

EXECUTIVE SUMMARY AND OVERVIEW

Many of the elections for governor, the U.S. Senate and House of Representatives will be close in 2010. Potentially, party control of the Senate and House hangs in the balance; gubernatorial races will also be critical, with redistricting to begin shortly after the elections. These dynamics set the stage for election time mischief and attempts at suppression and manipulation of registration and voting rules, especially in close contests where a handful of votes could tip the balance. In other words, the laws and policies governing voting have the potential to be game changing.

In this report, we review a number of election laws and policies in 10 states chosen because they are expected to have close elections. In each state, there are problems with election laws, policies and practices which could impact enough voters to determine election outcomes.

The stakes are high.

The tenor of the political debate and the mood of the country around government make our election system particularly susceptible to challenges this year. The negative tone started with town hall meetings in the Summer and Fall of 2009 around the issue of health care, in which members of Congress and other citizens were shouted down and intimidated. It continued through the winter with the burgeoning of the “tea parties,” particularly their more extreme elements. In the spring, it devolved into a situation in which racial and homophobic epithets were directed at members of Congress and threats made against their lives. And in the last several months the issue of immigration – and more importantly the role of immigrants and ethnic minorities in our society – has been debated in a way that makes clear that we are going through a period of great suspicion and anger toward some minority groups. This dangerous cocktail has the potential to set up a particularly toxic environment for hotly contested elections, often between candidates with significant ideological differences. How elections are administered, and how the activities of partisan activists are managed, will be crucial in determining whether our elections are fair.

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As in previous election cycles, including in our 2008 Swing State Report, we examine the following critical election issues in key states, provide a summary chart evaluating each state’s practices, and offer recommendations for improvement of these voting procedures.

- **Voter Registration Issues.** Surveys and voter hotlines identified problems with the voter registration process as the top factor causing eligible votes to go uncounted in 2008 and up to 3 million eligible voters were disenfranchised as a result.¹ There are numerous ways inadequate voter registration processes impede citizens from registering to vote and staying on the rolls; such problems are ongoing.
 - » In most states, registration deadlines fall nearly a month before elections. This means just as the media and much of the public are focusing attention on the races, voters who have not registered are barred from doing so. Every state we reviewed except North Carolina has unreasonably limited voter registration deadlines.
 - » There are inadequate provisions to allow voters to update their addresses or party affiliations once they are registered.
 - » Voter registration drives can be so restricted by state law that they become too cumbersome and expensive to conduct.
 - » Failure to implement the National Voter Registration Act (NVRA), which requires state-based public assistance and disability agencies to conduct voter registration, can block a major avenue for voter registration, especially among lower income Americans. Kentucky for instance has seen a 74 percent decline in registrations from public assistance agencies between the 1996 and 2008 election cycles, while Louisiana saw an 88 percent decline.

- » State law can create barriers to voting for formerly incarcerated citizens who have completed their sentences. Kentucky, for example, requires a pardon from the governor to have voting rights restored, effectively blocking some 186,000 people from voting.
 - » Flawed processes in compiling and verifying voter registration databases can lead to rejection of valid registrations due to typos, poor handwriting, or other clerical errors.
 - » State law can unreasonably require an exact match between data on voter registration forms and data in existing state databases such as the Department of Motor Vehicles. In these cases, simply including or not including a middle name or transposing of a number can cause a voter's registration to be flagged. Nevada, for instance, requires an exact match of every character of a person's name and birthday with their drivers' license, state ID, or last four digits of their Social Security number.
- **Voter Identification.** While all states have means by which voters identify themselves at polling sites, some states require very specific forms of ID that are not universally available. That distorts election results by preventing eligible voters from casting ballots. Arizona has one of the more restrictive laws in the nation, requiring voters to bring proof of citizenship to register to vote; the state also accepts only fairly limited forms of ID at polling places. From 2004 to 2008, more than 38,000 registrations were rejected in Arizona despite court documents indicating 90 percent of these were from people born in the United States.

Moreover, even though some states allow for a wide range of types of identification, and others permit voters to cast ballots if they forget to bring their ID but sign an affidavit as to their identity, election workers do not always know these laws are on the books and will require certain types of ID anyway.

- **Provisional Ballots.** All states are now required to offer voters provisional ballots when problems arise with registration or voter identification, but use of these ballots varies widely by state. Depending on how they are administered, these ballots can either help voters or mislead them; the rules in some states are so restrictive that a ballot the voter believes was valid will in fact be discarded. Missourians who come to vote without requisite identification will not even be provided with a provisional ballot. In a majority of these states, provisional ballots cast in the wrong precinct – even through no fault of the voter -- will be disregarded.
- **Voter Suppression/Deception.** In every election, there are still efforts to intimidate and deceive voters to suppress turnout. States have not done enough to prohibit these practices, whether they occur via the Internet, flyers, letters, or robocalls. Very few of the states under review here, or anywhere in the country, have measures in place directly prohibiting deceptive practices or prescribing actions to be taken by officials if deceptive practices are perpetrated. In the last election cycle, robocalls to voters' homes gave voters incorrect polling location information and e-mails were blasted around the country with misinformation about the voting date. In 2004, deceptive practices were widespread, with flyers distributed in some low income and ethnic minority neighborhoods claiming that voters who had not paid child support or parking tickets would be arrested if they tried to vote.
- **Caging and Challenge Laws.** Most of our states have laws that allow political operatives and ordinary voters to block other eligible voters from casting ballots through "caging" and "challenge" techniques with few evidentiary requirements and little accountability. In Ohio in 2004, partisan operatives challenged 35,000 voter registrations based only on returned non-forwardable mailings; challenges again were threatened in 2008 in other states.
- **Challenges for New Citizens and Ethnic Minorities.** States need better policies to help new citizens and limited English proficient voters overcome barriers to the voting process. Election administrators also need to be more proactive in their outreach to these communities. New citizens, as well as ethnic minorities born in the U.S., register and vote at lower rates than the general population. In 2008, naturalized citizens voted at a rate more than 10 percentage points lower than that of native born citizens. In most of the states under review the gap was also in the double digits, sometimes high double digits.
- **Overseas and Military Voters.** Overseas voters, particularly our servicemen and women, also face special circumstances in voting. Congress recently passed the Military and Overseas Voter Empowerment Act (MOVE) to require mailing of absentee ballots 45 days prior to an election. The 2010 election will be the first major election in which states have implemented it. It is far from clear that all will meet this requirement and some states, including Colorado, are requesting a waiver. The voices of overseas and military voters need to be heard in our country, and state election officials must take extra measures to ensure that these votes are counted. Regrettably, some states have adopted policies which allow voters to cast ballots via the Internet. These ballots are vulnerable to tampering and to computer glitches. Additionally, voters who send ballots by e-mail and fax must often waive their rights to a secret ballot – an unacceptable practice.

OVERVIEW OF MAJOR OBSTACLES IN EACH STATE

ARIZONA

Political Outlook. The race for *governor* in Arizona is competitive, with State Attorney General Terry Goddard (D) challenging current Governor Jan Brewer (R). At least four races for the *House of Representatives* are also close.

Obstacles to Voting: Arizona is the only state which requires proof of citizenship in order to register to vote. This law has, and was written to have, a disproportionate impact on naturalized citizens seeking to vote; it has already prevented thousands of Arizonans from registering, and acts as a deterrent to the registration of other eligible voters. Arizona has also historically had inadequate outreach to certain language minority communities covered by Section 203 of the Voting Rights Act, and gaps in coverage for qualified and trained bilingual poll workers. Lack of funding and basic administrative support continues to make the jobs of voting rights outreach workers difficult. There is a continued need for federal observers to ensure compliance with the Voting Rights Act in some Arizona counties.

Arizona permanently disenfranchises individuals with more than one felony conviction, but permits those with one felony conviction to vote (though only after completing probation and parole), a distinction which confuses even many elections officials. Arizona's laws regarding challengers at the polling site are lax, and voters are vulnerable to confusion and disenfranchisement due to dissemination of misinformation about the electoral process; Arizona lacks specific laws targeting such deceptive practices. Also in Arizona, provisional ballots cast in the wrong precinct will not be counted, probably disenfranchising a great number of voters. Finally, Arizona's voter registration deadline falls 29 days before the election – a policy which unnecessarily bars many voters from registering.

Exemplary Voting Laws/Procedures: The State of Arizona has an excellent website for limited English proficient voters.

COLORADO

Political outlook: Both the *gubernatorial* and *senatorial* elections in Colorado are considered toss-ups and could be seriously impacted by the Latino vote. The race for governor is a three-way contest, featuring former Denver Mayor John Hickenlooper (D), businessman Dan Maes (R) and former U.S. Rep. Tom Tancredo, a Republican-turned-independent. The Senate race pits incumbent Michael Bennet (D) against Ken Buck (R). Two races for the *House of Representatives* are also looking close in Colorado.

Obstacles to Voting: There are more than 404,000 eligible Hispanic voters in Colorado. Colorado has more than 150,000 immigrant citizens, and Latinos make up 12.2 percent of the electorate.² Yet Colorado elections officials do not conduct any formal outreach for immigrant or language minority voters. Colorado also lacks any law directly banning dissemination of deceptive information, leaving the state open to the use of phony flyers as well as online dissemination of misinformation meant to disenfranchise voters. Colorado needs to change the law so that citizens who have completed their prison sentences can vote and needs to strengthen its procedures notifying ex-felons of their voting rights.

Also, the voter registration deadline in Colorado falls 29 days before the election, unnecessarily barring some eligible citizens from registering to vote. Although Colorado allows “emergency registration” for some voters who miss the deadline, the policy is not comprehensive.

Finally, voting in Colorado may be especially difficult for military and overseas voters. Colorado has requested a waiver of the recently passed federal requirement that absentee ballots be sent out 45 days in advance to overseas voters who have requested them prior to that time.

Exemplary Voting Laws/Procedures: When voters' names in the Colorado statewide voter database don't exactly match data in other databases, and minor errors occur or nicknames are used, officials are authorized to use good judgment and keep the voter registered. Additionally, when voters are given a provisional ballot, the onus is on election workers to check voter databases and the voter's history to determine eligibility.

In 2008, Common Cause, Mi Familia Vota, and SEIU sued the Colorado Secretary of State for unlawfully purging close to 20,000 voters from the voting rolls in violation of the National Voter Registration Act. As a result of the suit, in 2010, there are new policies in place which govern maintenance of the voter lists and establish reasonable matching criteria when adding voters to the statewide registration database. Furthermore, Colorado's legislature passed a law in May 2010 that specifies that no elector's registration may be cancelled solely for failure to vote. These policies should be helpful for voters.

ILLINOIS

Political Outlook: The U.S. *Senate* race for President Barack Obama's former Senate seat is very competitive, as polling shows either a dead heat or a gap of single digits in the contest between U.S. Rep. Mark Kirk (R) and State Treasurer Alexi Giannoulias (D). The *gubernatorial* race may also be tight, as State Senator Bill Brady (R) will be facing Gov. Pat Quinn (D), who replaced disgraced former governor Rod Blagojevich. At least 3 *House* districts also have competitive campaigns.

Obstacles to Voting: Illinois voters who are "challenged" at the polls must show two forms of identification or have another voter testify to their eligibility in order to vote. Elections officials are not provided with clear standards on when to allow a challenged individual to vote a regular ballot. This problem is exacerbated by the fact that any registered voter in the state may act as a designated challenger. In Illinois, provisional ballots cast in the wrong precinct – even if cast in the correct polling site or county – will not be counted for any race, potentially disenfranchising a great number of eligible voters.

Exemplary Voting Laws/Procedures: In Illinois, voting rights are automatically restored to citizens when they are released from prison; citizens on parole or probation are eligible to vote. Illinois also has exemplary voter ID laws, which require only that first time voters who registered by mail provide identification, as mandated by the 2002 Help America Vote Act (HAVA). Illinois does not jeopardize the privacy and security of overseas and military voters by accepting ballots cast by fax, e-mail, or over the Internet. Cook County, Illinois also has an exemplary program for reaching out to new citizens and limited English proficient voters.

KENTUCKY

Political Outlook: The U.S. *Senate* race in Kentucky is competitive, with Tea Party activist Rand Paul (R) ahead of Jack Conway (D), the state's Attorney General.

Obstacles to Voting: In Kentucky, elections will once again be marred by the state's extremely restrictive felon disenfranchisement rules. Nearly six percent of Kentucky's population, and roughly 24 percent of its African American population, is disenfranchised under this law.³ While felons may regain the franchise through a petition to the Governor, that process is clearly inadequate to give ex-felons real access to voting rights. Kentucky is another state that does not have a direct law regarding dissemination of misinformation about the electoral process. This makes it vulnerable to both traditional and online vote suppression mischief. Also, like many other states, Kentucky does not count provisional ballots cast in the wrong precinct, potentially taking the vote away from many eligible voters.

Exemplary Voting Laws/Procedures: Kentucky has the most exemplary voter "challenge" law among the states under review. Only designated challengers and election officials who undergo specific training can challenge other voters' right to vote. Also, Kentucky does not jeopardize the privacy and security of overseas and military voters by accepting ballots cast by fax, e-mail, or over the Internet.

LOUISIANA

Political Outlook: In the U.S. *Senate* race, embattled U.S. Sen. David Vitter (R) is running for reelection and is facing a challenge from U.S. Rep. Charlie Melancon (D). Two *House* seats are also up for grabs.

Obstacles to Voting: Louisiana has experienced an 88 percent decline in the number of registrations from public assistance agencies since such registration programs were required – from 74,636 registrations in 1995-1996 to only 8,688 registrations in 2007-2008 – one of the steepest drops in the nation.⁴ Moreover, laws in Louisiana regarding voter challenges are troublingly unclear. Any voter registered in the state may make a challenge, and once challenged, an individual's right to vote is left entirely to the discretion of the majority of the election commissioners at the polling place, with little guidance provided to the commissioners regarding how to make such a determination. In addition, many in Louisiana are likely to miss the state's very early, 30-day registration deadline. Finally, Hurricanes Katrina and Rita could continue to present challenges to election administration in Louisiana. A 2007 purge program removed 21,000 names from the statewide voter registration list when officials compared the names of Louisiana voters with lists from other states. Although the Secretary of State's office eventually restored many names in the vicinity of New Orleans that they originally struck, list maintenance programs in Louisiana should continue to be monitored.

Exemplary Voting Laws/Procedures: None among those studied.

MICHIGAN

Political Outlook: The race for *governor* was considered close, slightly leaning Republican; however, in recent weeks Republican businessman Rick Snyder now has a substantial lead in the polls over Democrat Virg Bernero, the mayor of Lansing. Two *House* seats currently held by Democrats are considered toss-ups.

Obstacles to Voting: Michigan was until recently involved in a lawsuit over purges to its voter registration databases in which the state agreed to settle and reform its past practices.⁵ During the 2008 election, Michigan was the epicenter of controversy over possible plans to challenge voters whose homes had been foreclosed.⁶ Challenges and caging lists remain a potential problem.

In addition, the number of voter registration applications reported to have come from Michigan's public assistance agencies declined 87 percent between 1995-1996 and 2007-2008 – from 79,538 to only 10,542.⁷ The state's Department of Human Resources (DHR) worked cooperatively with advocates to make some improvements in their NVRA procedures in late 2007 and early 2008. Data on voter registration reported since then however, suggest those improvements may not have been uniformly implemented throughout the state or that accountability mechanisms may not have been utilized by the state agency after initial implementation of the reforms.

Michigan also lacks a law specifically prohibiting deceptive practices, leaving voters vulnerable to Election Day dirty tricks and misinformation campaigns. Additionally, in Michigan provisional ballots cast in the wrong precinct – even if cast in the correct polling site or county – will not be counted, potentially disenfranchising a great number of eligible voters. Finally, Michigan's voter registration deadline falls a full 30 days prior to the election, effectively barring some interested citizens from being able to register to vote in time to cast ballots.

Exemplary Voting Laws/Procedures: Citizens' voting rights are restored as soon as they are released from prison. Michigan does not jeopardize the privacy and security of overseas and military voters by accepting ballots cast by fax, e-mail, or over the Internet. The Secretary of State also makes a serious effort to conduct voter registration at citizenship naturalization ceremonies, a practice others should emulate

MISSOURI

Political Outlook: In Missouri a U.S. *Senate* race is in play. Secretary of State Robin Carnahan (D) and U.S. Rep. Roy Blunt (R) are very close in the polls. Missouri's 4th *Congressional District* may also be competitive.

Obstacles to Voting: In Missouri, voters who do not bring the right ID to the polls on Election Day are barred from voting and not permitted to receive a provisional ballot. Also in Missouri, there may be difficulties caused by challenge laws, which permit any voter to challenge any other voter on Election Day and leave the final determi-

nation of whether the voter may vote by a regular ballot up to the majority of election judges at the polling place. When Missouri voters cast provisional ballots in the wrong precinct, those ballots are completely disregarded. Missouri's voter registration deadline falls 27 days prior to the election, effectively barring some interested citizens from registering and voting. Missouri also does not permit individuals who are on probation or parole for a felony to vote.

Exemplary Voting Laws/Procedures: Missouri is the only state that has a law very directly addressing deceptive practices. Also, after a federal judge found the state's Department of Social Services to be in violation of the National Voter Registration Act, the Department of Social Services dramatically increased voter registration services.

NEVADA

Political Outlook: In Nevada, the U.S. *Senate* race involving Senate Majority Leader Harry Reid is expected to be close. The *gubernatorial race* is a toss-up, with former district judge Brian Sandoval (R) running against Rory Reid (D), a Clark County commissioner. Nevada's 3rd *Congressional District* also is considered a toss-up.

Obstacles to Voting: Nevada uses an "exact match" standard on voter registration databases, which may make it more difficult for some voters to cast a ballot. Nevada is another state where issues could arise around immigrant and Latino voters. There are 192,000 eligible Hispanic voters in Nevada. The Secretary of State has not taken any particularly proactive steps to reach out to these voters. Moreover, even in a state with such large numbers of Latinos, Spanish language voter registration forms are not available on the Secretary of State's website.

In addition, Nevada has had experiences with deceptive practices causing confusion and impeding the vote, and its deceptive practices law is not as specific as it should be to combat these concerns. Nevada's challenge law is also inadequate.

Exemplary Voting Laws/Procedures: Nevada has excellent voter identification laws, with requirements that go no further than the HAVA mandate that first time voters who registered by mail must show certain types of ID prior to voting.

NORTH CAROLINA

Political Outlook: North Carolina has emerged in recent years as a potential swing state. President Obama narrowly won there, but it is unclear if other Democrats will be able to follow suit. Early polls showed the race for *senate* to be competitive, though more recent numbers have shown GOP Senator Richard Burr pulling away from the challenger, Democrat Elaine Marshall. At least three House races are very competitive.

Obstacles to Voting: While North Carolina has by far the strongest voter protection laws and policies of the states we studied, there is still room for improvement. The challenge law in North Carolina is too expansive; any registered voter in a county may challenge a voter before the 25th day before an election,⁸ and any individual registered to vote in a precinct may challenge any voter at his or her precinct on Election Day.⁹ North Carolina does not appear to require that challenges made on Election Day be made in written form or be recorded. Also, voting rights for citizens who have finished a prison sentence are not restored until that individual has completed parole or probation.

Exemplary Voting Laws: In general, North Carolina is a good place to be a voter. First, voters are permitted to register to vote right up until the end of the early voting period, which stops the Saturday before the election. The state agencies are working effectively under an implementation plan developed by the State Board of Elections in cooperation with advocates in 2007¹⁰ to increase voter registration at state agencies. There are no state imposed voter ID laws – North Carolina voters are governed by the federal statute covering first time voters only. North Carolina also has a very strong law prohibiting misinformation campaigns designed to confuse voters and suppress the vote. It is a felony in North Carolina "for any person, directly or indirectly, to misrepresent the law to the public through mass mailing or any other means of communications where the intent and the effect is to intimidate or discourage potential voters from exercising their lawful right to vote."¹¹ Finally, provisional ballots cast in the correct county but wrong precinct will be counted for relevant races.

OHIO

Political Outlook: Ohio is a swing state as both the *senatorial* and *gubernatorial* races are hotly contested. Gov. Ted Strickland (D), who won 60.5 percent of the vote in 2006, is running for re-election, with a challenge from former Congressman John Kasich (R). Former Congressman Rob Portman (R) and Lt. Gov. Lee Fisher (D) will have a competitive battle for the Senate seat. At least four *House* races will also be close.

Obstacles to Voting: While leaders in Ohio have taken great strides to improve the voting system, there is still room for improvement. Ohio's very early voter registration deadline – a full 30 days prior to the election – may prevent many interested citizens from participating. Ohio also has ongoing issues regarding database matching, though the Secretary of State has taken major strides to resolve them. Ohio has had problems with deceptive robo-calls and other attempts to prevent individuals from voting by spreading misinformation; Ohio law is not as specific as it should be to combat such practices. Ohio lacks any anti-spam statutes which apply to non-commercial e-mails, which is worrisome because e-mail is a common and rapid method of spreading disinformation. Finally, Ohio continues to toss away provisional ballots that are mistakenly cast in the wrong precinct by otherwise eligible voters.

Exemplary Voting Laws/Procedures: The state is improving its registration practices at state agencies. The state's Department of Job and Family Services entered into a settlement agreement to effectively implement and monitor the NVRA in November 2009.¹² The first several months of data reporting under the agreement are encouraging.¹³ Ohio also allows citizens who have finished their prison sentences to vote. Ohio's implementation of the MOVE Act is exemplary. The state also has exemplary practices with regard to voter registration outreach to newly naturalized citizens.