the Willie Horton spot as an example, she demonstrates that, in contrast to the ineffectiveness of explicit racial messages, implicit appeals such as those in the Horton ad and Gableman ad have a unique ability to prime racial stereotypes and create additional racial polarization.⁷⁵

Implicit racial messages are also disseminated by various individuals and groups beyond the campaigns themselves. In the final days of the 2012 presidential election approximately 85 billboards in the Milwaukee metropolitan area displayed messages from a then-anonymous sponsor stating that voter fraud is a felony subject to a punishment of three years in prison and \$10,000 fine. As the *Milwaukee Journal-Sentinel* reported at the time, “Democrats and civil

⁷¹ “Editorial: Butler the Clear Choice for Bench,” *Milwaukee Journal-Sentinel*, March 30, 2008.

⁷² Nick Coleman, “Dead Fish May Be Stinky, but This Judge’s Race Smells Worse,” *Minneapolis Star-Tribune*, April 7, 2008.

⁷³ Wisconsin Judicial Campaign Integrity Committee, “WJCIC Finds Gableman Campaign TV Ad Offensive and Misleading,” Press Release, March 17, 2008.

⁷⁴ <https://web.archive.org/web/20070213122407/http://www.channel3000.com/news/10039182/detail.html> (last visited December 3, 2015).

⁷⁵ Tali Mendelberg (2001) *The Race Card: Campaign Strategy, Implicit Messages, and the Norm of Equality*. Princeton University Press. The importance and robustness of this research was verified in professor Mendelberg’s subsequent review of 17 empirical studies (“Racial Priming Revived,” 2008, *Perspectives on Politics* 6:109-123) and her winning the American Political Science Association’s Woodrow Wilson Foundation Award for the best book published in the United States on government, politics, or international affairs.

rights groups complained that the signs...were concentrated in minority neighborhoods and intended to suppress the election turnout.”⁷⁶ The sponsor was later revealed to be Stephen Einhorn, an investment banker and major donor to Republican candidates. Mr. Einhorn and his spouse had contributed nearly \$50,000 to Scott Walker’s campaigns between 2005 and 2012.⁷⁷

Senate Factor Seven evaluates “the extent to which members of the minority group have been elected to public office in the jurisdiction.”

Blacks are not well represented in Wisconsin public life. In the 163-year history of the state, only one black candidate has been elected statewide, Vel Phillips, who served one term as in the largely ceremonial office of Secretary of State beginning in 1978. Only one black candidate has been elected to Congress from Wisconsin, Gwen Moore starting in 2004. Although blacks have achieved reasonable parity in the state legislature – at 4% of the Assembly and 6% of the Senate – Latinos are vastly underrepresented. Only two of the 99 members of the Assembly are Latino; there are no Latinos in the State Senate. Despite being a majority-minority city, Milwaukee has yet to elect a black or Latino mayor.⁷⁸

Academic research has shown that blacks and Latinos are more likely to vote when their state legislatures have larger percentages of black and Latino representatives.⁷⁹ The state’s history of underrepresentation of these groups has contributed to their lower levels of electoral participation and contributes to the likelihood that adding burdens to the voting process will more likely deter blacks and Latinos from voting because the perceived benefits of voting are not as high as they would be if minority-preferred candidates enjoyed greater electoral success.

The first additional, unenumerated factor in the Senate report is whether “there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members.” Evidence for a lack of responsiveness is provided in the discussion of Senate Factor Five and elsewhere in this report. Blacks and Latinos suffer severe disparities in education, health, employment, income, and criminal justice in part due to state policies. Many of these disparities are more severe than in the rest of the country and have worsened over time.

There is also social science evidence that local election officials in Wisconsin are less responsive to minority constituents seeking information about how to participate in state elections. A study by Ariel White, Noah Nathan, and Julie Faller of Harvard University provides an empirical demonstration of this using a randomized field experiment.⁸⁰ The researchers sent an email to each of Wisconsin’s county clerks in September 2012 to assess the responsiveness of election

⁷⁶ Daniel Bice, “Author of Voter Fraud Billboards Steps Forth,” *Milwaukee Journal-Sentinel*, October 29, 2012.

⁷⁷ Rachel Weiner, “Venture Capitalist Behind Fraud Billboards,” *Washington Post*, October 31, 2012.

⁷⁸ A black citizen, Marvin Pratt, served briefly as acting mayor but lost his election bid.

⁷⁹ Rene R. Rocha, Caroline J. Tolbert, Daniel C. Bowen, and Christopher J. Clark (2010), “Race and Turnout: Does Descriptive Representation in State Legislatures Increase Minority Voting?,” *Political Research Quarterly* 63:890-907; Kenny J. Whitby (2007), “The Effect of Black Descriptive Representation on Black Electoral Turnout in the 2004 Elections,” *Social Science Quarterly* 88:1010-23.

⁸⁰ Ariel R. White, Noah L. Nathan, and Julie K. Faller (2015), “What Do I Need To Vote? Bureaucratic Discretion and Discrimination by Local Election Officials,” *American Political Science Review* 109:129-42.

administrators to the public. The email messages all contained the following text: “Hello, I’ve been hearing a lot about voter ID laws on the news. What do I need to vote? Thank you.”⁸¹ Following this text, the messages were randomly signed by someone with a name that was putatively white and non-Latino (i.e., “Greg Walsh” or “Jake Mueller”) or a name that was putatively Latino (i.e., “José Martinez” or “Luis Rodriguez”). Because this was a randomized field experiment, each clerk received only one or the other message, and clerks were not informed that they were participating in an experiment.

The authors’ analysis found that equivalent messages sent to Wisconsin county clerks were 6.5 percentage points less likely to get a response if they were signed by Latino names.⁸² This suggests that even a law that applies uniformly to the population is likely to be more costly for minority voters because they are less likely to receive official assistance in navigating election processes.

When government has intervened to address the needs of blacks and Latinos, it was seldom the state legislature and governor who acted. Instead, state courts, federal courts, and the federal government were frequently the actors who forced the state to respond. Several examples have been offered in this declaration. Among others, the “5,000 rule” for requiring voter registration and the absence of Spanish-language ballots in Milwaukee County were both remedied by federal action rather than by the state itself.

The second additional, unenumerated factor identified in the Senate report is whether the policy is “tenuous.”⁸³ The election law changes challenged in this litigation are not sufficiently justified by facts and are a departure from the history of voting practices in Wisconsin. Election laws in Wisconsin have generally become more accommodating over time. The state adopted election day registration in 1976. It permitted absentee voting without an excuse starting in 2000. For most of the state’s history, a registered elector wishing to vote merely needed to state her or his name and residence to the poll worker.⁸⁴

The challenged provisions are a significant shift away from long-term trends in Wisconsin election law. Wisconsin has prided itself on an inclusive election system that has generally become more accommodating over time. Voters have adapted to that system. Under the new law, voters face more stringent residency requirements, more limitations and greater risk in casting absentee ballots, and additional demands for documentation, including the need for government-issued IDs to vote.

⁸¹ A random half of county boards received this message. The other half received a “control” question about voting in a primary that serves as a baseline for the voter ID question.

⁸² This estimate is statistically significantly different from zero. See panel B of Figure SI.5 in the Supplemental Information file accompanying the article.

⁸³ Footnote 117 the Senate Report explains further. “If the procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact. But even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff’s showing through other factors that the challenged practice denies minorities fair access to the process.”

⁸⁴ Wisconsin statutes refer to poll workers as “election inspectors.” I use the more familiar terminology here.

Minority residents are also more likely to move and thus less likely to have identification that reflects current residency. Recent Census data show that while only 12.5% of whites lived in a different household one year ago, 20.1% of Latinos and 26.1% of blacks did so.⁸⁵ Moving frequently also makes it less likely that a person meets residency requirements and has the necessary identification to vote. Academic research shows that resources such as education are even more important enablers of voting among recent movers than among the general population.⁸⁶

A tenuous policy is also one that is not well grounded in facts to justify a state interest. One possible interest is security of the election system. However, voter “fraud,” especially the in-person kind, is uncommon. As Lorraine C. Minnite has documented, apparent cases of voter impersonation are frequently the result of misunderstandings, poor recordkeeping, or other errors.⁸⁷ Despite aggressive efforts by the Department of Justice to combat various forms of voter fraud between 2002 and 2005, only 24 people nationwide were convicted or pled guilty to voting illegally; two of these cases were in Wisconsin. A bipartisan study of election crimes by the Election Assistance Commission found that “Many [experts] asserted that impersonation of voters is probably the least frequent type of fraud because it is the most likely type of fraud to be discovered, there are stiff penalties associated with this type of fraud, and it is an inefficient method of influencing an election.”⁸⁸

A report by researchers at the Ohio State University law school explored this issue in Wisconsin and four other Midwestern states. They interviewed state and local election officials and attorneys in the Milwaukee district attorney’s office. Despite the fact that “There are few states in which allegations of voter fraud have received greater scrutiny than Wisconsin...On the whole, voting fraud is exceedingly rare.”⁸⁹ Their follow-up report on Wisconsin concluded that “There is no evidence of any serious problem with voter impersonation fraud, the only form of illegal voting that a strict ID law could hope to address.”⁹⁰ Supporting this conclusion is an exhaustive analysis of voter fraud allegations by the News21, an investigative reporting project

⁸⁵ American Community Survey 2009-2013 5-Year estimates.

⁸⁶ Peverill Squire, Raymond E. Wolfinger, and David P. Glass (1987), “Residential Mobility and Voter Turnout,” *American Political Science Review* 81:45-65. Richard Timpone (1998), “Structure, Behavior, and Voter Turnout in the United States,” *American Political Science Review* 92:145-58.

⁸⁷ Lorraine C. Minnite (2010), *The Myth of Voter Fraud*, Cornell University Press. See also Ray Christensen and Thomas J. Schultz (2014), “Identifying Election Fraud Using Orphan and Low Propensity Voters,” *American Politics Research* 42:311-37.

⁸⁸ U.S. Election Assistance Commission. “Election Crimes: An Initial Review and Recommendations for Future Study.” December 2006.

⁸⁹ Steven H. Huefner, Daniel P. Tokaji, Edward B. Foley, and Nathan A. Cemenska (2007) *From Registration to Recounts: The Election Ecosystems of Five Midwestern States*, The Ohio State University Moritz College of Law, p. 118.

⁹⁰ Steven F. Huefner, Nathan A. Cemenska, Daniel P. Tokaji, and Edward P. Foley (2012), *From Registration to Recounts Revisited: Developments in the Election Ecosystems of Five Midwestern States*, The Ohio State University Moritz College of Law, p. 41.

based at Arizona State University. They found 57 allegations of fraud in Wisconsin between 2000 and 2013 but zero convictions for voter impersonation.⁹¹

Voters who cast absentee ballots by mail are now generally required to provide a photocopy of an acceptable form of ID. As I explain below, this is a burdensome requirement. Yet the justification for the requirement is elusive. Because the clerk who processes the absentee ballot will not actually interact with the voter, the clerk will have no way to determine whether the photocopied ID actually represents the voter or not. This provision devalues the photo requirement and effectively creates two classes of voters.

Complaints about potential fraud from three top leaders in the State Assembly prompted the state's chief election officer, Government Accountability Board Director and General Counsel Kevin Kennedy, to respond with the following statement: "Speaking frankly on behalf of our agency and local election officials, absent direct evidence, I believe continued unsubstantiated allegations of voter fraud tend to unnecessarily undermine the confidence that voters have in election officials and the results of the election." He continued: "I hope that, as elected officials, you would agree that there is little benefit in promoting unsupported allegations questioning the credibility of the election process and the work of local clerks and election inspectors."⁹²

Wisconsin has a history of well-administered elections. The Pew Charitable Trust's Election Performance Index (EPI), which ranks states based on their scores on an array of as many as 17 relevant measures, places Wisconsin in the top four states in terms of how effectively they administered the 2008, 2010, and 2012 elections.⁹³ I am unaware of evidence showing that Wisconsin is in particular need of stricter election regulations because of crimes being committed by voters.

Absentee Ballots Illustrate the Disparate Burdens Imposed by the Challenged Changes in Wisconsin Election Law

In this section of the report I provide an analysis of absentee voting in Wisconsin. Absentee voting is examined because it is informative about the broader class of election practices in the state and how they impact various subpopulations. As I explain below, absentee voting is something of a "canary in a coal mine," as it is representative of the problems with many of the provisions challenged in this case.

Absentee voting is not a trivial matter or an activity limited to a small number of Wisconsin residents. Absentee voting in Wisconsin occurs at a substantial rate and has been increasing over time. The EAVS reports indicate that absentee voting in midterm elections in the state rose from 7.8% in 2006 to 10.6% in 2010 to 15.5% in 2014. In presidential elections absentee voting increased from 21.1% in 2008 to 21.4% in 2012. This pattern is consistent with a national trend of higher levels occurring in presidential election years than in midterm years, amidst an overall

⁹¹ See votingrights.news21.com.

⁹² Letter from Kevin J. Kennedy to State Assembly Speaker Jeff Fitzgerald. July 13, 2012.

⁹³ Elections Performance Index, available at <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/elections-performance-index> (last visited October 25, 2015).

rise in early voting over time.⁹⁴ Absentee voting is often an attractive alternative to traditional polling place voting for people who are busy with work, school, or other responsibilities, lack transportation on election day, or suffer from health problems that limit their activity.

The Wisconsin election laws challenged in this litigation include several new restrictions around the issuing, casting, and counting of absentee ballots. A review of these new restrictions helps to illustrate the discriminatory impact of the challenged restrictions and the weak justifications for them. Among the changes in absentee voting are the following:⁹⁵

- The early voting period was shortened from a 30-day period ending on the day before the election to a 12-day period ending on the Friday before the election.
- Early voting was eliminated on weekends, further reducing the early voting period to 10 days.
- Early voting at a clerk's office on weekdays was limited to the hours between 8 a.m. and 7 p.m.
- The sending of absentee ballots by email or fax to most voters was eliminated.
- Clerks were generally prevented from returning ballots when voters make mistakes.
- Voters submitting absentee ballots by mail were required to include a photocopy of an acceptable form of government-issued photo ID.

Difficulties of Absentee Voting

Even without taking the challenged changes into account, casting an absentee ballot comes with a surprising set of complications. Successfully navigating the process requires knowledge, skills, and other resources.

To begin, a person wishing to vote absentee must know how to request an absentee ballot. In general this requires a person to obtain an absentee ballot request form (GAB-121) from the state or a municipal clerk. The form must be completed and submitted to a clerk in person or by mail. Doing so requires time and funds to travel to the clerk's office or pay the necessary postage. It also requires literacy skills and the ability to interact with government agencies.

The GAB-121 form indicates that the application "should be submitted to your municipal clerk" but it does not provide clerks' names and addresses or even indicate where those can be found.⁹⁶ Information about one's municipal clerk can be difficult to obtain. If a person has Internet access, the GAB's web site would be a common starting point. However, the GAB's informational web site about the absentee voting process directs people to find the appropriate

⁹⁴ For example, see Michael P. McDonald (2013), "A Modest Early Voting Rise in 2012," The Huffington Post, available at http://www.huffingtonpost.com/michael-p-mcdonald/a-modest-early-voting-ris_b_3430379.html (last visited October 28, 2015).

⁹⁵ I use the term "early voting" to indicate absentee voting that takes place at a clerk's office or other location designated within a municipality for casting of absentee ballots.

⁹⁶ http://www.gab.wi.gov/sites/default/files/gab_forms/4/gab_121_application_for_absentee_ballot_2015_04__19162.pdf (last visited November 6, 2015).

clerk “by searching through the list of all Wisconsin municipal clerks.”⁹⁷ Following that link takes users to either a 437-page document or a spreadsheet of almost 2,000 lines listing all of the clerks. Scanning these files takes time and skill.

Some clerks provide information on their official municipal web sites, but this is far from a universal standard across the state. For example, the City of Sheboygan – the 13th largest municipality in the state – provides no information about absentee ballots. Indeed, it barely makes any mention that the clerk is responsible for conducting elections.⁹⁸ A frustrated voter who visited the Sheboygan County web site would fail to find appropriate information. The county web site’s link about absentee voting takes the user to a document stating that the voter must “send a written request to the Municipal Clerk.”⁹⁹ The site does not provide names and addresses of municipal clerks or even an explicit link to the absentee ballot request form, which is what the “written request” entails. For voters who find the form on the GAB web site, the form does not list the deadline by which the form must be mailed or received. Even confident voters with abundant resources and established voting habits will find the process challenging.

A voter who has not already done so must include a copy of an acceptable government-issued photo ID along with the application. In addition to any effort and cost required to obtain an ID, such a voter must find a way to make a photocopy. This will often require a trip to a public library or private business where copying is possible, thus entailing additional costs.

If these hurdles are overcome, the voter will be provided with an absentee ballot. The ballot must be completed following the directions provided and submitted to the appropriate clerk by the deadline for counting. Submission of the ballot generally requires either travel to the clerk’s office or use of the mail to deliver the ballot on time. The absentee ballot must be in a certified envelope that is sealed and signed by the voter and a witness. If the envelope is unsealed or lacks either or both signatures, it is unlikely to be counted. Ballots received after the deadline will not be counted. Ballots on which the voter’s intent cannot be determined will be rejected. This includes ballots on which a person “overvotes” by choosing more candidates or options than are permitted, for example, voting for two presidential candidates.

There are many ways to fail in this process. A lack of resources makes it challenging to successfully request, complete, and submit an absentee ballot for counting. Even the anticipation of difficulty in having one’s ballot cast and counted as intended could deter potential voters from participating. As a result, the rate at which absentee ballots are counted is a useful barometer for judging how voters from various sociodemographic groups are treated by the electoral system more broadly.

The counting of absentee ballots has been used by researchers to evaluate how well state election systems function. For example, the Pew Charitable Trust’s Election Performance Index (EPI), a respected non-partisan ranking of state election administration, is based on 17 indicators. Two of the indicators are the rates at which mail ballots are unreturned and mail ballots are rejected.

⁹⁷ <http://www.gab.wi.gov/voters/absentee> (last visited November 6, 2015).

⁹⁸ <http://www.sheboyganwi.gov/departments/city-clerks/> (last visited November 6, 2015).

⁹⁹ <http://www.sheboygancounty.com/home/showdocument?id=246> (last visited November 6, 2015).

The widely used metric known as the “residual vote rate” developed by researchers at Cal Tech and MIT, is calculated as the percentage of ballots that go uncounted.¹⁰⁰ The residual vote rate in a jurisdiction is driven in part by the use of absentee ballots and has been shown to increase as the number of mail ballots increases.¹⁰¹

The overall rate at which absentee ballots are counted might not be a useful metric to compare *across* states because “regimes” vary so widely across the country.¹⁰² That is not my purpose. I employ the measure to compare across communities within the state of Wisconsin where the “regime” is held constant. This approach has been used in other academic studies. Research in California has examined the rates at which absentee ballots are returned and counted.¹⁰³ In short, the rate at which absentee ballots go uncounted is a useful indicator of the overall health of the election administration system and a means for evaluating the equality of treatment by the law. If early voting continues to increase in use as expected, treatment of absentee ballots becomes even more consequential.

The rate at which absentee ballots are counted reflects both election law that was in place before 2011 and the challenged provisions that were adopted between 2011 and 2014. Absentee voting procedures in Wisconsin prior to 2011 were often more challenging for blacks, Latinos, young people, poor people, and supporters of the Democratic Party. These disproportionate burdens have been exacerbated rather than alleviated by changes in election law since 2011.

State law limits the number of early voting locations to one per municipality. This restriction, which is being challenged in this case, is in place despite the fact that municipalities vary tremendously in land area and population. State data from the 2014 election indicate that the number of adults per municipality ranged from 33 to 433,496, a ratio of 13,136 to one. In more populous municipalities, the number of voters served by a single location is necessarily many times that in less populous municipalities. Research has shown that a lower density of early voting locations relative to the size of the voting age population decreases overall voter turnout.¹⁰⁴

Members of the groups who are disproportionately disadvantaged by the changes in state election law challenged by plaintiffs in this litigation are also more likely to live in more

¹⁰⁰ For example, see Charles Stewart III (2006), “Residual Vote in the 2004 Election,” *Election Law Journal* 5:158-69.

¹⁰¹ Charles Stewart III (2014), “The Performance of Election Machines and the Decline of Residual Votes in the U.S.,” in Barry C. Burden and Charles Stewart III, ed., *The Measure of American Elections*, New York, NY: Cambridge University Press.

¹⁰² Christopher B. Mann (2014), “Mail Ballots in the United States: Policy Choice and Administrative Challenges,” in Barry C. Burden and Charles Stewart III, ed., *The Measure of American Elections*, New York, NY: Cambridge University Press.

¹⁰³ R. Michael Alvarez, Thad E. Hall, and Betsy Sinclair (2008), “Whose Absentee Votes are Returned and Counted: The Variety and Use of Absentee Ballots in California,” *Electoral Studies* 27:673-83.

¹⁰⁴ Elliot B. Fullmer (2015), “Early Voting: Do More Sites Lead to Higher Turnout?,” *Election Law Journal* 14:81-96.

populous municipalities. A larger population means that one location must serve a larger volume of voters. In 2014 the correlation between the size of the adult population and the percent of a group in the municipality was positive and statistically significant for blacks ($r = .64$), Latinos ($r = .33$), people aged 18 to 22 ($r = .17$), and people voting Democratic ($r = .12$).¹⁰⁵ Thus, in addition to the resource disadvantages faced by these groups and their less robust voting habits, blacks, Latinos, and Democrats were also required to use early voting locations that served significantly larger numbers of people. Recent changes to absentee voting laws have compounded these disparities by adding new requirements to absentee voting.

Minorities, young people, and lower income people are also more likely to move.¹⁰⁶ Wisconsin election laws now require that people who moved within 28 days of the election must vote from their previous polling place or use absentee ballots. Thus, these groups will disproportionately be required to find time and appropriate transportation to return to the previous voting location or make use of the absentee ballot process.

Even before the challenged changes in law, minorities were generally less likely to have their absentee ballots counted. Studies in other states also indicate that blacks, Latinos, and Democrats are more likely to cast overvotes that result in absentee ballots being rejected.¹⁰⁷ The new restrictions implemented in Wisconsin that are challenged in this litigation reinforce rather than alleviate these inequalities. Because the affected groups have fewer resources to pay the costs of voting, they will face even more challenges in complying with the law to cast absentee ballots. These difficulties are likely to discourage if not prevent participation in elections by groups that lack robust voting habits and/or resources that are helpful in voting.

Statistical Analysis of Counting of Absentee Ballots

To examine the counting of absentee ballots across sociodemographic groups, I analyze data from the November 2014 election in Wisconsin. This is the first general federal election in the state following the adoption of all of the election laws being challenged in this litigation.¹⁰⁸ I use ecological data analysis to estimate how likely it was for members of each group to have their absentee ballots counted.

Ecological data analysis has been used extensively in federal and state election law cases dealing with both denial and vote dilution issues tracing back to at least the 1980s. Ecological inference

¹⁰⁵ The correlations for blacks, Latinos, and people aged 18 to 22 are based on the share of adults they represent. The correlation for people who vote Democratic is based on the share of votes cast for major party candidates in the 2014 gubernatorial election that went to the Democratic candidate. All correlations are significant at $p < .01$.

¹⁰⁶ As noted above, recent Census data show that the share of Wisconsin residents who moved within the last year is 12.5% for whites, 20.1% for Latinos, and 26.1% for blacks. The rates are 38.2% for those aged 18-24 and 29.7% for those living below the poverty level. Data are from the American Community Survey 2009-2013 5-Year Estimates.

¹⁰⁷ Michael C. Herron and Jasjeet S. Sekhon (2003), "Overvoting and Representation: An Examination of Overvoted Ballots in Broward and Miami-Dade Counties," *Electoral Studies* 22:21-47. D.E. "Betsy" Sinclair and R. Michael Alvarez (2004), "Who Overvotes, Who Undervotes, Using Punchcards? Evidence from Los Angeles County," *Political Research Quarterly* 57:15-25.

¹⁰⁸ The only significant provision not in place for that election was the photo ID requirement.

encompasses a range of methods including ecological regression analysis and other techniques developed by social scientists and statisticians over several decades.

My analysis is conducted at the level of the “reporting unit.” The reporting unit is the level at which the state of Wisconsin generally reports election results. Each unit covers one ward or multiple wards. In 2014 reporting units had a mean adult population of 1,160 people and a mean of 675 voters participating in the election.¹⁰⁹ In general ecological inference is more effective when the units of analysis are smaller and more numerous. The methods have been applied in a range of levels from small units such as precincts to larger units such as counties and congressional districts.¹¹⁰ In data that the state reports to the U.S. Election Assistance Commission (EAC) for its biennial Election Administration and Voting Survey (EAVS), the state lists 3,589 reporting units.¹¹¹

As my key outcome of interest, I computed the *absentee uncounted rate* from the state’s EAVS data as the number of absentee ballots counted divided by the number of absentee ballots issued to voters. The 2012 EAVS indicates that 93.3% of absentee ballots were counted, for an uncounted rate of 6.7%. In 2014, 97.6% were counted, for an uncounted rate of 2.4%.¹¹² This difference between the presidential and midterm elections reflects nationwide patterns in which absentee ballots are rejected at higher rates in presidential election years.

In the 2014 election, absentee ballots were not counted for a variety of reasons. These reasons include: failure to deliver the ballot to voter, failure to return the ballot, lack of a voter signature on the envelope, lack of a witness signature on the ballot, death of the voter, failure to have the ballot postmarked by election day and received by the Friday after the election, failure to seal the envelope. An absentee ballot might also be rejected if voter intent is unclear. Clerks were generally prohibited from returning ballots with mistakes to voters for correction and resubmission.

I estimate ecological regression models to determine how the absentee counted rate varies across affected groups. To ensure the robustness of the results to specification, I estimate several versions of each model to reflect the range of dominant practices in the field.¹¹³ The magnitude of the estimates will depend in part on decisions made by the researcher about model specification. The functional form of the model should be appropriate to the data at hand. Following the standards of social science research, I considered alternative specifications that allowed for nonlinear or other specifications where the data suggested they might be appropriate. What is most important is the direction and statistical significance of the effects because they

¹⁰⁹ A reporting unit occupies a geographic middle ground between Census Tracts and Census Block Groups. In 2010, Wisconsin had 1,409 tracts and 4,783 block groups. See <https://www.census.gov/geo/maps-data/data/tallies/tractblock.html> (last visited October 28, 2015).

¹¹⁰ See Gary King, Ori Rosen, and Martin A. Tanner, ed. (2001), *Ecological Inference: New Methodological Strategies*, New York, NY: Cambridge University Press.

¹¹¹ <http://www.gab.wi.gov/publications/statistics/gab-190/November-2014> (last visited November 7, 2015)

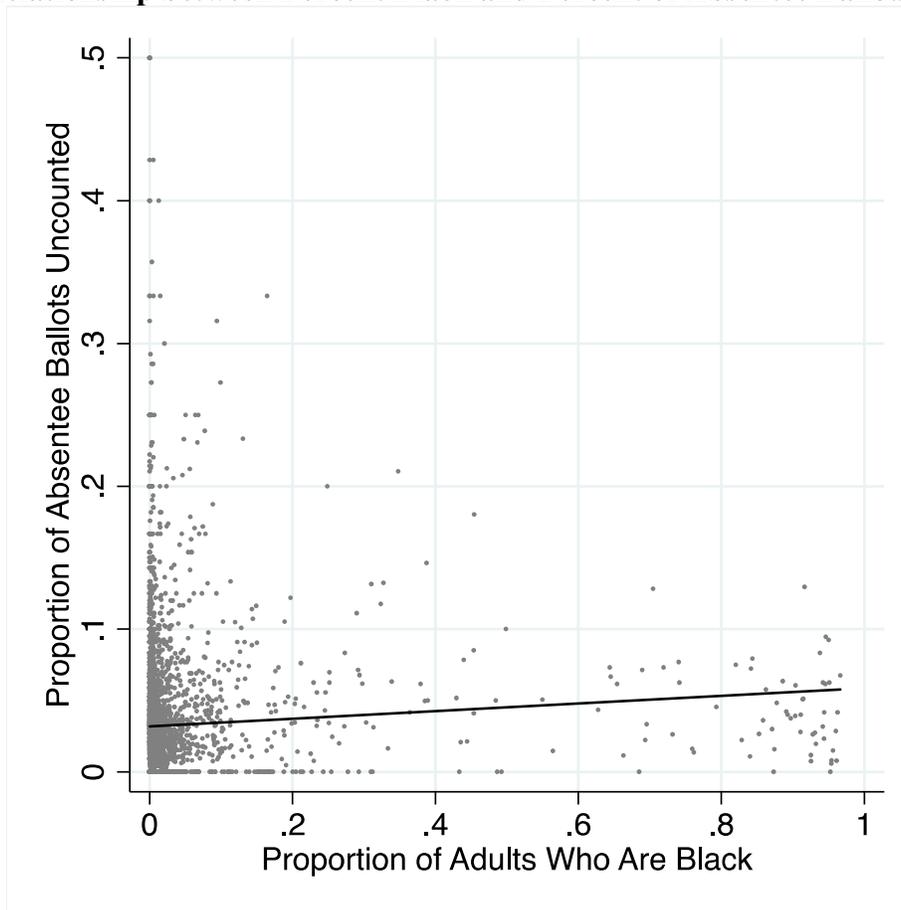
¹¹² In the analyses below I use the terms “percent,” “rate,” and “fraction” interchangeably.

¹¹³ See Christopher H. Achen and W. Phillips Shively (1995), *Cross-Level Inference*, Chicago, IL: University of Chicago Press.

indicate whether there are disparities between groups and whether those differences are statistically meaningful. The results I present below are generally robust to reasonable variations in specification, thus providing more confidence in the patterns uncovered.

To provide a brief example of the data underlying the regression analyses, I present a scatterplot of the percent of adults who are black and percent of absentee ballots that went uncounted in 2014. Each dot represents a reporting unit. The ordinary least squares linear regression line that best fits that data is superimposed over the dots. Although there is substantial scatter of the points around the line, the upward slope indicates that, on average, absentee ballots become increasingly likely to go uncounted as the share of the population that is black increases. The rate roughly doubles as one moves from the left end of the line (where there are few black residents) to the right end of the line (where there are few white residents). The difference between where the line crosses the vertical axis at the two endpoints of the graph is the estimate of how much more likely black voters' absentee ballots are to be rejected.

Figure 1. Relationship between Percent Black and Percent of Absentee Ballots Uncounted



I first present ecological regression results to assess how the rate at which absentee ballots go uncounted reflects the percent black, percent Latino, and percent Democratic among adults in each reporting unit. Information about the race, ethnicity, and vote shares for the major parties is

available from the state at the ward level.¹¹⁴ For the 2014 election 6,726 wards are listed. Because wards are nested within reporting units, I am able to aggregate up the ward file so that it may be matched to the EAVS data on how absentee ballots are treated. This combined dataset permits an ecological regression analysis in which the rate at which absentee ballots are rejected in a reporting unit is a function of the percent black, percent Latino, and the percent voting Democratic in that election.¹¹⁵

Because the field is unsettled as to whether all observations should be treated equally (i.e., unweighted) or whether each should be weighted by the size of the population, I present both kinds of models. Fortunately the choice to weight or not has little influence on the results.

I then present additional models in which the percentage of each group is calculated among actual voters. For example, in these models the percent black represents the share of people who voted in the 2014 general election who were black. Whereas partisanship is taken directly from the raw election results reported by the state, estimates of racial, ethnic, and age composition of voters in each reporting unit are based on the analysis of Professor Kenneth Mayer. The procedures he used are described in his expert report submitted in this litigation. A limitation of these data is that some units could not be matched between the various datasets, thus resulting in a smaller sample size. The primary benefit is that the analysis relies on actual voters rather than the adult population. Using actual voters also permits an analysis of young people aged 18 to 24 that is not possible with the data based on all adults. As with the first set of analyses, I report both weighted and unweighted data. The analyses thus complement one another and provide additional confidence in the robustness of the results.

Some researchers have suggested transforming variables that have heavily skewed distributions. In particular, taking natural logarithms has been done so that variables' distributions are closer to normal.¹¹⁶ This can be helpful to avoid findings that are driven primary by outliers, but it also has the problem of eliminating many observations from the analysis where the log is undefined.¹¹⁷ The substantive findings are quite similar to what is reported here, so I retain the more intuitive raw regression results in the report to facilitate meaningful interpretations.

Tables 2 and 3 present the ecological regression analyses. The first column of data in Table 2 (under "Unweighted Analysis") is a summary of the regression line displayed in Figure 1. Coefficients can be read as percentages. In that column the coefficient of .027 indicates that the absentee ballots went uncounted at a rate that was 2.7 percentage points higher for blacks than

¹¹⁴ <http://legis.wisconsin.gov/gis/data> (last visited November 7, 2015).

¹¹⁵ Some reporting units are not included in the analysis for various reasons. First, some of the wards in the EAVS file are "empty" in the sense that they lack voters. In some cases these appear to be "future" wards that are not yet populated by people. For example, for the City of Madison the EAVS lists wards numbered up to 125 but the city's web site only indicates there are 113 wards. Second, some municipalities did not report data on disposition of absentee ballots. Third, a very small number of observations that appear to be clear errors have been omitted from the analysis. Even with these omissions the analysis covers more than 90% of the state's reporting units.

¹¹⁶ J. Morgan Kousser (2001), "Ecological Inference from Goodman to King," *Historical Methods* 34:101-26.

¹¹⁷ The log of zero is undefined. Using logged variables thus omits many observations where no absentee ballots go uncounted and/or there are not members of the affected group.

for other voters. The line in Figure 1 begins at .032 on the left hand side (0% black) and goes to .059 on the right hand side (100% black), an estimated effect of 2.7 points. This effect is statistically significant by conventional standards.

Table 2. Analysis of Absentee Ballot Uncounted Rate in 2014 Using Adult Population

| Variable | Unweighted Analysis | | | Weighted Analysis | | |
|--------------------|---------------------|--------|--------|-------------------|--------|--------|
| Percent Black | .027* | -- | -- | .028* | -- | -- |
| | (.007) | | | (.005) | | |
| Percent Latino | -- | .094* | -- | -- | .111* | -- |
| | | (.010) | | | (.010) | |
| Percent Democratic | -- | -- | .037* | -- | - | .038* |
| | | | (.004) | | | (.004) |
| Constant | .032* | .029* | .016* | .029* | .025* | .012* |
| | (.001) | (.001) | (.003) | (.001) | (.001) | (.002) |
| <i>N</i> | 3,246 | 3,247 | 3,246 | 3,246 | 3,246 | 3,247 |

*significant at $p < .01$, one-tailed test.

Table 3. Analysis of Absentee Ballot Uncounted Rate in 2014 Using Voters

| Variable | Unweighted Analysis | | | | Weighted Analysis | | | |
|--------------------|---------------------|--------|--------|-------------------|-------------------|--------|--------|-------------------|
| Percent Black | .024* | -- | -- | -- | .025* | -- | -- | -- |
| | (.005) | | | | (.004) | | | |
| Percent Latino | -- | .145* | -- | -- | -- | .174* | -- | -- |
| | | (.016) | | | | (.018) | | |
| Percent Democratic | -- | -- | .036* | -- | -- | -- | .038* | -- |
| | | | (.005) | | | | (.004) | |
| Percent 18-24 | -- | -- | -- | .019 ⁺ | -- | -- | -- | .011 [^] |
| | | | | (.010) | | | | (.007) |
| Constant | .032* | .031* | .016* | .033* | .029* | .028* | .012* | .030* |
| | (.001) | (.001) | (.002) | (.001) | (.001) | (.001) | (.002) | (.001) |
| <i>N</i> | 2,988 | 2,988 | 2,988 | 2,988 | 2,988 | 2,988 | 2,988 | 2,988 |

*significant at $p < .01$, one-tailed test. +significant at $p = .025$, one-tailed test. ^significant at $p = .057$, one-tailed test.

The results in Table 2 indicate that absentee ballots are more likely to go uncounted in reporting units with larger shares of blacks, Latinos, and Democrats. In every model, regardless of whether or not weighting is applied, the coefficients of interest are positive and statistically significant. As noted above, the unweighted analysis suggests that blacks are 2.7 percentage more likely than whites are to have their absentee ballots go uncounted. Latinos are 9.4 points more likely to have their absentee ballots uncounted. Democrats are 3.7 points more likely to have their absentee ballots uncounted. Stated in a different way, the rates at which absentee ballots go uncounted for blacks and Democrats are roughly twice the overall rate and for Latinos are several times the overall rate.

These patterns also appear in Table 3 in which actual voters are analyzed. The rate at which absentee ballots are uncounted increases with the share of voters who are black, Latino, and Democratic. There is also evidence that young people are less likely to have their absentee

ballots counted. Those models show that young adults have ballots go uncounted at a rate that is one to two percentage points higher than the overall baseline of approximately three percent. This represents an increase of roughly 33% to 50% above the average voter who is older than age 24.

Absentee voting is growing in prevalence and the treatment of absentee ballots is a key measure of the health of the state's system of election administration. The absentee voting process in Wisconsin evidently is more challenging for blacks, Latinos, Democrats, and young people. It would surely be disproportionately challenging for lower income voters as well. The election provisions challenged in this litigation make the absentee voting process more difficult for all voters, but especially for these groups. These groups generally display less robust voting habits and thus are more easily dissuaded or deterred from voting by new requirements. This is compounded by the fact that they have fewer resources such as formal education and skills that help to overcome administrative hurdles and pay the literal and figurative costs of voting.

Conclusion

I conclude that the changes to Wisconsin election law between 2011 and 2014 that are challenged by plaintiffs in this litigation will predictably have a disproportionate impact on voting participation by blacks, Latinos, young people, lower income individuals, and Democrats in Wisconsin. The challenged laws disproportionately increase the costs of voting for these individuals. Based on theory about the "calculus of voting" and scholarly research on voter habit, I conclude that voting was more costly for members of these groups before the challenged changes in election law were implemented. These voters generally had less established voting habits and had fewer resources to help overcome the costs of voting. The challenged changes exacerbate these disparities. For minority groups the Senate Factors interact with the challenged laws in ways that result in members of these groups having less opportunity to participate in the political process and elect representatives of their choice. For the affected groups more generally, the changes to election law in Wisconsin undermine the opportunity of members of these groups to express political preferences and participate in the political process.

Exhibit 1

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Professor of Political Science, University of Wisconsin-Madison (2006-present)

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Center for Demography of Health and Aging, Faculty Affiliate (2013-present)

School of Journalism and Mass Communication, Faculty Affiliate (2015-present)

Associate Professor of Government, Harvard University (2003-2006)

Assistant Professor of Government, Harvard University (1999-2003)

Assistant Professor of Political Science, Louisiana State University (1998-1999)

Education

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Authored and Co-Authored Books

Burden, Barry C. 2007. *Personal Roots of Representation*. Princeton, NJ: Princeton University Press. [Reviewed in *Choice*, *Democratization*, *Journal of Politics*, *Legislative Studies Section Newsletter*, *Political Studies Review*, & *Polity*]

Burden, Barry C., and David C. Kimball. 2002. *Why Americans Split Their Tickets: Campaigns, Competition, and Divided Government*. Ann Arbor, MI: The University of Michigan Press. [Reviewed in *Campaigns & Elections Magazine*, *Choice*, *Journal of Politics*, *Legislative Studies Section Newsletter*, *National Journal*, *Party Politics*, *Perspectives on Politics*, *Political Science Quarterly*, *Public Choice*, & *VOX POP.*]

Edited Books

- Burden, Barry C., and Charles Stewart III, eds. 2014. *The Measure of American Elections*. New York, NY: Cambridge University Press.
- Hershey, Marjorie R. (editor), Barry C. Burden (associate editor), and Christina Wolbrecht (associate editor). 2014. *Guide to Political Parties*. Thousand Oaks, CA: Sage Publications.
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- Burden, Barry C., Bradley M. Jones, and Michael S. Kang. 2014. "Sore Loser Laws and Congressional Polarization." *Legislative Studies Quarterly* 39:299-325. [Featured in *The New York Times* column by Mickey Edwards, Mischiefs of Faction blog, and *Washington Monthly* Ten Miles Square blog. Winner of the Jewell-Loewenberg Prize for the best article published in *LSQ* in 2014]
- Burden, Barry C. David T. Canon, Kenneth R. Mayer, and Donald P. Moynihan. 2014. "Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform." *American Journal of Political Science* 58:95-109. [Featured in a variety of outlets including *The Atlantic Wire*, *The New York Times*. Pew Research Center FactTank, The Huffington Post, *The Deseret News*, National Review Online, *The Baltimore Sun*, and *Orlando Sentinel*. Winner of the State Politics and Policy Best Journal Article Award in 2014.]
- Burden, Barry C., David T. Canon, Stéphane Lavertu, Kenneth R. Mayer, and Donald P. Moynihan. 2013. "Selection Methods, Partisanship, and the Administration of Elections." *American Politics Research* 41:903-36.
- Burden, Barry C., and Jacob R. Neiheisel. 2013. "Election Administration and the Pure Effect of Voter Registration on Turnout." *Political Research Quarterly* 66:77-90.

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- Neiheisel, Jacob R., and Barry C. Burden. 2012. "The Impact of Election Day Registration on Voter Turnout and Election Outcomes." *American Politics Research* 40:636-64. [Featured on the *Wall Street Journal's* Ideas Market blog]
- Burden, Barry C. David T. Canon, Kenneth R. Mayer, Donald P. Moynihan. 2011. "Early Voting and Election Day Registration in the Trenches: Local Officials' Perceptions of Election Reform." *Election Law Journal* 10:89-102.
- Berry, Christopher R., Barry C. Burden, and William G. Howell. 2010. "The President and the Distribution of Federal Spending." *American Political Science Review* 104:783-99.
- Berry, Christopher R., Barry C. Burden, and William G. Howell. 2010. "After Enactment: The Lives and Deaths of Discretionary Programs." *American Journal of Political Science* 54:1-14.
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- Burden, Barry C., and D. Sunshine Hillygus. 2009. "Opinion Formation, Polarization, and Presidential Reelection." *Presidential Studies Quarterly* 39:619-35.
- Burden, Barry C. 2009. "Candidate-Driven Ticket Splitting in the 2000 Japanese Elections." *Electoral Studies* 28:33-40.
- Burden, Barry C., and Gretchen Helmke. 2009. "The Comparative Study of Split-Ticket Voting." *Electoral Studies* 28:1-7. [Introduction to a Special Issue co-edited with Gretchen Helmke.]
- Burden, Barry C. 2008. "The Social Roots of the Partisan Gender Gap." *Public Opinion Quarterly* 72:55-75.
- Burden, Barry C. 2007. "Ballot Regulations and Multiparty Politics in the States." *PS: Political Science & Politics* 40:669-73.
- Burden, Barry C. 2006. "A Tale of Two Campaigns: Ralph Nader's Strategy in the 2004 Presidential Election." *PS: Political Science and Politics* 39:871-4.
- Burden, Barry C., and Casey A. Klofstad. 2005. "Affect and Cognition in Party Identification." *Political Psychology* 26:869-86.
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- Burden, Barry C. 2005. "Minor Parties and Strategic Voting in Recent U.S. Presidential Elections." *Electoral Studies* 24:603-18.
- Burden, Barry C. 2005. "Ralph Nader's Campaign Strategy in the 2000 U.S. Presidential Election." *American Politics Research* 33:672-99.
- Burden, Barry C., and Tammy M. Frisby. 2004. "Preferences, Partisanship, and Whip Activity in the House of Representatives." *Legislative Studies Quarterly* 29:569-90.

- Burden, Barry C. 2004. "A Technique for Estimating Candidate and Voter Positions." *Electoral Studies* 23:623-39.
- Burden, Barry C. 2004. "Candidate Positioning in U.S. Congressional Elections." *British Journal of Political Science* 34:211-27.
- Burden, Barry C., and Anthony Mughan. 2003. "The International Economy and Presidential Approval." *Public Opinion Quarterly* 67:555-78.
- Burden, Barry C., and Joseph Neal Rice Sanberg. 2003. "Budget Rhetoric in Presidential Campaigns from 1952 to 2000." *Political Behavior* 25:97-118.
- Burden, Barry C. 2003. "Internal and External Effects on the Accuracy of NES Turnout." *Political Analysis* 11:193-5.
- Burden, Barry C. 2002. "When Bad Press is Good News: The Surprising Benefits of Negative Campaign Coverage." *Harvard International Journal of Press/Politics* 7:76-89.
- Burden, Barry C. 2002. "United States Senators as Presidential Candidates." *Political Science Quarterly* 117:81-102. [Featured in David S. Broder's *Washington Post* column.]
- Burden, Barry C. 2000. "Voter Turnout and the National Election Studies." *Political Analysis* 8:389-98.
- Burden, Barry C., Gregory A. Caldeira, and Tim Groseclose. 2000. "Measuring the Ideologies of U.S. Senators: The Song Remains the Same." *Legislative Studies Quarterly* 25:237-58. [Reprinted in Carl Grafton and Anne Permaloff, ed. 2005. *The Behavioral Study of Political Ideology and Public Policy Formation*, Lanham, MD: University Press of America.]
- Burden, Barry C., and Steven Greene. 2000. "Party Attachments and State Election Laws." *Political Research Quarterly* 53:57-70.
- Burden, Barry C., and Anthony Mughan. 1999. "Public Opinion and Hillary Rodham Clinton." *Public Opinion Quarterly* 63:237-50. [Featured in *The Chronicle of Higher Education* and Richard Morin's *Washington Post National Weekly Edition* column.]
- Burden, Barry C., and Marni Ezra. 1999. "Calculating Voter Turnout in U.S. House Primary Elections." *Electoral Studies* 18:89-99.
- Lacy, Dean, and Barry C. Burden. 1999. "The Vote-Stealing and Turnout Effects of Ross Perot in the 1992 U.S. Presidential Election." *American Journal of Political Science* 43:233-55.
- Burden, Barry C., and David C. Kimball. 1998. "A New Approach to the Study of Ticket Splitting." *American Political Science Review* 92:533-44. [Reprinted in Richard G. Niemi and Herbert F. Weisberg, ed. 2001. *Controversies in Voting Behavior*, 4th ed. Washington, DC: CQ Press.]
- Burden, Barry C. 1997. "Deterministic and Probabilistic Voting Models." *American Journal of Political Science* 41:1150-69.

Book Chapters

- Burden, Barry C., and Logan Vidal. Forthcoming. "How Resources, Engagement, and Recruitment are Shaped by Election Rules." In *Resources, Engagement, and Recruitment: New Advances in the Study of Civic Volunteerism*, ed. by Casey A. Klofstad. Philadelphia, PA: Temple University Press.
- Vidal, Logan, and Barry C. Burden. Forthcoming. "Voter Registration." In *American Governance*, ed. Stephen L. Schechter. Farmington Hills, MI: Cengage Learning.
- Burden, Barry C., and Charles Stewart III. 2014. "Introduction to the Measure of American Elections." In *The Measure of American Elections*, eds. Barry C. Burden and Charles Stewart III. New York, NY: Cambridge University Press.
- Burden, Barry C. 2014. "Registration and Voting: A View from the Top." In *The Measure of American Elections*, eds. Barry C. Burden and Charles Stewart III. New York, NY: Cambridge University Press.
- Hillygus, D. Sunshine, and Barry C. Burden. 2013. "Mass Polarization During the Bush Presidency." In *Taking the Measure: The Presidency of George W. Bush*, ed. Donald R. Kelley and Todd G. Shields. College Station, TX: Texas A&M University Press.
- Burden, Barry C. 2013. "The Nominations: Ideology, Timing, and Organization." In *The Elections of 2012*, ed. Michael Nelson. Washington, DC: CQ Press.
- Berry, Christopher R., Barry C. Burden, and William G. Howell. 2012. "The Lives and Deaths of Federal Programs, 1971-2003." In *Living Legislation: Political Development and Contemporary American Politics*, ed. Jeffrey A. Jenkins and Eric M. Patashnik. Chicago, IL: University of Chicago Press.
- Burden, Barry C., and Amber Wichowsky. 2010. "Local and National Forces in Congressional Elections." In *The Oxford Handbook of American Elections and Political Behavior*, ed. Jan E. Leighley. New York, NY: Oxford University Press.
- Burden, Barry C. 2009. "The Puzzle of the Japanese Gender Gap in LDP Support." In *Political Changes in Japan: Electoral Behavior, Party Realignment, and the Koizumi Reforms*, ed. Steven Reed, Kenneth Mori McElwain, and Kay Shimizu. Stanford, CA: Shorenstein Asia-Pacific Research Center.
- Burden, Barry C., and Philip Edward Jones. 2009. "Strategic Voting in the USA." In *Duverger's Law of Plurality Voting: The Logic of Party Competition in Canada, India, the United Kingdom, and the United States*, ed. Bernard Grofman, André Blais, and Shaun Bowler. New York, NY: Springer.
- Burden, Barry C. 2009. "The Nominations: Rules, Strategy, and Uncertainty." In *The Elections of 2008*, ed. Michael Nelson. Washington, DC: CQ Press.
- Burden, Barry C. 2008. "Multiple Parties and Ballot Regulations." In *Democracy in the States: Experiments in Elections Reform*, ed. Bruce E. Cain, Todd Donovan, and Caroline J. Tolbert. Washington, DC: Brookings Institution Press.
- Burden, Barry C. 2005. "Laws Governing Suffrage." In *Guide to Political Campaigns in America*, ed. Paul S. Herrnsen. Washington, DC: CQ Press.

- Burden, Barry C. 2005. "Family Feud in Massachusetts: How Intraparty Dynamics Influence Redistricting." In *Redistricting in the New Millennium*, ed. Peter F. Galderisi. Lanham, MD: Lexington Books.
- Burden, Barry C. 2005. "The Nominations: Technology, Money, and Transferable Momentum." In *The Elections of 2004*, ed. Michael Nelson. Washington, DC: CQ Press.
- Burden, Barry C. 2003. "Minor Parties in the 2000 Presidential Election" In *Models of Voting in Presidential Elections: The 2000 U.S. Election*, ed. Herbert F. Weisberg and Clyde Wilcox. Stanford, CA: Stanford University Press.
- Burden, Barry C. 2003. "Everything but Death and Taxes: Uncertainty and American Politics." In *Uncertainty in American Politics*, ed. Barry C. Burden. New York, NY: Cambridge University Press.
- Burden, Barry C. 2001. "The Polarizing Effects of Congressional Primaries." In *Congressional Primaries in the Politics of Representation*, ed. Peter F. Galderisi, Michael Lyons, and Marni Ezra. Lanham, MD: Rowman and Littlefield.
- Mughan, Anthony, and Barry C. Burden. 1998. "Hillary Clinton and the President's Reelection." In *Reelection 1996: How Americans Voted*, ed. Herbert F. Weisberg and Janet M. Box-Steffensmeier. Chatham, NJ: Chatham House Publishers.
- Burden, Barry C., and Aage R. Clausen. 1998. "The Unfolding Drama: Party and Ideology in the 104th House." In *Great Theatre: The American Congress in the 1990s*, ed. Herbert F. Weisberg and Samuel C. Patterson. New York, NY: Cambridge University Press.
- Mughan, Anthony, and Barry C. Burden. 1995. "The Candidates' Wives." In *Democracy's Feast: Elections in America*, ed. Herbert F. Weisberg. Chatham, NJ: Chatham House.

Book Reviews

- Burden, Barry C. 2014. Review of *Getting Primaried: The Changing Politics of Congressional Primary Challenges* by Robert G. Boatright. Ann Arbor, MI: University of Michigan Press. *Congress & the Presidency* 41:132-4.
- Burden, Barry C. 2009. Review of *Minority Report: Evaluating Political Equality in America* by John D. Griffin and Brian Newman. Chicago, IL: University of Chicago Press. *Public Opinion Quarterly* 73:590-2.
- Burden, Barry C. 2009. Review of *The American Voter Revisited*, ed. Michael S. Lewis-Beck, William G. Jacoby, Helmut Norpoth, and Herbert F. Weisberg. Ann Arbor, MI: University of Michigan Press. *Political Science Quarterly* 124:344-6.
- Burden, Barry C. 2003. Review of *Learning by Voting: Sequential Choices in Presidential Primaries and Other Elections* by Rebecca B. Morton and Kenneth C. Williams. *Public Choice* 114:248-51.
- Burden, Barry C. 2002. Review of *Elements of Reason: Cognition, Choice, and the Bounds of Rationality*, ed. Arthur Lupia, Mathew D. McCubbins, and Samuel L. Popkin. *Journal of Economic Literature* 40:928-9.

Reports

- Bland, Gary, and Barry C. Burden. 2013. "Electronic Registration Information Center: Stage 1 Evaluation." Report to the Pew Charitable Trusts. December 10.
- Burden, Barry C., and Brian J. Gaines. 2013. "Administration of Absentee Ballot Programs." Testimony and report to the Presidential Commission on Election Administration. Hearing in Denver, CO. August 8.
- Burden, Barry C., and Jeffrey Milyo. 2013. "The Recruitment and Training of Poll Workers." Testimony and report to the Presidential Commission on Election Administration. Hearing in Cincinnati, OH. September 20.
- Burden, Barry C. 2010. *Polling Place Incidents in the November 2008 General Election*. Report to the Wisconsin Government Accountability Board.
- Burden, Barry C., David T. Canon, Stéphane Lavertu, Kenneth R. Mayer, and Donald P. Moynihan. 2009. *2008 Wisconsin Election Data Collection Grant Program Evaluation Report*. Report to the Wisconsin Government Accountability Board.
- Burden, Barry C., and Janet M. Box-Steffensmeier. 1998. "Vote Likelihood and Institutional Trait Questions in the 1997 NES Pilot Study." Report to American National Election Study Board of Overseers.

Other Publications

- Burden, Barry C. 2015. "FEC Isn't Right Model for Wisconsin." *Wisconsin State Journal*. September 18.
- Burden, Barry C., David T. Canon, Kenneth R. Mayer, and Donald P. Moynihan. 2014. "Keep Hands off the GAB." *Milwaukee Journal Sentinel*. October 15.
- Burden, Barry C. 2014. "How Political Scientists Informed the President about Election Reform." The Monkey Cage blog. January 23.
- Burden, Barry C., and Kevin J. Kennedy. 2013. "State Ranks High on Election Performance." *Milwaukee Journal Sentinel*. February 7.
- Burden, Barry C., David T. Canon, Kenneth R. Mayer, and Donald P. Moynihan. 2012. "Election-Day Registration Works Here." *Milwaukee Journal Sentinel*. December 26.
- Burden, Barry C. 2012. "A Portrait of the Wisconsin Municipal Clerk." *The Municipality*. Volume 106, Number 5.
- Burden, Barry C. 2011. "Polarization, Obstruction, and Governing in the Senate." *The Forum*. Volume 9, Issue 4.
- Burden, Barry C., and Kenneth R. Mayer. 2010. "Voting Early, but Not So Often." *The New York Times*, October 25.

- Burden, Barry C. 2009. "Representation as a Field of Study." In *The Future of Political Science: 100 Perspectives*, ed. Gary King, Kay Lehman Schlozman, and Norman Nie. New York, NY: Routledge.
- Burden, Barry C. 2004. "An Alternative Account of the 2004 Presidential Election." *The Forum*. Volume 2, Issue 4.
- Burden, Barry C. 2003. "Chronology of the 2000 Presidential Campaign." In *Models of Voting in Presidential Elections: The 2000 U.S. Election*, ed. Herbert F. Weisberg and Clyde Wilcox. Stanford, CA: Stanford University Press.
- Burden, Barry C. 1998. "Chronology of the 1996 Presidential Campaign." In *Reelection 1996: How Americans Voted*, ed. Herbert F. Weisberg and Janet M. Box-Steffensmeier. Chatham, NJ: Chatham House Publishers.
- Burden, Barry C. 1995. "Chronology of the 1992 Presidential Campaign." In *Democracy's Feast: Elections in America*, ed. Herbert F. Weisberg. Chatham, NJ: Chatham House Publishers.

Honors and Awards

- Association for Politics and the Life Sciences Best Professional Paper (2015) – given by the APLS for the best paper given by faculty members at the annual conference – "How Different Forms of Health Matter to Political Participation: The Roles of Cognitive, Physical, and General Health," with Jason M. Fletcher, Pamela Herd, Bradley M. Jones, and Donald P. Moynihan.
- State Politics and Policy Best Journal Article Award (2015) – given by the State Politics and Policy section of the APSA for best article published in the previous year – "Election Laws, Mobilization, and Turnout: The Unexpected Consequences of Electoral Reform," with David T. Canon, Kenneth R. Mayer, and Donald P. Moynihan
- Jewell-Loewenberg Prize (2015) – given by the Legislative Studies section of the APSA for the best article published in Legislative Studies Quarterly in the previous year – "Sore Loser Laws and Congressional Polarization," with Bradley M. Jones and Michael S. Kang
- Vilas Associates award, UW Graduate School (2014-2016)
- Robert H. Durr Award (2014) – given by the Midwest Political Science Association for the best paper applying quantitative methods to a substantive problem in political science – "Election Laws and Partisan Gains: The Effects of Early Voting and Same Day Registration on the Parties' Vote Shares," with David Canon, Kenneth Mayer, and Donald Moynihan
- H. I. Romnes Faculty Fellow, UW Graduate School (2010-2015)
- Licking Valley Schools "Wall of Pride" Award (2009) – given by Licking Valley Local School District to alumni who distinguished themselves professionally or made notable contributions to society
- Hamel Family Faculty Fellow, UW College of Letters and Science (2008-2013)

University Residence Hall Favorite Instructor Award (2007)

Nominated for Harvard University Everett Mendelsohn Excellence in Graduate Mentoring Award (2006)

Emerging Scholar Award (2005) – *given by the Political Organizations and Parties section of the APSA for significant research by a scholar receiving her or his doctorate within the past seven years*

Wittenberg University Outstanding Young Alumnus Award (2002) – *given to a graduate of the last decade to recognize professional achievement*

Council of Graduate Schools/University Microfilms International Distinguished Dissertation Award (2000) – *given to recognize best dissertation completed nationwide in the social sciences between 1998 and 2000*

Nominated for Harvard University Joseph R. Levenson Memorial Teaching Prize (2000)

ΑΑΔ Award for superior instruction of freshman students (1999)

OSU Presidential Fellow (1998)

Francis R. Aumann Award for best OSU graduate student conference paper (1996 & 1997)

Malcolm Jewell Award (1996) – *best graduate student paper presented at the 1995 Southern Political Science Association meeting*

Ohio Board of Regents Fellow (1993-1995)

ΦBK (1993)

Wittenberg University Student Leader of the Year (1992-1993)

Jeffrey Y. Mao Alumni Award in Political Science (1992)

Grants

Vilas Associates award, “The Genetic, Personality, and Health Origins of Political Participation” (2015-2017)

UW Graduate School Research Committee, “Political Participation among Older Americans” (2014-2015, co-PI with Moynihan)

Center for Demography of Health and Aging, “Political Participation of Older Americans: The Role of Social and Genetic Factors” (co-PI with Jason M. Fletcher and Donald P. Moynihan, 2013-2014)

Pew Charitable Trusts, \$46,400 for “Measuring Elections Performance Project,” (with head PI Charles Stewart III, 2012-2013)

Wisconsin Government Accountability Board, \$43,234 for “Analysis of Polling Place Incident Logs” (head PI with Canon, Mayer, and Moynihan, 2011-2012)

UW Graduate School Research Committee, “The Consequences of Electing Election Officials” (2009-2010)

- Pew Center on the States, Making Voting Work: \$49,400 for “Early Voting and Same Day Registration in Wisconsin and Beyond” (head PI with Canon, Mayer, and Moynihan, 2008-2009)
- U.S. Election Assistance Commission, Election Data Collection Grant Program: responsible for \$212,442 of \$2,000,000 grant to the Wisconsin Government Accountability Board (head PI with Canon, Mayer, and Moynihan, 2008-2010)
- UW Graduate School Research Committee: “The Puzzling Geography of Federal Spending,” (2007-2008)
- UW Graduate School Research Committee: “The Political Economy of the Japanese Gender Gap” (2006-2007)
- CAPS faculty research conference: \$36,500 for “Democracy, Divided Government, and Split-Ticket Voting” (2006)
- Joseph H. Clark fund award: “The Limits of Representation” (2004-2006)
- Reischauer Institute of Japanese Studies: “Accountability, Economics, and Party Politics in Japan” (2004-2006)
- Time-sharing Experiments in the Social Sciences: “Affect and Cognition in Party Identification” (with Casey A. Klofstad, 2004)
- Harvard Faculty of Arts & Sciences Course Innovation Funds: “The Practice of Political Science” (2003)
- Dirksen Congressional Center Congressional Research Award: “The Discharge Rule and Majoritarian Politics in the House of Representatives” (2002-2003)
- Reischauer Institute of Japanese Studies Curriculum Enrichment Grant: “Electoral Politics in America and Japan” (2002)
- CBRSS research program grant: “Affect and Cognition in Party Identification” (2001)
- Joseph H. Clark fund award: “Affect and Cognition in Party Identification” (2001-2002)
- Joseph H. Clark fund award: “Ideology in Congressional Elections” (2000-2001)
- National Science Foundation Doctoral Dissertation Improvement Grant: “Candidates’ Positions in Congressional Elections” (1997)

Teaching and Advising

Undergraduate courses:

- Introduction to American Politics
- Elections and Voting Behavior
- Political Behavior
- American Public Opinion
- Election Reform in America
- The Politics of Congress/The Legislative Process/U.S. Congress

Techniques of Political Analysis
Electoral Politics in America and Japan
The Practice of Political Science Research

Graduate courses:

American Politics Field Seminar
Mass Political Behavior/American Electoral Politics
Congressional Politics
American Political Parties
Readings on Advanced Statistical Methods
Quantitative Research Design/Empirical Methods of Political Inquiry
American Political Institutions
Readings on Interest Group Politics
American Politics Workshop
Political Science as a Discipline and Profession

Advising of doctoral students (year and placement):

Danna Basson (2007 Mathematica Policy Research)
Amy Bree Becker, Journalism & Mass Communication (2010 Towson University & Loyola University Maryland)
Deven Carlson (2012 University of Oklahoma)
Amnon Cavari (2011 Interdisciplinary Center–IDC Israel)
George C. Edwards III Dissertation Award for best dissertation in presidency research
Meghan Condon (2012 Loyola University Chicago & DePaul University)
APSA section on Experimental Research best dissertation award
Evan Crawford, *chair*
Benjamin Deufel (2006 Greenberg Quinlan Rosner Research)
Jack Edelson (ABD)
William Egar (2015 Government Accountability Office)
Erika Franklin Fowler (2006 RWJ Scholar in Health Policy & Wesleyan University)
Tammy M. Frisby (2006 Stanford University-Lane Center)
Hannah Goble (2009 Texas Christian University)
Simon Haeder
Matthew Holleque, *chair* (2012 Obama for America)
Bradley Jones, *chair* (ABD)
Michael Kang (2009 Emory University-School of Law)
Andrew Karch (2003 University of Texas & University of Minnesota)
Dimitri Kelly, *chair* (2013 Linfield College)
Yujin Kim, *chair* (2014)
Casey A. Klofstad (2005 University of Miami)
Paul Lachelier, Sociology (2007 Stetson University)
Ruoxi Li (2015 California State University-San Marcos)
Jeremy Menchik (2011 Stanford Shorenstein Center post-doc & Boston University)
Daniel Metcalf
Jacob Neiheisel, *chair* (2013 Denison University & University of Buffalo)
Joel Rivlin (ABD MSHC Partners & The Pivot)
Rajen Subramanian (2008 Abt Associates)

Benjamin Toff (ABD)

Robert Van Houweling (2003 University of Michigan & UC-Berkeley)

Carl Albert Dissertation Award for best dissertation in legislative studies

Logan Vidal, *chair* (2015 MA)

Amber Wichowsky, *chair* (2010 Yale CSAP Fellowship & Marquette University)

Carl Albert Dissertation Award for best dissertation in legislative studies

Reviewing Activities

Journal manuscript reviews:

Acta Politica, American Journal of Political Science, American Political Science Review, American Politics Quarterly, American Politics Research, American Review of Politics, Behavioral Science and Policy Journal, British Journal of Political Science, Comparative Political Studies, Congress & the Presidency, Election Law Journal, Electoral Studies, European Journal of Political Research, International Journal of Forecasting, International Journal of Public Opinion Research, International Organization, Japanese Journal of Political Science, Journal of Law, Economics, and Organization, Journal of Elections, Public Opinion, and Parties, Journal of Politics, Journal of Theoretical Politics, Journal of Women, Politics, & Policy, Legislative Studies Quarterly, Party Politics, Perspectives on Politics, Political Analysis, Political Behavior, Political Communication, Political Psychology, Political Research Quarterly, Political Science Quarterly, Politics & Gender, Politics and Policy, Presidential Studies Quarterly, PS: Political Science & Politics, Public Administration Review, Public Choice, Public Opinion Quarterly, Rationality and Society, Research and Politics, Quarterly Journal of Political Science, Social Science Quarterly, Sociological Forum, Sociological Methods and Research, State Politics & Policy Quarterly, Statistical Science, and World Politics

Book manuscript reviews:

Addison Wesley Longman, Atomic Dog Publishing, Brookings Institution Press, Cambridge University Press, CQ Press, Oxford University Press, Palgrave, and University of Chicago Press

Tenure and promotion reviews:

Arizona State University, Boston University, Clark University, Dartmouth College, Florida State University, Fordham University, Louisiana State University, Northwestern University, Princeton University, Rutgers University, Temple University, Texas Tech University, Tulane University, University of British Columbia, University of California-Berkeley, University of California-Merced, University of California-Riverside (twice), University of California-Santa Cruz, University of Chicago, University of Colorado, University of Houston, University of Massachusetts-Dartmouth, University of Maryland (twice), University of Missouri-Columbia, University of Missouri-St. Louis, University of North Carolina at Charlotte, Northwestern University, University of Notre Dame, University of Pennsylvania, University of Texas-Dallas, Washington State University, and Washington University in St. Louis

External review committee, Union College Department of Political Science (*chair*, 2010)

Other reviews:

Canada Research Chair College of Reviewers, Government Accountability Office, Radcliffe Institute Fellows, National Science Foundation, Robert Wood Johnson Scholars in Health Policy, Time-sharing Experiments in the Social Sciences (TESS)

Professional and University Service

Journal editorial boards:

Election Law Journal (2013-present)
Electoral Studies (2011-present)
Political Research Quarterly (2014-present)
Legislative Studies Quarterly (2011-2013)

Other boards and councils:

Election Performance Index Advisory Board, Pew Center on the States (2010-2014)
Elections, Public Opinion, and Voting Behavior organized section Communications Director (2012-2015)
Legislative Studies organized section council (2009-2011)
Political Organizations and Parties organized section council (2005-2007)
APSA Ad Hoc Committee on Member Communications (2013)
Project Vote Smart Advisory Board (2007-present)

Conference program organizer:

Political Organizations and Parties, APSA annual meeting (2006)
Political Methodology, SPSA annual meeting (2001)

Award committees:

Legislative Studies organized section Jewell-Loewenberg Prize for the best article published in *Legislative Studies Quarterly* in the previous year (*chair*, 2016)
Elections, Public Opinion, and Voting Behavior organized section graduate student travel award committee (2013-2015)
Political Organizations and Parties organized section/*Party Politics* award committee for the best paper presented at the 2006 APSA annual meeting (*chair*, 2007)
Political Organizations and Parties organized section Emerging Scholar Award committee (*chair*, 2013)

Campus presentations:

Dartmouth College, Northwestern University, Stanford University, SUNY-Stony Brook, University of Houston, University of Iowa, University of Minnesota, University of Missouri-Columbia, University of North Carolina-Chapel Hill, University of Notre Dame, University of Rochester, University of Texas at Austin, Utah State University (twice), Wittenberg University, & Yale University (twice)

Public and community presentations:

Boston Museum of Science, Brookings Institution, Civitas, National Legislative Program Evaluation Society, Newton Center for Lifetime Learning, Reach Out Wisconsin, Senior Summer School, UW-Extension College Days, Vantage Point, Wisconsin Academy of Sciences, Arts, & Letters, Wisconsin Department of Revenue, and university events in Wisconsin and New York City

Affiliations:

Elections Research Center (*founding director*, 2015-present)
 Election Administration Project (*co-founder*, 2008-present)
 Wisconsin Advertising Project
 La Follette School of Public Affairs (2007-present)
 Center for Demography of Health and Aging (2013-present)
 School of Journalism and Mass Communication (2015-present)
 Political Behavior Research Group (2006-present)
 Institute for Quantitative Social Science, Faculty Associate (1999-2006)
 Political Psychology and Behavior Workshop (*co-founder*, 2000-2006)
 Center for American Political Studies, Executive Committee (2001-2006) & Steering Committee (2003-2004)
 Program on US-Japan Relations, Faculty Affiliate (2004-2006)
 Weatherhead Center for International Affairs, Faculty Associate (2005-2006)
 Harvard Kennedy School, Mid-Career MPA Summer Program (2001-2005 & 2007-2012)
 Summer Institute in Political Psychology (1995 & 1997)

University of Wisconsin Department of Political Science service:

Associate Chair/Director of Graduate Studies (2007-2012)
 Graduate Admissions and Fellowships, *chair*
 Graduate Program Committee, *chair*
 Teaching Assistant Evaluation Committee, *chair*
 Faculty Recruitment Committee (2013-2014)
 American Politics Search Committee, *chair*
 Preliminary Examination Appeals Committee (2013-2014)
 Graduate Program Committee (2014-2015)
 Budget and Development Committee (2014-2015)
 Special Appointments Committee (2014-2015)

Other University of Wisconsin service:

Faculty Senate (2006-2007)
 L&S Teaching Fellow Anniversary Symposium Planning Committee (2009-2010)
 L&S C-GRS Faculty Executive Committee (2009-2010)
 Graduate School Social Studies Fellowships Committee (2010-2013)
 Social Studies Divisional Executive Committee (2013-2017)
 Hilldale Award subcommittee (2014-2016)
 Principal Investigator Committee, Graduate School (2015-2016)

Harvard University service:

American Politics Faculty Search (1998-1999, 2001-2002, 2002-2003, & 2005-2006)
 Graduate Admissions (1999-2000)
 Government Concentration/Board of Senior Examiners (2000-2001 & 2004)
 Teaching Fellow Coordinator (2003-2004)
 American Politics Field Coordinator (2005-2006)
 Center for Government and International Studies, Subcommittee on Teaching and
 Conference Spaces (2003)
 Truman Scholarship Nomination (2000-2001)
 Eben Fiske Studentship Nomination (2004-2005)
 Political Communication Faculty Search, Kennedy School of Government (2004-2005)

Occasional source for media coverage of politics including abcnews.com, Al Jazeera English, *Atlanta Journal-Constitution*, Associated Press, *The Baltimore Sun*, *The Baton Rouge Advocate*, Bloomberg News, *The Boston Herald*, cbsnews.com, *Campaigns & Elections Magazine*, *Chicago Tribune*, *Christian Science Monitor*, *Cleveland Plain Dealer*, *Congressional Quarterly Weekly Report*, *The Daily Caller*, *Dallas Morning News*, *Des Moines Register*, forbes.com, Fox Business Network, Fox News, *Glamour*, *The Globe and Mail* (Canada), *The Guardian* (UK), *The Harvard Crimson*, *Harvard Political Review*, *The Hill*, *International Herald Tribune*, *Kansas City Star*, *Los Angeles Times*, *The London Times*, *Le Monde*, *The New Orleans Times-Picayune*, *National Journal*, *The New Republic*, *New Scientist*, *New York Post*, *The New York Times*, *Newsday*, *Newsweek*, *el Nuevo Herald*, *Omaha World Herald*, *PBS NewsHour*, *Pittsburgh Post-Gazette*, Politico.com, Reuters, Salon.com, States News Service, *USA Today*, *Veja* (Brazil), *The Wall Street Journal*, *The Washington Post*, *The Washington Times*, *Wisconsin Law Journal*, *Yomiuri Shimbun*, *Greater Boston* on WGBH, NECN, *Nitebeat with Barry Nolan*, *Odyssey* on Chicago Public Radio, and many local television, radio, and newspaper outlets

Featured in *An Unreasonable Man*, an independent documentary film about the life and career of Ralph Nader (2006)

Expert Consulting

Expert witness (testifying), *North Carolina State Conference of the NAACP et al. v. Patrick Lloyd McCrory et al.*, case 13-CV-658, U.S. District Court, Middle District of North Carolina (2014-2015)

Expert witness (non-testifying), *Ohio State Conference of the NAACP et al. v. Jon Husted et al.*, case 13-cv-00404, U.S. District Court, Southern District of Ohio (2014)

Expert witness (testifying), *United States of America v. State of Texas*, case 13-cv-00263, Southern District of Texas (2014)

Expert witness (testifying), *League of United Latin American Citizens of Wisconsin et al. v. Judge David G. Deininger et al.*, case 12-cv-00185, U.S. District Court, Eastern District of Wisconsin (2013)

Academic researcher, Presidential Commission on Election Administration, established by presidential Executive Order 13639 (2013)

Research consultant, via Research Triangle International Institute and the Pew Charitable Trusts, for evaluation of the Electronic Registration Information Center (2012-2017)