Rethinking Transparency in U.S. Elections

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Bush v. Gore catapulted this country into a crisis of confidence in the management of our elections. Despite reforms since 2000, public confidence in election administration continues to wane. Are dead people on the rolls? Are noncitizens voting? Are provisional ballots wrongly rejected? State election transparency statutes meant to reassure the public that elections are producing legitimate results are often conflicting, vague, and even nonexistent. Exacerbating the problem, the last two decades have witnessed huge changes that offset the transparency balance. Dramatic changes in how Americans vote, how elections are administered, and who scrutinizes the election process call for a recalibration of election transparency norms. It is not immediately clear, as some are beginning to sense, that unqualified openness serves the fundamental goals of election transparency, that reactive access policies boost public confidence, or that current state transparency architectures tap the full potential technology offers. Circumstances demand not just statutory revision, but revisiting traditional assumptions about election transparency to accommodate radically changed circumstances. This paper contains a proposal pairing an increase in public access to election materials with penalties for harmful uses of election data. We have an opportunity to craft a modern transparency regime trained on the core goal of ensuring public confidence in election outcomes. Developing state transparency regimes that address—and take advantage of—modern realities is critical in an era when election controversy is the new normal.

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I. INTRODUCTION

After the initial tally in Virginia’s 2013 election for attorney general, Republican Mark D. Obenshain trailed Democrat Mark R. Herring by seventeen votes out of 2.2 million cast—one of the closest statewide races in U.S. history. During the canvas, representatives of the Herring campaign huddled at the Fairfax County Clerk’s office taking pictures of lists of provisional voters with their cell phones. The clerk, unsure of whether such lists could be made public and if so to whom and in what form, looked nervously on. The campaign wanted to record which voters had cast provisional ballots to help ensure Herring provisional votes counted. But, as in many states, Virginia’s state and local rules are silent on whether the names of provisional voters may be released.1 The answer mattered: the outcome of the race could well have hinged on provisional votes. And the race mattered. After his win (by 810 votes at the time Obenshain conceded), Herring refused to defend the state’s same-sex marriage ban, surely contributing to a federal judge’s decision to overturn it just weeks after Herring took office.2

This example is one of many recent incidents that expose an election transparency regime terribly out of date. Transparency in elections is a key pillar of a functioning democracy.3 Since the founding of this country, those who run elections have understood that democratic legitimacy depends on

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1 VA. CODE ANN. § 24.2-653 (2014) (permitting “[o]ne authorized representative of each political party or independent candidate in a general or special election or one authorized representative of each candidate in a primary election . . . to remain in the room in which the determination [of the eligibility of a provisional voter] is being made as an observer so long as he does not participate in the proceedings and does not impede the orderly conduct of the determination. Each authorized representative shall be a qualified voter of any jurisdiction of the Commonwealth. Each representative, who is not himself a candidate or party chairman, shall present to the electoral board a written statement designating him to be a representative of the party or candidate and signed by the county or city chairman of his political party, the independent candidate, or the primary candidate, as appropriate.”). Later, the Chief Judge for the Circuit Court for the City of Richmond instructed in his December 10, 2013 Recount Procedural Order that representatives of the candidates be given access to records regarding decisions on the eligibility of provisional voters but prohibited public dissemination of this information. Recount Procedural Order at 1–3, Obenshain v. Herring, No. CL13-5272 (Va. Cir. Ct. Dec. 10, 2013), available at http://www.fairfaxcounty.gov/elections/releases/recountproceduralorder.pdf.


public confidence in the conduct of elections. Today, from federal transparency requirements for voter registration forms, to poll watcher and recount observer statutes, to voting machine audit requirements, our system routinely acknowledges transparency as a core value in ensuring the legitimacy of electoral outcomes. But history demonstrates transparency must be carefully calibrated; greater transparency does not always lead to greater legitimacy. The most obvious example is the shift to secret ballot in the late nineteenth century, a form of voting adopted to restore public confidence in elections after decades of debauchery at the polls. History teaches that too much transparency in the voting process carries risk and undermines the legitimacy of outcomes.

Our democracy has walked the transparency tightrope for hundreds of years. In the last two decades, however, several currents dramatically offset the balance. First, we are witnessing enormous changes in voting. Today, fewer and fewer Americans cast traditional ballots due in part to significant increases in early, mail-in, and provisional voting. Second, new technologies have transformed how states interface with the public, how voters cast ballots, and how election officials collect, store, and disseminate election data. The digitization of elections fundamentally changes the election transparency landscape. And third, since Bush v. Gore, the days when political party and candidate representatives served as the principal watchdogs of elections are

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4 Cortlandt F. Bishop, History of Elections in the American Colonies, in 3 STUDIES IN HISTORY ECONOMICS AND PUBLIC LAW 1, 186 (New York, Columbia College 1893) (explaining as a transparency measure, many colonies and towns would offer a copy of the polls to anyone who would pay for them so they could look through and check votes); see infra Part II.

5 42 U.S.C. § 1973gg-6(i)(1)–(2) (2012) (requiring that each state maintain for two years, and make available for public inspection at reasonable cost, voter registration records).

6 See, e.g., FLA. STAT. ANN. §101.131 (West 2014) (allowing each political party, candidate, or ballot measure advocate one poll watcher at the polls); OHIO REV. CODE ANN. §§ 3501.35, 3505.21 (West 2012) (permitting watchers to include those selected by political parties, those selected by candidates themselves, watchers selected by the state, and requiring watchers to take an oath); VA. CODE ANN. § 24.2-604 (2014) (watchers can include those selected by political parties, those selected by candidates themselves, or selected by the state; watchers must be registered voters in the county; provisions for news media observation).


8 Note that this paper narrows its scope to election administration transparency only. Campaign finance transparency falls outside its scope.

fading quickly. Election integrity advocates, voting rights activists, and members of both the citizen media and traditional media scrutinize election materials at levels and in ways not previously possible.

Amidst this series of cultural and technological changes, state election transparency statutes offer confused guidance; transparency statutes are often dated, inconsistent, underinclusive, and even absent. Circumstances demand not just statutory revision, but revisiting traditional assumptions about election transparency to accommodate radically changed circumstances. It is not immediately clear, as some scholars are beginning to sense, that total and unqualified openness serves the fundamental goals of election transparency, that reactive access policies boost public confidence, or that current policies tap the full potential of election data. Policymakers have an opportunity to craft a modern transparency regime trained on the core goal of ensuring public confidence in election outcomes. Developing state transparency regimes that address modern realities is critical, particularly in an era when election controversy has begun to feel like the new normal.

Election transparency is a broad topic. Much has been written about it, particularly in the area of campaign finance and the extent to which political spending should be made public. Some scholars have tackled the question of transparency in election administration with the bulk of the work focused on improving election administration through better recordkeeping and performance data creation and analysis. Quite a lot has also been written about transparency in the age of electronic voting and the auditability of voting machines. Virtually all of the work done to date on election-administration

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11 Following the 2013 Supreme Court’s decision to strike the coverage formula undergirding Voting Rights Act preclearance provisions, citizen oversight efforts are likely to ramp up. Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013); see Cody Gray, Savior Through Severance: A Litigation-Based Response to Shelby County v. Holder, 50 HARV. C.R.-C.L. L. REV. (forthcoming 2014) (arguing for expanded federal observation under the Voting Rights Act).

12 See, e.g., E. Scott Adler & Thad E. Hall, Ballots, Transparency, and Democracy, 12 ELECTION L.J. 146, 147 (2013) (arguing against public access to voted ballots).

13 Election litigation in this country has more than doubled since Bush v. Gore in 2000. See HASEN, supra note 3, at 134.


transparency assumes that transparency is an unqualified good; the more transparency in our elections the better. This Article will step back to test basic truths about transparency in elections and demonstrate the need to adapt rules to changed circumstances. It asks, given modern realities, whether states should constrict election transparency or whether access should be broadened, and, if so, how and with what accompanying protections.

This Article proceeds in three parts. The first establishes the central goal of election transparency and how election administrators have adapted processes throughout American history in pursuit of it. The next section documents three fundamental shifts and the failure of current transparency policies to adequately address them. The final section proposes election transparency reform to ensure that dated transparency rules do not undermine already-fragile public faith in our system of elections.

II. ELECTION TRANSPARENCY AND ADAPTATION

Transparency in elections is different than transparency in other administrative settings. Just as the right to vote is hailed as preservative of all other rights, so too is election transparency preservative of all other forms of government transparency. Without the public confidence in election outcomes transparency enables, no legitimate government could form.

It is true that election transparency serves goals similar to transparency in other administrative settings: promoting accountability, enabling an informed citizenry, protecting citizens against arbitrary and capricious state action, and exposing mistake or fraud. Election transparency can also increase efficiency in election administration. But administrative transparency in elections serves an additional—and critical—function that sets it apart from administrative transparency in other realms. Like courts, for which transparency’s key goal is to enhance the public’s perception of just legal outcomes, a critical function of

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18 Mark Fenster, The Opacity of Transparency, 91 IOWA L. REV. 885, 888 (2006) (“By any commonsense estimation, governmental transparency, defined broadly as a governing institution’s openness to the gaze of others, is clearly among the pantheon of great political virtues.”). Two of the most commonly cited goals of government transparency in liberal democratic theory are to enable both an informed citizenry and official accountability, central ingredients of the democratic project. See, e.g., Jeremy Bentham, An Essay on Political Tactics, in 2 THE WORKS OF JEREMY BENTHAM 551 (John Bowring ed., Edinburgh, William Tait 1843); JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 80–89 (Henry Regnery Co. 1962) (1861).

19 Professor Heather Gerken makes the convincing argument, discussed infra at Part IV.B, that the more data we have about election administration, the easier it will be to identify problems and solutions. GERKEN, supra note 15, at 59–61.

20 Though not acknowledged as a First Amendment right until Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the American judicial system and its British precursor
administrative transparency in elections is ensuring public confidence in electoral outcomes. For elections to achieve their intended purpose, the peaceful transfer of power, the public must believe that outcomes reflect the true will of the people. Without this perception, legitimate government cannot function and all other forms of government transparency are for naught. Administrative transparency in elections is thus a precondition for all other forms of government transparency.

Recognizing that the fundamental goal of transparency in elections is ensuring public confidence in outcomes, election administrators since the founding of this country have understood that more transparency does not necessarily equal a better process. Election designers have calibrated the extent to which the public could see for itself various portions of the election process depending upon a variety of historical, demographic, and technological conditions underpinning the conduct of elections. Election administrators intuitively understood that election processes could not be conducted entirely in the dark without some measure of public oversight. Likewise, election designers also recognized that too much transparency might undermine the result.

Perhaps the best example of election-legitimizing transparency measures in early U.S. elections was the common practice of casting votes by speaking the name of the preferred candidate out loud, a process known as *viva voce* voting. After voicing one’s vote, custom had it that the candidate would bow and thank the voter as partisan onlookers applauded. In jurisdictions using paper

has long recognized the value of open courts in assuring just outcomes and public acceptance of judicial verdicts. *Id.* at 566 (“[T]he King's will was that all evil doers should be punished after their deserts, and that justice should be ministered indifferently to rich as to poor; and for the better accomplishing of this, he prayed the community of the county by their attendance there to lend him their aid in the establishing of a happy and certain peace that should be both for the honour of the realm and for their own welfare.”) (citations omitted).

21 See generally Adler & Hall, *supra* note 12.

22 Early examples include the New Hampshire constitution of 1792 which required that a moderator receive votes in an open town meeting who would then, “count them and make a public declaration thereof” and the Massachusetts constitution which required that, “persons qualified to vote shall give in their votes for Governor to the Selectmen, who shall preside at such meetings; and the town-clerk, in the presence and with the assistance of the Selectmen shall, in open town meeting, sort and count the votes, and form a list of the persons voted for, with the number of votes for each person, against his name; and shall make a fair record of the same in the town books.” In Virginia, a 1785 statute dictated that each “writer” at the polls would be given a poll book with the name of each candidate at the head of a column. “As each elector named his preferred candidate his name was written in the column of that candidate,” thereby creating a written, transparent record of who voted for whom. *)SPENCER D. ALBRIGHT, THE AMERICAN BALLOT 18 (1942).*

23 Virginia and Kentucky employed *viva voce* voting through the Civil War. James Schouler, *Evolution of the American Voter, in 2 THE AMERICAN HISTORICAL REVIEW 665, 671* (George B. Adams et al. eds., 1897) (“[T]he appeal to unflinching manliness at the
ballots, balloting practices—such as brightly colored ballots—commonly connected a voter to his choice. Voting through much of the nineteenth century, whether through voice voting or paper balloting, was a very public act. Most scholarly references to open balloting discuss its purpose of securing voter accountability. A less examined feature of voice voting and other forms of open balloting was its instrumental function as a primitive election transparency tool, allowing onlookers to literally tally for themselves who won and who lost.

Given the small population and even smaller pool of eligible voters in early U.S. elections (only propertied males held the franchise), open voting served transparency’s legitimizing purpose well. But as the franchise expanded, especially after the Civil War, elections became increasingly complex and difficult to administer. Transient and illiterate populations and large urban immigrant communities made the process of determining voter eligibility
difficult.\textsuperscript{31} States relied heavily on powerful political parties to do much of the work of administering elections—a task parties were only too happy to undertake. Nineteenth-century American elections were run largely out of government hands. Parties printed and distributed ballots,\textsuperscript{32} brought (their) voters to polling places, and oversaw vote tabulation.\textsuperscript{33} Polling locations were commonly housed in non-state-owned establishments such as private homes, hotels, saloons, and stores.\textsuperscript{34} Nineteenth-century election officials were not paid state employees but political party representatives or appointees. In many cases, a township’s majority party would stack the polls with election judges from its own ranks.\textsuperscript{35}

Increasingly, as the electorate expanded and political parties grew in entrenchment and hubris, American elections began to spin out of control.\textsuperscript{36} Transparency measures originally intended to instill public confidence in election results instead rendered the opposite effect. Historians describing this era report widespread problems at the polls. Public drunkenness at polling places, voter intimidation, and violence diminish the democratic process.\textsuperscript{37}

\textsuperscript{31} Richard Franklin Bensel, The American Ballot Box in the Mid-Nineteenth Century 17–18 (2004) (noting the difficulties of confirming voter eligibility: “[M]uch of the United States during the nineteenth century was a preliterate society; until the turn of the century, in fact, there were many counties in which a quarter or more of adult white men could not read or write. This meant that voters were unable to keep records of when they were born or how long they had resided in a town or neighborhood. Since government agencies seldom kept records of these things, there were no certificates that could be presented to election officials. . . . This was less true of citizenship, where the federal government provided naturalization papers when immigrants became American citizens. However, since native-born citizens were not given such certificates, election officials had to know when and whom to ask for papers.”).

\textsuperscript{32} Ballots were commonly printed on brightly colored paper, which served to confirm which party slate the voter had selected. As one historian noted of the practice of parties printing ballots on colored paper, “[s]ecrecy, quite obviously, was not a characteristic of the voting process.” Richard P. McCormick, The History of Voting in New Jersey: A Study of the Development of Election Machinery 1664–1911, at 114 (1953).

\textsuperscript{33} One historian describes the problem of the practice of town meeting selection of election officials in the late 1700s in New Jersey, which often resulted in election officials from the same political party overseeing elections. Id. at 97.

\textsuperscript{34} See Bensel, supra note 31, at 10 (listing polling places in Saint Louis in 1859 as a representative example of the non-state-owned polling sites).

\textsuperscript{35} There are several accounts of election judges being selected from opposing parties. Id. at 18. In other cases, election judges were voted in on the day of the election by “those men who happened to be present.” Id. at 37. Bensel notes that the selection of election judges was often a complex matter, “reflecting a mixture of community norms, notions of fair play between the party organizations, and the formal provisions set down in the statutory code.” Id.

\textsuperscript{36} See McCormick, supra note 32, at 114.

\textsuperscript{37} Id. at 151–52 (“Scenes of drunkenness at the polls had become traditional. Indeed, in a great many places voting still took place in a ‘hotel,’ which made resort to spirituous refreshment both convenient and tempting.”). Bensel, supra note 31, at 20 (“[T]he street or square outside the voting window frequently became a kind of alcoholic festival in which
Polling places were routinely rife with party operatives engaged in vote-buying efforts, “distribut[ing] tickets [to voters], lin[ing] up last minute vote-sellers, and monitor[ing] ballot casting to be sure their investments paid off.” 38 Far from enhancing public confidence in election outcomes, transparency enhanced vote buyers’ confidence in their investment.39

As election corruption persisted, state legislatures routinely attempted to restore order in the election process.40 But such attempts were fruitless in the face of majoritarian politics and strong political party grip on the election process.41 Statutory attempts to achieve fair and clean elections were repeatedly overwhelmed by the power of the party system and even collusion among elected officials to thwart anti-fraud measures.42 Ultimately, the reform that most effectively reduced corruption also drastically reduced election.
transparency: the secret ballot. Reformers saw the secret ballot as a means of foiling would-be vote buyers by taking away their ability to confirm purchased votes. By 1896, ninety percent of U.S. states had moved to secret balloting; many had amended their constitutions to require it.\footnote{Burson v. Freeman, 504 U.S. 191, 204–05 (1992) (citing Jerrold Glenn Rusk, The Effect of the Australian Ballot Reform on Split Ticket Voting 1876–1908 (1968) (unpublished Ph.D. dissertation, SUB Gottingen)).}

The secret ballot was not, however, the only transparency-constricting reform of this era. Attempts to rid elections of fraud proved difficult when political parties still dominated the mechanics of elections. Thus reformers aimed their sights at constraining political parties’ role in election administration. In the late 1800s, and the early part of the twentieth century, reformers instituted a series of election reforms intended to bring voting processes and procedures under state purview.\footnote{Frank O’Gorman, The Secret Ballot in Nineteenth-Century Britain, in \textit{The Hidden History of the Secret Ballot}, supra note 27, at 16, 30–31. O’Gorman notes other examples of transparency restrictions the secret ballot entailed, for example abolition of the practice of publishing poll books that revealed individual voter choice. Id. at 32.} Reformers sought to cut political parties out of their dominant role in running U.S. elections by limiting their grip on election officiating;\footnote{Examples of public agitation for nonpartisan election officials included a petition from New York suggesting that “the ballot should be delivered to the voter within the polling-place on election day, by sworn public officials.” ALBRIGHT, supra note 22, at 26 (citing a New York Ballot Reform League petition). Summarizing advocacy for ballot reform, Albright suggests that, “[i]n brief, the two features usually advocated by [reform] organizations were first, an official uniform ballot, printed at public expense, and, second, secret voting within the polling-place under official supervision.” Id. States passed laws to curtail the overtly partisan nature of election officiating. In New Jersey, for example, an 1889 bill adopted a somewhat contorted process intended to diffuse the power of parties in selecting election officials:

The governor appointed annually in each county a four-man board made up of two men nominated by the state chairmen of each of the major parties. The county boards in turn appointed, on the nomination of the county party chairmen, similar bipartisan, four-man district boards of elections. The board members served for one-year terms and were required to be residents of the district. Each board appointed two poll clerks.}

\cite{McCormick, supra note 32, at 177. McCormick describes a method instituted in 1911 to appoint officials whereby “the county chairmen of the two major parties each nominated two or more men of good moral character.” The Civil Service Commission would then conduct annual examinations of the nominees for fitness. In addition, the reforms limited the terms in office of election officials to two years. Id. at 209.}

\footnote{McCormick, supra note 32, at 179 (explaining that municipal officials were instructed to provide suitable rooms).}

\footnote{The state-printed ballot profoundly impacted political processes in this country in ways beyond election administration. See KORNBLUH, supra note 26, at 124–126 (discussing}
system of voter registration that cut out the party middleman from deciding who approached the polls.\(^{48}\)

Reformers drafted legislation to ensure cast-ballot security, ranging from strict chain-of-custody provisions to ballot box sealing rules.\(^{49}\) Many state legislatures implemented laws requiring that cast ballots be destroyed post-election, usually after a specified period to ensure finality of results.\(^{50}\) These measures constricted transparency by bringing much of the voting process behind an official veil. By erecting transparency boundaries, reformers sought to bolster public confidence and tame the circus elections had become.

Although states wrested control of most voting processes from political parties, reformers understood that transparency could not be eliminated. Political parties would be unwilling to cede power without mechanisms to confirm the other party had not committed fraud or otherwise stolen the vote. Those unhappy with election outcomes would allege fraud, corruption, or official collusion in throwing the election if elections were conducted entirely out of view. State legislatures therefore passed statutes giving explicit roles to party representatives in election processes, creating a system of what will be
termed here “structured transparency.” Structured transparency rules consisted of defined roles for political party representatives at various stages in the election process. Some state statutes required that election officers be drawn from opposing political parties. Others passed poll watcher statutes that required one representative from each major party to observe each phase of the voting process. These statutes knighted campaign and political party representatives to act as proxies for public oversight throughout the election process. State poll watcher and counting-observation statutes of this era typically allowed only major political parties and candidates to appoint poll watchers and counting observers as party or candidate representatives. Often statutes required party and candidate representatives to register or receive

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52 See MCCORMICK, supra note 32, at 177.

53 Most states allowed one poll watcher from each party and/or one poll watcher representing each candidate to view the voting process. E.g., ARIZ. REV. STAT. ANN. § 16-603 (2006); FLA. STAT. ANN § 101.131(1) (West 2014); see also Daniels, supra note 10, at 250. Many states have explicit rules allowing party representatives to oversee vote counting. E.g., R.I. GEN. LAWS ANN. § 17-22-2 (West 2013) (permitting party and candidate representatives to observe vote counting). Interestingly, this statute notes that while vote counting must be public, “no notice or advertisement of these [vote counting] sessions needs to be given.”

54 Many states still confine access to political party representatives and candidates. E.g., GA. CODE ANN. § 21-2-408 (West 2014) (“In an election or run-off election, each political party and political body shall each be entitled to designate, at least seven days prior to such election or run-off election, no more than two official poll watchers [in each precinct] to be selected by the appropriate party or body executive committee.”); WYO. STAT. ANN. § 22-15-109 (2013) (“The county chairman of each political party may certify poll watchers prior to the day of the election to serve in each precinct. Not more than one (1) poll watcher from each political party may serve simultaneously unless the chief judge determines that one (1) additional poll watch prior from each political party may be accommodated in the polling premises without disrupting the polling process.”). More recently, several states have passed statutes that do not restrict poll watchers to political party representatives. Beginning in 1990, for example, a Wisconsin statute grants any member of the public the right to observe at polling places. WIS. STAT. ANN. § 7.41(1) (West 2013) (“Any member of the public may be present at any polling place, . . . except a candidate whose name appears on the ballot at the polling place. . . .”).
accreditation from parties or candidates prior to assuming observer roles, and included strict rules for where observers could stand and what they could see. States also wrote procedures for party and candidate representatives to observe vote counting at the close of elections and during recounts. In this way, Progressive Era transparency reforms carefully calibrated transparency to impose order on what had been an unruly and undignified process. As will be discussed further below, many state election codes still feature structured

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55 E.g., DEL. CODE ANN. tit. 15, § 4977 (West 2007) (mandating that poll watchers be accredited).

56 See, e.g., ALA. CODE § 17-8-7 (LexisNexis 2007) (describing process by which party-appointed poll watchers may observe certain election processes including monitoring poll opening, observing inside the polling place on election day, and monitoring vote counting).

57 See, e.g., ALA. CODE § 353 (1907) (“Each political party or organization having candidates nominated may . . . name a watcher who shall be permitted to be present at the place where the ballots are cast from the time the polls are opened until the ballots are counted and certificates of the result of the election signed by the inspectors.”); IND. CODE § 6248 (1901) (“No person, other than the members of the election board, poll clerks, election sheriffs and the duly authorized watchers representing the various political parties, shall be permitted in the room during the election, or during the canvass of the votes, except for the purpose of voting.”).

58 Even state-dominated election administration had a limited ability to prevent widespread election wrongdoing, as witnessed during the Civil Rights Era when the dominant party and state governments colluded to prevent minority voting. Just as party-dominated election processes corrupted the electoral process the century before, so too did state-managed elections in the Jim Crow South disfigure election processes. Whether in the form of poll taxes, literacy tests, registration barriers, intimidation at the polls, or bald violence, minority voters were effectively denied meaningful electoral participation. See STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at 131–32 (1976) (describing racial violence at polling places). Transparency measures played a critical role in the federal electoral reforms of the 1960s aimed at preventing discrimination in the South. A prominent example is federal observer provisions in the Voting Rights Act of 1965 (VRA). See H.R. Rep. No. 89-439, at 29 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2460. The VRA authorizes federal courts and the U.S. Attorney General to send federal observers to observe polling and ballot counting locations throughout the South. Federal observers were an important aspect of documenting enduring discrimination and ensuring that laws intending to prevent discrimination took effect on the ground. See James Thomas Tucker, The Power of Observation: The Role of Federal Observers Under the Voting Rights Act, 13 MICH. J. RACE & L. 227, 230 (2007) (describing federal observers under the VRA as “non-lawyer employees of the United States Office of Personnel Management (OPM) authorized to observe ‘whether persons who are entitled to vote are being permitted to vote’ and ‘whether votes cast by persons entitled to vote are being properly tabulated.’”). It will be interesting to see whether federal observer provisions of the VRA survive (and potentially thrive) following the Supreme Court’s invalidation of the Section 4 coverage formula in Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013). See also Gray, supra note 11 (arguing for expanded federal observation under the Voting Rights Act).
transparency provisions giving explicit roles to candidate and party representatives as the deputized eyes and ears of the public.\textsuperscript{59}

Other than 1960s-era federal civil rights statutes mandating federal observation of voting in certain (mostly Southern) states,\textsuperscript{60} structured transparency norms continued on an unremarkable path until the 2000 presidential election when major shortcomings in our system of elections were alarmingly exposed.\textsuperscript{61} Since \textit{Bush v. Gore}, reliance on structured transparency has begun to buckle amidst radically changed circumstances. Changes in the way Americans vote, the digitization of U.S. elections, and changing oversight norms since \textit{Bush v. Gore} have combined to challenge basic principles of structured transparency—and election oversight generally. Throughout U.S. history, transparency rules and norms have adapted to changed circumstances; as the next section demonstrates, public faith in electoral outcomes suffers when state transparency rules fail to adapt.

III. POST-\textit{BUSH V. GORE}: RADICALLY CHANGED ELECTION LANDSCAPE

Since \textit{Bush v. Gore}, the country has witnessed a series of fundamental shifts that markedly destabilized the election transparency balance. This section describes these changes and the failure of transparency rules to adapt to them. The first part reviews the changed nature of American voting and the reasons why structured transparency norms fall short given new voting realities. The next part examines the digitization of U.S. election administration and its resulting promise and peril for election transparency. The final part of this section explores how changes in oversight culture place stress on structured election oversight norms.

A. Changes in Voting

Before 1980, less than 5\% of the U.S. voting public cast ballots before election day, typically through mail-in absentee voting.\textsuperscript{62} By 2000, 14\% of voters nationwide cast early ballots; by 2004, 20\% of Americans voted before

\textsuperscript{59} See, e.g., \textit{supra} note 54.

\textsuperscript{60} See generally Tucker, \textit{supra} note 58.

\textsuperscript{61} See Adler & Hall, \textit{supra} note 12, at 147.

In the past, many states required voters who requested to vote by mail to provide an excuse for why they could not vote at the polls on election day. States often created lists of permissible excuses entitling voters to mail-in ballots. Today, twenty-seven states (and the District of Columbia) allow no-excuse absentee or mail-in voting. The states of Washington, Oregon, and Colorado are experimenting with all-mail elections, doing away with polling places altogether.

65 McDonald, supra note 62.
67 COLO. REV. STAT. § 1-7.5-104 (2014); OR. REV. STAT. ANN. § 254.465 (2013); WASH. REV. CODE ANN. § 29A.40.010 (West 2014). Other states are toying with all-mail voting. See, e.g., CAL. ELEC. CODE § 4001 (West 2014) (pilot program in Yolo county that allows mail-in only elections). Some states are experimenting with designating certain areas for mail-in elections (for example, for small districts or districts far from polling stations). See, e.g., NEV. REV. STAT. ANN. § 293.343 (LexisNexis 2013) (small districts and districts which the county clerk deems mail voting districts are mail voting districts); N.M. STAT. ANN. § 1-6-22.1 (LexisNexis 2012) (mail-in districts created when district is 100 voters or
In addition to expanded mail-in voting, many states have introduced and expanded early in-person voting opportunities (EIPV). As distinguished from voting by mail, EIPV allows voters to cast ballots at designated locations for a specified period before election day. Early voting garnered significant attention in the 2012 election. Campaigns pushed supporters to cast early ballots for a variety of strategic reasons. In 2012, President Obama became the first major presidential candidate to cast an early vote. Like lists of voters who requested mail-in ballots, lists of voters who cast votes early have become valuable to campaigns and groups interested in election oversight.

Provisional voting is another example of a nontraditional form of voting on the rise. To address the problem of voters being turned away wrongfully at the polls, the 2002 Help America Vote Act (HAVA) mandated that voters whose eligibility to vote is in question at the polls be offered a provisional ballot.

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68 According to the National Conference of State Legislatures, any qualified voter in thirty-three states and the District of Columbia may cast a ballot in person during a designated period prior to election day. No excuse or justification is required. See Absentee and Early Voting, supra note 66.


73 The reasons a voter may be offered a provisional ballot include but are not limited to:
Once handed a provisional ballot, the provisional voter must sign an affidavit declaring that she is eligible and registered to vote in that jurisdiction. If the voter is later confirmed to be eligible, HAVA requires that the state must count that provisional ballot.\textsuperscript{74}

The volume of provisional votes cast since HAVA mandated their existence is far from trivial. In the 2012 presidential election, for example, Kansas issued 38,865 provisional ballots, 3.5\% of all ballots cast.\textsuperscript{75} Election officials in Kansas rejected approximately 35\% of provisional votes cast.\textsuperscript{76} States like Pennsylvania have seen sharp increases in provisional voting rates. In 2008, Pennsylvania voters cast 33,000 provisional ballots.\textsuperscript{77} In 2012, Pennsylvania election officials issued 49,000 provisional ballots (even though voter turnout in Pennsylvania decreased).\textsuperscript{78} Ohio has issued provisional ballots at the highest rate of any state in the country. In the 2012 presidential election, Ohioans cast 208,087 provisional ballots.\textsuperscript{79}

New trends in voting have wreaked havoc on the ability of existing transparency rules to inspire confidence in electoral outcomes. Few state transparency statutes explicitly mention mail-in ballot envelopes, lists of mail-in, early and provisional voters, or access to electronic poll books. In recent years, the nation has discovered how old rules very often fail to adequately account for new transparency demands. The Franken–Coleman U.S. Senate recount in Minnesota provides a dramatic early example. During the November 2008 election, 281,291 Minnesota voters (9.6\% of total votes cast) cast civilian mail-in ballots.\textsuperscript{80} When the vote totals separated the candidates by only 215,

\begin{enumerate}
\item The voter’s name does not appear on the official list of voters at his or her polling place.
\item The voter’s eligibility is challenged in accordance with state law.
\item A court order requiring provisional ballots.
\item A court order extending polling place hours.
\item State law mandates provisional ballots.
\end{enumerate}

\textsuperscript{1} \textsuperscript{Id.} \textsuperscript{2} \textsuperscript{Id.} \textsuperscript{3} \textsuperscript{Id.} \textsuperscript{4} \textsuperscript{Id.} \textsuperscript{5} \textsuperscript{Id.}


\textsuperscript{76} \textsuperscript{Id.} \textsuperscript{77} \textsuperscript{Id.} \textsuperscript{78} \textsuperscript{Id.}


\textsuperscript{80} According to The U.S. Election Assistance Commission, an additional 11,255 voters cast ballots under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).
votes, the Franken recount team’s preliminary litigation strategy focused on mail-in ballots. The Franken team’s first move was to file a series of Minnesota Data Practices Act suits when election officials in many counties (including populous Ramsey County) refused to turn over the names of mail-in voters. Some counties, such as Beltrami County in northwest Minnesota, complied with the Franken team’s requests. Others did not. When Franken sued for access, Minnesota courts had difficulty agreeing on how to classify mail-in ballot materials under the Act. Explained lead recount attorney Marc Elias, “This is about giving us access to the data that will allow us to determine whether or not there are lawful ballots.” Elias did not just want access to the mail-in ballots themselves. He sought access to everything: mail-in ballot envelopes; lists of voters who voted by mail; rules and training manuals governing election administration in the state; anything and everything that would help him build his case.

The press pushed back on Elias’s strategy to find and question mail-in voters in counties that turned over mail-in voting lists and other materials. One reporter wondered, “[m]ight that be seen as some level of [voter] intimidation?” But the media didn’t wonder long. Soon reporters got into the game of ferreting out mail-in voters to “find real people whose real votes were in real doubt.” State statutes were unprepared for such access requests, leaving judges to decide.

Even in less dramatic circumstances, non-polling place voting presents numerous transparency challenges. Observers have cautioned that voting by mail increases opportunities for fraud. At polling places, strict laws define
circumstances when voters may receive help when casting their vote; otherwise, the voter must enter the private booth alone. Not so for a ballot cast in a living room. Mail-in ballot fraud can take place in numerous ways, for example, watchdog groups claim that election fraudsters in Florida paid elderly Hispanic voters for their mail-in ballots in 2012. Critics of mail-in voting also cite instances of intimidation of mail-in voters, concerns about mail-in voter privacy, and a lack of audit standards in mail-in vote tabulation.

States have done little to confront oversight problems associated with mail-in voting. Most states allow members of the public to access lists of people who have cast early in-person or mail-in ballots prior to election day. Several mail-

89 E.g., IND. CODE ANN. § 3-11.7-2-2 (West 2013) (requiring that voters must “[m]ark the ballot in the presence of no other person, unless the voter requests help in marking a ballot under [§] 3-11-9.”).


92 E.g., ALA. CODE § 17-11-5 (LexisNexis 2007) (list of mail-in ballot applicants is publicly posted and accessible); ALASKA STAT. § 15.20.180 (2012) (mail-in voter list open to public inspection); CAL. ELEC. CODE § 3203(b)(3) (West 2014) (list of vote by mail ballot recipients is kept open to public inspection); CONN. GEN. STAT. ANN. § 9-140(c) (West 2014) (list of names of those who returned a mail-in ballot are kept as public records); GA. CODE ANN. § 21-2-384(d) (West 2014) (list of voters that voted by mail-in ballot is kept as a public record); IDAHO CODE ANN. § 34-1011 (2008) (list of applicants for mail-in ballots are kept as
in ballot transparency statutes delay public access until after election day has passed.93 Some states include specific provisions for challenging mail-in voters during the counting process.94 Several states, following the structured oversight model, restrict access to early and mail-in voting lists to political parties and candidates.95 Texas maintains a strict bar on public access to early in-person and mail-in voter material.96 Hawaii has a fine example of a poorly drafted election transparency statute. The public may access information about voter “status,” but that word is undefined, leaving access specifics to anyone’s guess.97

As numerous candidates, members of the press, and election oversight activists have discovered, vague pronouncements about accessibility of mail-in

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93 E.g., MINN. STAT. ANN. § 203B.04(1)(d) (West 2009) (lists of mail-in voters are available after elections close); MISS. CODE ANN. § 23-15-625 (West 2012) (list of absentee ballot recipients is available for inspection); MO. ANN. STAT. § 115.289 (West 2014) (list of names of mail-in voters are subject to public inspection); NEB. REV. STAT. § 32-948 (2008) (records of early voter information is open to the public); NEV. REV. STAT. ANN. § 293C.312 (LexisNexis 2013) (application for mail-in open to inspection); N.M. STAT. ANN. § 1-6-6 (LexisNexis 2012) (mail-in voter register is open for public inspection); N.C. GEN. STAT. ANN. § 163-232 (West 2013) (list of mail-in voters is open for public inspection); N.C. GEN. STAT. ANN. § 163-258.26 (West 2013) (military absentee voter list is open for public inspection); OKLA. STAT. ANN. tit. 26, § 14-130 (West 2014) (post names who requested mail-in ballots); S.C. CODE ANN. § 7-15-440 (2012) (list of mail-in ballot recipients is available for public inspection); UTAH CODE ANN. § 20A-3-304.1(4) (LexisNexis 2013) (mail-in voter information is subject to public records request); VT. STAT. ANN. tit. 17, § 2534 (2012) (list of early and mail-in voters is available for inspection); VA. CODE ANN. § 24.2-710 (2014) (list of mail-in voters is open to public inspection); VA. CODE ANN. § 24.2-706 (2014) (mail-in voter applicants names are subject to public inspection); W. VA. CODE ANN. § 3-3-2b (LexisNexis 2013) (list of special mail-in voters is a permanent record).

94 E.g., ARK. CODE ANN. § 7-5-416 (West 2013) (counting of mail-in ballots is open to the public, the name of each mail-in voter is called off so challenges may be issued).

95 DEL. CODE ANN. tit. 15, § 7585 (West 2007) (mail-in voter files are sent to the candidates on the ballot); IND. CODE ANN. § 3-11.5-4-15 (West 2013) (mail-in voters are marked on poll lists and the names are announced to watchers); IND. CODE ANN. § 3-6-8-1 (West 2013) (candidates may appoint watchers); N.H. REV. STAT. ANN. § 657:15 (2013) (candidates may receive list of mail-in voters); N.D. CENT. CODE ANN. § 16.1-05-09 (West 2013) (election observers allowed access to early and mail-in voting); 25 PA. CONS. STAT. ANN. § 3146.2c (West 2014) (list of mail-in voters is posted but copies may only be given to candidates); TENN. CODE ANN. § 2-6-304 (2003) (mail-in voters’ names recorded in absentee poll book); TENN. CODE ANN. § 2-8-116 (2003) (all candidates have the right to poll list copies).

96 TEX. ELEC. CODE ANN. § 87.121(f) (West 2010) (express bar on access to lists of persons who have requested early ballots, though lists of individuals who have voted early are accessible).

97 HAW. REV. STAT. § 11-97 (West 2008).
and early voting materials before, during, and after election day commonly crumble under the weight of election controversy. Often, discerning which nontraditional voting materials are available to whom falls to individual county clerk’s assessments of equivocal (and sometimes conflicting) statutory commands and administrative norms. Decisions—by clerks and courts—made in this statutory vacuum very often bear the whiff of partisan favoritism.98 The problem is acute in the area of provisional voting.

HAVA requires states to make available to voters who have cast provisional ballots a means to verify the status of their provisional ballots.99 But HAVA specifically restricts access to information about the fate of a cast provisional ballot to the voter.100 Provisional voting has been controversial in part because the federal mandate requires states to fill in many gaps, including gaps in the provisional voting transparency regime.101 Like mail-in ballots, processing provisional ballots implicates materials other than the provisional ballots themselves such as lists of provisional voters, poll books, provisional ballot envelopes, and affidavits. And like mail-in voting materials, provisional voting produces election materials to which candidates, parties, and citizens will inevitably demand access when races are close.

Statutory incoherence in the case of public access to provisional balloting material is pronounced. Fifteen states expressly allow members of the public to access lists of voters who cast provisional ballots.102 Four states allow access to

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98 See supra note 82.
99 42 U.S.C. § 15482(a)(5)(B) (2012) (“The appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.”).
100 42 U.S.C. § 15482 (2012) (“The appropriate State or local official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system established under paragraph (5)(B). Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.”).
101 The provisional ballot requirements raise quite a few other concerns outside the transparency context. See generally Edward B. Foley, The Promise and Problems of Provisional Voting, 73 GEO. WASH. L. REV. 1193 (2005).
102 DEL. CODE ANN. tit. 15, § 4979 (West 2007) (allows oaths and affidavits to be seen, not a set list); FLA. STAT. ANN. § 98.0981 (West 2014) (voter history is part of electronic register system, electronic register system is open to public records requests); GA. CODE ANN. § 21-2-72 (West 2014) (affidavits and election records are open to inspection); IND. CODE ANN. § 3-10-1-31.1(c) (West 2013) (provisional voting materials are open to inspection); KAN. STAT. ANN. § 25-1122 (West 2013) (list of provisional voters may be inspected); KY. REV. STAT. ANN. § 117.225 (LexisNexis 2004) (provisional voters must sign precinct list); KY. REV. STAT. ANN. § 117.025 (LexisNexis 2004) (precinct lists are available for inspection); MD. CODE ANN., ELEC. LAW § 10-311 (LexisNexis 2010) (watchers may keep lists of provisional voters); Mich. COMP. LAWS ANN. § 168.735 (West 2005) (provisional voters are recorded in the poll book); Mich. COMP. LAWS ANN. § 168.733 (West 2005) (poll watchers may view poll books); MO. ANN. STAT. § 115.430 (West 2014)
lists of challenged voters, which may (or may not) include voters who cast provisional ballots.\textsuperscript{103} Oklahoma allows access to information about provisional voters, but only after a one-week waiting period or after a recount has ended.\textsuperscript{104} Eight states affirmatively forbid access to provisional voting materials.\textsuperscript{105} Eighteen state election codes make no mention of access to provisional voting materials at all.\textsuperscript{106}

The question of access to names of provisional voters has found its way into court on numerous occasions. In 2004, a Washington court held that lists of provisional voters must be released in the name of “the public’s right to an open and transparent electoral process. . . .”\textsuperscript{107} Professor Edward Foley, in a blog post on the eve of the 2012 election, raised questions about whether the identity of provisional voters in Ohio is public or private.\textsuperscript{108} Professor Foley wondered
whether Ohio courts would react similarly. HAVA’s language restricting access to information about provisional ballots is arguably clear on its face as a means of protecting voter privacy.\(^{109}\) Pondering the tension between Washington’s take and what might happen in Ohio courts, Professor Foley voiced concern about Ohio’s statutory readiness to confront the question of access to provisional voter lists, if, as seemed likely, the election came down to Ohio’s provisional ballots.\(^{110}\) Echoing Foley, Jeffrey Toobin worried too: “Pause to consider the chaos that would ensue. Both campaigns would try to track down the provisional voters, find their proper documentation, and shepherd them through the process at the county seat. Ballot-by-ballot warfare—for several hundred thousand votes. And that’s just the start.”\(^{111}\) As it turned out, Foley and Toobin’s fears were not unfounded. Ohio issued 210,000 provisional ballots on election day 2012; President Obama won the state by 166,214 votes.\(^{112}\)

Although Ohio ducked provisional ballot controversy in the 2012 presidential election, it blossomed in the 2012 Kansas house race in the fifty-fourth district. Ann Mah trailed Ken Corbet by a mere 27 votes out of more than 10,000 cast.\(^{113}\) Following the election, Mah contacted county officials requesting access to lists of voters who had voted provisional ballots intending to contact each.\(^{114}\) The 2012 election marked the first statewide election in which its new voter ID statute was in effect.\(^{115}\) Mah believed many voters cast provisional ballots because of failure to bring proper ID to the polls.\(^{116}\) In Kansas, provisional votes will only count if voters can produce proper ID at their local election office in advance of the county canvass.\(^{117}\) Candidates, therefore, have an incentive to track down individual provisional voters to


\(^{110}\) Foley, supra note 108.


\(^{116}\) See Marso, supra note 113.

\(^{117}\) Id.
ensure they take the necessary steps to verify their eligibility to vote (particularly when armed with data about which voters to go after).

But the Kansas statute did not address whether candidates should be given access to lists of provisional voters. Some counties agreed to give Mah access to the lists. On November 7, clerks in Douglas and Osage Counties provided Mah access to lists of provisional voters. The clerk in Douglas County explained to the press that, “limited provisional ballot information had always been considered [an] open record.” This prompted Kansas Secretary of State Kris Kobach to release a memo advising clerks that the names of provisional voters are not public records and by law cannot be disclosed. Kobach’s memo further reasoned that requests for post-election materials would, “impede the function of [election officials] and provide an additional burden [on election officials] at a very busy time.”

Consistent with the Kobach memo, the Shawnee County commissioner denied Mah’s request arguing that Kansas law prohibited disclosure, “except as ordered by a court of competent jurisdiction.” Mah promptly secured an order from the Shawnee County court. Like the Washington court in 2004, the county court granted the order on the theory that Mah had not requested access to information about which candidates specific provisional voters voted for, but only the names of voters who voted provisionally.

Secretary Kobach immediately obtained an order from a U.S. district court to prevent Mah’s court order from taking effect. Later, in a ruling on the merits, the U.S. district court ruled against Kobach. The Kansas court aligned with the Washington court’s holding that the federal law requiring provisional voters’ access to the status of their ballots did not bar others seeking access to information about who casts provisional ballots. “Access to information about [an] individual provisional ballot” the court wrote, “does not protect information about the individual casting the ballot.” In the end, Corbet defeated Mah by twenty-one votes and the Republican-dominated state legislature moved to prevent public access to provisional ballot materials.

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119 *Id.*


121 *Id.*

122 *Mah*, supra note 113.


124 *Id.*

125 *Mah*, 2012 WL 5584613, at *3.

126 Senate Roundup: Bill Inspired by Mah Race Approved, TOPEKA CAP. J. (Feb. 28, 2013), http://m.cjonline.com/news/2013-02-
Commenting on provisional ballot access in Kansas, a political scientist at the University of Missouri expressed concern:

If legislatures and courts rule that provisional ballot information is not public, I expect that absentee, vote-by-mail, and early voting would be the next logical targets for a similar ruling. Restricting public access to ballot information would impose a significant curb on campaign activity aimed at those forms of voting. It is certainly an interesting strategy for curbing post-election litigation—quash public access to the evidence needed for such litigation.\(^{127}\)

Is curbing access to provisional and other new forms of voting materials a desirable constriction aimed at preserving the dignity and decorum of elections? Or, should such material be made widely available to assure the public that ineligible voters did not vote? In the case of state response to provisional ballot transparency, the jury appears to be out.

The story of election officials’ inconsistent responses to requests for access to election materials is often told, in part because local election officials—keepers of the vast majority of election materials\(^ {128}\)—are commonly left rudderless by vague or inconsistent election transparency statutes. As nontraditional forms of voting rise in prominence, the lack of oversight rules does damage to public confidence in the legitimacy of our elections and throws that uncertainty to judges, who are less than thrilled to enter the political thicket.

B. The Digitization of U.S. Elections

In the days when U.S. voters cast paper ballots in voting booths on election day, the question of election oversight was relatively straightforward. Even when new forms of paper balloting complicated oversight (butterfly ballots are a perfect example), the ability to review outcomes still constituted a manual review of physical objects. Now that so many voters in the United States vote on machines, meaningful oversight of vote tallying has become a more complex matter.\(^ {129}\)

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128 See, e.g., Voting for Am., Inc. v. Steen, 732 F.3d 382, 399 (5th Cir. 2013) (holding that federal public access provisions in the National Voting Registration Act did not apply until voting records at issue were actually in custody of the state as opposed to being in the hands of local level officials).

129 Every state that uses voting machines maintains federally mandated pre- and post-election audit procedures and machine certification. See generally Stephen N. Goggin,
When they were first introduced in the early 1900s, voting machines drew much skepticism, so much so that their use was often curbed or eliminated.\textsuperscript{130} In the years since \textit{Bush v. Gore}, their use has been on the rise, particularly driven by HAVA’s federal funds to purchase new voting equipment. Two categories of voting machines have emerged as the most prevalent: direct recording electronic machines (DREs) and optical scan machines. In the 2012 election, approximately 39\% of voters cast ballots on DREs and 56\% cast ballots on paper ballots counted on optical scanners.\textsuperscript{131} HAVA requires that all voting machines have “audit capacity” that can produce a “permanent paper record” for manual audit.\textsuperscript{132} Transparency advocates are quick to point out, however, that HAVA fails to require a contemporaneous, or “voter-verified,” paper trail.\textsuperscript{133} Consistent with Election Assistance Commission recommendations, many state statutes require DREs to be equipped with voter-verifiable, paper trail audit capacity.\textsuperscript{134} Experience has shown, however, that audit capabilities may fall short (and can create fresh problems).\textsuperscript{135}


\textsuperscript{130} See \textsc{Albright}, \textit{supra} note 22, at 78 (describing alleged bribery by an early voting machine manufacturer that led Illinois to abandon the use of electronic voting machines in the early twentieth century). Albright describes problems with fraud and machine reliability that hindered adoption of voting technology in elections subsequently in other states. \textit{Id.} As described by another historian of the introduction of voting machines in New Jersey in 1907, “[m]any citizens were distressed because they could not feel assured that their vote had actually been registered, or because they feared that the machine might err in recording the totals.” MCCORMICK, \textit{supra} note 32, at 201. By 1911, 321 out of 335 election districts in New Jersey had voted to return to the paper ballot. \textit{Id.} at 201.


\textsuperscript{134} E.g., \textsc{Ark. Code Ann.} § 7-5-532 (2013) (“The Secretary of State or the county shall not purchase or procure a direct-recording electronic voting machine that does not include a voter-verified paper audit trail.”); \textsc{Cal. Elec. Code} § 19270 (West 2014) (“The Secretary of State shall not . . . approve a direct recording electronic voting system unless [it] includes an accessible voter verified paper audit trail.”); \textsc{Haw. Rev. Stat.} § 16-42 (West 2008) (“No
DRE machines are designed to walk voters through the ballot more carefully than paper ballots allow. Machine voting therefore helps ensure that ballots are cast without error. Even accepting the increased voter accuracy machines may enable, skeptics voice concern that voters have no means of ensuring their vote has registered correctly. This has been a perennial problem since voting machines first came on the scene. Concerns persist today. Many voters during the 2012 elections complained of “vote flipping” on DRE machines where the machine appeared to register Obama when Romney had been selected and vice versa. Critics of machine voting also point to potential for errors in coding or hacker mischief that are not entirely unfounded.

For example, in many states the paper trail capacity consists of a printer attached to an existing DRE with a paper spool behind a sheet of glass. During a recount or audit, voting officials can count the records on the printer module. But the spools are continuous sheets of paper. If a ballot is spoiled (i.e., a voter completes a ballot and then rejects it), the spoiled ballot remains on the spool with the valid ballots. This process can lead to errors in vote tallies if election officials erroneously include spoiled ballots in the vote tally. Election officials complain that segregating the invalid ballots is a costly and time-consuming process. When totals from the paper record do not match machine totals, public confidence in the election outcome suffers. Goggin, supra note 129, at 40.

On a DRE, voters cannot fail to properly fill in a bubble or leave a stray mark that confuses an optical scanner. DREs also ensure that voters do not unintentionally overvote and may only undervote after receiving a warning they have done so. “Over voting” occurs when a voter votes for more than one candidate in a single race. “Under voting” occurs when a voter casts no vote in a race. Some voters fail to indicate a choice in error, other voters consciously do not vote in some races. See Jason W. Hilliard, Punch Card Ballots v. Direct Record Electronic Voting: Why Ohio’s Use of Different Methods to Count Ballots Violates the Equal Protection Clause – Stewart v. Blackwell, 356 F. Supp. 2d 791 (N.D. Ohio 2004), 31 U. DAYTON L. REV. 527, 534–35 (2006).

See Wexler v. Anderson, 452 F.3d 1226, 1233 (11th Cir. 2006) (noting that voters using touchscreen DRE machines “prevent some of the voter errors that are characteristic of optical scan voting systems.”).

McCormick, supra note 32, at 200; see also infra note 141 (discussing modern distrust of voting machines).

Albright, supra note 22, at 78 (“Early experience with the voting machine . . . developed well-defined objections in the minds of many voters.”).


The digitization of elections has placed stress on state election transparency regimes. Two examples illustrate some of the complications that have arisen. During the 2006 race for U.S. Congress in Florida’s thirteenth district, Sarasota County’s iVotronic DRE machines lacked verified paper trails.142 When the machine spit out the vote totals, challenger Christine Jennings trailed incumbent Vern Buchanan by 369 votes (out of nearly a quarter million cast, a one-quarter of one percent margin). To complicate matters, voters oddly cast 18,000 “undervotes” in the Jennings–Buchanan race (meaning no vote was recorded). The number of undervotes was far higher than in previous elections in that county.143 During early voting, several voters had reported “difficulties getting their choices for Congress to register on the electronic touchscreen voting machines.”144 What was the problem? Poor ballot design? Voters expressing dissatisfaction with both candidates by voting for neither? A machine glitch? The world will never know.

The narrow margin of victory triggered a manual recount145 that, in the case of iVotronic DRE, amounted to nothing more than a printout listing the machines’ vote totals—not a recount but a reprint quipped one observer.146

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143 In 2002 in the last mid-term election, Sarasota reported an undervote of 2.5%, in contrast to the Jennings–Buchanan undervote total of 13.9% on election day and 17.6% during early voting. Id. at 399.
144 Id.
145 FLA. STAT. ANN. § 102.166(1) (West 2014) (requiring recount for a margin of victory of 0.25% or less).
146 Id.
Unsurprisingly, vote totals remained unchanged, prompting observers to label the recount an “an exercise in futility.”147 With no way to determine the source of the mysteriously large undervote, Jennings pursued an ultimately unsuccessful suit in state court and in the U.S. House of Representatives (which holds jurisdiction for election contests in U.S. House races).148 Jennings sought access to the hardware, software, and source code of the Sarasota machines. In state court, Florida’s trade secret privilege thwarted Jennings’s discovery attempts.149 A Florida circuit court denied access, holding that the producer of the iVotronic’s trade secret protections outweighed Jennings’s right to access materials.150 Attempts at the federal level proved similarly fruitless in determining the actual cause of the undervote. A fifteen-month congressional process under the Federal Contested Elections Act151 did not include forensic review of the machines at issue, meaning the cause of the 18,000 undervotes will never been known.152

A second example is Virginia’s statute governing recounts for DRE machines. Some counties in Virginia use optical scan voting machines; others use DREs. In a Virginia recount, optical scan paper ballots are recounted by hand. The recount statute provides for a process by which DRE ballots may be “redetermined” for recount purposes as follows:

For direct recording electronic machines . . . the recount officials shall open the envelopes with the printouts and read the results from the printouts. If the printout is not clear, or on the request of the court, the recount officials shall rerun the printout from the machine or examine the counters as appropriate.153

But the word “counter” is an anachronism. DREs do not contain counters in the way, for example, lever machines contained mechanical, analog counters. The entire DRE machine is, in a manner, a counter. Determining the cause of a glitch and possibly recovering votes in a Virginia recount involving DREs could result in as much uncertainty as Florida’s thirteenth district experienced in 2006.154

148 U.S. CONST. art. I, § 5 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members.”).
150 Id.
154 This scenario formed the basis of the May 16, 2012 Election Law Program Virginia War Game. See Virginia War Game, ELECTION LAW PROGRAM,
The Florida and Virginia examples illustrate that beyond problems of voter distrust of voting technology, outdated transparency statutes can exacerbate the problem and unnecessarily test the ability of election officials and the courts to resolve election transparency conflicts free of political taint. Furthermore, and almost as importantly, because electronic voting machines can remove the possibility of manual ballot counting, electronic voting has the collateral effect of focusing campaign and public oversight energy on other materials such as early, mail-in, and provisional voting materials. This collateral effect compounds transparency problems when state statutes inadequately address these forms of voting.

C. Post-Bush v. Gore Oversight Norms

The 2000 presidential election controversy ushered in a new era in election oversight. The drama that unfolded in Florida served as a wake up call to many Americans that our system of elections was broken and in need of attention. Since Bush v. Gore, this country has witnessed an explosion of interest in election oversight. Voting rights and voting integrity groups have proliferated, and individual citizens have become interested in monitoring elections—particularly when elections are close.\(^\text{155}\) Election litigation has increased in frequency and the election law bar has expanded considerably.\(^\text{156}\) In addition, the post-Bush v. Gore oversight era coincided with a larger government transparency movement prompted by the rise of the Internet, a technology enabling government transparency and oversight on a scale and scope not previously imaginable. The promise of digital transparency changes the nature of access requests and the type and volume of data election administrators can, and do, release. It has also magnified the public’s transparency expectations.

In the past, most election records never saw the light of day, in part because election records were highly decentralized and in paper form. Access requests were commonly denied due to heavy burdens on election administrators in compiling hard copy materials—often when time was short and offices understaffed.\(^\text{157}\) Before the 2002 Help American Vote Act, for example, states were not required to maintain centralized voter registries and few did. Local
registrars maintained their own lists of voters, making any attempt to gather statewide election data extremely difficult. The problem of historically poor data on U.S. elections and election administration has been well documented.\textsuperscript{158} Today, access requests for many types of election records can (at least in theory) be met by clicking a mouse, removing perhaps the greatest historic barrier to election transparency. Examples of Internet-enhanced election transparency abound. In one early instance, during the Franken recount in 2008, the \textit{Minneapolis Star Tribune} broadcast a live stream on its website of votes being counted; in the first four days of counting, over 112,000 viewers watched the proceedings.\textsuperscript{159} The media also affirmatively posted disputed ballots online, allowing the public to weigh for themselves whether voter intent could be discerned.\textsuperscript{160} During the Scott Walker recall recount in 2012, Wisconsin’s Government Accountability Board (seen as a model for nonpartisan election administration)\textsuperscript{161} broadcast the recount over the Internet to instill public confidence that election officials were following the rules. In another example, for a trial period in 2008–2009, Humboldt County, California election officials scanned voted ballots and posted them online.\textsuperscript{162} State election administrators are also experimenting with Internet portals for voter information such as voter registration lists and information about mail and provisional ballot status.\textsuperscript{163}

\begin{footnotes}
\item[158] GERKEN, supra note 15, at 4.
While most such efforts are intended to help individual voters track their mail-in or provisional ballot status, these online systems hold the technical potential to enable much broader public access to election records should states opt to open them up.

As the two trends converge—more groups and individuals interested in overseeing election processes and greater capacity of election officials to serve up digitized election records—perhaps optimism is warranted. Have we come to a point when absolute election transparency can replace a state’s reliance on structured oversight? Maybe allowing access to traditional and nontraditional voting materials to traditional and nontraditional overseers marks the real future of election transparency. So far, however, most election officials have been wary to embrace this future.

Colorado’s experience provides a window into some of the concerns. In 2009, controversy arose in Colorado when Marilyn Marks, the losing candidate in the Aspen mayoral election, sued for access to digital copies of voted ballots cast in the election she lost.164 The clerk’s office had taken extraordinary steps to make digitized copies of voted ballots available for public inspection, briefly displaying each of the 2,544 ballots in digital form (as TIFF files)165 on large, public video monitors at the tabulation center.166 About a week after the election (and after the deadline had passed to contest the result) the clerk disclosed a discrepancy between the manual count of cast ballots and computer-generated data.167 Marks immediately filed a Colorado Open Records Act (CORA) request for the full set of TIFF files.168 The clerk denied Marks’s request, citing ballot secrecy concerns and a Colorado statute requiring ballots be held for six months after elections and then destroyed.169 Marks sued. After losing in district court, the appeals court reversed. The court of appeals held that granting Marks’s request would not compromise secrecy in voting and that copies of the ballots, which had already been publicly

164 TrueBallot, Inc., the company hired by the clerk’s office, created copies of the ballots as “part of a computerized ballot tabulation system designed for the new instant runoff voting (IRV) procedures of the City of Aspen.” Marks v. Koch, 284 P.3d 118, 120 (Colo. App. 2011).

165 Tagged Image File Format.

166 The clerk even broadcasted selected TIFF files on local television encouraging public scrutiny. Marks, 284 P.3d at 120.

167 Id.


169 Marks, 284 P.3d at 120–21.
disclosed, were not “ballots” under the election code and must therefore be released to Marks.\textsuperscript{170}

But the story did not end there. With an appeal to the Colorado Supreme Court pending, election officials successfully lobbied the legislature to pass legislation prohibiting county clerks from fulfilling a CORA request for voted ballots during a blackout period—forty-five days before election day until the election is certified.\textsuperscript{171} The legislation carves out an exception for “interested parties” such as candidates and parties who may access ballots during the blackout period. Critics of the legislation decried the creation of a “privileged class” of persons who could access the materials. Governor Hickenlooper signed the bill nevertheless in June 2012, and it remains on the books today.\textsuperscript{172}

As states struggle to adapt to increasing pressure for transparency of nontraditional voting materials from nontraditional oversight groups and amidst fast-changing technical realities, election transparency statutes often prove inadequate. Access disputes threaten the stability of outcomes, the neutrality of the judiciary, and the ability of election administrators to run elections smoothly. Transparency rules that fail to address changed circumstances weaken public confidence in electoral outcomes. The next section examines how policymakers might respond to these challenges and suggests possible paths forward.

IV. THE ROAD AHEAD: REFORMING ELECTION TRANSPARENCY

Transparency rules must adapt to changing circumstances. This section explores how in four parts. The first examines whether states should constrict who may access election materials, concluding that “structured oversight” is neither desirable nor possible. The second section surveys current thinking on the dangers of transparency and considers scholarship that aims to improve transparency regimes by taking these dangers into account. The third section suggests reforms that might curb the negative impacts of greater election transparency. And the final section presents a case study to test these theories.

A. A Return to Structured Oversight?

Some might argue the best way forward is to look back, returning to Progressive Era-styled structured oversight. The Colorado legislature’s choice to limit access to voted ballots to candidates and parties provides one example of a state choosing this direction. One could imagine states turning to this solution for other kinds of voting materials. States might decide that only

\textsuperscript{170} Id. at 124
\textsuperscript{171} \textsc{Colo. Rev. Stat.} § 24-72-205.5 (2014).
candidates and their representatives can access provisional or mail-in voting lists, voter histories, poll book data, voter registration materials, and so forth. There are several reasons why this approach might be beneficial. First, much like the adversarial system in our judiciary, the parties will serve as vigilant proxies for the public. Parties and candidates have strong reasons to make sure that only eligible voters are registered, that election technology is functioning, that election day processes are carried out according to the rules, and that counting is fair, accurate, and honest.  

Second, a party or candidate-led system of oversight is easier for election officials to administer. Rather than handling access requests from numerous (even multitudes of) requestors, limiting access to parties and candidates narrows the number of access requests to a manageable few. Restricting oversight access to parties and candidates enables election administrators to retain high levels of transparency without sacrificing dignity and decorum in the process. A free-for-all model of access risks exposing elections to morass, uncertainty, and delay. In addition, those few granted access are accountable, known actors. Restricting access to parties and candidates allows election administrators to impose standards on behavior and on the use of information released to protect election integrity and voter privacy—a growing concern in the age of Big Data. 

While tempting, particularly for those who crave order in what feels like an increasingly chaotic electoral process, the drawbacks of structured oversight are many. A first issue is information asymmetry. As is often the case, if one campaign or party has better political information about the voting public or is more technologically sophisticated, access to election information can result in the voters of one party or candidate having an advantage over the other. A stark example of this is Minnesota’s Franken–Coleman recount in 2008. According to one observer, Franken’s attorneys far outmatched Coleman’s team in data sophistication. Franken’s attorneys had “computer geeks” sitting nearby as they figured out which mail-in ballots to challenge. Information asymmetries will likely decrease going forward as both parties are now actively engaged in

173 We rely on adverse interested parties to act as proxies for the public interest in many settings. For example, we promote corporate competition through antitrust laws for the benefit of consumers. See generally Clayton Act, 15 U.S.C. §§ 12–27 (2012) (prohibiting activities that restrict competition in the marketplace).  


175 Weiner, supra note 84, at 133 (“More than once, voting officials and Coleman reps witnessed Franken lawyers check with staff members— ‘computer geeks’ . . . —who sorted through voter data information on their laptops. In a few cases, the staffer with the computer gave a thumbs-up or thumbs-down to the Franken lawyer, and a decision was made.”).
vigorous political data efforts. Yet in smaller races, in instances when national and state parties decide against devoting significant resources to data-driven decision making—and for races involving less sophisticated third parties—information asymmetries will persist. Relatedly, the adversarial system can pit well-funded candidates against candidates who lack resources to undertake expensive oversight operations, which can require paid staff and hundreds of volunteers. Particularly in state and local level races (and races with poorly-funded third parties), resource asymmetries can translate to a breakdown in adversarial oversight.

A second problem with structured access is what can be termed “loser distortion.” Losing candidates and parties, far from seeking to ensure that elections are being run legitimately, have a huge incentive to demonstrate the exact opposite. The more doubt the losing candidate can cast on the propriety of an election process the better. Partisan oversight can fuel mutual distrust, can be wasteful, and can threaten election decorum. After all, partisans are not after the truth; they want to “get their guy in.” This phenomenon is well-documented. Not allowing a wide range of observers, such as members of the press and public, access to confirm or disprove such allegations will exacerbate public distrust of electoral outcomes.

Finally, perhaps the most persuasive argument against structured oversight is that it may well be impossible to put the toothpaste back in the tube. Limiting access to only candidate and party representatives is increasingly unacceptable to advocacy groups, the media, and others interested in overseeing elections. Although restricting oversight access to political party and candidate representatives has been the norm for decades, the norm is fast unraveling as

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177 This phenomenon played out dramatically in the Cochran-McDaniel primary runoff in Mississippi discussed below. In the aftermath of that race, McDaniel, a Tea Party challenger to a six-term U.S. Senator, faced serious financial challenges when attempting to identify illegal crossover votes after the election. Sam R. Hall, Hall: McDaniel Campaign in Financial Straits, CLARION LEDGER (July 6, 2014, 3:03 PM), http://www.clarionledger.com/story/opinion/columnists/2014/07/05/hall-mcdaniel-campaign-financial-straits/12260883/, archived at http://perma.cc/74YG-D3U8. However, whether or not outside groups could assist the McDaniel campaign in post-election oversight became a litigated question. See infra Part IV.D.

178 See HASEN, supra note 3, at i; Carrie Menkel-Meadow, The Trouble with the Adversary System in a Postmodern, Multicultural World, 38 WM. & MARY L. REV. 5, 6 (1996) (commenting on the adversarial system in the justice system, “polarized debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies.”) (footnotes omitted)).

179 Then again, outside groups may be just as dedicated to distorting the truth as political parties and campaigns—in some cases even more so.
technology enables ordered access and the open government movement gains steam.

In the past, the government’s interest in confining access to a limited few was often compelling given the practical realities of the day. For example, when the information being sought must be acquired in person (e.g., viewing counting tables during ballot counting), allowing too many bodies in the room is unworkable. Concern about preserving original documents is another example. Technology increasingly renders these concerns moot. Cameras can be mounted and live feeds posted online to allow as many observers to watch ballot counts as are interested. Original materials can be copied and distributed digitally without harming original documents.

Frustrated by structured transparency regimes when old justifications often no longer hold water, numerous individuals and groups have challenged structured oversight laws. The *KnowCampaign v. Rodrigues* provides an example. In that case, a nonprofit group sought access to voter history records. The Virginia statute allowed only candidates, elected officials, and political party chairmen access to voter history lists. The *KnowCampaign* brought suit claiming that the denial of access constituted a violation of the First and Fourteenth Amendments of the U.S. Constitution. The circuit court judge agreed, finding no compelling interest served by the government’s restriction of disclosure to political parties and candidates only.

Instead of seeing broad oversight by many different groups as a hindrance, perhaps we should welcome this trend. Understaffed and under-budgeted election offices (and underfunded local or third-party candidates) can arguably use the help. Knowing that various groups are fully engaged in oversight—for

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181 The same can be said of allowing TV cameras in the courtroom, a practice that courts commonly refused to allow before cameras could be deployed without disruption. See *Estes v. Texas*, 381 U.S. 532, 536 (1965) (describing the disruption of TV cameras in the courtroom: “Cables and wires were snaked across the courtroom floor, three microphones were on the judge’s bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings.”). Once technology advanced such that cameras posed no threat of disruption, that argument fell. *Chandler v. Florida*, 449 U.S. 560, 576 (1981).


185 VA. CODE ANN. § 24.2-406(a) (2014).


187 See *KnowCampaign*, No. CL10-3425, at 10.
example, through online crowdsourced vetting of voter lists,\textsuperscript{188} recount processes,\textsuperscript{189} or petition signature validity\textsuperscript{190}—can provide a measure of comfort as election administrators struggle to do the best they can with limited resources.\textsuperscript{191} Broad public scrutiny of elections can also help local registrars identify and rectify problems in real time. We have seen perhaps no better example of this play out than David Wasserman’s tweeting effort during the canvass in the 2013 Virginia attorney general’s race.\textsuperscript{192} Wasserman, a Virginia political blogger, mounted a tweeting effort that consolidated on-the-ground reports from observers, citizens, and election officials. The media, the candidates, election officials, and the public at large scrutinized Wasserman’s Twitter feed. It became the go-to information source during the canvas. Many believe Wasserman’s efforts lead to the discovery of missed ballots and ultimately, some argue, a more accurate final count. Wasserman explained his surprise at Virginia election officials’ reaction to his tweeting: “I was expecting them to say, ‘Stop denigrating our electoral process.’ Instead they said, ‘I want to thank you for the public service you’re doing.’”\textsuperscript{193} Close, broad-based scrutiny may enhance efficient resolution of election irregularities.

For the reasons above, permitting access to election materials to outside groups may have cost and efficiency benefits. The opposite, however, could equally be true. Too many eyes sifting through election material has the potential to increase costs to election administrators, decrease efficiency, or worse, damage public confidence in election outcomes. Making election information available too broadly can backfire if doing so gives rise to confusion, conspiracy theories, inaccurate portrayals or distortion of data, or threats to individual voting rights. This impulse has perpetuated structured oversight regimes.\textsuperscript{194}


\textsuperscript{190} Rebecca Green, Petitions, Privacy, and Political Obscurity, 85 TEMP. L. REV. 367, 382 (2013) (discussing privacy concerns associated with publication of petition signatories).

\textsuperscript{191} The obvious counterargument here is that when outside groups vet voter lists, they cause more work, not less, for election workers and often falsely challenge voters. See Levitt, supra note 188 (describing mass public challenges to voter eligibility by “amateur sleuths” being, in the end, “predictably replete with error” and resulting in few legitimate challenges).

\textsuperscript{192} Davis, supra note 155.

\textsuperscript{193} Id.

B. Against Transparency?

A version of this impulse prompts some to conclude that government transparency has a dark side, giving rise a growing sense that the drive to put any and all government data online could undermine the very confidence in government it is meant to inspire. Some voice concern that “[w]e are not thinking critically enough about where and when transparency works, and where and when it may lead to confusion, or to worse.” Especially when government data contains inaccuracies, when it is not contextualized, and when data users fail to take the time reach accurate conclusions, broad data disclosure threatens to do more harm than good.

Building on important work sorting through effective and ineffective transparency regimes, one way to think about transparency in election administration is to start by making a distinction between transparency that helps election administrators and legislators improve election processes (management transparency) and transparency measures that enable observers to verify voter eligibility and election outcomes (outcome transparency). While the line between the two is admittedly fuzzy, management transparency in elections would consist of election data that afford both the public and election officials the ability to evaluate election processes and their successes and shortcomings before, during, and after elections. Much thoughtful work has been done on improving management transparency in elections. In Evaluating Elections, R. Michael Alvarez, Lonna Rae Atkenson, and Thad V. Hall argue convincingly for increased performance-based evaluation of election administration. They believe that the success of election administration can and should be measured to improve election efficiency and public confidence in outcomes. The authors argue that states should cull data before, during, and after elections that helps evaluate topics such as:

- “How many people were turned away from the polls or voted provisionally? . . .


196 See Lessig, supra note 195.

197 Id. Some have raised concerns about too much transparency in the campaign finance realm as well. See Hasen, supra note 14, at 558–59. These same concerns, interestingly, have prompted U.S. Supreme Court justices to refuse to allow cameras to record oral argument at the Court. Exclaimed Justice Souter, “I can tell you the day you see a camera come into our courtroom, it’s going to roll over my dead body.” On Cameras in Supreme Court, Souter Says, ‘Over My Dead Body,’ N.Y. TIMES (Mar. 30, 1996), http://www.nytimes.com/1996/03/30/us/on-cameras-in-supreme-court-souter-says-over-my-dead-body.html, archived at http://perma.cc/ECV6-NR99.

198 FUNG, GRAHAM & WEIL, supra note 195, at 6.

• Did the poll workers report problems in the election? . . .
• Did the machines count votes correctly?
• What was the roll-off on down ballot races?"200

According to Alvarez, Atkenson, and Hall, answers to questions such as these will help election administrators improve elections and will help the public evaluate how well (or poorly) elections are run.201

Others have called for increased management transparency in elections. One early thought leader is Heather Gerken at Yale. Gerken argued in her 2009 book *The Democracy Index* that more election data would lead to better-run elections.202 Gerken suggested that election data could spur state rankings on various aspects of election performance, exposing what works and what does not.203 Data-based rankings would then push state election administrators to try and “keep up with the Joneses,” improving overall election management countrywide.204

Pew’s Election Performance Index, released in 2013, makes Gerken’s idea a reality.205 The index uses management data to measure election performance according to seventeen measurable indicators such as polling place wait times and ballot rejection rates.206 To create it, Pew collected data from a variety of sources, including: the U.S. Census Bureau’s Current Population Survey Voting and Registration Supplement, Election Assistance Commission surveys, and other surveys and studies.207 The result is impressive—amounting to a thorough numbers-based evaluation of state election ecosystems.

Increased management transparency in elections offers promise even beyond Gerken’s vision. Election management data accessible in machine-readable format could allow developers to create a variety of applications that assist the smooth functioning of elections from voter registration interfaces to voting efficiency to improvements in voter education on substantive election questions.208 Examples of the power of open data in elections are apps that

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200 *Id.* at 3. This is by no means an exhaustive list, but rather offered as examples of the kinds of data and information that should be transparent in a management transparency model.

201 *Id.*


203 *Id.*

204 *Id.* at 6 ("A ranking should work for the simplest of reasons: no one wants to be at the bottom of the list.").


207 See *Elections Performance Index, supra note 205.*

assist voters in locating their polling place, determine levels of local polling place congestion on election day, and help voters learn about ballot initiatives and candidates (lessening time spent in the voting booth and thus shortening wait times on election day).209

C. Addressing Outcome Transparency

If management transparency in elections furthers the goal of increasing election efficiency and improving election processes, what does election outcome transparency look like, what are its dangers, and how can election officials temper its negative effects? Outcome transparency can be thought of as any oversight action aimed at verifying the accuracy of an election outcome. This can range from efforts to verify that individual voters are U.S. citizens or that a single voter has not cast ballots in multiple states. Outcome transparency would also encompass efforts on election day to oversee the voting process to make sure election officials do not turn away eligible voters. Outcome transparency would also include efforts after votes are cast to audit machines or examine absentee ballots or lists of provisional voters to ensure no ineligible votes are counted. Outcome transparency trains its sights on ensuring that only eligible voters voted, that the system did not prevent eligible voters from casting ballots, and that all legal ballots were included in the count.

What are the dangers of outcome transparency? Professor Justin Levitt of Loyola Law School supplied an example on the eve of the 2012 election. Levitt called attention to mass-challenge efforts by amateur “voting integrity sleuths” scouring state voter registration databases to unearth illegal registrants.210 Levitt documents, however, that such challenges very often jeopardize the rights of legally registered voters.211 Sleuths based their challenges on mismatches between voter registration information and information in other public


210  Levitt, supra note 188.

211  Id.
documents (for example inconsistencies in address information).\footnote{Id. In one of Levitt’s examples, amateur sleuths challenged a registrant based on a missing comma. Id.} Levitt cautioned that amateur sleuths might unwittingly do more harm than good.\footnote{Id.} Time and again in the election context, allegations of fraud and illegally registered voters turn out “false positives,” fuel misinformation and misperception, and waste state resources.\footnote{JUSTIN LEVITT, BRENNAN CENTER FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD 4 (2007), http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf (discussing instances of alleged voter fraud and the paltry number of proven cases); David Schultz, Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement, 34 WM. MITCHELL L. REV. 483, 496 (2008).} Seen in this light, outcome transparency in elections is transparency that enables members of the public to expose fraud, disqualify voters, or otherwise discredit elections without sufficient evidence. Outcome transparency in elections can be harmful because it empowers users of data—who may take the data out of context, purposefully distort the data, or otherwise misinterpret data—to threaten the rights of eligible voters, the legitimacy of elected candidates, and the public’s confidence in elections generally.

It does not follow, however, that just because election records can be misused or create confusion they should therefore be hidden from public view. One problem is the practical difficulty of disaggregating management data from outcome data, allowing public access to one but not the other. Another is that in many instances state and federal law mandate public access to records that can be used for outcome-challenging purposes.\footnote{E.g., National Voter Registration Act, 42 U.S.C. § 1973gg-6(i) (2012) (“Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.”). In another example, as noted above, many state laws require public access to lists of voters requesting and casting early and mail-in ballots. See supra note 92.} Instead of denying access or resorting to structured oversight policies, perhaps a more targeted approach is advised.

In their 2007 book, \textit{Full Disclosure: The Perils and Promise of Transparency}, Archon Fung, Mary Graham and David Weil surveyed transparency policies in a wide range of government and private settings. They concluded that the common wisdom that more transparency is always better is shortsighted and in many cases wrong. Instead the authors argue that policymakers should engage in what they term “targeted transparency,” thoughtful disclosure aimed at serving specific policy goals.\footnote{FUNG, GRAHAM & WEIL, supra note 195, at 6.} The authors call for careful design of transparency interfaces to ensure that users can
comprehend and compare information and put data in context. The authors also argue for mechanisms to ensure that the data are accurate, that data subjects can correct data about them, and that the data source incorporates mechanisms for data analysis and user feedback.\footnote{Id. at 177–80.}

Fung, Graham and Weil’s conclusions do not map perfectly onto the election transparency landscape. The systems they studied largely focused on transparency aimed at improving individual decision making—which products to buy (consumer transparency), which hospitals to seek care from (patient safety information), who to vote for (campaign finance disclosure), and so forth. The main goal of election administration transparency is not to enable improved citizen decision making but, as established above, to ensure that citizens have faith in electoral outcomes. Still, although the goals are different, the idea of targeting transparency does helpful work.

Using targeted transparency ideas as a basis, several specific policy recommendations to increase the benefits of management transparency and lessen the negative impacts of outcome transparency come into focus. First, states should strive to improve their election information architectures. Fung, Graham, and Weil advise that transparency works best when the entity disclosing data provides information that is easy for ordinary citizens to use and understand.\footnote{FUNG, GRAHAM & WEIL, supra note 195, at 8 (describing public disclosure of drinking water safety data that was overly-technical, inaccurate, and out-of-date). The result was public confusion and increased health risks for consumers who relied on the data released. Id.} To that end, election administrators should take steps that range from improving database design and election data user interfaces to enabling registered voters to easily update and correct their own voter information. Some states are already doing important work improving voter interfaces with election data. Colorado, for example, just released a new website called ACE (Accountability in Colorado Elections).\footnote{ACCOUNTABILITY COLO. ELECTIONS, http://www.sos.state.co.us/pubs/elections/ACE/home.html (last visited Oct. 22, 2014), archived at http://perma.cc/43XA-U38P.} The site sorts election administration data by county into a series of interactive maps, charts, and tables. While this data has long been publicly available, it was practically inaccessible. Anyone who wanted to access this information before would have had to visit dozens of websites and election offices to collect it.\footnote{Doug Chapin, Colorado Opens Its Books to the People and Data Geeks, ELECTIONLINEWEEKLY (Aug. 8, 2014), http://blog.lib.umn.edu/cspg/electionacademy/2014/08/electionlineweekly_colorado_op.php.} Other states have invested in improving quality and accuracy by creating online portals that allow voters to register online, correct voter registration information, and determine the status of ballots cast.\footnote{See supra note 163. According to a recent survey, twenty states currently offer online registration and another four states have passed legislation to create online voter registration interfaces. Some online registration systems provide mechanisms for registered voters to correct voter registration information. See Online Voter Registration, NAT’L CONF.}
Second, states should ensure that when the eligibility of registered voters is challenged—whether by amateur sleuths, through the state’s own efforts to cleanse its list, or in a post-election context where mail-in or provisional votes are questioned—voters should receive adequate notice in ample time to rectify problems. The National Voter Registration Act provides a model, requiring that before a state may remove a voter from its voter database, the state must mail a notice to the voter informing the voter how to update his or her voter registration and advising the voter how to proceed upon change of address.\footnote{42 U.S.C. § 1973gg-6(d)(2) (2012).} HAVA provides a further example in the case of provisional ballots. After a voter casts a provisional ballot, HAVA requires that states provide a mechanism, such as a website or a toll-free hotline that allows the provisional voter an opportunity to confirm that her vote counted.\footnote{42 U.S.C. § 15482(a)(5)(B) (2012).}

And third, rather than denying public access to voting materials altogether or relying on structured access policies, states should open their new-and-improved books to all comers. Improved data interfaces and redaction mitigates the risk of wide-open access. But relying on improved election data should not be the end of the story. States should impose consequences for misuse of election information. Frivolous challenges to voter eligibility should result in sanctions, and subsequent denial of access to election materials for actors with a history of misuse of data. The idea of imposing penalties to discourage bad behavior and encourage good behavior is a model used in numerous contexts. Rule 11(b) in the Federal Rules of Civil Procedure, for example, discourages frivolous lawsuits by imposing costs on parties bringing them forward.\footnote{FED. R. CIV. P. 11(b).} Under Rule 11(b), those filing suit in federal court certify that, \textit{inter alia}, to the best of their knowledge the suit is not being filed for an improper purpose and that the factual contentions have evidentiary support.\footnote{Id. (“By presenting to the court a pleading, written motion, or other paper . . . an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.”).}
those filing improper or frivolous suits. Why not impose a version of Rule 11(b) to combat the negative impacts of outcome transparency? Rather than fret about whether releasing election materials to outside groups will threaten eligible voters’ legitimate voting rights or result in bad faith efforts to undermine public faith in election outcomes, put the burden on the group using the data to use it responsibly.

The idea of punishing individuals and groups for interfering with the right to vote or undermining elections is not a new one. Several states have rules on the books that punish anyone who knowingly challenges a person’s right to vote on fraudulent or spurious grounds—often levying criminal sanctions for such action. The innovation here is: (1) tying increased access to improved election data to sanctions for its misuse, and (2) broadening the sanction not just for interference with the right to vote, but also for harms like violating voter privacy and misrepresenting data to undermine the legitimacy of election outcomes.

Applying these ideas to a real-world case study, the 2014 Mississippi Republican primary runoff provides interesting fodder these suggestions.

D. Case Study: True the Vote v. Hosemann

In the lead up to the June 2014 Republican primary runoff election for Thad Cochran’s U.S. Senate seat in Mississippi, Tea Party challenger Chris McDaniel...
seemed poised to beat the six-term senator. On the heels of Eric Cantor’s historic loss to a virtually unknown Tea Party challenger in Virginia a few weeks before, Cochran had every reason to worry. In an effort to keep his seat, Senator Cochran adopted a controversial strategy—wooing Democratic voters to cast ballots on his behalf in the Republican primary. When the counting was complete, Senator Cochran had pulled out a win by over 6,700 votes, a lead many attributed to crossover Democratic voters. Infuriated by the tactic, McDaniel refused to concede, vowing to scour the rolls in search of illegal votes.

Mississippi law allows crossover voting, but does not allow voters to cast ballots in both party primaries. Ballots cast by voters in the Republican primary who had already cast ballots in the earlier Democratic primary would

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229 See Curtis Wilkie, *The Last Southern Gentleman*, POLITICO (June 24, 2014), http://www.politico.com/magazine/story/2014/06/the-last-gentleman-108228/Page2.html#U_9LTVYFII, archived at http://perma.cc/5YK5-64X8 (“So this year, Thad is left with a following that is loving and loyal, but he is confronted with an opposition that is passionate. His friends are not optimistic.”).


234 Mississippi law prohibits voters from casting ballots in primaries for candidates they did not intend to vote for in the general election. See MISS. CODE ANN. § 23-15-575 (West 2012) (“No person shall be eligible to participate in any primary election unless he intends to support the nominations made in the primary in which he participates.”). Several commentators opined that McDaniel would have a tough time disqualifying votes under the statute because he would have to find Democratic voters willing to go on record on McDaniel’s behalf stating that they violated Mississippi law. E.g., Rick Hasen, *What’s Next for McDaniel After Apparent Loss But No Concession in #MSSEN Race? The Courts?*, ELECTION LAW BLOG (June 24, 2014, 9:15 PM), http://electionlawblog.org/?p=62735, archived at http://perma.cc/6QE3-JANA. Another perhaps more viable avenue was to disqualify voters by proving they had cast ballots in the Democratic primary two weeks earlier. See Alexandra Jaffe, *The Defiant Mississippi Loser*, THE HILL (July 1, 2014, 6:20 PM), http://thehill.com/blogs/ballot-box/senate-races/211127-the-defiant-mississippi-loser, archived at http://perma.cc/XU5P-8PVN.
be disqualified. Under Mississippi’s structured oversight regime, McDaniel sent representatives to pore over election records throughout Mississippi to determine whether enough double votes had been cast to warrant filing a contest. Cochran likewise launched his own investigation to defend his lead.

Mississippi’s election code is vague with respect to who may access election materials and when. While Mississippi’s statute clearly confines inspection of cast ballots to candidates and their representatives, it makes no specific mention of access to other kinds of election materials. Mississippi’s public records statute, however, is quite broad, proclaiming that all public records are “public property” that any person should have the right to inspect.

This lack of clear statutory command created confusion when the Texas-based conservative voter integrity group True the Vote (TTV) sought access to election records in an effort to see for itself whether election irregularities had occurred. When TTV representatives sought access to election materials at county election clerks’ offices, they were met with mixed results. Some counties denied TTV access altogether. Others permitted access to certain information, but insisted that TTV pay for nonpublic voter information to be redacted, citing Mississippi open records laws protecting personal information of Mississippi citizens.

In its complaint before the U.S. District Court in the Southern District of Mississippi, TTV claimed its right to access poll books, voter registration applications, absentee voting envelopes, absentee ballot applications, voter rolls and other documents had been violated. TTV asserted that the National Voter Registration Act (NVRA) required access because it mandates that states make available for public inspection “all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.” TTV claimed that the NVRA thus required the state to grant TTV access to a range of election materials—not just voter registration materials—on the theory that those materials are all “records concerning the implementation of programs and activities conducted

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237 Miss. Code. Ann. § 25-61-5 (West 2013) (“[A]ll public records are hereby declared to be public property, and any person shall have the right to inspect, copy or mechanically reproduce or obtain a reproduction of any public record of a public body in accordance with reasonable written procedures. . . .”).
239 Miss. Code Ann. § 25-61-5(2) (West 2013) (“Public agency shall be entitled to charge a reasonable fee for the redaction of any exempted material, not to exceed the agency’s actual cost.”).
240 Complaint ¶ 16, True the Vote v. Hosemann, No. 3:14CV532HTW-LRA.
for the purpose of ensuring the accuracy and currency of official lists of eligible voters.\textsuperscript{242} The state pushed back, citing its own data privacy rules.\textsuperscript{243}

True the Vote did not emerge victorious on its claims.\textsuperscript{244} Setting aside the merits, as a policy matter, are we happier leaving oversight of Mississippi’s exceptional election to the candidates to duke it out? Should structured transparency run its course? Does it matter that one candidate, as a sitting U.S. senator, has a resource advantage over a relatively unknown third-party candidate? Or, should Mississippi’s statutes be rewritten to allow outside groups like TTV access too? For reasons stated in Part IV.A above, clinging to structured oversight is a losing proposition if the goal is to promote confidence in election outcomes. Restricting access to parties and candidates—especially when the race involved a third party and allegations of irregularities and tampering swarmed—severely undermines public confidence in the integrity of Cochran’s win and feeds conspiracy theories about the political motivations of election officials and judges. Restricting access to election materials leaves many Mississippi voters to doubt the legitimacy of their elected representative, and may dampen Mississippi voters’ future enthusiasm to participate in elections. Shutting outside groups out of the process provokes distrust; if ensuring the election’s legitimacy is Mississippi’s goal, the state should have made the full panoply of election records available to anyone and everyone interested in taking a look.

But the recommendation cannot end there. Mississippi election officials can take numerous steps to stave off the negative impacts of outcome transparency in the future. First, Mississippi should ensure that its outcome transparency rules anticipate access requests for different kinds of election records by a full range of actors. Regardless of whether the state decides to continue its structured access regime or if it decides to open its election records more broadly (or chooses different approaches for different kinds of records at different stages in the election process), Mississippi’s transparency statutes should include transparency rules for materials associated with new forms of voting and digitized election records, and they should make clear who can

\textsuperscript{242} Id.

\textsuperscript{243} Mississippi law provides that “[s]ocial security numbers, telephone numbers and date of birth and age information in statewide, district, county and municipal voter registration files . . . shall not be subject to inspection, examination, copying or reproduction. . . .” MISS. CODE ANN. § 23-15-165(6)(a) (West 2014). Mississippi’s Open Records Act requires parties inspecting records to bear the cost of redacting “exempted,” identifying information from voter rolls. See Miss. Code Ann. § 25-61-5(2) (West 2013) (“[P]ublic agency shall be entitled to charge a reasonable fee for the redaction of any exempted material, not to exceed the agency’s actual cost.”).

\textsuperscript{244} On August 29, 2014, Judge Nancy Atlas denied TTV’s motion for a temporary restraining order and preliminary injunction, rejecting the claim that the NVRA disclosure provisions encompass the range of materials TTV sought. True The Vote v. Hosemann, No. 3:14–CV–00532–NFA, 2014 WL 4273332, at *31 (S.D. Miss. Aug. 29, 2014). The Republican Party sought Rule 11 sanctions against TTV to reimburse its attorney’s fees, a request the court denied. As of this writing, the ruling has not been appealed.
access what and when. Second, and relatedly, is the urgency of establishing clear transparency rules before the fact, well before elections take place. Clear rules in effect well before election day would have gone far to instill public confidence that partisan motives did not taint access decisions.

Third, Mississippi should make improvements to its information architecture that make voting materials easy to access and easy to understand. On this front Mississippi has a lot of work to do. Others have already called attention to the poor state of Mississippi’s election data. Pew’s Election Performance Index, for example, rated Mississippi’s election data quality as the second lowest in the country. What if Mississippi election administrators had created a voter information system that indicated, in a centralized and publicly accessible online database, which voters had voted in which primaries? Anyone could sign on to see whether double voting took place or challenge voters’ eligibility to vote for other valid reasons. Mississippi’s online database might also contain a notice mechanism, whereby a voter whose registration or ballot (including mail-in or provisional ballot) is challenged would receive automatic notice and be afforded an opportunity to correct any errors through an easy-to-use website interface or in person at a clerk’s office. Mississippi might also consider baking into its voter records management system voter privacy protections by, for example, creating a mechanism that automatically redacts certain personal information before records are released.

Aside from making changes and improvements to its information architecture, the state could combat misuse by implementing a Rule 11(b)-like sanctions regime for misuse of election data. With increased access to election materials should come increased responsibility. Those who misuse state voter records by filing frivolous challenges, harassing voters, violating voter privacy, or otherwise misusing or misrepresenting election data to maliciously or fraudulently foment distrust in election outcomes should be fined. Proceeds from Mississippi’s election data misuse fee could go to the state to recoup costs to taxpayers the misguided claim engendered, to citizens whose votes were

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245 Mississippi Elections Performance Index, PEW CHARITABLE TRUSTS (Apr. 2014), http://www.pewtrusts.org/~/media/assets/2014/04/07/2012_election_performance_index_mississippi.pdf?la=en, archived at http://perma.cc/E4MN-C9YR (“In 2012, the state had the second-lowest data completeness rate, 72.1%, and was one of only 10 states in which the rate decreased compared with 2008. The lack of data prevented calculation of Mississippi’s performance in most areas in the index.”).

246 Presumably such a database might even have assisted election officials during the election by preventing individuals who had cast ballots in the Democratic primary from voting in the Republican primary two weeks later.

247 Mississippi does not currently impose sanctions for misuse of election data or fraudulent or spurious challenges to the eligibility of voters. Indeed, some provisions of Mississippi’s election code absolve challenges to voter eligibility. E.g., MISS. CODE. ANN. § 23-15-17 (West 2012) (“Any person who so notifies an authorized law enforcement officer [of a false registration] shall be presumed to be acting in good faith and shall be immune from any liability, civil or criminal, that might otherwise be incurred or imposed.”).
imperiled, to recoup costs associated with defending voters’ eligibility, or to state election offices to further improve election data usability and access.

A Mississippi election data misuse penalty would not come without cost. If we believe that individuals and outside groups should be encouraged to engage in oversight—particularly in a climate in which investigative journalism budgets are shot\(^\text{248}\)—and we are convinced that more, not less, oversight would improve the legitimacy of our elections, imposing fees for misuse might deter would-be overseers. Even the specter of the cost of defending against allegations of misuse might prevent well-intentioned overseers from engaging in important oversight work. Although these concerns are valid, the solution is not to scrap the idea altogether. Instead Mississippi could calibrate its data misuse penalties to ensure that they are high enough to do the job but low enough that they will not squelch oversight efforts. In addition, concerns about deterrence are minimized since penalties would only be imposed for misuse of data, not for access.

This recommended set of policies has numerous advantages for Mississippi and, of course, other states as well. First and foremost, a policy that allows full and open access to voting information enhances public confidence in Mississippi’s elections. As more and more voting takes place outside of polling places (mail-in voting was “brisk” in the Cochrane-McDaniel primary),\(^\text{249}\) increased transparency will serve to satisfy the public of the propriety of election processes. Voter integrity groups, journalists, and anyone else with the time and resources to examine voting materials for problems receives full access to comprehensible election records. Second, these reforms enhance oversight because they require election officials to make the data more easily comprehensible, usable, and available. Third, these policies would encourage users of Mississippi election data to act responsibly and refrain from levying hasty or poorly-researched accusations. Mississippi would achieve protection against the effects of loser distortion—only claims backed by credible evidence would move forward. And finally, these reforms would afford Mississippi voters a measure of comfort in knowing that their lawful voting status would not be frivolously challenged or their right of privacy abridged.

The above suggestions acknowledge the danger of too much transparency in the election context. But they also harness the promise of technology and increased interest in election oversight to heal wounded public confidence in election outcomes. Adapting election transparency to changed circumstances requires creative approaches that encourage broad oversight of elections and limits the harms of too much transparency.

\(^{248}\) See Lessig, supra note 195 (noting that “[l]ess than 10 percent of large daily newspapers in America have four investigative journalists or more” and that “40 percent have no investigative journalists at all.”).

VI. CONCLUSION

It is the responsibility of government to react to changed circumstances. Election transparency rules in this country are based on dated assumptions and significantly changed realities concerning how Americans vote, how modern information architecture operates, and how election oversight is conducted. Responding to these challenges, state election transparency statutes must set clear, predetermined rules for election oversight. When rules that govern elections are vague, outdated, or nonexistent the integrity of our election system is most in peril. Furthermore, states must recognize that efforts to limit access to election materials disserve transparency’s primary goal of legitimizing election outcomes. Policy makers must understand that they are not constrained to a light switch approach to transparency—either all on or all off. User interfaces both for voters and for overseers can be improved to prevent data errors and misuse, to better contextualize information, and to protect voter privacy. And finally, carefully calibrated deterrence measures can be implemented to ensure that the negative impacts of election transparency are minimized. In the end, taking the time to address transparency in elections and adapt policies to changed circumstances will improve not only the legitimacy of our elections but the quality of our democracy.