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Addressing Constitutional Concerns and Strengthening Nebraska's Election Administration: A Roadmap to Substantive Reform

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Addressing Constitutional Concerns and Strengthening Nebraska’s Election Administration: A Roadmap to Substantive Reform

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I. INTRODUCTION

It is no secret that the nation’s election system is imperfect, and Nebraska’s election system is no exception. Indeed, the issues that plague elections nationwide are the same source of problems in Nebraska. Troublesome election issues in this state include: decentralized election administration; a lack of uniform election standards; arbitrary voter registration deadlines; and the appointment of high-level, partisan, political operatives to administer elections.¹ Combined, these factors create a system of ad hoc decision-making that, at best, leads to the unequal treatment of voters from one county to the next, and, at worst, could lead to partisan manipulation of elections.

The solutions to these problems are surprisingly straightforward. However, the political barriers are exceptional. In Nebraska, like many states, election administration is highly decentralized, with a different election official administering the elections for each of the

1. HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* 4–5 (2009). This section provides an overview of election problems in the United States; many of these problems are also prevalent in Nebraska.

state's ninety-three counties.² While the Nebraska secretary of state also serves as chief election officer, has the power to make uniform interpretations of election law, and has a responsibility to train election administrators, the secretary of state rarely does so.³ Surprisingly, Nebraska's secretary of state is one of the few state election officers in our region who does not provide uniform election administration standards or poll worker standards and guidelines.⁴ This decentralized system of conducting elections leads to varying degrees of administrative competency and fosters non-uniform election practices from county to county. Non-uniform election practices in turn lead to unequal treatment of voters and trigger equal protection implications.⁵

This Comment will explore the statutory structure of Nebraska's election system and point out areas of concern. First, it will examine the decentralized nature of the Nebraska election system and how this leads to a lack of uniformity and unequal treatment of voters. Second, this Comment will discuss the effect of arbitrary registration deadlines on voter turnout, particularly among traditionally disenfranchised populations. Third, it will explore the partisan nature of the Nebraska election system and the subsequent negative effects of partisan election administration. Finally, this Comment will discuss the various solutions and ways in which reform may take place.

This Comment is a call and roadmap for substantive election reform in Nebraska. All too often, substantive reform within democracies is reactive rather than proactive. What is at stake? Elections are the primary vehicle by which citizens in a democratic society voice their will. The success or failure of the election system directly reflects upon the democratic system as a whole. Reliable, fair, and accessible elections are critical to a form of government that relies upon legitimacy through democratic governance.

A. Nebraska Election System Overview: Areas of Concern

In order to understand the need for reform it is important to provide an overview of how elections are administered in Nebraska. Pursuant to state statute, counties with a population of 100,000 or more shall have an election commissioner appointed by the Governor.⁶ For counties with a population of less than 100,000, the county clerk shall

2. NEB. REV. STAT. §§ 32-207, -218 (Reissue 2008).

3. *Id.* §§ 32-202, -203. The secretary of state has the discretion to promulgate rules and regulations but is only *required* to do so for special elections by mail. *Id.* §§ 32-202(12), -952, -959.

4. *See infra* notes 49–56 and accompanying text.

5. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000); *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011).

6. NEB. REV. STAT. § 32-207.

act as chief election officer of the county, unless the county board decides to create the office of election commissioner and appoint one.⁷ However, only counties with a population of more than 20,000 may create the office of election commissioner.⁸

There are seven appointed election commissioners in Nebraska.⁹ Three counties (Douglas, Lancaster, and Sarpy) have a population greater than 100,000, and thus have a governor-appointed election commissioner. In addition, four county boards (Buffalo, Cass, Hall, and Platte) made the decision to appoint an election commissioner.¹⁰ As of 2011, eighty-six elected county clerks serve as chief election administrator in their respective counties. However, these county clerks only administer the elections of a little under half of all registered Nebraska voters,¹¹ while partisanly-appointed election commissioners in Douglas, Sarpy, and Lancaster Counties administer the elections of the remainder of Nebraska's registered voters.¹² With little oversight and a lack of comprehensive uniform standards, this decentralized election system leads to differing election practices, which can result in unequal treatment of voters and ballots.¹³ Differing treatment of ballots, particularly provisional ballots, is a violation of the Equal Protection Clause of the United States Constitution.¹⁴

In addition to their duties as chief election administrators, county clerks also record all actions of the county board, maintain county records, and may perform the duties of a court reporter, depending on the size of the county.¹⁵ Since election administration is only one of many tasks delegated to county clerks, elections may fall by the wayside.¹⁶ Perhaps most worrisome is many county clerks assume elec-

7. *Id.* §§ 32-211, -218.

8. *Id.* § 32-211.

9. John A. Gale, *Election Officials Contact Information*, NEB. SECRETARY STATE, <http://www.sos.ne.gov/elec/clerks.html> (last visited May 3, 2011).

10. *Id.*

11. See John A. Gale, *General Canvass Book*, NEB. SECRETARY STATE, 4-5 (2008), <http://www.sos.ne.gov/elec/pdf/2008%20General%20Canvass%20Book.pdf>. The total number of registered voters in Douglas, Sarpy, and Lancaster Counties in 2008 was 585,909. *Id.* Divided by the number of registered voters statewide (1,157,345), we see that 50.6 percent of voters reside in one of these three counties. *Id.*

12. *Id.*

13. See *Gore v. Bush*, 531 U.S. 98, 103 (2000) (finding "standardless" recount procedures violate the Constitution's Equal Protection Clause); *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 242 (6th Cir. 2011) (holding the non-uniform treatment of provisional ballots within the same county violates the Equal Protection Clause).

14. *Hunter*, 635 F.3d at 242.

15. NEB. REV. STAT. §§ 23-1301, -1302 (Reissue 2008).

16. ERIC A. FISCHER & KEVIN J. COLEMAN, CONG. RESEARCH SERV., ELECTION REFORM AND LOCAL ELECTION OFFICIALS: RESULTS OF TWO NATIONAL SURVEYS 6 (2008), available at <http://www.fas.org/sfp/crs/misc/RL34363.pdf> (noting that most local

tion administration responsibilities with little or no experience in elections. As will be discussed at length in Part II, this is why the lack of uniform election standards and formal training requirements for election administrators are a critical oversight by the Nebraska secretary of state's office.

Counties with populations greater than 100,000 have full-time election commissioners dedicated solely to election administration and have their own uniform election standards and guidelines.¹⁷ These offices have larger, full-time professional staffs dedicated to elections, unlike less populous counties.¹⁸ Governor-appointed election commissioners have the ability to focus on elections, allowing for the creation of uniform election standards and greater knowledge of election laws and processes. In addition, these administrators have broad discretion to promulgate rules so long as they do not interfere with the Election Act¹⁹ or the secretary of state's regulations.²⁰ However, these election standards and guidelines are created by individual election commissioners, and only ensure uniform treatment of voters within their respective counties, not statewide.

Surprisingly, there is little official collaboration between the full-time election administrators and the part-time county clerk election administrators.²¹ This lack of collaboration creates a system of haves and have-nots. Nebraska statute requires that gubernatorially-appointed election commissioners have a chief deputy of the opposite party.²² The deputy election commissioner is hired by the election commissioner and has little statutory authority.²³ The result is a superficial layer of checks and balances on often highly partisan election commissioner appointees, many of whom are recent senior political campaign operatives.²⁴

election officials have less than twenty hours of training and are often expected to do more than simply administer elections).

17. NEB. REV. STAT. § 32-207 (stating that an office of election commissioner should be created in counties over 100,000); *id.* § 32-209 (a deputy election commissioner of an opposing political party must also be appointed). Given the larger size of the counties, administrative realities require that larger counties also have additional support staff, based on the author's experience with NCR.

18. *Id.* § 32-207.

19. *Id.* §§ 32-101–1551.

20. *See id.* § 32-215(1).

21. Through six years of personal conversations between the author and election administrators, both appointed full-time election administrators and part-time administrators admit there is little to no official collaboration facilitated by the secretary of state's office.

22. NEB. REV. STAT. §§ 32-209(1), -210.

23. *Id.* § 32-209(4).

24. *See infra* Part V.

Nebraska is one of thirty-nine states that require the secretary of state to also serve as chief election officer.²⁵ However, this is but one of the secretary of state's many duties, so the deputy secretary of state for elections oversees day-to-day state election administration. The secretary of state's duties under the Nebraska Election Act include overseeing elections, providing training for election administrators, making uniform interpretations of the Election Act, and creating election standards mandated by statute.²⁶ In addition to the above duties, the secretary of state has the power to inspect the practices of election officials, adopt and promulgate rules and regulations as to the conduct of elections, and enforce the Election Act by injunctive action.²⁷ The secretary of state has broad powers regarding the administration of elections and corresponding broad discretion in determining whether to exercise such powers.

Finally, the secretary of state has the ability to interpret disputed points of election law, which "have the force of law until changed by the courts."²⁸ In short, the secretary of state retains broad discretion to interpret the Election Act, enforce the Act, and to issue uniform rules and guidelines on how the Act is carried out. Such discretion is not meaningless, as interference or refusal to comply with the secretary of state is punishable by a Class III misdemeanor, which carries a maximum fine of up to \$500 and/or up to three months incarceration.²⁹ This power to enforce the Election Act could be an effective tool to provide and enforce uniform treatment of voters in Nebraska's elections and avoid equal protection claims.

Violations of the Election Act are prosecuted by either county attorneys or the attorney general's office.³⁰ County attorneys investigate and prosecute all complaints of violations of the Act, with the exception of laws pertaining to the initiative process.³¹ However, the decentralized means of enforcing the Act complicates identifying violations and providing policy solutions.

The Nebraska Election Act provides the framework for the uniform administration of the state's elections. However, the secretary of state's broad discretion in determining whether to exercise power to promulgate uniform election standards, and his subsequent failure to do so, creates ad hoc decision-making among local election administrators. This lack of guidance from the secretary of state in turn provides local election officials with broad discretion in the administration of

25. COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 241 (2010).

26. NEB. REV. STAT. § 32-202.

27. *Id.* § 32-203.

28. *Id.* § 32-201.

29. *Id.* § 32-1501.

30. *Id.* § 32-1548.

31. *Id.*

elections. Such lack of uniformity in election practices can result in unequal treatment of voters and has equal protection implications.³² The potential downfalls of this discretion are further exacerbated when the election offices of Nebraska's largest counties are run by partisan political appointees. Allowing these political operatives to administer the elections of over half of Nebraska's registered voters not only presents the appearance of impropriety but also opens the door to actual impropriety.³³

II. LACK OF UNIFORM STANDARDS

The lack of uniform election standards and guidelines at the county, state, and national levels is a problem that plagues Nebraska and the entire country.³⁴ The problem in Nebraska is particularly acute because the state lacks a uniform election guide and standard practices beyond the Election Act.³⁵ Uniform election standards are critical to the successful administration of a decentralized election system because they provide consistency and help to ensure the equal treatment of voters from one county to the next.³⁶ Statewide election standards and practices can also translate into easy-to-use guides for poll workers and election administrators. These election guides aid in providing consistent treatment of voters, unlike simply giving a poll worker or election administrator 150 pages of Election Act text. The Act leaves much to be desired in specificity and is often ambiguous. One such example is recount procedures.³⁷

A. The Problem

Currently, the lack of uniform standards and guides requires ninety-three different Nebraska county election administrators to promulgate their own rules and regulations based on their personal inter-

32. See *infra* section II.A.

33. See Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1208–09 (2005); *infra* section II.B.

34. GERKEN, *supra* note 1, at 4.

35. See NEB. REV. STAT. § 32-202(12). The secretary of state is only required to provide uniform guidelines for mail elections under section 32-202(12), though he retains the power to promulgate additional rules under section 32-202(4). Regionally, Nebraska is an anomaly in this regard. See *infra* notes 49–56. A national study on this distinction is underway and is due to be released in the summer of 2012.

36. GERKEN, *supra* note 1, at 23; Paul S. Herrnson, *Improving Election Technology and Administration: Toward a Larger Federal Role in Elections?*, 13 STAN. L. & POL'Y REV. 147, 151–52 (2002).

37. See *infra* subsection II.A.1.

pretations of the Election Act.³⁸ Given their varying experience in elections, and no state-level approval process, the accuracy of these interpretations is suspect, at best. Varying election practices from county to county result in the potential unequal treatment of voters and has equal protection implications.³⁹ In order to ensure fair and consistent elections, uniform standards and guides for poll workers and election administrators are critical.

There are three specific dangers in the lack of uniform standards and guidelines for poll workers. First, if a poll worker is unsure of what to do in a particular situation on Election Day, the poll worker will likely make an ad hoc decision or call the election office. These ad hoc determinations encompass decisions to let someone vote provisionally, regularly, or to send a voter to another precinct. All of these decisions have equal protection implications if voters are treated differently from one precinct to the next, or inter-jurisdictionally.⁴⁰ Calling the central election office is complicated by the fact that the office is incredibly busy on Election Day and numerous phone calls from polling locations are not preferred.

The second danger is that a county election administrator has a uniform guide, but there is no oversight or assurance that it is a correct interpretation of the Election Act. Uniform election standards and guidelines would help ensure equal treatment of voters and ballots across the state. These guides are designed to be easily understood and mirror election standards promulgated by the secretary of state,⁴¹ whereas reading the plain language of the Act is not an easy task for the average poll worker or election administrator, particularly when trying to solve a problem on Election Day. At the poll worker level, uniform guides are particularly critical in the issuance of provisional ballots. A common error that often results in a voter's ballot not being counted occurs when a poll worker incorrectly informs an individual that she must cast a provisional ballot, before determining if the voter is simply in the wrong jurisdiction.⁴² As clearly stated in

38. NEB. REV. STAT. § 32-215.

39. See *Bush v. Gore*, 531 U.S. 98, 108–09 (2000); *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 242 (6th Cir. 2011) (holding since “individual counties have already adopted their own standards and applied differential treatment to provisional ballots,” the Equal Protection Clause is violated).

40. See *Gore*, 531 U.S. at 103; *Hunter*, 635 F.3d at 240; *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008).

41. See, e.g., Kris W. Kobach, *Election Standards*, KAN. SECRETARY STATE, http://www.kssos.org/elections/elections_reform_standards.html (last visited May 3, 2011); Mark Ritchie, *Election Guides*, OFFICE MINN. SECRETARY STATE, <http://www.sos.state.mn.us/index.aspx?page=230> (last visited May 3, 2011).

42. This is based on the author's experience as an Election Judge in the 2010 General Election for Lancaster County and through conversations with election officials across the state.

*Bush v. Gore*⁴³ and its Sixth Circuit progeny, uniform application of provisional ballot requirements at the polling place, and recount provisions on the administrative level, have critical constitutional equal protection implications.⁴⁴ As will be discussed, this was the problem in one Nebraska county.⁴⁵

As noted, the secretary of state has the power to promulgate rules pertaining to the conduct of elections.⁴⁶ Currently, the secretary of state's office has only issued rules it is statutorily required to create.⁴⁷ These rules only address the conduct of all-mail elections.⁴⁸ In comparison to surrounding states Nebraska's lack of uniform election procedures, whether at the polling location or in the central election office, is an anomaly. South Dakota,⁴⁹ Iowa,⁵⁰ Minnesota,⁵¹ Kansas,⁵² Montana,⁵³ Oklahoma,⁵⁴ Wisconsin,⁵⁵ and Colorado⁵⁶ all have uniform election standards and guides.

The need for uniform election standards was highlighted during the 2000 presidential election and subsequent Supreme Court rulings in *Gore* and *Hunter v. Hamilton County Board of Elections*.⁵⁷ In *Gore*,

43. *Gore*, 531 U.S. at 107–08.

44. See cases cited *supra* note 40; see also Edmund S. Sauer, Note, "Arbitrary and Disparate" Obstacles to Democracy: The Equal Protection Implications of *Bush v. Gore* on Election Administration, 19 J.L. & POL. 299, 301 (2003) (arguing that the equal protection holding in *Gore*—that states adopt uniform standards for the manual recount of ballots in presidential elections—can also be applied to local election issues). But see Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 9–10 (2007) (discussing how lower courts applied equal protection principles to election administration outside of the *Bush v. Gore* context, but the Sixth and Ninth Circuits have not). Note Hasen's article came out before the Sixth Circuit's decision in *Hunter*.

45. See *infra* subsection II.A.2.

46. NEB. REV. STAT. § 32-203(3) (Reissue 2008).

47. *E.g.*, *id.* § 32-203(12).

48. *Id.* § 32-952.

49. Jason M. Grant, *Election Information*, S.D. SECRETARY STATE, <http://www.sdsos.gov/content/viewcontent.aspx?cat=elections&pg=/elections/localelectionofficials.shtm> (last visited Sept. 24, 2011).

50. IOWA CODE ANN. § 49.126 (West 1999).

51. See Ritchie, *supra* note 41.

52. See Kobach, *supra* note 41.

53. See Linda McCulloch, *Montana Election Judge Handbook 2010*, MONT. SECRETARY STATE, http://sos.mt.gov/Elections/Officials/Forms/Election_Judge_Forms/2010_Election_Judge_Handbook.pdf (last updated Feb. 2010).

54. See V. Glenn Coffee, *Administrative Rules: Online Code and Register*, OKLA. SECRETARY STATE, <https://www.sos.ok.gov/oar/online/viewCode.aspx> (last visited May 31, 2011).

55. See *Election Day Manual*, STATE WIS. GOV'T ACCOUNTABILITY BOARD., http://gab.wi.gov/sites/default/files/publication/65/election_day_manual_rev_6_10_pdf_81306.pdf (last updated Oct. 2011).

56. See COLO. CODE REGS. § 1505-1 (2011).

57. *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011); see *Bush v. Gore*, 531 U.S. 98 (2000).

the Court found Florida's lack of standards for determining when a ballot is classified as an "undervote" violated the Equal Protection Clause.⁵⁸ Specifically, the Court found that the lack of "specific standards" did not satisfy the "minimum requirement for non-arbitrary treatment of voters necessary" under the Equal Protection Clause.⁵⁹ While this case was decided in the context of determining the intent of the voter whose ballot had a hanging chad, such disparate treatment of voters can also occur when recount and provisional ballot processes lack uniformity.⁶⁰

The Supreme Court specifically limited its findings in *Gore* to the specific facts of the case.⁶¹ Much to the disappointment of election reform advocates, ten years after the Court's decision, circuit courts have yet to embrace *Gore*'s equal protection holding in the context of election administration.⁶² Both reformers and academics hoped the decision in *Gore* would fix inequalities in a "hyper-decentralized" election administration system.⁶³ But only the Sixth Circuit has ruled in support of reform advocates' efforts to make elections uniform and more accurate. Indeed, the Sixth Circuit's recent decisions in *League of Women Voters of Ohio v. Brunner*⁶⁴ and *Hunter* could very well breathe the new life into *Gore*'s equal protection holding.

In *Brunner*, the plaintiffs claimed "Ohio utilizes non-uniform rules, standards, and procedures that result in massive disenfranchisement and unreasonable dilution of the vote."⁶⁵ The Sixth Circuit heard the case based on an interlocutory sovereign immunity appeal,⁶⁶ after the court determined that, if true, allegations of non-uniform election procedures, long lines, inadequate poll worker training, and provisional ballot discrepancies "could establish that Ohio's voting system deprives its citizens of the right to vote or severely burdens the exercise of that right."⁶⁷ The court remanded the case, allowing the plaintiffs' equal protection claim to proceed.⁶⁸ On June 16, 2009, the parties set-

58. *Gore*, 531 U.S. at 107–08. Specifically, the Court found that the lack of specific standards fails to "satisfy the minimum requirement for nonarbitrary treatment of voters necessary" under the Equal Protection Clause. *Id.* at 105.

59. *Id.*

60. See discussion and cases cited *infra* subsection II.A.2.

61. *Gore*, 531 U.S. at 109.

62. See Hasen, *supra* note 44, at 3.

63. *Id.* at 2 (citing Alec C. Ewald, American Voting: The Local Character of Suffrage in the United States 2 (Feb. 2005) (unpublished Ph.D. dissertation, Univ. of Mass., Amherst)).

64. 548 F.3d 463 (6th Cir. 2008).

65. *Id.* at 478 (internal quotation marks omitted).

66. *Id.* at 473.

67. *Id.* at 478.

68. *Id.* at 479.

tled their claims, and an order enforcing the settlement agreement was entered.⁶⁹

The settlement was a clear victory for election reformers in that, among other provisions, it required the secretary of state to develop and implement uniform training materials and standards.⁷⁰ This was particularly important to address the serious problems encountered in the processing of provisional ballots in Ohio's 2004 general election.⁷¹

Likewise, *Hunter* involved the unequal treatment of provisional ballots stemming from poll worker errors in a November 2010 election for juvenile court judge.⁷² Some voters were given (and cast) a ballot for the wrong precinct, but the twenty-seven ballots in question were counted regardless.⁷³ Another 269 ballots were cast at the correct polling location but for the wrong precinct and were rejected by the election board.⁷⁴ The Sixth Circuit recognized the "evidence suggests that, despite the contrary instruction of Ohio law, individual counties have already adopted their own standards and applied differential treatment to provisional ballots."⁷⁵ The court held, "In sum, the Board . . . chose to consider evidence of poll-worker error for some ballots, but not others, thereby treating voters' ballots arbitrarily, in violation of the Equal Protection Clause."⁷⁶ The Sixth Circuit denied a petition for rehearing on April 8, 2011, and the Supreme Court denied the application to stay the Sixth Circuit's equal protection ruling and order to recount several hundred provisional ballots.⁷⁷ The case will go back to the federal trial court for further proceedings, including fact-finding in regard to poll worker error.⁷⁸

Uniform standards and guidelines would have prevented, or at the very least, mitigated the unequal treatment of ballots in *Hunter* and *Brunner*. The settlement in *Brunner* required the promulgation and use of such uniform guidelines to prevent the improper processing of provisional ballots the state experienced in 2004.⁷⁹ The implementation and enforcement of uniform election practices and standards

69. See Order Enforcing Settlement Agreement, No. 3:05-CV-7309 (N.D. Ohio June 19, 2009) (Election Law @ Moritz), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/LWVBlackwell-Order-6-19-09.pdf>.

70. *Id.*

71. *Brunner*, 548 F.3d at 466.

72. *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 222 (6th Cir. 2011).

73. *Id.* at 224.

74. *Id.* at 237–38.

75. *Id.* at 242.

76. *Id.* at 243.

77. *Hamilton Cnty. Bd. of Elections v. Hunter*, 131 S. Ct. 2149 (2010) (order denying motion to stay mandate).

78. *Hunter*, 635 F.3d at 247.

79. Order Enforcing Settlement Agreement, No. 3:05-CV-7309 (N.D. Ohio June 19, 2009) (Election Law @ Moritz), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/LWVBlackwell-Order-6-19-09.pdf>.

would likely have prevented unequal treatment of voters in *Gore*, *Hunter*, and *Brunner*.

While uniform election standards and practices have not been developed in Nebraska, many other states have done so.⁸⁰ The need for uniform election procedures and guidelines may not seem pressing at first glance. But standing in the shoes of a newly-elected county clerk, realizing the only resources available are one training session a year, a copy of the Nebraska Election Act, form documents, and a poll worker training video, the need suddenly becomes clear. County clerks inherit their election duties with varying backgrounds in elections and often outdated or incomplete resources from their predecessors. While the secretary of state does provide a secure online portal for Nebraska election administrators, the site does not contain an election guide or standard practices, merely form documents.⁸¹

The lack of uniform election practices leads to ad hoc decision-making among election administrators, as demonstrated in *Gore*, *Brunner* and *Hunter*.⁸² Perhaps even more troubling is the varying levels of resources available to front-line election workers. Nebraska's three largest counties, Sarpy, Douglas, and Lancaster, all have regularly updated, detailed election guides for their poll workers. These guides provide polling place procedures, *do's* and *don'ts*, answers to common registration questions, ballot handling procedures, and most importantly, provisional ballot procedures.⁸³ But while such guides help ensure equal treatment of ballots in individual counties, they do not provide statewide uniformity.

Uniform election standards and guides help ensure uniform treatment of voters on a statewide level, and eschew violating a voter's right to equal protection under the law, as recognized in *Gore*, *Brunner*, and *Hunter*. Such guides and standards also serve as excellent tools for election administrators themselves, in helping them make consistent election decisions in areas where the Election Act grants them a degree of discretion.⁸⁴ Nebraska's largest counties have full-time election commissioners and several other full-time election staff members. However, smaller counties do not have the resources to employ full-time election staff, and are often unable to create and maintain comprehensive election standards and guides. But even the standards and guides that already exist in Douglas, Lancaster, and

80. See *supra* notes 49–56.

81. *Hearing on LB 434, LB 324, LB 325, and LB 544 Before the Comm. on Gov't, Military & Veterans Affairs*, 101st Leg., 1st Sess. 40 (Neb. 2009).

82. See *Bush v. Gore*, 531 U.S. 98 (2000); *Hunter*, 635 F.3d at 240; *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008).

83. See, e.g., David J. Shively, Lancaster Cnty. Election Bd. Official Manual (Feb. 2008) (on file with the author).

84. See NEB. REV. STAT. § 32-215 (Reissue 2008).

Sarpy Counties only ensure uniform standards within those particular counties and not inter-jurisdictionally.

1. *Case in Point: The Disparate Treatment of Ballots in Nebraska*

An unsure or misinformed poll worker may provide a voter with a provisional ballot when he should have directed the voter to her correct precinct. But a mistaken county clerk or election commissioner can have a much greater effect on a higher number of voters. An incident in Platte County, discussed below, highlights the critical need for election administrator standards and guidelines.

On Election Day, November 2, 2010, Platte County Election Commissioner Diane Olmer had a problem—455 problems, to be precise. That was the number of ballots that turned out to be printed incorrectly and were thus defective.⁸⁵ The defective ballots included a congressional race, a state legislative race, and several down-ballot candidates. The print markers on the ballot were seriously misaligned and an electronic ballot scanner would not accept or count the votes.⁸⁶ Luckily, the Election Act has a specific provision for this situation:

If any ballot is damaged or defective so that it cannot properly be counted by the vote counting device, *the resolution board shall make a true duplicate copy and substitute the copy for the damaged or defective ballot.* All duplicate ballots shall be clearly labeled duplicate, and all damaged or defective ballots shall be clearly labeled damaged or defective. Each pair of duplicate and damaged or defective ballots shall bear a similar serial number or some form of identification so that both the damaged or defective and duplicate ballots can be matched to facilitate recounts or any inspection of the ballots. The resolution board shall maintain the secrecy of the damaged or defective ballots as much as possible and shall cause the damaged or defective ballots to be made up in a sealed packet. The resolution board shall endorse the packet with the words Damaged or Defective Ballots and the designation of the precinct. The resolution board shall sign the endorsement label and place the sealed packet in the ballots-cast container with the voted ballots as provided in section 32-1017.⁸⁷

However, Olmer did not convene a resolution board or create a true and duplicate copy of all 455 ballots.⁸⁸ She decided to hand-count the defective ballots instead, which is allowed when scanning the ballots becomes “impracticable.”⁸⁹ In testimony before the government, mili-

85. Eric Freeman, *Printing Error Puts 455 Ballots in Limbo*, COLUMBUS TELEGRAM, Nov. 3, 2010, http://columbustelegram.com/news/local/govt-and-politics/elections/article_e4fa3ca0-e720-11df-94d8-001cc4c002e0.html.

86. *Id.*

87. NEB. REV. STAT. § 32-1016 (emphasis added).

88. Eric Freeman, *Helping Hands: Count Is on for 455 Scanner-Rejected Ballots*, COLUMBUS TELEGRAM, Nov. 4, 2010, http://columbustelegram.com/news/local/article_864405c0-e823-11df-b7f7-001cc4c03286.html.

89. NEB. REV. STAT. § 32-1012.

tary, and veterans affairs committee on legislation that would allow hand recounts at the candidate's expense, Olmer stated that the secretary of state gave her two options on November 2, 2010: (1) have the ballots reprinted and filled out according to section 32-1016; or (2) conduct a hand recount.⁹⁰ For many years, Secretary of State John Gale has testified along with Olmer in opposition to legislation that would allow manual recounts, since manual recounts are incredibly inaccurate (compared to scanners) and subject to human error.⁹¹

The use of a manual recount in Platte County subjected 455 ballots to a method of tabulation that both the secretary of state and the Platte County election commissioner have repeatedly testified to as highly inaccurate.⁹² This unequal treatment of ballots in Platte County is similar to the unequal treatment of votes cast using punch card machines in Ohio during the 2002 election,⁹³ and in California's special election in 2003.⁹⁴ In *Stewart v. Blackwell*,⁹⁵ a three-judge panel of the Sixth Circuit Court of Appeals held that when a "lesser chance that a vote cast on a punch card machine will be accurately counted, the Equal Protection Clause is violated."⁹⁶ Because Ohio abandoned the use of the punch card system before the decision by the three-judge panel, the Sixth Circuit sitting en banc vacated the decision.⁹⁷

Similarly, in *Southwest Voter Registration Education Project v. Shelley*, a three-judge panel of the Ninth Circuit Court of Appeals, citing *Gore*, found the use of punch card machines by some counties, when other counties use more accurate methods of vote counting, violates the Equal Protection Clause.⁹⁸ The three-judge panel found the use of punch card voting in the California recall election failed to meet even rational basis scrutiny, and it granted an injunction less than a month before the election.⁹⁹ However, the Ninth Circuit, sitting en banc, reversed on public policy grounds and found the district court did not abuse its discretion in concluding public interest weighed in

90. *Hearing on LB 117, LB 161, LB 97, and LB 168 Before the Comm. On Gov't, Military & Veterans Affairs*, 102nd Leg., 1st Sess. 64–66 (Neb. 2011) (statement of Diane Olmer, Platte County Election Comm'r).

91. *Id.* at 49 (statement of John Gale, Nebraska Secretary of State).

92. *Id.*

93. See *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007). *Stewart* was vacated after the State of Ohio stopped using punch card voting machines in 2006. *Stewart*, 473 F.3d at 693.

94. See *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003), *rev'd en banc*, 344 F.3d 914 (9th Cir. 2003).

95. 444 F.3d 843.

96. Hasen, *supra* note 44, at 13 (citing *Stewart*, 444 F.3d at 874–76).

97. *Stewart*, 473 F.3d at 693.

98. *Shelley*, 344 F.3d at 894–95.

99. *Id.*

favor of holding a constitutionally-mandated election.¹⁰⁰ The court stated the plaintiffs had a legitimate equal protection concern, but the State's interest in holding the election outweighed it.¹⁰¹

The unequal treatment of ballots in Platte County is similar to *Shelley* and *Blackwell* in that a less accurate form of tabulating votes was used for some ballots and not for others. Equal treatment of ballots in Platte County could have been achieved by creating a copy of each ballot and scanning it in, as provided by state statute. If consistent election standards were promulgated by the Nebraska secretary of state and Nebraska legislature, equal treatment of the ballots would have had the force of law under the Election Act.¹⁰²

To put this in better context, consider the 2008 presidential election in Nebraska's 2nd Congressional District. The 2nd Congressional District encompasses both Sarpy and Douglas Counties.¹⁰³ President Obama won the district by a narrow margin of 3,325 votes.¹⁰⁴ In Platte County, 455 ballots constituted five percent of a total 9,011 ballots cast in the 2010 general election.¹⁰⁵ In 2008, five percent of the 274,374 total ballots cast in the 2nd Congressional District equaled 13,719 ballots¹⁰⁶—more than enough ballots to change the outcome of the electoral vote in Nebraska's split electoral college system.

Now suppose that what happened in Platte County were to happen in the 2nd Congressional District during the 2008 election. Five percent of the 274,374 ballots cast (13,719) were defectively printed and thus would not scan. No standard procedure exists to remedy the problem, and the state's chief election officer has explicitly allowed two different methods for dealing with defective ballots: manual recount, a method that the secretary of state has repeatedly testified against; or according to statute, by creating copies of the ballots and rescanning them.

Keeping in mind that the 2nd Congressional District encompasses both Douglas and Sarpy Counties, the potential for differing treatment of ballots in this scenario is real. If the Sarpy County election

100. *Id.* at 919–20.

101. *Id.* at 919.

102. NEB. REV. STAT. § 32-203 (Reissue 2008) (stating the secretary of state may adopt and promulgate rules in regard to the conduct of elections and may enforce the act by injunctive action through the attorney general); *id.* § 32-1501 (stating that failure to “comply with the requirements of and cooperate with the” secretary of state under NEB. REV. STAT. § 32-203 is a class III misdemeanor).

103. *Congressional District 2*, NEB. LEGISLATURE (May 23, 2011), http://nebraskalegislature.gov/maps/2011/congress/congress_dist2.pdf.

104. Gale, *supra* note 11, at 10.

105. John A. Gale, *2010 General Election Official Results*, <http://www.sos.ne.gov/elec/pdf/2010%20Gen%20Canvass%20Book%2011-30-Final.pdf> (last visited Jan. 6, 2012).

106. Neb. Secretary of State, *Official Results of Nebraska General Election*, 15 (Nov. 4, 2008), <http://www.sos.ne.gov/elec/pdf/2008%20General%20Canvass%20Book.pdf>.

commissioner were to decide to hand-count the defective ballots (a method noted as unreliable and error prone by Secretary of State John Gale),¹⁰⁷ and the Douglas County election commissioner were to follow section 32-1016 and re-mark and scan the ballots, then a situation very similar to *Shelley* and *Blackwell* could easily result: the use of a less reliable voting system in one county, and use of a more reliable voting system in another county.¹⁰⁸

The incident in Platte County could have been easily avoided with basic uniform election standards promulgated by the secretary of state's office, such as checking ballots to ensure the print markers are aligned correctly before an election, a standard practice in some Nebraska counties.¹⁰⁹ Alternatively, uniform procedures governing what to do when a high number of defective ballots are discovered *after* being cast during an election would ensure that ballots are treated in a non-arbitrary manner and provided equal protection.¹¹⁰ While testifying in opposition to Legislative Bill (LB) 161 (a manual recount bill) before the committee on government, military, and veterans affairs in 2011, Secretary of State Gale stated his office eliminated hand counting in forty-eight counties because it was inaccurate and "absolutely constitutionally challengeable, because there was not equal protection; they were counted in two different ways."¹¹¹ Despite his own claim that such a method of counting ballots is unconstitutional, the secretary of state refuses to promulgate uniform election standards and continues to allow county election administrators to recount ballots in two different ways when ballots are either damaged or defective.¹¹²

B. Obstacles to Reform

It is important to note that opposition to uniform election guidelines is largely led by highly experienced and engaged election officials who have many years of experience in election administration.¹¹³ The

107. See *Hearing on LB 117, LB 161, LB 97, and LB 168, supra* note 90, at 49 (statement of John Gale, Nebraska Secretary of State) ("Machine-counting has an accuracy of one-third of one-tenth of 1 percent in terms of the ballot counting. Hand-counting has an error rate that—according to studies, anywhere from 1 percent to 4 percent—a considerable discrepancy and counted in different ways.")

108. See, e.g., *Stewart v. Blackwell*, 444 F.3d 843, 846 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007).

109. Several election administrators reported to the author that it is standard to always check the ballots to make sure they are aligned correctly before the election.

110. See *Bush v. Gore*, 531 U.S. 98, 105–06 (2000).

111. *Hearing on LB 117, LB 161, LB 97, and LB 168, supra* note 90, at 49 (statement of John A. Gale, Nebraska Secretary of State).

112. See *id.* at 78–79 (statement of Neal Erickson, Deputy Secretary of State for Elections); *Hearing on LB 434, LB 324, LB 325, and LB 544, supra* note 81, at 38–39 (statement of Neal Erickson, Deputy Secretary of State for Elections).

113. See *Hearing on LB 434, LB 324, LB 325, and LB 544, supra* note 81.

election administrators who testify in opposition to election reform measures are almost exclusively appointed election commissioners with full-time staff and their own uniform election standards and guides in place.¹¹⁴ Thus, they are least likely to benefit from such legislation and also the least likely to appreciate uniform practices when they have already promulgated their own. Nor do they want to be told how to run elections when they are used to doing things their way.

There are several other reasons why full-time election commissioners happen to be the primary opposition to election reform. First, the appointed election commissioners often work more closely with the secretary of state's office, given their increased election responsibilities with larger counties. Second, the elected county clerks who serve as chief election administrators for their counties have an association called the Nebraska Association of County Officials (NACO) that represents them in the legislature.¹¹⁵ Though admittedly, testimony from a full-time lobbyist is likely less convincing to policymakers than testimony from an election administrator. Finally, full-time election commissioners rarely have major elections during the legislative session and few other duties other than to administer elections. Thus, they simply have more time to testify at a committee hearing.

While these full-time election administrator's opinions often carry a great deal of weight with the committee on government, military, and veterans affairs, their superior resources are likely not representative of Nebraska's other eighty-six counties. NACO did testify in support of LB 544,¹¹⁶ but was followed by several appointed election commissioners who testified in opposition to it.¹¹⁷ Unfortunately, the influence full-time election administrators have over policymakers distorts the actual needs of the majority of the state's election administrators.

1. An Attempt to Provide Uniform Election Guides and Standards in Nebraska

In 2009, Nebraska state Senator Robert Giese introduced Legislative Bill (LB) 544 which would have required the secretary of state to create uniform election guides for poll workers.¹¹⁸ The idea for LB

114. *Id.* at 42 (Douglas County Election Commissioner Dave Phipps testifying in opposition to uniform election guides); *Hearing on LB 117, LB 161, LB 97, and LB 168*, *supra* note 90, at 65 (Lancaster County Election Commissioner Dave Shively testifying in opposition to uniform election guides).

115. *About NACO*, NEB. ASS'N COUNTY OFFICIALS, <http://www.nacone.org/webpages/aboutnaco/aboutnaco.htm> (last visited Jan. 2, 2012).

116. *See infra* text accompanying notes 118–26.

117. *Hearing on LB 434, LB 324, LB 325, and LB 544*, *supra* note 81, at 42.

118. L.B. 544, 101st Leg., 1st Sess. (Neb. 2009).

544 came at the suggestions of Nebraska election officials during an Election Day Registration (EDR) fact-finding trip to Des Moines, Iowa hosted by Nebraskans for Civic Reform (NCR).¹¹⁹ Eight Nebraska election administrators met with the Iowa secretary of state, deputy secretary of state for elections, and local Iowa election administrators.¹²⁰ EDR aside, the Nebraska election officials took note of the uniform election standards and guides for administrators and poll workers provided by the Iowa secretary of state's office.¹²¹ The election officials from Nebraska recognized that such a guide would be extremely useful and would provide reliable, up-to-date election standards and guidelines based on state law and best practices.¹²²

Subsequently, NCR representatives met with Nebraska Deputy Secretary of State J.P. Green and Deputy Secretary of State for Elections Neal Erickson to discuss the creation of a uniform election guide for either poll workers or administrators.¹²³ However, the idea for uniform statewide standards and guides was quickly rejected,¹²⁴ as the secretary of state's office already provides forms and technical assistance for election officials.¹²⁵ NCR representatives then asked State Senator Giese to introduce legislation mandating the secretary of state's office to create uniform standards and guides for poll workers.¹²⁶

Several county clerks who initially suggested the idea sent letters supporting the passage of LB 544 to the legislature.¹²⁷ Legislative Bill 544 was advanced unanimously from the committee on government, military, and veterans affairs to the floor of the legislature in 2009, and was debated by the full body in 2010.¹²⁸

More than likely, the most considerable barrier in utilizing the legislative process to reform the election system is the election administrator's appreciation of the status quo. Reform often means extra

119. The author organized this trip and witnessed the election officials' suggestions.

120. Election Day Registration Fact-Finding Trip with county election administrators Nancy Josoff, Chris Lewis, Sandra Stelling, Diane Mohr, Diane Olmer, Kay Forslund and Deb Finn, in Des Moines, IA (Feb. 3, 2009).

121. *Id.*

122. *Id.*

123. Meeting with J.P. Green, Senior Deputy Sec'y of State, and Neal Erickson, Deputy Sec'y of State for Elections, in Lincoln, Neb. (Oct. 10, 2009).

124. *Id.*

125. *See Hearing on LB 434, LB 324, LB 325, and LB 544, supra* note 81 (Neal Erickson, Deputy Secretary of State testifying that they provide forms and technical assistance to clerks).

126. The author was the NCR representative who asked Senator Giese to introduce the legislation.

127. Letter from Diane M. Olmer, Platte Cnty. Election Comm'r, to Gov't, Military and Veterans Affairs Comm. (Feb. 10, 2009) (on file with author).

128. Committee Statement on LB 544, 101st Leg., 1st Spec. Sess. (Neb. 2009), *available at* <http://nebraskalegislature.gov/FloorDocs/101/PDF/CS/LB544.pdf>.

expense, more training, and in many cases, more accessibility and higher voter turnout. This requires more resources and time, things counties have increasingly less of.¹²⁹ With the exception of \$22 million Nebraska received in Help America Vote Act (HAVA) funds to create a centralized registration database and equip every county with voting machines, all election costs are borne by the counties, per state law.¹³⁰ Further, the hyper-decentralization and localism that pervades the election system makes it exceedingly difficult to educate, lobby, and coordinate reform efforts.¹³¹ There have been several pieces of legislation where NACO testified in support of a bill, with several county clerks also testifying in opposition.¹³²

Ironically, the primary reason for election administrator opposition to LB 544 stemmed from the possibility of being held liable for deviating from what would likely be considered best practices,¹³³ even though the legislation intentionally left out any penalty for deviating from the guide and specifically called them “guidelines for election workers.”¹³⁴ The intention of the legislation was to model the guidelines after Lancaster and Douglas County guides.¹³⁵ Nebraska election administrators noted in their letters of opposition and testimony that the way things are done in Douglas County (largely Omaha metropolitan population) are different than the way things are done in Scotts Bluff County (largely rural, Western Nebraska).¹³⁶ No examples of these purported differences were given in committee testimony, or in subsequent email and phone conversations. However, even though the statute is fairly explicit as to poll worker duties, it unfortunately does not translate into smaller counties with fewer resources having up-to-date election standards and guides available for poll workers.

129. Martha Stoddard, *Aid Cut to Cities, Counties OK'd*, OMAHA WORLD-HERALD, Mar. 4, 2011, <http://www.omaha.com/article/20110304/NEWS01/703049829>.

130. NEB. REV. STAT. § 32-1201 (Reissue 2008).

131. GERKEN, *supra* note 1, at 4, 23–26 (discussing reasons for local election administrators’ aversion to change). This observation is also based on the author’s personal experience in lobbying for NCR.

132. *See, e.g., Hearing on LB 125, LB 382, and LB 349 Before the Comm. on Gov’t, Military & Veterans Affairs*, 101st Leg., 1st Sess. 14–17, 44–51, 53–58 (Neb. 2009) (statements of Beth Bazyn Ferrell, Assistant Legal Counsel, Nebraska Association of County Officials; Mary Eickhoff, Richardson County Clerk; Dave Phipps, Douglas County Election Comm’r; Diane Olmer, Platte County Election Comm’r).

133. *See Hearing on LB 434, LB 324, LB 325, and LB 544*, *supra* note 81, at 41.

134. L.B. 544, 101st Leg., 1st Sess. (Neb. 2009).

135. The author drafted the legislation and his intention was to model the guidelines on the Lancaster and Douglas County guides.

136. *Hearing on LB 117, LB 161, LB 97, and LB 168*, *supra* note 90, at 42 (testimony of Douglas County Election Commissioner Dave Phipps).

The lessons learned from the efforts to pass LB 544 are twofold. First, critical relationships and alliances need to be built with the silent majority of election administrators across the state to demonstrate the need for uniform election standards and resources. Galvanizing support among rural election officials will likely lead to softened opposition by appointed election commissioners and provide legislators with a more balanced perspective on the need for uniform election standards and guides. Second, the dangers of lacking uniform election standards needs to be a data- and fact-driven argument that is clearly presented to the legislature and Nebraska secretary of state. Up until this point, the need for uniform election standards has been presented to the government, military, and veterans affairs committee as a convenient tool for poll workers and election administrators, but the constitutional implications of unequal treatment of voters must be made clear.

C. Proposed Reforms

Three avenues of reform exist to create uniform election standards and guidelines: (1) the promulgation of rules and regulations under the existing authority of the secretary of state; (2) the enactment of state legislation; and (3) litigation. The secretary of state's office has repeatedly declined to promulgate election standards and has testified against two pieces of legislation that would require it to do so.¹³⁷ Thus, legislation requiring the secretary of state's office to promulgate uniform election standards and guidelines and use of the courts remain the most viable options for reform.

1. *Legislative Reform: Collaboration and Outreach*

Creating innovative and effective policy solutions that require minimal additional resources and training time is a challenge. However, it is possible. As discussed above, in 2009 Senator Giese introduced LB 544, a bill to create uniform election standards and guides for poll workers. However, a lack of effective alliances and collaboration with election administrators led to the demise of the bill on the floor of the legislature. The election administrators that were vocal on LB 544 were from election offices that already have their own election guides. Their argument that the legislation was unnecessary (combined with a fiscal note) struck a chord with senators on the floor and it was defeated by six votes.¹³⁸ Despite LB 544's defeat, the legislation received bi-partisan support in the government, military, and veterans

137. See *Hearing on LB 117, LB 161, LB 97, and LB 168, supra* note 90, at 78–79 (statement of Neal Erickson, Deputy Secretary of State for Elections); *Hearing on LB 434, LB 324, LB 325, and LB 544 supra* note 81.

138. *Floor Debate on 544*, 101st Leg., 1st Sess., 20 (Neb. 2009).

affairs committee, advancing unanimously.¹³⁹ Legislators on both sides of the aisle can and have been convinced of the importance of uniform election standards and guidelines.¹⁴⁰ However, election administrators must be convinced as well.

After advocating for election reform in the legislature for the past five years it has become exceedingly clear that outreach and collaboration with election administrators is critical.¹⁴¹ Providing election administrators with the opportunity to have a stake in the election reform discussion and a hand in crafting the legislation are essential to address administrative concerns and overcome opposition. This sort of outreach requires time and resources. Meeting with election administrators in person and building relationships requires travel time (Nebraska is a large state) and Nebraska-specific election research to educate administrators and policymakers on how potential reforms will improve the state's election system. The legislative process can be an effective avenue of election reform in Nebraska; however, the obstacles inherent in a decentralized election system must first be overcome.

2. *Reform via Litigation*

Election reform via litigation has been met with mixed results. Many academics speculated that *Gore's* equal protection holding would lead to a new era of election administration in the United States.¹⁴² One such academic, Professor Richard Hasen, pointed out that while there has been success in applying *Gore* in the lower courts, the more conservative circuit courts have generally ended such reform efforts without directly ruling on *Gore's* equal protection holding.¹⁴³ This was the situation in punch card voting cases *Shelley* and *Blackwell*, discussed earlier.¹⁴⁴

However, the recent Sixth Circuit equal protection holding in *Hunter* could breathe new life into *Gore's* equal protection holding. A leading election law scholar called *Hunter* the "most significant application of *Bush v. Gore* in the decade since that precedent was de-

139. Committee Statement on LB 544, 101st Leg., 1st Spec. Sess. (Neb. 2009), available at <http://nebraskalegislature.gov/FloorDocs/101/PDF/CS/LB544.pdf>.

140. *Id.* The 2009 Government, Military, and Veterans Affairs committee is almost evenly split between Republicans and Democrats, despite the Legislature's official non-partisan designation.

141. This is based on the author's experiences in the Legislature on behalf of NCR.

142. Hasen, *supra* note 44, at 8–9 (citing several election scholars who believed *Bush v. Gore* would bring about election administration reform).

143. *Id.* at 9–10.

144. See *supra* text accompanying notes 95–101.

cided.”¹⁴⁵ Recall that *Hunter* involved the unequal treatment of provisional ballots in the same county due to poll worker error and the misapplication of state law.¹⁴⁶ A three-judge panel of the Sixth Circuit Court of Appeals decided 2–1 that such disparate and unequal treatment of ballots violated the Equal Protection Clause of the Constitution.¹⁴⁷ The Sixth Circuit denied a request to hear the case en banc, and the Supreme Court denied an emergency application to stay the Sixth Circuit’s mandate.¹⁴⁸

Nebraska is not a battleground state or known for highly competitive candidate races.¹⁴⁹ Thus, Nebraska election law litigation is typically limited to the initiative process and redistricting, and does not address election administration. However, the Sixth Circuit’s equal protection ruling in *Hunter*, and the settlement in *Brunner*, requiring the creation of election standards and practices, could open the door to litigation in Nebraska involving the unequal treatment of provisional ballots from county to county based on the state’s lack of uniform guidelines and standards. This would require extensive research, interviews with voters who used the provisional voting process and whose ballots were both accepted and denied, along with extensive research into the standard practices of each county and how they differ.

The punch card litigation in *Blackwell*¹⁵⁰ and *Shelley*¹⁵¹ was vacated en banc for reasons other than *Gore*’s equal protection analysis and could be instructive in challenging the lack of clear and often inaccurate hand recount procedures in Nebraska. Just as the panels in *Blackwell* and *Shelley* found the punch card system was inaccurate (compared to other modern forms of vote counting),¹⁵² the same could be said about manual recounts in Nebraska.

Litigation, even when not completely adjudicated, has often led to favorable settlements. One such example is the State of Ohio’s settlement with the League of Women Voters of Ohio in *Brunner*.¹⁵³ In *Brunner*, the State agreed to require and provide uniform election

145. Edward B. Foley, *A Major Ruling on the Meaning of Bush v. Gore*, ELECTION LAW @ MORITZ (Jan. 27, 2011), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=8099>.

146. *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 222 (6th Cir. 2011).

147. *Id.* at 242.

148. *See* *Hamilton Cnty. Bd. of Elections v. Hunter*, 131 S. Ct. 2149 (2010) (order denying motion to stay mandate).

149. Interview with Don Walton, Reporter, Lincoln Journal Star, in Lincoln, Neb. (May 13, 2011).

150. *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007).

151. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003), *rev’d en banc*, 344 F.3d 914 (9th Cir. 2003).

152. *See Stewart*, 444 F.3d at 873; *Shelley*, 344 F.3d at 896.

153. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008); *see also* *Common Cause v. Jones*, No. 01-03470 SVW(RZX), 2002 WL 1766436, at *1

standards and practices to all election officials, and to enforce them.¹⁵⁴ Sometimes the threat of litigation is enough to convince state actors that reform is necessary. However, unsuccessful litigation can also strengthen the argument against election reform. Ultimately, use of the courts to advance election reform can prove to be just as unpredictable as the legislative process. However, when the legislative process fails to require uniform standards to help ensure equal treatment of voters, as it did with LB 544 in 2010, the courts can provide another avenue for reform.

III. THE NEED FOR TRAINED PROFESSIONALS

With the exception of a non-mandatory, once-a-year training by the secretary of state's office, there is no formal training requirement or certification for Nebraska election administrators.¹⁵⁵ The lack of formal training requirements, combined with a lack of statewide uniform election guidelines, raises serious questions about the consistency in which the Election Act is applied, how elections are carried out, and general qualifications of the election administrators themselves.¹⁵⁶ Required training and certification of election administrators would provide opportunities to learn best practices from counterparts, increase the confidence of the electorate, provide uniform curriculum and standards, and provide information on how to engage the public in the election process.

A. The Problem

In Nebraska, most election experience is passed down from one administrator to the next by working on campaigns, providing predecessors with guides, and simply reading the Election Act.¹⁵⁷ In addition, the deputy secretary of state for elections provides technical support

(C.D. Cal. Feb. 19, 2002) (ordering nine California counties to discontinue the use of pre-scored punch-card voting systems before the 2004 elections).

154. Press Release, League of Women Voters, A Win for Ohio Voters: State Agrees to Make Changes in Ohio's Electoral Process (June 16, 2009), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/LWVBlackwell-Press-Release-6-16-09.pdf>.

155. Interview with Nancy Josoff, Cass County Election Commissioner (Jan. 3, 2012).

156. See Sam Reed, *Elections and Voting: Certification and Training*, WASH. SECRETARY STATE, http://www.sos.wa.gov/elections/certification_training.aspx (last visited May 29, 2011) ("The Certification and Training Program was created in 1992 in response to a very close legislative district race. The recount in the race revealed inconsistencies and errors that pointed out the critical need for standardization and uniformity in all aspects of the election process.")

157. This is based on the author's experience and conversations with numerous election officials across the state in his official capacity as executive director for NCR.

to election administrators.¹⁵⁸ The lack of election administrator training and education is perhaps one reason partisan campaign operatives are often tapped for appointment as election commissioners, since they happen to be the individuals who are most knowledgeable about Nebraska election law.

Several states require, or at least offer, election administrator certification and training. However, a recent national study found that on average local election administrators have less than twenty hours of formal training and only one-fifth are required to pass an examination.¹⁵⁹ The State of Washington requires each county to have at least two certified election administrators on staff.¹⁶⁰ They must attend a two-day class, pass an exam, and attain forty hours of additional education, in addition to having two years of service in an elections office prior to requesting certification.¹⁶¹ Finally, once certified, election administrators must complete eighteen hours of continuing education each year via classes offered by the secretary of state's office.¹⁶² Nebraska's neighbor, Iowa, also provides election administrator certification, but does not appear to require it.¹⁶³ Iowa's certification consists of forty hours of classes offered by the Iowa secretary of state's office, in conjunction with the Iowa State Association of County Auditors and the Iowa State Association of Counties.¹⁶⁴

B. Obstacles to Reform

The obstacles to uniform election standards and practices are the same for mandatory training. Although Nebraska has never attempted to implement mandatory training, opposition to such training would likely come from full-time election commissioners and the secretary of state's office, for the same reasons these parties oppose uniform election standards and guidelines. However, unlike uniform election standards, county clerks who administer elections may support mandatory training because many are aware they may lack important knowledge and resources.¹⁶⁵ An additional obstacle to mandatory training is funding. As noted below, HAVA funds could be

158. See *Hearing on LB 434, LB 324, LB 325, and LB 544*, *supra* note 81 (Neal Erickson, Deputy Secretary of State testifying that they provide technical assistance to clerks).

159. FISCHER & COLEMAN, *supra* note 16.

160. Reed, *supra* note 156.

161. *Id.*

162. *Id.*

163. Matt Schultz, *State Election Administrators Training (SEAT)*, IOWA SECRETARY STATE, <http://www.sos.state.ia.us/elections/auditors/SEAT/#1> (last visited May 11, 2011).

164. *Id.*

165. This is based on conversations that the author has had with county clerks across the state of Nebraska.

utilized for training purposes, but these federal funds are quickly running out.¹⁶⁶ However, utilization of innovative, online, and remote teaching technology could be implemented to find cost-effective ways of providing training.

C. Proposed Reforms

In Nebraska, mandatory training can be ordered by the secretary of state or through enactment of legislation.¹⁶⁷ Such mandatory collaboration would aid the secretary of state's office in identifying and addressing problem areas. To ensure continuity from one county election office to the next, legislation should be introduced requiring the secretary of state to provide training.¹⁶⁸ Nebraska's HAVA funding could be used to cover the costs of these mandatory trainings.¹⁶⁹ Admittedly, Nebraska's HAVA funding is quickly running out and Congress may not extend such funding;¹⁷⁰ but, as noted above, some aspects of training could be provided online to increase convenience and cost efficiencies.

IV. DISENFRANCHISEMENT BY DEADLINE: THE NEED FOR ELECTION DAY REGISTRATION

Perhaps one of the greatest myths in American elections is the need for registration deadlines.¹⁷¹ Nebraska has fallen victim to this myth.¹⁷² While technological and administrative barriers exist, Ne-

166. See *infra* text accompanying notes 168–69.

167. NEB. REV. STAT. § 32-202 (Reissue 2008).

168. See, e.g., WASH. REV. CODE § 29A.04.540 (2011) (delineating Washington's election administrator training program).

169. *Funding Advisory Opinion: FAO-08-012*, U.S. ELECTION ASSISTANCE COMM'N, 1–2 (Sept. 26, 2008), www.eac.gov/assets/1/Documents/Final%20FAO-08-012%20_NY.pdf.

170. See Adam Fogel, *Fair Vote Signs onto HAVA Funding Letter*, FAIRVOTE: THE CTR. FOR VOTING & DEMOCRACY (Mar. 3, 2010), <http://www.fairvote.org/fairvote-signs-onto-hava-funding-letter>.

171. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 312 (2000) (conceding the passage of registration laws in the nineteenth century was just as much about preventing fraud as it was about preventing African-Americans, immigrants, and the working-class from voting); Jason P.W. Halperin, *A Winner at the Polls: A Proposal for Mandatory Voter Registration*, 3 N.Y.U. J. LEGIS. & PUB. POL'Y 69, 106–08 (1999) (discussing the history of voter registration laws and their use to suppress voter turnout among certain racial and political groups); see also Stephen Knack & James White, *Election-Day Registration and Turnout Inequality*, 22 POL. BEHAV. 29, 29 (2000) (quoting PAUL KLEPPNER, *WHO VOTED?: THE DYNAMICS OF ELECTORAL TURNOUT* 9 (1982)), available at <http://www.jstor.org/stable/pdfplus/1520060.pdf?acceptTC=true> (“Historians of voting in the United States generally agree that registration requirements were instituted at least as much ‘to shape the social character of the eligible electorate’ as to control fraud.”).

172. See NEB. REV. STAT. § 32-302.

braska has the technological capability and resources necessary to overcome these barriers and provide EDR. The political obstacles, however, are immense. This is likely caused by election administrators' fear of the unknown, belief by policymakers that EDR may shift the political status quo, and a general belief that those who do not meet the state's election deadlines are lazy or uninformed. All three concerns are largely unfounded.

EDR makes our democratic institutions more accessible to traditionally disenfranchised segments of society: youth, the disabled, minorities, and the highly mobile. Nebraska should adopt EDR because it eliminates arbitrary deadlines while simultaneously increasing the accessibility of the fundamental right to vote.¹⁷³ Democracy should always err on the side of inclusiveness. This section will highlight the need for EDR and the last half-decade push for it in Nebraska.

A. The Problem

Demos, a non-partisan, public policy research and advocacy organization, conducted a study on the potential effect of EDR on Nebraska in 2008.¹⁷⁴ The study revealed that arbitrary registration deadlines likely disenfranchised 67,058 Nebraskans in the 2004 presidential election.¹⁷⁵ A 2010 Census Bureau Current Population Report (CPR) on voting and registration found that 14.7 percent of Americans surveyed did not register because they did not meet the registration deadline.¹⁷⁶ Six percent of those who were registered but did not vote said they did not vote because of registration problems.¹⁷⁷ Finally, the eight states without registration deadlines averaged a seven percent higher turnout in the 2008 presidential election.¹⁷⁸

173. See 42 U.S.C. § 1973gg(a) (2006) (“The Congress finds that—(1) the right of citizens of the United States to vote is a fundamental right . . .”); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

174. See R. Michael Alvarez & Jonathan Nagler, *Election Day Voter Registration in Nebraska*, DEMOS, (Winter 2008), http://www.demos.org/sites/default/files/publications/Nebraska_EDR_Report-Demos.pdf.

175. *Id.* at 1.

176. Thom File & Sarah Crissey, *Voting and Registration in the Election of November 2008*, U.S. CENSUS BUREAU, 14 (May 2010), <http://www.census.gov/prod/2010/pubs/p20-562.pdf>.

177. Steven Carbo & Regina M. Eaton, *Voters Win with Same Day Registration*, DEMOS, 1 (last updated Jan. 2010), http://www.demos.org/sites/default/files/publications/VotersWinSDR_2010_Demos.pdf. The eight states with EDR were: Idaho, Iowa, Maine (as of 2011, it no longer utilizes EDR), Minnesota, Montana, New Hampshire, Wisconsin, Wyoming, and Washington, D.C. *Id.*

178. SAMUEL ISSACHAROFF, *THE LAW OF DEMOCRACY* 90 (Robert C. Clark et al. eds., 3rd ed. 2007).

Among Western democracies, the United States is unique in that there is virtually no affirmative action taken to register voters.¹⁷⁹ The closest to any affirmative action the government takes is through “motor voter” registration, which was created by the National Voter Registration Act (NVRA) of 1993.¹⁸⁰ However, this is an opt-in system and not an opt-out system, so it can hardly be considered affirmative action on the part of the government. Further, the underlying rationale for the creation of voter registration in the nineteenth century was, for the most part, discriminatory.¹⁸¹ Despite the government’s efforts in the 1960s with the Voting Rights Act, states are still left with voter registration requirements that depress turnout and disproportionately affect low income citizens, the disabled, and youth.¹⁸²

Voter registration barriers are strong institutional roadblocks to voting. The more barriers to voting that are created, the less likely citizens are to vote. Studies have consistently shown that once a citizen registers, they vote at high rates.¹⁸³ For instance, in the 1996 election, 127.7 million people were registered to vote and 105 million turned out on election day.¹⁸⁴ That is an eighty-two percent turnout rate, and the 1996 presidential election was a low turnout year.¹⁸⁵ In 1980, eighty-nine percent of registered voters voted, and eighty-eight percent voted in 1984.¹⁸⁶ Once registered, citizens vote.

The above statistics indicate that registration deadlines are, in fact, a barrier to voting. It is important to explain why registration deadlines are unnecessary. Many believe registration deadlines are necessary to verify who the individual is and to put them on voter rolls. This is only partly true, as there is no real identification verification process except for first time voters in the state. The only purpose of registration deadlines in Nebraska is to give election officials enough time to put the name on the list. For instance, the Nebraska voter registration form asks for a Nebraska driver’s license or social security number, but it is not required to process the application¹⁸⁷—an out of state student or individual with a different state’s driver’s license would not be in the state DMV database. At best, registration deadlines provide a false sense of security, and at worst, they are a proven way of disenfranchising thousands of eligible citizens.

179. 42 U.S.C. § 1973gg-3.

180. *Id.* §§ 1973gg to 1973gg-10.

181. See Halperin, *supra* note 171, at 76–83 (discussing the history of voter registration laws and their use to suppress voter turnout among certain political and racial groups).

182. *Id.*

183. *Id.* at 71–72.

184. *Id.* at 72.

185. *Id.*

186. *Id.*

187. NEB. REV. STAT. § 32-312.03 (Reissue 2008).

1. *Why Push for Election Day Registration in Nebraska?*

Secretary of State John Gale stated that between eighty and ninety percent of eligible Nebraskans were registered to vote and therefore EDR was unnecessary.¹⁸⁸ This does not address the problem EDR seeks to solve. The recent implementation of EDR in Iowa serves as a perfect example. During the 2008 general election in Iowa, fifty percent of the voters who utilized EDR were already registered in the state of Iowa but had simply moved and not reregistered.¹⁸⁹ In terms of Nebraska, this statistic is particularly relevant in that nearly a quarter of all provisional ballots cast during the 2008 presidential election (804 ballots total) were rejected based on a registered Nebraska voter forgetting to reregister and thus voting in the wrong jurisdiction.¹⁹⁰

This statistic does not take into account the voters who did not cast a ballot after discovering they had to vote in the jurisdiction they were already registered in. In many cases, the polling location where the voter is registered could be hours away, if the voter is even still a legal resident in that jurisdiction. As an election judge in the 2010 general election, the author of this Comment turned away no fewer than twenty-five students who were registered in other jurisdictions in Nebraska.¹⁹¹ Only those who state that they should be registered in their current precinct receive provisional ballots. Otherwise, they must report to the precinct in which they are registered. Even for those who have the time and ability to drive to the jurisdiction in which they are registered, if they or their parents do not have an established residence in that jurisdiction, it would be unlawful for them to vote even where they are currently registered.¹⁹²

The reasons that registration deadlines disenfranchise eligible voters are varied. Students and the eighteen- to twenty-five-year-old demographic seem to benefit the most from the breakdown of registration barriers. The Demos study conducted in 2008 concluded that turnout among eighteen- to twenty-five-year-olds could have increased by 10.6 percent in a presidential election with EDR in Nebraska.¹⁹³ Younger voters are often disenfranchised because they are

188. See *Hearing on LB 803 Before the Comm. on Gov't, Military & Veterans Affairs*, 100th Leg., 1st & 2nd Sess. 7 (Neb. 2008) (statement of Diane Olmer, Platte County Election Comm'r).

189. E-mail from Iowa Sec'y of State's office to author (Mar. 14, 2011) [hereinafter Iowa Email] (on file with author).

190. E-mail from the Neb. Sec'y of State's office to author (Oct. 10, 2010) (on file with author).

191. NEB. REV. STAT. § 32-914.02 (Reissue 2008) (allowing a voter to vote with a regular ballot if they have moved within a county and not reregistered, at the discretion of the election commissioner, but not outside the county).

192. *Id.* § 32-314.

193. Alvarez & Nagler, *supra* note 174, at 1.

highly mobile or inexperienced with voting.¹⁹⁴ Many register while in high school or when they turn eighteen, but few realize they must re-register when they move from one county to the next in the same state. Younger citizens are also a much more mobile demographic, thus requiring them to reregister makes registration requirements a unique barrier for this demographic. In Iowa, for instance, sixty-four percent of the 45,929 voters who utilized EDR in 2008 were eighteen to thirty-four years of age.¹⁹⁵

A CPR study on geographical mobility found that young adults (ages twenty to twenty-nine) have the highest mobility rates.¹⁹⁶ One-third of this population moved at least once in the previous year, which is more than twice the average moving rate.¹⁹⁷ Hyper-mobility combined with their general inexperience with the registration laws explain why twenty-one percent of eighteen- to twenty-four-year-olds surveyed did not register to vote because they did not meet the registration deadlines.¹⁹⁸

The effects of registration deadlines are not limited to young segments of the population. African Americans and Latinos were both found to benefit greatly from the elimination of registration deadlines. Demos found that turnout among Latinos would likely increase by nine percent and African Americans by six percent if EDR were implemented in Nebraska.¹⁹⁹ Similarly, the U.S. Census Bureau report on geographic mobility found that the moving rate among Latinos and African Americans was nearly five percent higher than that of Caucasians.²⁰⁰ With these numbers in mind, one wonders if the fact that youth and minorities vote in higher numbers with EDR is one factor in opposition.²⁰¹

The prevailing attitude among many in the legislature appears to be: "If it ain't broke, don't fix it." Unfortunately, this attitude only reinforces and drives our largely crisis-driven election reform policy.²⁰² The fact remains that thousands of Nebraskans are disenfranchised each year by unnecessary voter registration deadlines.

194. Scott Novakowski, *Democracy in a Mobile America*, DEMOS (July 24, 2009), <http://www.demos.org/publication/democracy-mobile-america>.

195. Iowa email, *supra* note 189.

196. Jason P. Schachter, *Geographical Mobility: 2002 to 2003*, U.S. CENSUS BUREAU 3 (Mar. 2004), <http://www.census.gov/prod/2004pubs/p20-549.pdf>.

197. *Id.*

198. File & Crissey, *supra* note 176, at 14.

199. Alvarez & Nagler, *supra* note 174, at 1.

200. Schachter, *supra* note 196, at 3–5.

201. Alvarez & Nagler, *supra* note 174.

202. GERKEN, *supra* note 1, at 3–5.

2. *Election Day Registration Saves Nebraska Election Commissioners Time and Money*

Creating a more inclusive democratic system is an important benefit of EDR—though it is not the only benefit. EDR also saves election administrators both time and money. One of the administrative benefits of EDR is the sharp reduction of provisional ballots. A vast majority of provisional ballots are cast because the voter is not in the correct precinct or did not register on time.²⁰³ Election Day Registration eliminates the need for the use of a majority of provisional ballots. Election officials can appreciate this aspect of EDR because provisional ballots require nearly ten to fifteen minutes at the polls (per voter) and independent verification by the canvassing board after the election.²⁰⁴ When Iowa implemented EDR, the amount of provisional ballots fell dramatically from 14,661 provisional ballots cast in 2004 to 4,725 provisional ballots in 2008.²⁰⁵

Nebraska's Cass County election commissioner, Nancy Josoff, estimated the cost of provisional ballots during the 2010 gubernatorial election.²⁰⁶ In 2010, there were a total of 78 provisional ballots cast in Cass County.²⁰⁷ Josoff estimated that processing the ballots at the polling location cost \$3.36 per provisional ballot (fifteen minutes of time per ballot).²⁰⁸ Further, initial review and recommendation of the provisional ballot by her office cost \$20.00 per provisional ballot.²⁰⁹ Josoff also estimated that final canvass board determination, creation of new reports, and final processing of information in the voter database would cost an additional \$10.00 per provisional ballot.²¹⁰ This adds up to a total of \$33.36 per provisional ballot and a total cost of \$2,602.08 for the 2010 election in Cass County alone. The 2010 general election budget for Cass County was \$38,317.70.²¹¹ This repre-

203. Jessie Cleveland, *P's and Q's of Provisional: An Exploration of Nebraska's Provisional Ballot's, The Need for County-to-County Portability*, NEBRASKANS FOR CIVIC REFORM (2008), <http://nereform.org/index/wp-content/uploads/2011/01/The-Argument-for-County-to-County-Portability.pdf> (last visited May 25, 2011) (finding that registered voters in the wrong precinct and unregistered voters in general are a source of a majority of the rejected provisional ballots).

204. E-mail from Nancy Josoff, Cass Cnty. Election Comm'r, to author (Nov. 3, 2011) (on file with author).

205. Regina Eaton, *Demos Fact Sheet: Same Day Registration*, DEMOS, www.demos.org/pubs/EDR_factsheet.pdf (last visited May 11, 2011); *State of Iowa Voter Turnout Report November 4, 2008*, IOWA SECRETARY STATE, www.sos.state.ia.us/pdfs/2008report.pdf (last visited May 11, 2011).

206. E-mail from Nancy Josoff, Cass Cnty. Election Comm'r, to author (Nov. 3, 2011) (on file with author).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

sents about 6.8 percent of the cost to administer the 2010 general election. A statewide analysis of potential cost savings of EDR is currently underway and set to be released in early 2012.²¹² At the very least, the cost savings provided by the reduction in provisional ballots offsets any additional cost caused by a five percent increase in voters.²¹³ Further, based on the author's experience, poll workers would not need to be concerned about running out of ballots because it is already standard that each polling place has well over the amount of ballots needed. Also, it often takes just as long to explain to someone the reasons they cannot vote, as it would take to register them on Election Day.

B. Obstacles to Reform

The arguments against EDR are varied. However, in Nebraska, most are centered around administration issues and the abnormally high number of "ballot splits" in Nebraska.²¹⁴ Given Nebraska's unique organization of political subdivisions (school districts, public power districts, airport authorities, etc.), the different numbers of ballot types—or "ballot splits"—that must be generated per precinct is high as compared to neighboring states.²¹⁵ Thus, the likely argument against EDR in Nebraska is that it will be extremely difficult for poll workers to determine which ballot goes to each particular voter that is not on the precinct voter list. This is a problem that is generally not prevalent in other EDR states with lower amounts of ballot splits.

The ballot split problem is easily remedied with Nebraska's electronic voter file and street finder database. Voter information, including address, is stored in a statewide database managed by the secretary of state's office.²¹⁶ The street finder database is maintained by the county election administrator and contains all physical addresses in the county and all of the political subdivision and precinct boundaries.²¹⁷ The county election administrator then syncs their street finder map system with the state voter registration database,

212. Nebraskans for Civic Reform's legal clerks and research assistants are beginning this project Summer 2011.

213. See Alvarez & Nagler, *supra* note 174, at 1.

214. See *Hearing on LB 125 & LB 382 Before the Comm. on Gov't, Military & Veterans Affairs*, 101st Leg., 1st & 2nd Sess. 53 (Neb. 2009) (statement of Diane Olmer, Platte County Election Comm'r).

215. This is largely based on the author's personal knowledge and observations as an election observer in Iowa and Minnesota, along with conversations with election administrators in other EDR states. A forthcoming Nebraskans for Civic Reform study on the issue of ballot splits is expected to be released in early 2012.

216. This information is based on the author's personal knowledge of the street finder database as shown to him and described by election administrators and the deputy secretary of state.

217. *Id.*

which contains the voters' names and corresponding addresses.²¹⁸ Each county currently has access to the statewide voter registration database and is required to use it for the creation of their precinct voter lists.²¹⁹ The current voter lists are generated by matching the statewide electronic voter database with physical addresses in each county's electronic street finder database.²²⁰ The ballot is then electronically assigned by a match up of these two databases.²²¹

The street finder database can easily be utilized to make EDR a reality in Nebraska. Lists of all the physical addresses in the precinct with corresponding ballot types can easily be printed for each precinct using the two existing databases. This is a capability that all Nebraska counties currently possess as a result of the mandatory statewide electronic voter registration system mandated by HAVA. Thus, the eligible voter using EDR would come to the polling place with his valid proof of residence, the election worker would look up his physical address on the list and quickly identify which ballot type the voter requires.²²² This physical address and corresponding ballot list would not only be useful for EDR, but also for the current provisional ballot process. Voters who require a provisional ballot are likely eligible voters not listed on the precinct voter rolls. Therefore, poll workers must determine which ballot each provisional voter should receive based on their address and a large precinct map in each precinct. Based on the author's experience, this process is cumbersome, can take awhile, and is not fool proof. Often, a precinct contains several different ballot splits, which can make it confusing as to which ballot the voter should receive based off the map.²²³ Thus, a list of all physical addresses in the precinct with the corresponding ballot type would reduce confusion and increase ballot accuracy.

A second potential argument against EDR is the increased cost of administering elections. While several organizations have attempted to measure the cost of EDR, it is tough to accurately calculate because EDR increases turnout, which increases the need for a variety of administrative resources.²²⁴ However, with a predicted five percent overall gain in turnout,²²⁵ EDR can hardly be seen as a large burden on the election system. Further, an increase in participation in the

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. LB 605, 102nd Leg., (Neb. 2011).

223. *See supra* note 211.

224. *See Hearing of the Hawaii House of Representatives Committee on the Judiciary, February 10, 2011, Testimony of Steven Carbo, DEMOS, http://www.demos.org/sites/default/files/publications/Demos_testimonyHB%20_343_Feb_10_2011.pdf (last visited Dec. 19, 2011).*

225. *See Alvarez & Nagler, supra* note 174, at 1.

electoral process should be seen as a positive externality of EDR and not a negative one.

While registering citizens to vote at the polls may cost in administrative time, it likely takes longer to explain the reason a person cannot vote, or even worse, having the voter fill out a provisional ballot. Based on this author's experience, the provisional ballot process often takes ten to fifteen minutes and generally requires a poll worker dedicated to explaining the process. Further, EDR dramatically decreases the amount of provisional ballots cast, which reduces administrative time at the polls and after the election in the verification process.²²⁶

The final argument against EDR, and one not extensively advanced in Nebraska, is fraud.²²⁷ Since EDR was introduced for the first time over thirty years ago, no higher incidences of fraud have been reported in states with EDR as compared to states without EDR.²²⁸ States with EDR require photo ID and proof of residency through a current bill with an address, which can include a current utility bill, driver's license, bank statement, or property tax document.²²⁹ This is just as much—and sometimes more—information than is required to register to vote at the DMV or by mail in Nebraska.²³⁰ Recently, Nebraska State Senator Danielle Conrad introduced LB 605 which would enact EDR in Nebraska, requiring proof of residency and a photo ID.²³¹ LB 605 requires twice the amount of identification that our current method of voter registration requires.²³² The Minnesota secretary of state says it best, "EDR is much more secure because you have the person right in front of you—not a postcard in the mail. That is a no brainer. We have 33 years of experience with this."²³³

226. See NEB. REV. STAT. § 32-1002 (Reissue 2008).

227. This simply is not an argument made in opposition to EDR based on the last four years of committee transcripts and news articles on EDR. This issue was first introduced in the Nebraska Legislature in 2008.

228. Lorraine Minnite, *Election Day Registration: A Study of Voter Fraud Allegations and Findings on Voter Roll Security, A Preliminary Report*, DEMOS, 4 (Nov. 18, 2007), http://www.demos.org/sites/default/files/publications/edr_fraud.pdf.

229. See, e.g., Mark Ritchie, *Registering to Vote*, OFFICE MINN. SECRETARY STATE, <http://www.sos.state.mn.us/index.aspx?page=204> (last visited Jan. 1, 2012) (detailing documents commonly also required in other EDR states to vote).

230. For example, HAVA requires first time (new to the state or first time voting) mail-in voters to mail in proof of residency or show their ID at the polls the first time. See *Voter Information Frequently Asked Questions*, NEB. SECRETARY STATE, http://www.sos.ne.gov/elec/voter_info.html (last visited Jan. 1, 2012). Otherwise, if someone is already registered in the state and simply updating their registration, all they need to do is fill out a new voter registration form. *Id.*

231. LB 605, 102nd Leg., 1st Sess. (Neb. 2011).

232. *Voter Information Frequently Asked Questions*, *supra* note 225 (requiring only one form of identification only when a first time voter in Nebraska).

233. Minnite, *supra* note 228, at 5.

EDR in Nebraska would increase turnout, decrease provisional ballot cost, and has no history of increasing fraud.²³⁴ EDR has been conducted effectively in Minnesota and Wisconsin for over thirty years,²³⁵ and with advances in technology, the ease of implementing EDR has become even more feasible.²³⁶ If the argument against EDR is fear of the unknown and disruption of the status quo, then the case for EDR is all the more strong. The Nebraska Constitution states, “All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise.”²³⁷ It is time for Nebraska to remove the unnecessary impediment of registration deadlines—an impediment that has been proven to disenfranchise eligible voters.

C. Proposed Reforms

In the eight states that have enacted EDR, all have done so via use of the legislative process.²³⁸ EDR legislation has been introduced in the Nebraska legislature five times in the last four years and has failed to get out of committee each time.²³⁹ Keeping in mind the obstacles to reform discussed above, implementation of EDR requires building consensus among policymakers and election administrators by mitigating administration concerns. Several alternative forms of EDR should also be considered such as EDR only at county election offices²⁴⁰ or allowing registration up until the day of the election. These modified forms of EDR may address concerns of the various stakeholders and potentially make EDR more politically viable, potentially leading to its success on the floor of the legislature.

Finally, an alternative piece of legislation could allow residents of Nebraska who are registered to vote in the state, who have moved to a different county, but did not reregister before the registration deadline, to update their registration on Election Day. This is commonly known as county-to-county portability and is EDR for state residents who have registered to vote but did not update their registration after moving. A recent study of rejected provisional ballots in the 2008 Ne-

234. See discussion and research *supra* Part IV.

235. *Election-Day Registration: A Case Study*, PEW CENTER ON STS., 7 (Feb. 2007), <http://www.pewcenteronthestates.org/uploadedFiles/Election%20Reform%20Briefing%2016;%20Election-Day%20Registration%20A%20Case%20Study.pdf> (stating that EDR has been conducted in Minnesota for over 30 years).

236. *Id.* at 8 (noting that Minnesota was looking at electronic poll books at each precinct for EDR).

237. NEB. CONST. art I, § 22.

238. See *supra* note 177.

239. LB 605, 102nd Leg., 1st Sess. (Neb. 2011); LB 382, 101st Leg., 1st Sess. (Neb. 2009); LB 125, 101st Leg., 1st Sess. (Neb. 2009); LB 991, 100th Leg., 2d Sess. (Neb. 2008); LB 803, 100th Leg., 2d Sess. (Neb. 2008).

240. LB 382, 101st Leg., 1st Sess. (Neb. 2009).

braska general election found that twenty-four percent of the rejected provisional ballots (804 ballots) were rejected because the voter was registered in the wrong county.²⁴¹ This does not take into account the number of voters who declined casting a provisional ballot after they were informed they were in the wrong county. As noted above, in Iowa, fifty percent of the Iowans who registered to vote on Election Day were already registered in Iowa, but were no longer at their registered address.²⁴² County-to-county portability would break down unnecessary registration barriers, while providing a less drastic solution than EDR.

V. IN NEBRASKA WE LET THE FOX GUARD THE HENS: PARTISAN ELECTION COMMISSIONERS²⁴³

The lack of uniform election standards leads to the unequal treatment of voters, and arbitrary registration deadlines likely disenfranchises thousands of eligible Nebraska voters each year. However, a partisan election administrator with a high degree of discretion has the ability to do both, while advocating from a position of authority for election policies in the legislature that disadvantage their political opponents and the voter. Appointed election commissioners in Nebraska have historically been highly partisan campaign operatives.²⁴⁴ Nebraska is not alone. Party-affiliated election officials run elections across the country.²⁴⁵ This is particularly troubling when confronted with evidence indicating that the election official's party affiliation can affect the use of their discretion.²⁴⁶ A survey of nearly forty democratic countries recently found that the United States ranked second

241. Cleveland, *supra* note 203, at 2.

242. See *supra* text accompanying note 189.

243. GERKEN, *supra* note 1, at 15 (noting that the phrase “foxes guarding the henhouse” is commonly used by academics when discussing the partisan nature of election administration in the United States).

244. See *infra* text accompanying notes 263–67.

245. David C. Kimball et al., *Helping America Vote? Election Administration, Partisanship, and Provisional Voting in the 2004 Election*, 5 ELECTION L.J. 447, 453 (2006).

246. See *id.* at 457–59 (finding some evidence of local election officials' partisan affiliation and slightly more “generous” provisional ballot acceptance if the election official was Democratic than if Republican); Guy Stewart, *Databases, Felons, and Voting: Bias and Partisanship of the Florida Felon List in the 2000 Elections*, 119 POL. SCI. Q. 453 (2004) (finding Florida counties with Republican election officials to be more aggressive in conducting voter purges than Democratic officials); Joshua J. Dyck & Nicholas R. Seabrook, Paper Prepared for Presentation at the Annual Meeting of the Midwest Political Science Association: The Problem with Vote-by-Mail (Mar. 18, 2009 manuscript) (finding that with the moving of voters to inactive status, which does not allow the voter to vote, the Republican local election officials were more likely to move registrants to inactive status than Democratic officials); Daniel P. Tokaji, Remarks Prepared for Election Reform Agenda Conference at the University of Iowa: Partisan and Nonpartisan Election

to the bottom in voter confidence in the honesty of elections.²⁴⁷ Only thirty-nine percent of Americans rated the counting and reporting of votes in the last election as “Very Honest or Somewhat Honest,” ranking thirty-eighth out of thirty-nine countries, just above Russia.²⁴⁸

Nebraska election commissioners who are appointed by the partisanly-elected Governor hold a high degree of discretion in the implementation of rules, procedures, and administration of elections. This includes the designation of polling places, registration sites, and promulgating rules and regulations concerning conduct of poll workers and recount procedures.²⁴⁹ In addition, appointed election commissioners in Nebraska have historically been highly partisan campaign operatives. For instance, in Nebraska’s largest county with 510,000 people and 300,000 registered voters, the last four election commissioners have been the senior strategists in major political campaigns.²⁵⁰ In Nebraska, we let the fox guard the hens.

Election officials in Nebraska are selected one of three ways: (1) election administrators get the job by being elected county clerk; (2) they are appointed by the Governor in counties with populations above 100,000; or (3) they are appointed by the county commission in counties with populations under 100,000.²⁵¹ This section will focus on the gubernatorial appointees, as they are often senior level former campaign operatives. By national comparison, a total of thirty-three states have election systems headed by an official who is elected in a

Administration (May 7–9, 2009), myweb.uiowa.edu/bhlai/reform/papers/tokaji.doc.

247. Caroline Tolbert, Todd Donovan, & Bruce E. Cain, *The Promise of Election Reform*, in *DEMOCRACY IN THE STATES: EXPERIMENTS IN ELECTION REFORM* 7 (Bruce E. Cain et al. eds., 2008). Respondents were asked: “Thinking of the last national election in [country], how honest was it regarding counting and reporting the vote? Very honest, somewhat honest, neither honest or dishonest, somewhat dishonest, very dishonest.” *Id.*

248. *Id.*

249. NEB. REV. STAT. § 32-219 (Reissue 2008).

250. *About the Election Commission*, DOUGLAS COUNTY ELECTION COMMISSION, http://www.votedouglascounty.com/about_us.aspx (last visited May 12, 2011). Dave Phipps is the current election commissioner and began his post in 2005 after previously serving as the political director for Congressman Lee Terry. *Election Commissioner Dave Phipps*, DOUGLAS COUNTY ELECTION COMMISSION, http://www.votedouglascounty.com/commissioner_bio.aspx (last visited Jan. 8, 2012). Carlos Castillo was also the campaign manager for Republican Congressman Lee Terry. *Three Finalists Vie for County Elections Post*, OMAHA WORLD-HERALD, Apr. 5, 2003 (Sunrise Edition), at B6. Patrick McPherson was the election commissioner in 2003 and was formerly a Douglas County and 2nd Congressional District GOP Chairman. C. David Kotok, *GOP Fixture Gets County Election Job Gov. Johanns Appoints Pat McPherson to the Douglas County Position*, OMAHA WORLD-HERALD, Dec. 4, 2002 (Sunrise Edition), at B8. Scott Lautenbaugh, was the election commissioner from 2000–03 and is described as being “active in Republican politics.” *See infra* note 281.

251. NEB. REV. STAT. § 32-207, -211 (Reissue 2008).

partisan process.²⁵² In states that appoint election administrators, it is generally an appointment by the Governor.²⁵³ Finally, across the nation, on the local level, nearly two-thirds of jurisdictions elect their election officials and nearly half of local election administrators are officially affiliated with a party.²⁵⁴ Unfortunately, Nebraska's system of allowing partisan political operatives to administer elections is the norm.²⁵⁵

A. The Problem: The Case for Non-Partisan Election Administrators

Just as an independent judiciary is considered critical to a democratic society, so is an independent election system. A majority of democratic countries have an independent electoral commission.²⁵⁶ However, election administration in the United States can be more properly categorized as divided partisan authority.²⁵⁷ In this regard, the United States is in the minority, and the hyper-decentralized nature of the nation's election system is even more unique.²⁵⁸ While there is a certain degree of limited federal control as evidenced by HAVA, the Election Assistance Commission, and the Federal Election Commission, a vast majority of the power and control of elections in the United States lies with state and local election officials.²⁵⁹

To fully understand the extent and control of this localized power, one need only look at Nebraska's election system. The county election administrators have considerable discretion, and the Nebraska secre-

252. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming Election Administration To Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 974 (2005).

253. *Id.*

254. Daniel Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 131–32 (2009).

255. GERKEN, *supra* note 1, at 16–19.

256. RAFAEL LOPEZ-PINTOR, UN DEV. PROGRAMME, ELECTORAL MANAGEMENT BODIES AS INSTITUTIONS OF GOVERNANCE 25 (2000), available at www.pogar.org/publications/other/undp/elections/electoralmgmtbodies-e.pdf.

257. Tokaji, *supra* note 254, at 138–40.

258. *Id.* at 140–41 (“These [regarding election administration] different ways of allocating authority may be analogized to the American constitutional structure, with a horizontal division corresponding to what we call separation of powers and a vertical division corresponding to our federalism. Countries with some sort of divided authority model account for 27% of the world's democracies. Thus, the United States is in the minority—and at the far end of the spectrum in the hyper-decentralized character of our system—but we are not alone. Other countries also have decentralized systems, albeit ones that lack the degree of localism that predominates in the United States.”).

259. GERKEN, *supra* note 1, at 20 (citing Daniel Tokaji, *The Birth and Rebirth of Election Administration*, 6 ELECTION L.J. 118, 121 (2007)); ROY G. SALTMAN, THE HISTORY AND POLITICS OF VOTING TECHNOLOGY: IN QUEST OF INTEGRITY AND PUBLIC CONFIDENCE 185 (2006).

tary of state has even more.²⁶⁰ As discussed extensively above, the Nebraska secretary of state acts as the chief election officer and decides disputed points of election law, adopts and promulgates rules and regulations as to the conduct of elections, and enforces the Election Act through the Nebraska Attorney General's office.²⁶¹ Willfully interfering or refusing to comply with the requirements of the secretary of state can result in a Class III misdemeanor.²⁶²

However, without uniform election administrator and poll worker standards, an immense degree of discretion on election matters is left to the chief election officers of Nebraska's ninety-three counties.²⁶³ In fact, state statute specifically states that election commissioners "shall adopt . . . rules and regulations in regard to elections . . . not inconsistent with the Election Act or the rules and regulations of the Secretary of State."²⁶⁴ This is particularly troubling in light of a recent Midwest study that found partisanship has influenced election administrator decisions on provisional ballot regulations.²⁶⁵ The only restriction on appointed Nebraska election commissioners is that they not hold a political party office or be a member or officer of a candidate committee.²⁶⁶ However, election commissioners can be active in the political party structure as Nebraska law clearly states they may be a delegate to a county, state, or national political party convention.²⁶⁷ The obvious exception to this statute is county clerks who run for their office.

The current Douglas County election commissioner and deputy election commissioner do not hide their political affiliation and involvement.²⁶⁸ This is the norm in a system where partisan election administrator appointees are openly appointed based on their campaign or elections experiences in the field. Commissioner Dave Phipps announces on the Douglas County election commissioner's website that he was the political director and deputy campaign manager for Republican Congressman Lee Terry.²⁶⁹ The last sentence of his biography states he is active in the Republican Party, College Republicans, and volunteered for various campaigns.²⁷⁰ His deputy, who is

260. See NEB. REV. STAT. § 32-203 (Reissue 2008).

261. See *id.* § 32-202(3).

262. See *id.* § 32-1501, -1550.

263. See *id.* § 32-215.

264. *Id.*

265. Kimball et al., *supra* note 245 (finding some evidence of partisanship influence on election administration rules).

266. NEB. REV. STAT. § 32-219.

267. *Id.*

268. See *Deputy Election Commissioner Lisa Wise*, DOUGLAS COUNTY ELECTION COMMISSION, <http://www.voteddouglascounty.com/deputy-bio.aspx> (last visited Feb. 25, 2012); *Election Commissioner Dave Phipps*, *supra* note 250.

269. *Election Commissioner Dave Phipps*, *supra* note 250.

270. *Id.*

required by state statute to be of a different party, also displays that she worked full-time as field coordinator for the Nebraska Democratic Party and was a fundraiser for Democratic Senator Ben Nelson and Mayor Mike Fahey's re-election campaigns.²⁷¹ The election commissioner before Phipps was Carlos Castillo, who resigned to run Governor Dave Heineman's re-election campaign and managed Congressman Lee Terry's campaign right before assuming his duties as election commissioner in 2003.²⁷² While this is only one county, the story is no different in Sarpy and Lancaster counties.²⁷³

Douglas County is Nebraska's largest county with nearly 315,185 registered voters.²⁷⁴ With a total of 1,157,345 registered voters in Nebraska, Douglas County alone comprises over a quarter of the registered voters in Nebraska.²⁷⁵ This gives a self-proclaimed partisan, senior political operative an enormous amount of discretion over a quarter of the state's registered electorate. The counties of Lancaster (179,374 registered voters) and Sarpy (91,350 registered voters) also have election commissioners appointed by the Governor.²⁷⁶ Combined, partisan-appointed election commissioners administer the elections for just over half of all registered Nebraska voters.²⁷⁷ With the immense degree of discretion in the implementation of rules, procedures, and administration of elections discussed above, this is particularly disturbing, given the partisan nature of the appointed election administrators.

1. *Partisanship and Election Administration: Former Douglas County Election Commissioner Lautenbaugh's Argument for Redistricting*

Professor Heather Gerken, an election reform advocate and academic, put it best: "It's easy to see why it is a bad idea to have partisan officials run our elections. We don't let people referee the game they are playing, and with good reason."²⁷⁸ In Nebraska, the top election

271. *Deputy Election Commissioner Lisa Wise*, *supra* note 268.

272. Associated Press, *Castillo Will Lead Heineman's Campaign*, 1011NOW.COM, <http://www.1011now.com/news/headlines/1628607.html> (last visited May 12, 2011).

273. Press Release, Gov. Heineman Names Wayne Bena as Sarpy County Election Commissioner (Nov. 30, 2009), http://www.governor.nebraska.gov/news/2009/2009_11/30_sarpy.html (last visited May 12, 2011).

274. *Official Results of Nebraska General Election-November 4, 2008*, NEB. SECRETARY STATE (Nov. 4, 2008), <http://www.sos.ne.gov/elec/pdf/2008%20General%20Canvass%20Book.pdf>.

275. *Id.*

276. NEB. REV. STAT. § 32-207 (Reissue 2008) (stating counties with populations over 100,000 have election commissioners appointed by the governor).

277. *Id.* Using the 2008 registered voter numbers, Douglas, Sarpy, and Lancaster Counties' total registered voters equal 585,909 registered voters. *Id.* This divided by 1,157,345 total statewide voters equals .506, rounding down. *Id.*

278. GERKEN, *supra* note 1, at 16.

administrators of the state's three largest counties depend on the party for their jobs. When the Governor loses his job, so do they. While it is impossible to know exactly what an individual's motives are, partisan or pure, it does beg the question of why we allow partisan campaign operatives to run our elections? Partisan election administration creates unnecessary political conflicts of interest and undermines the election commissioner's authority and integrity.

Former Douglas County Election Commissioner Scott Lautenbaugh's often controversial tenure as the chief election administrator for Douglas County serves as a powerful example for non-partisan election administration in Nebraska. Currently, Lautenbaugh is a Nebraska State Senator serving on the legislature's 2010 Redistricting Committee.²⁷⁹ The Congressional map introduced by Lautenbaugh, and passed out of committee, was called a "partisan power grab" by a University of Nebraska-Lincoln political scientist who heads an independent redistricting oversight committee.²⁸⁰

Lautenbaugh's story actually begins in 1999 when Lautenbaugh was appointed by Republican Governor Mike Johanns to assume the role of Douglas County election commissioner after serving three years as chief deputy election commissioner.²⁸¹ Serving as chief deputy for three years, Lautenbaugh was no stranger to the office or to controversy.²⁸² However, the law (both then and now) does not ban election commissioners from participating in political activities, only from serving on a candidate committee.²⁸³ Less than a year after being appointed Douglas County election commissioner, a series of heated debates and court battles erupted around Lautenbaugh's May 2001 decision to redistrict city council districts using the 1990 census numbers instead of waiting for the 2000 census numbers to be released.²⁸⁴ The primary opposition came not from the Omaha City Council but rather the Unicameral's only African American legislator,

279. *Redistricting Committee*, NEB. LEGISLATURE, <http://news.legislature.ne.gov/red/> (last visited Jan. 1, 2012).

280. Professor Michael Wagner, Editorial, *A Better Way to Redistrict*, LINCOLN J. STAR (May 11, 2011), http://journalstar.com/news/opinion/editorial/columnists/article_a99006df-fa5d-54ff-99ea-72938bdd97ed.html.

281. Deborah Alexander, *New Election Commissioner is Appointed*, OMAHA WORLD-HERALD, Dec. 2, 1999 (Sunrise Edition), at 11.

282. As chief deputy election commissioner in 1996, Lautenbaugh sent a flower and wrote a note to a Democratic candidate for Congress that stated, "For Your Funeral in Nov., Best Wishes, R.I.P." Henry Cordes, *Official's Note Upsets Davis*, OMAHA WORLD-HERALD, Oct. 22, 1996 (Sunrise Edition), at 15.

283. NEB. REV. STAT. § 32-219 (Reissue 2008).

284. Joseph Morton, *Suit Seeks To Postpone Redistricting Chambers Says the Election Commissioner Must Wait for Numbers from the 2000 Census Before Redrawing the City Council Map*, OMAHA WORLD-HERALD, Aug. 25, 2000 (Sunrise Edition), at 15.

Senator Ernie Chambers.²⁸⁵ Chambers subsequently filed suit in Douglas County District Court requesting an injunction to stop Lautenbaugh from redistricting until after the 2000 census numbers became available.²⁸⁶

Senator Chambers' primary argument was that Lautenbaugh's redistricting plan would significantly dilute the district's African American voting power before the new census came out in time for the 2001 city council elections.²⁸⁷ Chambers argued that per state statute, the redistricting must be based off the most recent federal decennial census, which according to Chambers was the 2000 census.²⁸⁸

The Omaha City Council passed a resolution by a 6-1 vote in opposition to Lautenbaugh's redistricting plan before the 2000 Census numbers became available.²⁸⁹ More than one council member accused Lautenbaugh of political gerrymandering and noted Lautenbaugh was close to the then Omaha Mayor Hal Daub, with whom the council often clashed.²⁹⁰

i. Commissioner Lautenbaugh's Argument for Redistricting

Lautenbaugh's argument for redistricting was based on Omaha's recent western annexations, which caused the city council districts to become incredibly unequal and allegedly violated the concept of "one-person, one-vote" established in the U.S. Supreme Court case *Reynolds v. Sims*.²⁹¹ The Court in *Sims* held that both houses in a legislature must be based on population equality and not geographic location to pass muster under the Equal Protection Clause.²⁹² Thus, the population of districts must be as equal as possible. The U.S. Supreme Court later ruled the holding in *Sims* applied to local governments in *Board of Estimate v. Morris*.²⁹³

An Omaha World Herald editorial argued the annexation caused the sixth district's population to rise to 77,617 when the other districts' population averaged around 50,000.²⁹⁴ The editorial noted that

285. *Id.*

286. *Id.*; see also *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W. 2d 540 (2002).

287. Rick Ruggles, *Chambers Challenges Redistricting Plan*, OMAHA WORLD-HERALD, June 3, 2000 (Sunrise Edition), at 1.

288. *Id.* Ironically, the power Lautenbaugh exercised to redistrict was derived from a law Chambers sponsored in 1979. Editorial, *Omaha Vote Can Now Proceed*, OMAHA WORLD-HERALD, Jan. 31, 2001 (Sunrise Edition), at 10.

289. Rick Ruggles, *Council Opposes Redistricting Now*, OMAHA WORLD-HERALD, July 12, 2000 (Sunrise Edition), at 17.

290. *Id.*

291. *Reynolds v. Sims*, 377 U.S. 533 (1964).

292. *Id.* at 577.

293. 489 U.S. 688 (1989).

294. Editorial, *Mind-Readers, Be Gone*, OMAHA WORLD-HERALD, Sept. 3, 2000 (Sunrise Edition), at 28.

if the elections went forward without redistricting the council districts, then the uneven representation would exist until 2005 when the next council election would take place.²⁹⁵

It is important to note that in *Gaffney v. Cummings*, the United States Supreme Court ruled that partisan gerrymandering is permissible.²⁹⁶ In fact, the Court found that separating political considerations from districting and apportionment is nearly impossible.²⁹⁷ In *Cummings*, the Connecticut legislature enacted a redistricting plan, which took into consideration the relative strength of the political parties.²⁹⁸ The Court found this to be a permissible and inseparable consideration in redistricting.²⁹⁹ What is not permissible, however, is the purposeful dilution of minority voting strength through the use of multimember districts or otherwise.³⁰⁰ While Senator Chambers suggested vote dilution, or at least an attempt to weaken the African American vote in North Omaha, no formal lawsuit alleging a discriminatory gerrymander was filed. The African American voting power of Legislative District eleven and the Omaha City Council District two remains strong.³⁰¹

ii. *The Nebraska Supreme Court Weighs In*

Senator Chambers' petition to the Douglas County District Court alleged Lautenbaugh exceeded his authority by drawing boundaries based on the 1990 census and not the 2000 census.³⁰² Further, Chambers alleged that under Nebraska Revised Statute section 14-201.03, the election commissioner had no authority to draw the Omaha City Council district boundaries to maintain substantial population equality as set forth in the Nebraska Constitution.³⁰³ Chambers alleged that it must be done six months after the legislature redistricts the state based on the decennial census pursuant to Nebraska Revised Statute section 35-553.³⁰⁴ Lautenbaugh filed a demurrer which was sustained by the district judge.³⁰⁵ Senator Chambers appealed to the Nebraska Supreme Court which unanimously affirmed the district court's decision and found that Nebraska Revised Statute section 25-

295. *Id.*

296. *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973).

297. *Id.*

298. *Id.*

299. *Id.*

300. *Burns v. Richardson*, 384 U.S. 73 (1966).

301. *Legislative District 11-LB 703 (2011)*, NEB. LEGISLATURE (May 11, 2011), <http://nebraskalegislature.gov/maps/2011/legislature/Dist11.pdf>.

302. *Chambers v. Lautenbaugh*, 263 Neb. 920, 922-23, 644 N.W.2d 540, 544-45 (2002).

303. *Id.*; see NEB. CONST. art. III, § 5.

304. *Id.*

305. *Id.* at 922, 644 N.W. 2d at 544.

553 does not limit redistricting to once every ten years.³⁰⁶ The Court found that redistricting is mandatory six months after the legislature's redistricting of the state only if redistricting is required to maintain substantial equality of population within the district.³⁰⁷ This, however, was not found to prohibit redistricting "at other times to maintain substantial equality."³⁰⁸ Senator Chambers lost and Lautenbaugh won.

iii. Partisan Redistricting Accusations Continue

Criticism for Lautenbaugh's partisan gerrymandering did not end with the 2000 Omaha City Council redistricting. In 2002, Lautenbaugh redistricted the Omaha Public School District and re-numbered two sub districts, which placed the school board president and another member in a sub district that would not vote until 2004.³⁰⁹ Both members were Democrats and alleged that the Republican-appointed election commissioner's actions were politically motivated.³¹⁰ Omaha School Board President John Langan stated in an Omaha World-Herald story that, "I smell a rat . . . The rat is there. Who it is, I don't know. But I'll get a trap to catch them."³¹¹

Constituent Laurey Steinke and Langan filed a petition and an affidavit for writ of mandamus in state district court.³¹² The petition alleged that under Nebraska Revised Statute section 32-552(3), Lautenbaugh exceeded his authority and abused his statutory power by not simply adjusting boundaries, but also by switching the numbers between sub districts No. 9 and No. 10.³¹³ Lautenbaugh's redistricting plan placed Langan in sub district No. 10 which would not be up for election until 2004, essentially kicking Langan out of office.³¹⁴ The general area of the districts were extremely similar, Lautenbaugh simply switched the numbers.³¹⁵ The writ of mandamus requested that Lautenbaugh switch the numbers back to the previous configuration and accept the filing for candidacy submitted by Langan in sub district No. 9.³¹⁶

306. *Id.* at 931, 644 N.W.2d at 550.

307. *Id.*

308. *Id.*

309. Joseph Morton, *Langan's Re-Election Bid Heading Back to Court*, OMAHA WORLD-HERALD, Feb. 6, 2002 (Metro Edition), at B1.

310. Angie Brunkow, *Redistricting to Oust 2 OPS Board Members Democrats John Langan and Bernie Kolasa Question the Republican Election Commissioner's Impartiality*, OMAHA WORLD-HERALD, Dec. 1, 2001 (Metro Edition), at B1.

311. *Id.*

312. *Steinke v. Lautenbaugh*, 263 Neb. 652, 654, 642 N.W.2d 132, 135 (2002).

313. *Id.* at 655, 642 N.W.2d at 136.

314. *Id.*

315. *Id.*

316. *Id.*

During direct examination, Lautenbaugh admitted that the changing of the numbers had nothing to do with his statutory authority to redistrict school districts under Nebraska statute.³¹⁷ On redirect, Lautenbaugh testified that his decision to change the numbers of the district was to prevent the people of sub district No. 10 from being represented by someone who lived outside of sub district No. 10 for three years.³¹⁸ The district court found that Lautenbaugh exceeded his statutory authority because he was not allowed to take into account a political result when performing his statutory duty to redistrict school district boundaries.³¹⁹ Lautenbaugh appealed and, given the impending elections, the Nebraska Supreme Court expedited review.³²⁰

The Nebraska Supreme Court found it was not necessary for Lautenbaugh to alter the sub district numbers to achieve the political goal of achieving the incumbency of the No. 10 sub district school board member.³²¹ Further, the Supreme Court upheld the district court's determination that the statute did not authorize Lautenbaugh to weigh political factors when adjusting the boundaries following the census and the statutes did not authorize the formation of new sub districts.³²² By reassigning the numbers based on the residency of an incumbent, Lautenbaugh exceeded that authority.³²³ The district court's writ of mandamus was upheld and Lautenbaugh was ordered to return the original numbers to the sub districts and accept Langan's filing for candidacy.³²⁴

2. *Lessons Learned: The Need for Non-Partisan Election Administration*

Although Lautenbaugh was vindicated by the Nebraska Supreme Court's ruling in *Chambers*, he was also rebuked by the Court in *Steinke*. The Court specifically noted in *Steinke* that he could have achieved his purpose without renumbering School Board President Langan's district,³²⁵ which was one of the many reasons why Langan and others cried partisan foul play.

In 2008, Lautenbaugh was appointed to the Nebraska legislature by Governor Dave Heineman and subsequently elected to a full

317. *Id.*

318. *Id.* at 656, 642 N.W.2d at 136–37.

319. *Id.*

320. *Id.*

321. *Id.* at 664, 642 N.W.2d at 142.

322. *Id.*

323. *Id.* at 665, 642 N.W.2d at 142.

324. *Id.*

325. *Id.* at 665, 642 N.W.2d at 142–43.

term.³²⁶ Not surprisingly, Senator Lautenbaugh serves on the Nebraska legislature's 2010 Redistricting Committee and voted in favor of a Congressional map that removed an electorally competitive section of the 2nd Congressional District and placed it in the less competitive 1st Congressional District.³²⁷ This likely ensures that a repeat of the 2008 Democratic presidential win in the 2nd Congressional District will not happen any time soon.³²⁸ As noted above, in an editorial on the issue, a University of Nebraska-Lincoln political scientist called the proposed Congressional map a "partisan power grab."³²⁹ While Lautenbaugh's motives could have been pure, his partisan background and appointment eroded the public confidence in the election system and drew accusations of partisan foul play. All of which could be substantially avoided by a non-partisan election commissioner appointment system. This not only benefits the election administrator, but would also enhance the public confidence in the fairness of the system.

B. Obstacles to Reform

The source of most resistance to non-partisan election administration would likely be the governor and secretary of state. The governor currently has the power to appoint election commissioners of counties with populations over 100,000 with little restriction.³³⁰ The secretary of state acts as the chief election officer and, as discussed above, has considerable discretion in the promulgation of rules and enforcement of the Election Act. Neither elected official would likely support the elimination of such broad power and oversight under their offices.

In particular, the governor holds the power to veto any legislation. With most election reform occurring via the legislative process, such veto power could be a formidable roadblock to non-partisan election administration reform. However, as discussed below, non-partisan election reform utilizing the initiative process for a constitutional amendment or passage of a law would prevent the governor's use of his or her veto power.³³¹ Initiative process aside, generating enough

326. *Scott Lautenbaugh: Biography*, NEB. LEGISLATURE, <http://news.legislature.ne.gov/dist18/biography/> (last visited Jan. 1, 2012).

327. Wagner, *supra* note 280.

328. *Id.* (explaining the political consequences of the redistricting by stating: "The major political change is that voter registration moves from nearly equal (about 1,000 more registered Democrats in the 2nd District after the last round of redistricting) to a 5,000 to 10,000 registered Republican advantage").

329. *Id.*

330. NEB. REV. STAT. § 32-208 (Reissue 2008). There are few restrictions as to who the Governor can appoint except that they be a resident of the county and be of "good moral character and integrity and capacity." *Id.* They also may not be a candidate for any elective office and may not hold elective office. *Id.*

331. NEB. CONST. art. III, § 4.

public awareness and support for non-partisan election administration could sway both the governor and secretary of state to not oppose non-partisan election administration reform.

Allowing partisan campaign operatives to run Nebraska elections provides a troubling degree of partisan-led discretion over half of Nebraska's registered voters. Nebraska gives the keys to the state's elections to individuals with a proven record of partisan gamesmanship. Similarly, studies have indicated there is implicit bias in favor of a partisan election commissioner's political party when making certain discretionary administrative decisions.³³² Finally, the danger of giving partisan campaign operatives positions within the state's election administration is it provides a platform and position of authority to influence public policy to advance their party's goals or inhibit turnout among the opposing party's base.³³³ This has been proven and played out in committee hearing after committee hearing in the legislature.³³⁴ When the only full-time election professionals in the state are partisan political operatives, our policymakers lack reliable and unbiased sources of information when making important policy decisions.

C. Proposed Reforms

Nebraska should follow the lead of Wisconsin and create a commission of bi-partisan retired judges to make non-partisan election administrator appointments and assume the secretary of state's chief election officer duties under the Election Act.³³⁵

1. Reform via the Initiative Process

Given the likelihood of a veto on any legislation stripping the governor of the power to appoint election commissioners, the initiative process could provide the best avenue for reform. In particular, the Nebraska initiative process to change or create a statute may be most effective. This is particularly true for election reform issues that have polled favorably among registered voters. Non-partisan election administration is one such reform that has consistently polled high. A survey conducted by Michael Alvarez and Thad Hall found that among registered voters, 72.6% favored non-partisan election admin-

332. Kimball et al., *supra* note 245 (finding some evidence of partisanship influence on election administration rules).

333. In the author's experience, Lautenbaugh is a great example of this. As a state senator he often champions election issues in the Legislature, and his experience as a former election commissioner gives him a great deal of weight in election reform discussions.

334. This is based on the author's own opinion and experience in attending six years of committee hearings on legislative issues.

335. *Introduction to the G.A.B.*, WIS. GOV'T ACCOUNTABILITY BOARD, <http://gab.wi.gov/about/introduction> (last visited May 26, 2011).

istration.³³⁶ Among the general population, 66% thought local or state officials should be non-partisan.³³⁷ Only 19.6% thought election administrators should be partisan.³³⁸

However, the initiative process is time consuming and costly. In order to place a proposed constitutional amendment on the ballot, you must collect signatures from ten percent of the registered voters at the time of filing.³³⁹ In order to place a proposed statute on the ballot you must collect signatures from seven percent of the registered voters at the time of filing the petition.³⁴⁰ With 1,124,247 registered voters in Nebraska,³⁴¹ you would need to collect 114,225 signatures for a proposed constitutional amendment and 79,957 signatures to place a proposed statute on the ballot for consideration. These numbers do not include the extra signatures one must also collect in order to account for those who believe they are registered voters but are not.

The cost of coordinating and collecting the necessary signatures required is also expensive. In Nebraska, the cost of each signature collected is estimated to be around four dollars for paid canvassers, coordination, advertising, etc.³⁴² Taking into account that approximately one-fourth of the signatures collected would be by volunteers, and that several thousand extra would have to be collected to compensate for invalids, approximately 80,000 signatures would need to be collected by paid canvassers in attempting a constitutional amendment.³⁴³ Given the four dollars per signature cost estimate, this would equal approximately \$320,000. Not an insignificant sum for election reform advocates.

Given the amount of signatures needed, “homegrown” all-volunteer initiatives have become increasingly rare.³⁴⁴ However, given the high level of support for non-partisan election administration among registered voters, it may be an effective avenue worth pursuing. Amending

336. Tokaji, *supra* note 254. Respondents were asked to choose between the three options: (1) The local or state officials who run your elections should be (a) appointed or (b) elected; (2) The local or state officials who run your elections should be (a) partisan or (b) nonpartisan; (3) Elections in your community should be overseen by (a) a single election official or (b) an election board. *Id.*

337. *Id.*

338. *Id.*

339. *Duggan v. Beerman*, 245 Neb. 907, 515 N.W.2d 788 (1994) (holding that the signature threshold as required by the constitution requires ten percent of total registered voters at the time of filing the petition).

340. NEB. CONST. art. III, § 2.

341. *Registered Voters as of October 25, 2010*, NEB. SECRETARY STATE, <http://www.sos.ne.gov/elec/2010/pdf/2010-general-registered-voters.pdf> (last visited May 12, 2011).

342. E-mail from Kent Bernbeck, a professional Nebraska petition circulator and activist, to author (Mar. 15, 2011) (on file with author).

343. *Id.*

344. *Id.*

the Election Act via the legislative process and subsequently removing the Governor's power to freely make partisan election commissioner appointments would likely result in a veto. However, utilizing the initiative process to create non-partisan election administration via a proposed law would prevent the Governor from exercising his veto power as it is prohibited by the state constitution.³⁴⁵

VI. CONCLUSION

The solutions to these problems are surprisingly straightforward. However, the political barriers are exceptional. While exceptional, these political barriers are not insurmountable. Education, collaboration, and coalition-building with election administrators, policymakers, and other stakeholders can lead to substantive reform using the legislative, judicial, and perhaps even the initiative process. Accessibility of the electoral process, equal treatment of the electorate, and fair, non-partisan election administration are goals that all democracies should strive for. One of the opportunities that our nation's decentralized election system offers is the chance for Nebraska to set itself apart from its peers. Nebraska can and should lead the way in the development of a more inclusive, non-partisan, and fair election system.

345. NEB. CONST. art. III, § 4.