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Resolving Election Error

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RESOLVING ELECTION ERROR

Justin Levitt*

Abstract

The ghosts of the 2000 presidential election will return in 2012. Photo-finish, and error-laden, elections recur in each cycle. When the margin of error exceeds the margin of victory, officials and courts must decide which, if any, errors to discount or excuse, knowing that the answer will likely determine the election's winner. Yet despite widespread agreement on the likelihood of another national meltdown, neither courts nor scholars have developed consistent principles for resolving the errors that cause the chaos.

This Article advances such a principle, reflecting the underlying values of the electoral process. It argues that the resolution of an election error should turn on its materiality: whether the error is material to the eligibility of a voter or the determination of her ballot preference.

In developing this argument, the Article offers the first transsubstantive review of materiality as a governing principle. It then introduces the insight that, unlike the evaluation of materiality in other contexts, the materiality of a voting error may be reassessed over time. This dynamic assessment of materiality best accommodates the purposes of a decision rule for election error. Indeed, the insight is most powerful when the stakes are highest: when an election hangs in the balance. Finally, the Article discusses the pragmatic application of the materiality principle, including the invigoration of an underappreciated federal statute poised to change the way that disputed elections are resolved, in 2012 and beyond.

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INTRODUCTION

Twelve years ago, the U.S. Supreme Court's decision in *Bush v. Gore*¹ shocked a nation and catalyzed an academic field. In many ways, the controversy of 2000 marked the rebirth of the study of election law. But with all of the ink spilled on the law of democracy in the last decade, one of the difficulties at the heart of the catalytic event itself has been sorely neglected.

Humans are imperfect. This is no less true in our ability to execute election instructions than in any other arena. In Florida in 2000, citizens made mistakes, *inter alia*, in registering to vote, in completing and mailing absentee ballots, and most notoriously, in indicating their preferred choices on ballots. Citizens made similar mistakes elsewhere around the country, in 2000 and long before. The only meaningful difference is that in Florida, the mistakes happened to be outcome-determinative, and spectacularly so.

These mistakes and opportunities for others have not vanished, and with surprising frequency, they continue to represent the difference between those who prevail in an election and those who do not. The fundamental problem of what to do with these mistakes remains curiously unresolved. Particularly when minor errors—by voters and by election officials—exceed the margin of victory, courts are placed in the unenviable position of deciding which, if any, of these errors to discount or excuse, with the knowledge that their judgment will likely determine the election's winner.

They have had little help in this endeavor thus far. Though scholars have noted the likelihood of another national meltdown caused by the aggregation of election errors,² the most prominent analytical frameworks in the field—and particularly the prevailing frame of rights-based constitutional adjudication—provide little useful guidance to decisionmakers charged with averting crisis wrought by mistakes. Authors have examined the extent of election-related error,³ and discussed institutions to review claims of error,⁴ and discussed remedial options to

¹ 531 U.S. 98 (2000).

² See, e.g., Heather K. Gerken, *Getting From Here to There in Election Reform*, 34 OKLA. CITY U. L. REV. 33, 34-36 (2009); Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 940 (2005).

³ See, e.g., Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350 (2007).

⁴ See *id.*; Joshua A. Douglas, *Procedural Fairness in Election Contests* (working paper, on file with author).

salvage an election when all hope for confronting the error directly is lost.⁵ But very little scholarship offers a consistent principle or set of principles to help a decisionmaker facing an error determine which affected ballots, if any, should be counted.⁶

Absent such principles, some courts have attempted to intuit whether errors are “large” or “small.” Others turned to an assessment of responsibility or fault: voters are relieved from errors made by others, but held to their own mistakes or deficiencies. In this Article, I suggest a principle better suited to the purposes of the voting process than both approaches.

The principle I propose is materiality: particularly, the materiality of an error to an assessment of the affected individual’s eligibility or ballot preference. Materiality plays a critical role in contract, in tortious and criminal fraud, in the law of securities, and in many other legal contexts, separating predicates of legal consequence from those that the law ignores. Yet I am aware of no methodical transsubstantive examination of this notoriously flexible idea. This Article offers such an examination, with a taxonomy of materiality designed to assist in the identification of the election errors that should preclude the counting of a ballot.

Moreover, this Article unearths a feature of the concept that proves pivotal in the election context: the materiality of a voting error may *change*. Here, too, is a notion overlooked in the main: little work in the field of voting rights has addressed the impact of the ability to assess and reassess determinative rulings at different points in time.⁷

Today, errors in the election process are generally evaluated at the time they are committed, and the voter is saddled by that evaluation despite the fact that the error may later become wholly unimportant. The

⁵ See, e.g., Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265 (2007) (discussing systemic remedies for election-related errors, such as re-running the election); Michael J. Pitts, *Heads or Tails? A Modest Proposal for Deciding Close Elections*, 39 CONN. L. REV. 739 (2006) (recommending the random disposition of elections within a certain margin, including elections with substantial rates of error).

⁶ One of the few exceptions may be the interpretive rule suggested by Professor Rick Hasen in his exposition of the “Democracy Canon,” and the developing response that Hasen’s suggestion seems to have engendered. Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009); Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051 (2010); *The Benefits of the Democracy Canon and the Virtues of Simplicity: A Reply to Professor Elmendorf*, 95 CORNELL L. REV. 1173 (2010). I discuss the Democracy Canon in text accompanying notes 42 and 147-148, *infra*.

⁷ The leading pertinent work is by Professor Adam Cox, who concentrates on the difficulties in assessing harm and remedy to groups of voters across election cycles. See Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361 (2007).

dynamic nature of materiality, applied to election law, implies that this existing approach to the assessment of error is inadequate.

Furthermore, the insight into the dynamic nature of materiality is most powerful when the stakes are highest. When errors leave the result of an election in question, there often appears to be a conflict between two fundamental precepts: the rule of law and majority rule. A proper appreciation for the changing materiality of an election-related error can help to resolve this perceived, but ultimately artificial, conflict.

Finally, I explain how the materiality principle may be implemented in practice. The most tangible manifestation of the principle currently exists in a surprisingly underappreciated provision of the landmark Civil Rights Act of 1964, which prohibits disenfranchisement on the basis of some errors or omissions that are not material to a voter's qualifications.⁸ Few courts or commentators have recognized the power of this provision, and none have done so with an appreciation of the dynamic quality of materiality; indeed, proper application of the statute might well have yielded different results in several recent elections. Yet even the Civil Rights Act does not apply the materiality principle as thoroughly as would be beneficial. I therefore suggest that states incorporate the principle explicitly into their own election codes.

The Article proceeds as follows. Part I of the Article begins with a brief review of notable and often outcome-determinative errors that have materialized in recent elections, to demonstrate the relative frequency of the problem. In Part II, I explore some of the potential decision rules for confronting these errors. Part III offers the materiality principle that I propose as superior. Of particular note, I introduce for the first time the insight that in the voting context, an assessment of materiality may change over time. Moreover, recognizing the dynamic nature of materiality better serves the rationale supporting the elections process than any of the available alternatives for confronting error. Finally, in Part IV, I describe how the materiality principle may be implemented in practice, including the first sustained scholarly review of the Civil Rights Act's materiality provision, a ready vehicle for applying the concept.

⁸ Pub.L. 88-352, Title I, § 101(a), 78 Stat. 241, codified at 42 U.S.C. § 1971(a)(2)(B).

I. ERRORS IN RECENT ELECTIONS

The prospect that the balance of an election might turn on the resolution of errors did not die with *Bush v. Gore*.

In 2010, the election for a U.S. Senate seat in Alaska was cast into controversy when incumbent Senator Lisa Murkowski was defeated in the Republican party primary, and announced her intention to run as a write-in candidate. Suddenly, in a race polling well within a comfortable margin of error on the eve of the election,⁹ there was a substantial likelihood that the election result might turn on the spelling and/or penmanship of Murkowski's supporters. And sure enough, a healthy number of ballots were actually cast for "Murkowski," "Morcowski," and "McCosky," with corresponding controversy as to the outcome of the race.¹⁰

Two years earlier, another U.S. Senate election left at least 4,797 absentee ballots of disputed validity—far more than the 312-vote margin of victory.¹¹ These absentee ballots were rejected in the initial election canvass, and most remained uncounted through a thorough recount and vigorously disputed contest proceedings.¹² Many were rejected because of alleged errors.¹³ Some voters failed to sign absentee ballot materials,¹⁴ or signed them in the wrong place.¹⁵ Others completed their own materials

⁹ See, e.g., Nate Silver, *Alaska Race May Make for Long Election Night*, N.Y. TIMES FIVETHIRTYEIGHT, Oct. 18, 2010, <http://fivethirtyeight.blogs.nytimes.com/2010/10/18/alaska-race-may-make-for-long-election-night/>.

¹⁰ Sean Cockerham, *98% of Write-in Votes Go to Murkowski*, ANCHORAGE DAILY NEWS, Nov. 10, 2010.

¹¹ In re Contest of General Election Held on Nov. 4, 2008, for the Purpose of Electing a United States Senator from the State of Minnesota, 767 N.W.2d 453, 457 (Minn. 2009) [*"Coleman v. Franken Appeal"*].

¹² In re Contest of General Election Held on Nov. 4, 2008, for the Purpose of Electing a United States Senator from the State of Minnesota, No. 62-cv-09-56, 2009 WL 981934, at ¶ 12 (Minn. Dist. Ct. 2009) [*"Coleman v. Franken Trial"*].

¹³ See *Coleman v. Franken Trial*, 2009 WL at ¶¶ 85, 92-93.

¹⁴ Absentee ballot envelopes identify voters, and remain sealed with the ballot inside until election officials determine that they comply with state law and that the ballots inside may therefore be counted. In order to preserve the secrecy of an individual voter's political choices, there may be no marks that serve to identify the voter on the ballot itself. MINN. STAT. § 204C.18(2). Once the ballot envelope is opened and the absentee ballot is separated from its envelope, the identity of the individual casting votes via a particular ballot cannot be determined.

¹⁵ See, e.g., Affidavit of Charles N. Nauen exh.3 ¶ 13, Petition by Certain Minnesota Voters to Have Their Votes Counted Pursuant to Minn. Stat. § 204B.44, No. A09-0065 (Minn. 2009) [*"Coleman v. Franken Petition"*]; Contestants' Memorandum of Law in Support of Motion for Summary Judgment at 27-30, 35-38, *Coleman v. Franken Trial*.

accurately, but the information submitted by witnesses was in some way flawed.¹⁶

Though the Minnesota race drew the most attention, there were also ample errors elsewhere. Palm Beach County, Florida—no stranger to election controversy—also rejected absentee ballots with legitimate signatures in the wrong location.¹⁷ Officials in Waller County, Texas—home to the historically black university Prairie View A&M College and a history of alleged voting rights abuses¹⁸—rejected registration forms with complete addresses but no ZIP code.¹⁹ Waller County also rejected versions of registration forms that were not the most recent forms produced;²⁰ some counties in Indiana did the same.²¹ Colorado rejected voter registration forms on which applicants provided the last four digits of their Social Security number, but did not check a box explaining that they had no driver's license to provide instead.²² Ohio rejected absentee ballot applications for citizens who did not check a box indicating that the applicant was a qualified elector,²³ and rejected some provisional ballots

¹⁶ See, e.g., Affidavit of Charles N. Nauen exh.3 ¶ 14, *Coleman v. Franken Petition*; Contestants' Memorandum of Law in Support of Motion for Summary Judgment at 12, 39-43, *Coleman v. Franken Trial*.

¹⁷ Jane Musgrave, *372 Absentee Ballots Tossed*, PALM BEACH POST, Nov. 15, 2008.

¹⁸ Nina Perales et al., *Voting Rights in Texas: 1982–2006*, at 18-19, 25-26, (2006), <http://www.maldef.org/resources/publications/TexasVRA.pdf>.

¹⁹ See Consent Decree, *United States v. Waller County*, No. 4:08-cv-03022 (S.D. Tex. Oct. 17, 2008), available at http://www.usdoj.gov/crt/voting/sec_5/waller_cd.pdf. The U.S. Department of Justice sued, and the subsequent settlement required that these registration forms be accepted. *Id.*

²⁰ *Id.*

²¹ See Agreed Entry and Order in Resolution of Motion for Temporary Restraining Order, *Brown v. Rokita*, No. 1:08-cv-1484 (S.D. Ind. Nov. 3, 2008). On the eve of the election, the state settled a lawsuit, and agreed to accept these registration forms. *Id.*

²² Myung Oak Kim, *Secretary of State Stands By Registration Check-Box Policy*, ROCKY MOUNTAIN NEWS, Oct. 22, 2008; Colo. Rev. Stat. § 1-2-204(2)(f.5); § 1-2-204(3)(c); Colo. Code Regs. § 2.6.3; Letter from Maurice G. Knaizer, Deputy Att'y Gen., to Mike Coffman, Colo. Sec'y of State (Oct. 24, 2008), http://brennan.3cdn.net/d79a4060e5464ecb06_kam6ivbyr.pdf.

The Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, requires an applicant for voter registration to provide on the registration form her driver's license number if she has one, and otherwise the last four digits of her Social Security number, if she has one. 42 U.S.C. § 15483(a)(5)(A)(i). The federal law does not require applicants to indicate specifically when they do not have a driver's license number.

²³ See *State ex rel. Myles v. Brunner*, 899 N.E.2d 120 (Ohio 2008). The Ohio Supreme Court required that the absentee ballot applications be processed even when the checkbox was not marked. *Id.*

from voters who signed but did not print their name, or signed and printed their names in the wrong place on the ballot.²⁴

The litany from 2008 is no anomaly. In every single election cycle, errors occur. Some are major, some are minor; some are novel, some familiar. And in every single cycle, these errors prove outcome-determinative somewhere.²⁵ For William Davignon and Michael Carney, lightning struck *twice*: in both 2003 and 2001, Davignon beat Carney by one vote for a county legislative seat; the first time, the election depended on an absentee ballot signed on the wrong line, and the second time, a

²⁴ See *State ex rel. Skaggs v. Brunner*, 900 N.E.2d 982 (Ohio 2008). The Ohio Supreme Court required that the provisional ballots be rejected when they did not include both name and signature. *Id.*

²⁵ Consider just a few examples from the preceding years:

2007: *Mansfield v. McShurley*, 911 N.E.2d 581, 582-83 (Ind. Ct. App. 2009) (failure of an official to initial absentee ballots before sending); Margaret McHugh, *Votes Are In But Results Are Still Out*, STAR-LEDGER, Mar. 2, 2007 (failure to list voter's first and last names in the correct order on the voter rolls).

2006: *Edgmon v. State*, 152 P.3d 1154, 1158 (Alaska 2007) (failure to list mailing address as well as residential address on absentee ballots); Jeff Shields, *Provisional Ballots May Hold Key in Chesco*, PHILA. INQUIRER, Nov. 23, 2006 (multiple minor errors on the face of provisional ballot envelopes).

2005: *Harrison v. Stanley*, 193 S.W.3d 581, 585-86 (Tex. App. 2006) (failure to match signatures on absentee ballot envelopes with signatures on the ballot applications, despite testimony from the voters that all relevant materials were theirs); Frank Juliano, *Recounts Could Shake Up Milford Boards*, CONN. POST, Nov. 10, 2005 (failure of an official to sign next to a date stamp); *Judge Rejects Disputed Ballots From Primary*, ST. LOUIS POST-DISPATCH, Mar. 30, 2005 (failure to gather notaries' signatures on absentee ballots).

2004: *In re Primary Election Ballot Disputes 2004*, 857 A.2d 494 (Me. 2004) (failure to fill in checkboxes on the ballot, leading to—inter alia—the defeat of a write-in candidate who was running *unopposed*); Greg Moran, *Re-Election of Murphy Will Stand, Judge Rules*, SAN DIEGO UNION-TRIBUNE, Feb. 3, 2004 (failure to fill in a checkbox next to the name of a write-in candidate).

2003: Mary Beth Lane, *Incumbent Will Remain Mayor of Cambridge*, COLUMBUS DISPATCH, Jan. 9, 2004 (failure to cast ballot in the proper precinct).

2002: Op-Ed, John Fund, *We May HAVA Problem*, WALL ST. J., Oct. 18, 2004; Editorial, *Count All Valid Votes*, DENVER POST, Nov. 21, 2002 (failure to check box on provisional ballot explaining the reason for casting the provisional ballot); Kenneth Heard, *Absentee Ballot Lawsuit Ousts Mayor*, ARK. DEMOCRAT-GAZETTE, Feb. 3, 2003 (failure to submit doctor's note with absentee ballot cast for medical reasons); David Snyder, *Write-In Mayoral Bid Wins in Md. Court*, WASH. POST, July 31, 2002 (failure to include first name of write-in candidate); Todd von Kampen, *Write-in Mayoral Bid Dashed*, OMAHA WORLD HERALD, Feb. 7, 2003 (failure to fill in a checkbox next to the name of a write-in candidate).

2001: *Dayhoff v. Weaver*, 808 A.2d 1002 (Pa. Cmwlth Ct. 2002) (failure to spell candidate's name correctly, to write candidate's name on proper ballot line, and to fill in a checkbox next to the name of the write-in candidate).

timely ballot with a missing time stamp.²⁶ To be sure, it is unusual to see outcome-determinative errors in repeat races between the same candidates. But for most election participants, once is more than enough.

II. THE NEED FOR A PRINCIPLE TO RESOLVE ERRORS

Election errors like those above are the inevitable consequences of election procedures. These procedures serve a critical purpose: they help a community arrive at a reliable shared understanding of the individuals empowered to represent and govern it, which in turn—at least classically—secures the consent of those governed. Election procedures regulate who can vote for whom, when, and how, and the means by which those preferences are acknowledged and tallied to produce a representative vested with the authority of the state. Some of these procedures aim to protect the integrity or perceived integrity of the election against attempts to manipulate the results; others aim to make the election easier for a bureaucracy with limited resources to administer. It is not possible to run a reliable election without pervasive procedural regulations.²⁷

Consider for example just some of the regulations affecting a would-be absentee vote in California: officials must prepare a specific application form, with particular notices and particular requests for information;²⁸ the voter must complete the application, with specified information in specified locations on the specified form;²⁹ the voter must ensure that the application is received by specified officials within a designated period;³⁰ officials must process the application according to specific criteria;³¹

²⁶ *Carney v. Niagara County Bd. of Elections*, 778 N.Y.S.2d 631 (N.Y. Sup. Ct., Appell. Div. 2004); *Carney v. Davignon*, 735 N.Y.S.2d 263 (N.Y. Sup. Ct., Appell. Div. 2001).

²⁷ *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (“[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Though rules are crucial for the successful execution of an election, they are not definitional in the same way as they are, say, in sport. A game of baseball is a game of baseball and not a game of lacrosse or dodgeball or cricket or jai alai because of its rules. In contrast, and as fifty states’ varying election procedures confirm, the essential character of an election is not defined by the procedures put in place. Election procedures are merely safeguards to make possible the equitable determination of the eligible community’s preferences; they are means, not ends.

²⁸ CAL. ELECTION CODE §§ 3006, 3007.5.

²⁹ *Id.*

³⁰ *Id.* § 3001.

³¹ *Id.* §§ 3009, 3013.

officials must prepare the ballots themselves, with specified notices and instructions;³² officials must within a designated period deliver the appropriate absentee ballot, enclosure envelope, and sample ballot to the voter at a specified address;³³ the voter must complete the enclosure envelope, with specified information in specified locations;³⁴ the voter must complete the absentee ballot itself; the voter must enclose the absentee ballot in the proper manner within the enclosure envelope; the voter must ensure that the ballot and envelope are delivered by specified means to specified officials within a designated period;³⁵ officials must compare information on the envelope with information on other election records in a specified manner; and officials must transmit the envelopes to the entity responsible for counting ballots within a specific timeframe.³⁶

My point is not that these regulations are undue or onerous, but rather that the regulations are plentiful. And that means plentiful opportunities to mess up.

Some departures from the prescribed procedures may be the result of attempts to manipulate the system: intentional cheating by those who believe that violating the procedures will be more likely to lead to their desired outcome. Some departures may be the result of misunderstanding or mistake, by voters or officials who are not familiar with each element of the rules, or who, pressed for time, complete a procedure inaccurately. Whatever the cause, errors are inevitable. And that leaves the problem of what to do when they occur.

A. The Democratic Function of an Election

Acknowledging the imperfection of human endeavor, an election system needs *some* decision rule to determine the extent to which deviations from the procedural ideal should be accommodated. Such a rule should be grounded in the rationale for elections as an initial matter. And so, before discussing the candidates for a rule resolving election errors, it is useful to review exactly what it is that we as a society seek to accomplish through the election process.

First and foremost, the purpose of an election is to allow a community to decide whom it wishes to represent and govern the community (and, when repeated, to ensure that those chosen are responsive to the

³² *Id.* § 3011.

³³ *Id.* §§ 3009, 3010, 3023.

³⁴ *Id.* § 3011.

³⁵ *Id.* § 3017.

³⁶ *Id.* § 3019.

community's wishes). In this sense, the point of an election is to produce an agreed-upon set of winner or winners. An identified winner, however, does not alone suffice: otherwise, we could toss a coin or roll a die.³⁷ Instead, we expect the winner of an election to accurately represent, as best we can ascertain, the collective leadership choice of the polity. This, in turn, requires that an election aggregate the individual preferences of those who comprise the community.³⁸

However, choosing a winner—even choosing the “right” winner—is not an election's sole purpose. Modern survey science allows us to poll a comparatively modest representative sample of the eligible electorate to arrive at a statistically certain victor the vast majority of the time: instead of holding an election for governor or senator, we could simply ask several thousand randomly selected electors on Election Day whom they preferred, and we would quite often be confident that we could get the statewide answer precisely right. Yet even with full confidence that it would produce the correct result, a poll seems an unacceptable substitute for an election. This is because elections fulfill an additional societal function: they allow each eligible member of the community to participate (equally) in the act of choosing a representative, and thereby not only foster the strength of the community as a community,³⁹ but also secure community members' consent to be governed.⁴⁰ Indeed, as scholars have long recognized, the expressive and participatory elements of an election

³⁷ Indeed, sortition—the selection of governing bodies by random lot—has a rich history of discussion as an alternative to elections, dating back to ancient Athens. *See, e.g.*, Oliver Dowlen, *Sorting out Sortition: A Perspective on the Random Selection of Political Officers*, 57 POL. STUD. 298 (2009); Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1290-91 (1984).

³⁸ As Professor Arrow long ago demonstrated, when there are more than two available choices, no election system to aggregate individual preferences is always able to arrive at a universally agreed-upon articulation of the collective choice of the polity; the choice of aggregation mechanism may well change the outcome identified as the collective decision. KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed., 1963). That said, each election system in use in the United States represents at least a defensible approach to obtaining a plausible articulation of the polity's collective choice.

³⁹ *See* Ellen D. Katz, *Race and the Right to Vote After Rice v. Cayetano*, 99 MICH. L. REV. 491, 512 (2000); Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 368, 374, 376-77 (1993).

⁴⁰ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* §§ 95-99, at 52-53 (C.B. Macpherson ed., Hackett 1980) (1690); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.”).

explain each citizen's decision to cast a ballot far better than the remote possibility that her ballot would change the final instrumental result.⁴¹

Elections as we know them also fulfill a third purpose: cost-efficiency. If we wished to gather the preferences of the eligible electorate, with an opportunity for each member of the electorate to participate, we could send trusted government teams to canvass the eligible electors one-by-one. The duration and expense of such an enterprise, with safeguards for accuracy and the prevention of coercion, would be significant. Elections, while costly, are comparatively efficient means to (theoretically) assess the preferences of the legitimate electorate while (theoretically) permitting participation by all such electors.

Thus, elections have at least three aims: to accurately select community representatives by aggregating the preferences of the eligible community members, to allow participation in that endeavor by as many of the eligible members of the community as possible, and to accomplish these two objectives in a cost-efficient manner. When errors occur in the course of an election, a principle to address those errors should track the reasons for holding the election in the first instance. It should, that is, promote the most accurate assessment of eligible community members' preferences, with the broadest participation by eligible members of the community, at the least cost.

B. *Decision Rules for Error*

Unfortunately, the most straightforward decision rules for the resolution of errors are also the least adequate under these conditions. At one pole, for example, a decision rule might call for the counting of every ballot for which it is possible to count a vote, no matter how egregious the departure from prescribed regulations. Such a rule would allow substantial cause to question the reliability of the election's aggregation of preferences: ballots would be counted when cast by unknown individuals, from unknown addresses, which might or might not represent the lone votes of eligible members of the community. Indeed, such a rule would call for the counting of multiple ballots cast by the same individual, or by

⁴¹ See Andrew Gelman *et al.*, *What is the Probability Your Vote Will Make a Difference?*, ___ ECON. INQUIRY ___ (forthcoming), at <http://onlinelibrary.wiley.com/doi/10.1111/j.1465-7295.2010.00272.x/full> (calculating an American's average chance at casting the decisive vote in the 2008 presidential election at 1 in 60 million); Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963, 966, 968 (2001) (finding that turnout increases substantially in years with a presidential race, precisely when the incremental probability of a determinative vote is least); Morris P. Fiorina, *The Voting Decision: Instrumental and Expressive Aspects*, 38 J. POL. 390, 393 (1976).

individuals who acknowledge that they are not within the contemplated jurisdiction. This is not a principle for resolving errors that inspires confidence in the election results.

The converse rule is more often proposed, but just as flawed: zero tolerance for error, with no ballot counted when there has been any departure from prescribed procedures. Such a leaden emphasis on formalities would extend not only to errors like a voter's failure to register or a voter's failure to indicate a choice of candidate on the ballot, but also to voter errors like entering both given name and surname in the space designated for one or the other, and to official errors like failing to initial an absentee ballot or hitting the wrong key in data entry. Indeed, truly zero tolerance suggests that, in the California absentee ballot above, the ballot should not be counted if the election official failed to include a sample ballot in the mailing packet; procedural violation, by any actor for any reason, leads inevitably and uniformly to default. This sort of hard line fails for the same reason as its considerably softer counterpart above: it does not inspire confidence in the election's results. Given the number of regulations and the number of minor violations of those regulations that are inevitable in any large-scale election, a true zero-tolerance rule would exclude too many ballots of eligible electors to constitute a reliable representation of the community's aggregate preferences.

The prevailing approach in practice is to muddle along under a third approach, under the rough intuition that some errors should not be "charged" to the voter in counting her ballot. The states have developed different names for this concept. When state legislatures create such a rule, they usually do so by statutory declarations that election regulations are to be construed liberally in favor of the voter. When the judiciary imposes such a rule in the absence of legislative guidance, they usually frame the issue in terms of "substantial compliance" with the election regulation in question, distinguishing between major and minor errors. Professor Rick Hasen has identified this approach as the "Democracy Canon" of construction, in which ambiguous statutes are to be construed in voter-friendly fashion.⁴²

The central critique of such a decision rule is that there is little to ground the rule beyond the preferences of the decisionmaker. "Minor" errors are not self-defining; nor is "substantial" compliance with a regulation. Is the failure to notarize an absentee ballot a minor error or a

⁴² See Hasen, *supra* note 6. In addition to the jurisdictions that have turned to the canon as a rule of statutory construction without legislative prompting, Professor Hasen notes at least twelve states that also seem to have built the Democracy Canon into at least portions of their state code. *Id.* at 79-80 nn.49-52.

major one? What about mistakenly writing today's date rather than your date of birth on a voter registration form? What about casting a ballot in a neighboring precinct? How about missing the deadline to register—or to vote—by a day, or an hour, or a minute? No principle inherent in the concepts of “minor” error or “substantial” compliance indicates when the error in question crosses the line at which the error is to be regarded as consequential. As a result, judicial decisions to disregard error, or to refuse to disregard error, appear dangerously ad hoc.⁴³

Moreover, the magnitude of an error is unlikely to be the best measure of whether that error is significant to the conduct of an election. A tiny slip of the finger during data entry, changing a birth year from 1986 to 1996, makes a 25-year-old look 15—and ineligible to vote. A big mistake—leaving the date of birth entirely blank—yields a similar question about eligibility. In this context, size really doesn't matter much.

Some jurisdictions and commentators have tacked on a principle for resolving errors based on the fault of the offender.⁴⁴ Errors that are the voter's “fault” become preclusive; those that are not are forgiven, where it is possible to do so and still log a vote in favor of an identified candidate. It should first be noted that such assessments, when they occur, are fairly rudimentary, with little analysis of comparative contribution to the error: after all, as with most wrongs, rarely is one actor the exclusive causal agent. If the instructions on a form are ambiguous, and the voter completes the form incorrectly, whose fault is the resulting error?

Even if it were possible to assign blame clearly and cleanly to either voter or nonvoter, however, as I have investigated elsewhere, “fault” is at best an imperfect decision rule for the resolution of most of these errors.⁴⁵ The frame of fault implies that voters should be punished for errors for which they are primarily responsible, by refusing to count their ballots. But for the many election errors reflecting mistake rather than malfeasance, such punishment seems out of place, given the precepts on which punishment is normally justified.

⁴³ See, e.g., *Dayhoff v. Weaver*, 808 A.2d 1002 (Pa. Cmwlth Ct. 2002) (excusing misspellings of a write-in candidate's name, and attempts to write a candidate's name on the improper ballot line, but refusing to excuse a failure to mark a box next to the name of a write-in candidate).

⁴⁴ See, e.g., IND. CODE § 3-11.7-5-1.5 (counting ballots subject to errors by officials); Edward B. Foley, *The Provisional Ballots of Unregistered Voters* (Apr. 5, 2005) (proposing a post-election evaluation of registration errors based on fault), at <http://moritzlaw.osu.edu/electionlaw/comments/2005/050405.php>.

⁴⁵ See Justin Levitt, *Fault and the Murkowski Voter: A Reply to Flanders*, 28 ALASKA L. REV. 41 (2011).

For example, precluding the counting of a ballot cast by an eligible elector has little retributive merit. An error in the completion of a form or in the marking of a ballot delivers little psychic damage to the body politic; there is correspondingly little retributive value in punishing voters for mistakes they did not intend to commit. Mistake in complying with election regulation seems an unduly slight target for social vengeance.⁴⁶

A more serious argument may be premised on use of “fault” as a means to avoid externalization of the cost of a wrong. Election officials presumably rely on voter compliance with election regulations in order to develop efficient protocols of their own. When a voter errs, attempting to compensate for that error may incur administrative costs; punishing that error by refusing to count the associated ballot may be a means to avoid the extra cost. Indeed, it may even be a sufficiently stark punishment to deter voter carelessness in general.

That said, the deterrent value of a “fault”-based approach to election error can be easily overstated. In the morass of election rules, there are many opportunities for missteps. Before deciding to pay more attention to any specific regulation, a voter must be able to adequately assess her own capacity for error with respect to the procedure in question. It is far from clear that voters are that self-aware. Furthermore, in the event that an error does occur, the feedback mechanism in most jurisdictions is not sufficiently developed to communicate to the errant voter—or voters generally—where the mistake was made. If voters do not understand where errors are likely to occur, it will be difficult to deter mistakes, no matter how stark the punishment.

Without the systemic impact of an effective deterrent, it is not clear that the use of “fault” as a premise for determining the consequence of error actually avoids substantial cost. Once an error has occurred, if that error is to be disregarded only if the voter is not primarily at fault, there must be some procedure to ascertain where blame properly lies. Such a

⁴⁶ This Article unabashedly adopts an inclusive vision of democracy, with a normative emphasis on increased participation by eligible electors, and procedural regulation deployed primarily to ensure that eligibility. *See, e.g.*, S. REP. NO. 103-6, at 3 (1993) (“It must be remembered that the purpose of our election process is not to test the fortitude and determination of the voter, but to discern the will of the majority.”).

As Spencer Overton has chronicled, this is not the only possible vision: some believe that procedural regulations fulfill the independent normative function of screening the electorate for “merit” by weeding out electors who are unable to comply. In this view, discounting the ballots of those who fail to comply with election regulations is not an expression of social vengeance, but a related expression of the lesser “worth” of those ballots. *See* Spencer Overton, *A Place at the Table: Bush v. Gore Through the Lens of Race*, 29 FLA. ST. U. L. REV. 469, 473-79 (2001).

factfinding procedure will inevitably entail incremental cost. For example, consider a photo-finish election in which hundreds or thousands of provisional ballots have been cast.⁴⁷ Somewhere along the way, an error has led to these provisional ballots: perhaps the voter registered improperly, or perhaps an official improperly processed an accurate registration form; perhaps the voter arrived at the wrong precinct, or perhaps an official failed to locate the voter in the correct pollbook; perhaps the voter failed to respond adequately to a legitimate challenge of her qualifications, or perhaps her qualifications were improperly challenged. The source of the error is rarely immediately apparent. In order to determine which ballots may be counted in a fault-based regime, records and recollections will have to be reviewed in order to properly apportion fault. This review is not cost-free. And even if impeccably conducted, it still leads to the discarding of a substantial number of registration forms, absentee ballot applications, absentee ballots, and provisional ballots cast by voters who are actually eligible to vote, and who submitted their materials in timely fashion. This Article suggests that those resources might be better spent.

When election errors inevitably occur, rather than focusing on the magnitude of the error, or the blameworthiness of the perpetrator, I suggest a different guidestar: materiality. In some respects, this is a simple, almost tautological, proposition: an election error should only matter if it makes a difference in achieving an election's primary purposes. Yet this is *not* the principle currently driving the resolution of most election errors. The discussion below represents the first extended discussion of materiality in the election context. As it shows, materiality is a principle better suited to resolving inevitable errors than the available alternatives. Indeed, given the opportunity to re-evaluate materiality as an election progresses, the concept may have even more utility in the election context than in other legal arenas.

III. THE MATERIALITY PRINCIPLE

A. Materiality in Other Contexts

“Materiality” can be a protean concept. But in developing an operational understanding of materiality as applied to election errors, it is not necessary to start from scratch. The concept has been developed as an

⁴⁷ Provisional ballots, required by federal law in every state without election-day registration, are ballots that must be offered to a voter whenever there is a dispute concerning that voter's eligibility. 42 U.S.C. § 15482(a).

important principle in many areas, including the law of contract,⁴⁸ tortious⁴⁹ and criminal fraud,⁵⁰ securities transactions,⁵¹ prosecutorial conduct,⁵² legal ethics,⁵³ employment discrimination,⁵⁴ and civil procedure.⁵⁵ It is possible to distill from examinations of materiality in these other contexts a few common principles—an exercise that I believe to be the first attempt of its kind. Together, these principles can provide guidance for our voting inquiry.

First, materiality is used as a gauge for the legal significance of an action or piece of information, often a mistake or misdeed. If the action or information is material, certain legal consequences follow; if not, the legal consequences are different. Materiality is thus a toggle switch, rather than a spectrum: the question is not whether the item considered is more

⁴⁸ Materiality has at least three applications in contract law. First, among merchants, the outcome of a “battle of the forms” depends on materiality: proposed alterations of terms in an acceptance to an offer will not be considered part of the generated contract if they “materially alter” the offer itself. U.C.C. § 2-207(2)(b) (2002). Second, a misrepresentation in the formation of a contract may render the contract voidable, but only if the misrepresentation is material. Restatement (Second) of Contracts § 162(2) (1981). Third, the materiality of a breach of contract determines remedies available to the party on the breach’s receiving end: a material breach allows the offended party to suspend its own performance and seek rescission of the contract, while an immaterial breach allows only an action for damages, without excusing the offended party’s own performance of contract obligations.

⁴⁹ “Reliance upon a fraudulent misrepresentation is not justifiable unless the matter represented is material.” Restatement (Second) of Torts § 538(1) (1977).

⁵⁰ Federal criminal liability for fraud, and for many false statements under oath or to federal government officials, attaches only if the falsification regards a material fact. *See, e.g., Neder v. United States*, 527 U.S. 1, 20-25 (1999); *United States v. Gaudin*, 515 U.S. 506, 509 (1995); 18 U.S.C. § 1621.

⁵¹ In securities law, several related regulations amount to a requirement that regulated entities accurately and publicly disclose any fact that is material. *See* 15 U.S.C. §§ 78m(j), (l); 78n(e); 7241; SEC Rule 10b-5(b), 17 C.F.R. § 240.10b-5; SEC Rule 14a-9(a), 17 C.F.R. § 240.14a-9; SEC Regulation FD, 17 C.F.R. § 243.100.

⁵² A prosecutor has a constitutional obligation to disclose to a defendant all evidence that is material to either guilt or punishment. *See Cone v. Bell*, 129 S. Ct. 1769, 1782, 1785-86 (2009); *Brady v. Maryland*, 373 U.S. 83 (1963).

⁵³ An attorney has a duty to report potential malpractice to her client, but only if the mistake in question is material. Benjamin P. Cooper, *The Lawyer’s Duty to Inform His Client of His Own Malpractice*, 61 BAYLOR L. REV. 174, 195 (2009).

⁵⁴ An employer’s adverse action against an employee must be “material” in order to be actionable under Title VII of the Civil Rights Act of 1964. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 75 (2006) (Alito, J., concurring in the judgment) (recognizing that *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), established a materiality test, albeit using a different term).

⁵⁵ A court may not grant summary judgment if there is a genuine dispute over a material fact. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

material or less material, but instead whether it has reached a threshold level of significance, at which point a categorical change in the legal nature of the action or information is triggered.

Second, materiality has a referent: an action or piece of information evaluated for materiality is material or immaterial *to* a particular decision: a decision to make a purchase,⁵⁶ or perform a service,⁵⁷ or deliver a verdict.⁵⁸ As such, materiality cannot be evaluated in the abstract: that which is material for some decisions may be wholly immaterial for others. This renders the materiality threshold, courts and scholars agree, heavily context- and fact-dependent.⁵⁹

Third, materiality has an object: a particular fact, a particular statement, a particular action, or a particular change. It is important to keep the discussion of materiality anchored to the particular act or item for which materiality is at issue. In the contractual context, for example, the obligations of a contract between merchants will turn upon whether there has been a material alteration to an offer: that is, whether an alteration that has not expressly been accepted creates a legally recognized change to the offer as a whole. This requires *two* analyses: whether the term being altered is a material term, and whether the nature of the alteration to that term is material. Neither an insignificant change to an otherwise material term, nor a significant change to an immaterial term, will materially alter the offer as a whole.

Fourth, that which is material has probative weight and consequence for the decision in question, beyond mere relevance. Exactly how much consequence the material element must have is a particularly thorny question, and there is little transsubstantive scholarship examining the nature of the significance that an action or piece of information must have before it becomes material. Yet a review of the various substantive silos indicates a rough consensus. That which is material is not merely pertinent to a decision, but has the realistic potential to influence or affect—that is,

⁵⁶ See, e.g., *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32, 234 (1988) (decision to purchase a regulated security); U.C.C. § 2-207(2)(b) (2002) (decision to purchase goods).

⁵⁷ See, e.g., Restatement (Second) of Contracts § 162(2) (1981).

⁵⁸ See, e.g., FED. R. CIV. P. 56(c) (decision to render a civil verdict); *United States v. Bagley*, 473 U.S. 667, 682 (1985) (Blackmun, J.) (decision to render a criminal verdict).

⁵⁹ See *Basic*, 485 U.S. at 236 (“Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.”); *Weinstock v. United States*, 231 F.2d 699, 702 (D.C. Cir. 1956) (“Materiality [in the false statement context] must be judged by the facts and circumstances in the particular case.”).

change⁶⁰—the decision at issue.⁶¹ It is not necessary to establish but-for causation to establish materiality: no legal doctrine requires proof that a reasonable decisionmaker *would* select a different course absent the action or information to be evaluated for materiality.⁶² It is necessary, however, to find at least a substantial question as to whether the reasonable decisionmaker would do so.⁶³

Thus, a disputed fact is material for purposes of summary judgment only if the fact in question “might affect the outcome of the suit.”⁶⁴ In securities law, information is material (and subject to accurate and public disclosure) “if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote” or that a reasonable investor would consider it important in making an investment decision;⁶⁵ that is, that the information would have a “significant propensity to affect the voting [or investment] process.”⁶⁶ A false statement to a government official is material if it has “a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it [is] addressed.”⁶⁷ Evidence relating to a

⁶⁰ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (defining “influence,” *inter alia*, as both “sway” and “modify”); *id.* (defining “affect,” *inter alia*, as “to effect a change in”).

⁶¹ See *Kungys v. United States*, 485 U.S. 759, 771 (1988) (defining a fact as material if it is “predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision”). Courts have utilized the *Kungys* standard in a variety of contexts referring to materiality, *e.g.*, *Neder v. United States*, 527 U.S. 1, 16 (1999) (criminally false statements generally); *Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1015-16 (3d Cir. 1997) (ERISA disclosure); *Al Haramain Islamic Foundation, Inc., v. U.S. Dept. of Treasury*, 585 F.Supp.2d 1233, 1268 (2008) (designation as a terrorist organization).

⁶² See, *e.g.*, *Kungys*, 485 U.S. at 771 (rejecting a test of materiality examining whether a decision would have been different absent a misrepresentation); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976) (same).

⁶³ There is a substantial debate, beyond the scope of this Article, about the extent to which a determination of materiality should account for a particular decisionmaker’s individual characteristics in allocating responsibility for alleged misconduct between private individuals. See, *e.g.*, *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 78-79 (2006) (Alito, J., concurring in the judgment). In the voting context, the relevant decisionmaker is an election official. The law tends to avoid ascribing legal significance to individual variations among state actors when assessing the reasonableness of government decisions.

⁶⁴ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

⁶⁵ *TSC Industries*, 426 U.S. at 449; *Basic*, 485 U.S. at 231-32, 234.

⁶⁶ *TSC Industries*, 426 U.S. at 449 (quoting *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 384 (1970)); *Basic*, 485 U.S. at 231-32, 234; see also SEC Staff Accounting Bulletin No. 99—Materiality, 64 Fed. Reg. 45150, 45151 (1999).

⁶⁷ *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (quoting *Kungys*, 485 U.S. at 770) (internal quotation marks omitted).

defendant's guilt or punishment is constitutionally material when "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."⁶⁸ In each of these areas, and others, materiality distinguishes actions or information that reasonably call a given decision into substantial question, from those that do not.

Finally, and central to this Article, there have been a few fleeting discussions acknowledging that the materiality of an action or piece of information can change over time. In these other disciplines, actions or pieces of information that are initially immaterial may become material at some later point, based on their aggregate significance or a changed context. For example, in evaluating legal malpractice, a mistake may appear at first to be immaterial, with negligible impact on the client; if contextual factors change, however, the consequences may develop such that the initial error later becomes material.⁶⁹ Similarly, a financial misstatement that is immaterial on its own may become material when aggregated with other misstatements.⁷⁰ In the voting context, as described more fully in section III.B.3, *infra*, the significance of this facet of materiality operates in the opposite direction: errors that once were material may become immaterial at a later point.

B. *The Meaning of Materiality in the Election Context*

The principles above are helpful in distilling a sophisticated understanding of materiality. This next section applies the above taxonomy to election-related errors.

More generally, a fraudulent misrepresentation is material if "a reasonable man would attach importance to [the misrepresented fact's] existence or nonexistence in determining his course of action in the transaction in question." Restatement (Second) of Torts § 538(2)(a) (1977). In the formation of a contract, the misrepresentation of a fact is considered material "if it would be likely to induce a reasonable person to manifest his assent"—that is, if it is likely to cause a person to enter a contract, when she might not otherwise do so. Restatement (Second) of Contracts § 162(2) (1981).

⁶⁸ *Cone v. Bell*, 129 S. Ct. 1769, 1783 (2009) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985) (Blackmun, J.)).

⁶⁹ Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 791 (2008).

⁷⁰ See SEC Staff Accounting Bulletin No. 99—Materiality, 64 Fed. Reg. 45150, 45153 (1999) ("Matters . . . could potentially cause future financial statements to be materially misstated, even though the auditor has concluded that the adjustments are not material to the current financial statements. . . . This may be particularly the case where immaterial misstatements recur in several years and the cumulative effect becomes material in the current year.") (internal quotation marks and citation omitted).

The translation of the first principle above is straightforward: materiality becomes a toggle switch for determining when an error should prevent the counting of an otherwise valid vote. If an error is material, the associated ballot should not be counted. If, instead, an error is immaterial, it should not cause disenfranchisement.

The second principle above is also relatively straightforward to apply in the elections arena. Facts or objects are material *to* particular decisions. In the elections context, as discussed above, the primary purpose of the enterprise is to discern the political preference of eligible members of the political community. The materiality inquiry takes its lead from the same mandate, with two potential referents. First, error generally should be evaluated to determine whether it is material to ensuring that a ballot is cast by an elector who is eligible; second, error on a ballot itself should be evaluated to determine whether it is material to determining the preference of the elector.

The third principle counsels attention to the particular object of the materiality inquiry. The superficial answer, evident from the discussion above, is that the materiality of an error should be the touchstone. But as in contract law, this is usefully separated into *two* analyses: whether the underlying regulatory provision that has been violated is material, and whether the error or omission itself is material. Neither an insignificant error in otherwise material regulation, nor a significant error in immaterial regulation, should become a material error in the determination of disenfranchisement.

1. Materiality of the Underlying Regulatory Provision

In identifying whether an error is material in determining a would-be voter's eligibility or political preference, the first inquiry is therefore to assess whether the underlying regulatory request or command is material to determining the voter's eligibility or electoral preference. If the underlying regulation is immaterial, then a flaw in that information must also be immaterial, no matter how substantial the flaw.

In some cases, this inquiry is trivial. For example, if the underlying regulation is irrelevant to determining the voter's qualifications, it cannot be material in that inquiry. Consider a voter who refuses to provide his race on a voter registration form.⁷¹ The voter's race, the underlying information sought, is irrelevant to her qualifications to vote. *A fortiori*, the underlying information must be immaterial to that inquiry. And a

⁷¹ Mr. H. Jeff Lanier, Director, State Elections Division, Op. Ga. Att'y Gen. No. 95-35 (Aug. 4, 1995).

fortiori, any perceived flaw in the voter's answer to that immaterial question must itself be immaterial.

In other circumstances, the underlying information will be relevant to a final decision, but not necessarily material. A piece of information is relevant if it has even an iota of use in determining a voter's qualifications, or deciphering the voter's intended candidate.⁷² A voter's telephone number, for example, may be relevant to the determination of her eligibility, because it allows an election official to contact the voter directly to ask probative questions; moreover, the number's area code and exchange may increase or decrease the chance that a voter lives in the appropriate district.

Yet though a voter's telephone number may be relevant to determining her qualifications, it is not on its own material to that determination. As discussed in the fourth principle above, materiality demands more significance. That which is material influences a reasonable decisionmaker's decision. It need not alone be outcome-determinative, but it must have at least enough probative weight to create substantial doubt or uncertainty about the outcome. If the other information on a registration form indicated eligibility, a flaw in a telephone number would not cause a reasonable registrar to substantially question whether the voter in question was eligible to vote.

2. Materiality of the Error Itself

Thus, in applying the materiality principle developed in this Article, decisionmakers faced with flawed performance in the execution of an election requirement must first determine whether the underlying regulatory objective is material. However, the analysis is at this point at most halfway complete. There remains the materiality of the error itself. Does the error in question raise a substantial question for a reasonable decisionmaker about the voter's eligibility or ballot choice?

Several types of error may be presumptively immaterial. For example, there may be an error in the *form* of the information conveyed, when the substance of the information conveyed is clear and unambiguous. Consider a voter registration form requiring the voter's date of birth, XX/XX/XXXX. The regulation exists to extract the voter's age, which is unquestionably material: a voter's age is an element of substantive qualification to vote in every state in the country. Yet the materiality of the

⁷² See, e.g., FED. R. EVID. 401 (“Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

underlying information does not automatically render material any flaw in the expression of that information. Writing “November” instead of “11” as the month of birth, even when “11” is clearly called for, is not an error that is material to determining whether the voter is of lawful voting age. And as such, it should not serve as an error that enables disenfranchisement.

More controversially, and more contrary to current practice, the same principle applies if a voter marks a candidate’s circle on a ballot with an unambiguous checkmark, when the regulation calls for the voter to fill in the circle; or if a voter both fills in a candidate’s circle and unlawfully writes the same candidate’s name in the space for a write-in choice. There are certainly circumstances when the improper form of information may in fact create doubt about the substance it intends to convey: if instructions require checking an adjacent box to vote for a candidate, marking an “X” over Candidate Smith’s name may not indicate whether the voter intended to vote for Smith or convey her displeasure with Smith. That error would be material. But when the information’s form alone is at error, and that flaw does not create substantial doubt or uncertainty about the qualifications of the affected voter or her intended preference, the flaw is immaterial.

An error may also be immaterial if information material to a voter’s qualifications or preference does not appear in a particular *designated location*, even though the information is unambiguously provided elsewhere to the same regulatory actor. For example, a voter who presents the last four digits of her Social Security number in the voter registration form’s box designated for her birthdate, and presents her birthdate in the Social Security number box, has erred—twice. But as long as the information conveyed is unambiguous, neither error casts her eligibility in doubt. Both should therefore be regarded as immaterial.

These are not the only types of immaterial errors. Consider the electors whom Waller County refused to register in 2008, because they failed to provide ZIP codes on their registration forms.⁷³ As long as the voter provides a street address and city indicating that she lives in a particular location, the lack of a ZIP code does not cast into doubt her qualifications to vote for the candidates running for office in her precinct. No reasonable decisionmaker would believe that error alone to be material to eligibility.

The ZIP-code example above reflects that in election law, as elsewhere, materiality must be evaluated in the context of other information available to the decisionmaker. Indeed, this principle is not

⁷³ See *supra* text accompanying note 19.

limited to the information on a given form. I suggest that the materiality of a flaw can and should rely on other reliable contextual information readily available to elections officials. Such an approach contributes to ensuring that voting regulations focus on substantive qualifications and actual voter intent, rather than procedural hiccups. Consider a 75-year-old elector, physically appearing before an official, with no doubt about her identity. If she mistakenly offers the current date instead of her birthday on a voter registration form, there is a substantial error on her form. But unambiguous visual evidence renders that error immaterial in assessing her qualifications. Reliable evidence that a flaw is immaterial can come from sources other than the immediate vicinity of the flaw itself.

The question of the extent to which context may be considered, of course, is different from the question of a duty to seek that information out. Recognizing that information available to election officials beyond the four corners of a form may render a flaw on that form immaterial does not itself imply the existence of an affirmative duty to elicit the curative information in question. My argument on the contextual nature of materiality demands only that when curative information has been presented, an official may not ignore the information that resolves a pending question, simply by asserting that her evaluation of materiality is confined to the source of the error itself.

3. The Dynamic Reassessment of Materiality

That realization, in turn, leads to the insight at the heart of this Article: a determination about the materiality of an election error can and should rely on information that becomes available to government actors at different points in time. Thus far, this Article has addressed only errors for which materiality is a known quantity at the time the error is committed. Even with this limitation of the principle, materiality would still be a superior basis for resolving election errors than the available alternatives: more votes would be counted when the eligibility of the elector and her intended candidate(s) were not in doubt, with limited incremental cost for the decisionmaker. But the materiality principle begins to bear far more serious fruit with the insight that it is dynamic.

The evaluation of the materiality of an election error—at least with respect to a voter's qualifications—should not be confined to the initial appearance of the error in question. At the moment the error is first evaluated, it is material if it creates real and reasonable doubt as to whether the individual in question is qualified or not. But that which is immaterial at time t —say, a voter's omission of his apartment number on

his registration form, which does not create any doubt about his residency in a particular precinct—may become material at time $t + 1$, if there later arises reliable evidence calling into question whether he lives in his apartment building at all.⁷⁴ Conversely, and far more important, that which is material at time t —say, a voter’s failure to affirm his citizenship on his registration form—may become immaterial at time $t + 1$ if it later becomes clear that the voter is a citizen. At the time when there is no longer a doubt about the individual’s qualifications, the earlier error becomes immaterial. And in this Article, I suggest that it should therefore not provide cause to deprive the individual newly known to be eligible of her valid vote.

Some applications of this concept, though not identified as such, are readily observable in current practice. The easiest such example is an election official’s discovery of a mistake. If a data entry clerk hits an errant key while typing a registrant’s personal information into a computerized registration system, that keystroke becomes an error in the individual’s record. That error may lead to legitimate questions about, for instance, the individual’s true identity. The instant that the error is discovered as such, however, it becomes instantly immaterial, because the individual’s qualifications are no longer in doubt. The same is true if the error was caused by the applicant instead of an election official; once the error is discovered as an error, and reliable and accurate information is provided instead, the original flaw is no longer material to determining the voter’s qualifications.

The example above depends on the direct correction of flawed information. Errors may also be rendered immaterial by new information resolving eligibility questions raised by an original flaw.

Such an example can also be found in current practice, though it is a bit more difficult to spot. The Help America Vote Act of 2002,⁷⁵ also known as HAVA, was a wide-ranging piece of federal legislation. One of its provisions requires voters with a current and valid driver’s license to

⁷⁴ There are few practical applications of the progression from immaterial to material mistake in the election context. At virtually any point in an election cycle before a regular ballot is cast or an absentee or provisional ballot is separated from its ballot envelope, if a substantial question concerning an individual’s eligibility arises, election officials (and often private actors) have multiple procedural means to challenge that voter’s status and prevent the vote from counting if the voter is in fact ineligible. There will usually be no incremental benefit, at that point, in relying on the materiality principle to resurrect a past error that has become material, as the reason to block the vote: the information giving rise to the change in materiality will itself suffice as independent cause.

⁷⁵ Pub. L. No. 107-252, 116 Stat. 1666.

provide that license number on their voter registration form, and requires other voters to provide the last four digits of their Social Security number if they have one.⁷⁶ That number, and the voter's name and date of birth, are compared to motor vehicle or Social Security records.⁷⁷ For certain voters—those who are registering by mail and have not yet voted in the state—the comparison becomes part of an identity verification requirement: either the information must match, or the voter must show one of several enumerated forms of documentary identification, before the voter may vote a regular ballot.⁷⁸

In this Article's parlance, the HAVA provision establishes a regime to test voter qualifications in a manner acknowledging that the materiality of a piece of information may vary over time. HAVA requires states to test the identity of new voters registering by mail. It establishes one means to do so by demanding that states ask for information (the driver's license or Social Security number) that would be used to probe such applicants' identity. If the information on the registration form matches information held in the records of government databases, the applicant's identity is confirmed. However, if an error on the registration form, or in a corresponding government database record, causes a mismatch, the individual's identity could be called into question.

At that moment, time t , with the error in the record undiscovered, the mismatch is certainly relevant, and perhaps material, to determining the voter's qualifications. Yet HAVA does not contemplate rejecting outright registration forms with a mismatch. Instead, it allows mismatched voters to show a piece of documentary identification, at time $t + 1$, up to and including at the polls.⁷⁹ Once the voter provides her documentary identification, her identity is no longer in doubt. And because the original error in the mismatch, whatever its source, has become immaterial to determining her qualifications, it no longer interferes with the vote: the voter may vote a regular ballot, like all other eligible and registered electors.

Although both of the examples above are drawn from existing practice, the dynamic nature of the materiality decision has never before been articulated as such in the elections context. Indeed, present standard operating procedure is to assess election errors only when they occur,

⁷⁶ 42 U.S.C. § 15483(a)(5)(A)(i).

⁷⁷ *Id.* § 15483(a)(5)(B).

⁷⁸ *Id.* § 15483(b). For a general explanation of the matching regime, see Nathan Cemenska, *HAVA's Matching/ID Requirement: A Meaningless Tale Told By . . . Congress*, 12 RICHMOND J. L. & PUB. INT. 27 (2008).

⁷⁹ 42 U.S.C. § 15483(b)(2)(A)(i).

ignoring the potential to reassess with more complete information. For example, once an error has occurred in voter registration, or in the absentee balloting process, that error in practice normally proves determinative for the entire election cycle.

This is a lost opportunity. Indeed, the case for the dynamic assessment of materiality is substantially stronger in the elections context than in most other legal arenas. In these other environments, the materiality inquiry usually involves a retroactive counterfactual: a hypothetical *ex post* look at whether a decisionmaker might have acted differently had a prior action or piece of information been different. The materiality of misinformation in, or information omitted from, a securities disclosure, for example, is often gauged after financial damage has been done; the question is whether different disclosure might have caused an investor or potential investor to act differently. Similarly, the materiality of other wrongful disclosures or failures to disclose—false statements, prosecutorial evidence, tortious misrepresentations—usually depends on a retroactive counterfactual. Because the relevant decision point has already passed, the utility in allowing materiality to change over time in these circumstances is confined to gauging the magnitude of remedial and/or retributive liability.

Not so in the elections context, where an initial evaluation of materiality usually occurs *before* the ultimate decision point. The decision impacted by the materiality of an error on, say, most required election records is a decision about the eligibility of a would-be voter. The ultimate decision on that issue can usually be either deferred or repeatedly re-evaluated, until the vote is certified.

Consider an error on a voter registration form. When the form is submitted, the election official must assess whether that error is material: given the form as submitted, would a reasonable decisionmaker have a significant question about the would-be voter's substantive qualifications? For some errors, the answer will be yes; for others, no.

In an election cycle, these need not be the final answers. There will be multiple opportunities to reassess the materiality of that error in context, as other information comes to the official's attention. Perhaps the voter later contacts a registrar with additional curative information. Perhaps the error is uncorrected until election day, when she is able to submit a segregated provisional ballot with additional curative information. Or perhaps she is summoned before a court overseeing a post-election proceeding. All of these represent opportunities to collect additional information, and to reassess the materiality of the registration form's original error. Only the fact that the materiality of the error may change over time gives full effect to these multiple decision points. The dynamic reassessment of materiality converts the inquiry from a focus on the

accuracy of the election official's initial assessment and consequent assignment of fault, to a focus on the substantive qualifications of the individual in question. As discussed below, this latter focus better serves the values of the voting process as a whole.

C. Implications of the Materiality Principle

Recognizing the dynamic nature of materiality, particularly for questions involving a voter's eligibility, would have tangible consequences for the election system. In this next Section, I first give more robust shape to the materiality principle by reviewing some of the practical adjustments necessary to give it life in the elections context. I then explain the benefits and potential concerns of evaluating—and reevaluating over time—election errors through the lens of materiality.

1. Accommodating a Dynamic Assessment of Materiality

In practice, what would change if election errors were evaluated under a dynamic materiality principle? In pre-election and election-day administration, officials would favor procedures allowing them to reassess the materiality of an error, as available information changes. Such procedures would preserve the flexibility of the decision process, avoiding the conversion of early assessments into premature “final answers.”

Provisional ballots, for example, are an existing expression of this principle that account fairly well for a limited set of errors. Consider a voter at the polls whom the volunteer pollworker cannot readily find in the precinct's register of voters, often known as a pollbook. Federal law provides that she should be offered a provisional ballot.⁸⁰ On election day, her provisional ballot is collected and segregated, and later evaluated to determine whether she was actually on the rolls when the ballot was cast.

If at the moment a voter presents herself to vote, her name cannot be found in the pollbook, all that is certain is that there is an error. At that moment, the error is material to determining whether the voter is eligible, because a reasonable decisionmaker would find a substantial question about the voter's eligibility: she may not be a resident of the jurisdiction, she may never have attempted to register, or the registration may have been legitimately canceled. Yet her valid registration may later be found, improperly purged or entered with a typographical error making it difficult

⁸⁰ 42 U.S.C. § 15482.

to find in the pollbook. Allowing the voter to vote a provisional ballot at the polls provides an opportunity to effectuate a valid vote if an error in the precinct book that appears material at the time is later found to be immaterial.

The existing provisional ballot regime in most states, however, is insufficient to realize the potential of a dynamic assessment of materiality in other circumstances. At present, an error in the registration process is often frozen in place at the end of the registration period. If the error is uncorrected at the end of the registration period, the would-be voter's application is rejected, leaving her unregistered. This freeze has consequences down the road. If the voter ventures to the polls, she will not be listed in the pollbook; she may be given a provisional ballot, but state law rarely allows such ballots to be counted, no matter what evidence of eligibility the voter provides. Many states deem invalid a provisional ballot cast by a voter whose earlier attempt to register has been rejected.⁸¹

A different approach to errors in the registration process would better permit a dynamic assessment of materiality, in which initial errors may be later resolved. Some states perform data entry on registration forms despite potential flaws, and preserve those records for future revision, often in some sort of "provisional" or "pending" status.⁸² This practice permits the reevaluation of a registrant's eligibility in the event that material flaws become immaterial at a later point.

In such a system, errors can be corrected based on new information, whenever that information arrives. Consider our elector who substitutes the current date for her birthdate on a registration form. Her proper birthdate may become clear before the election, on election day, or in some sort of post-election proceeding. Preserving the provisional status of the registration allows the earlier error to be recognized as inconsequential whenever it becomes immaterial in determining her eligibility.

In this context, it is important to distinguish the voter's legal status under the materiality principle from administrative procedures designed to facilitate the smooth conduct of the election. Just as the obligation to accept corrective information when it is presented does not imply an obligation for officials to seek that information out, so too the obligation

⁸¹ *See, e.g.*, ARIZ. REV. STAT. § 16-584(E); ARK. CODE § 7-5-308(d)(2); COLO. REV. STAT. § 1-8.5-106; FLA. STAT. § 101.048(2)(b)(2); GA. CODE § 21-2-419(c)(3); ILL. STAT. ch. 10, § 5/18A-15(b)(3); IND. CODE § 3-11.7-5-3; LA. REV. STAT. § 18:566.2(A); MD. CODE, ELECTION L. § 11-303(d)(4)(i); MICH. COMP. L. § 168.813(1); MO. STAT. § 115.430(5); OHIO REV. CODE § 3505.183(B).

⁸² *See, e.g.*, MONT. CODE § 13-2-110(6)(b); REV. CODE WASH. § 29A.08.107.

to accept corrective information does not imply an obligation to immediately reflect that new status in every pre-election procedure.

For example, voter registration is not only a means to test eligibility, but also a means to facilitate planning for election day. Many states will use the rolls as they exist at the registration deadline to print pollbooks of voters whose eligibility is unquestioned. If a voter presents information rendering a registration error immaterial, but does so during a period that would interfere with the printing of the pollbooks, there is no need driven by the materiality principle to reflect her updated status on the pollbooks themselves. The important thing is that the change in the materiality of her registration error makes it possible for her to cast a (provisional) ballot that is legally valid, and that will be recognized as such by the end of the election cycle.

The absentee ballot system presents another opportunity for application of the dynamic nature of materiality. Preserving absentee ballot materials for a limited period after Election Day would allow jurisdictions to recognize changes in the materiality of errors over time. If a jurisdiction preserves even ballot envelopes with flaws that cast doubt on the voter's qualifications, and information rendering the flaws immaterial comes to light in a post-election process, the absentee ballots within could be counted.

2. Counting Votes Pursuant to the Materiality Principle

The changes above would preserve administrative flexibility to evaluate (and re-evaluate) the materiality of errors throughout the election cycle. When errors are revealed to be immaterial, I argue that the corresponding ballots should be counted.

Using the materiality of errors as a standard for counting ballots—even without a dynamic reassessment of that materiality—would have significant consequences. For example, in the event of an error on the ballot face, jurisdictions now usually determine whether that error is “substantial” or “insubstantial.” Materiality regularizes the inquiry. If it renders the voter's choice ambiguous, the error would be material and the ballot invalid; if it does not, the error would be immaterial and the ballot countable. Similarly, an error on a prerequisite form (e.g., a registration form) or in a prerequisite procedure (e.g., the casting of a provisional ballot in the proper precinct) need not jeopardize the vote's validity if that error is not material in determining the voter's eligibility to vote for the election in question. In each case, by definition, the only votes to be counted are those for which no reasonable decisionmaker would have

either a substantial question about the voter's eligibility or a substantial question about the voter's ballot preference.

Allowing for the *dynamic* reassessment of an error's materiality would have greater consequences still. In assessing the validity of a provisional ballot, officials now normally compare the material accompanying the provisional ballot to registration records. They discern whether the voter in question was validly registered; if there is a flaw in the registration, the officials may have to assess the magnitude of the flaw or the party at fault for the flaw. Processing an absentee ballot adds the extra step of assessing whether the voter in question submitted a valid application (and is properly identified as the applicant) by the relevant deadline; there too, in the event of a flaw, officials may have to assess the magnitude of the flaw or the party at fault for the flaw. A dynamic conception of materiality would, without adding additional investigation, shift the focus of the relevant inquiries: in the event of a flaw, officials would assess whether the other information newly available renders that flaw immaterial. If a reasonable decisionmaker would no longer question the voter's eligibility or ballot preference based on the original flaw, the vote should be valid.

As above, counting votes pursuant to the materiality principle need not involve substantial additional administrative burden. The materiality principle does not demand incremental procedures to seek information bearing on the validity of a vote; it merely changes the standard by which votes are evaluated when there is cause to undertake an evaluation.

For example, consider one of the 3000 jurisdictions where votes are cast using optically-scanned ballots, which function much like the answer forms for standardized tests.⁸³ Election procedures often specify that a voter wishing to vote for a write-in candidate must fill in an empty oval or box next to the line on which the candidate's name is written in.⁸⁴ These procedures help ensure that the optical-scan ballot reader is able to flag ballots on which there is a write-in vote, even if the system itself cannot process the identity of the chosen candidate; without the filled oval, normal tabulation procedures might not reveal the existence of a write-in preference.⁸⁵ Yet even without filling in the oval, a voter who has accurately written in the name of a valid candidate (and only that name) for a given office has unambiguously demonstrated the wish to vote for that individual. The materiality principle does not demand that election

⁸³ Verified Voting, Election Equipment 2010, <http://www.verifiedvoting.org/verifier/>.

⁸⁴ See, e.g., ALASKA STAT. § 15.15360(a)(10), (d)(2).

⁸⁵ In contrast, the write-in attempt may be discovered in an audit, a recount, or any other post-election proceeding examining ballots on which no vote for the office in question was revealed during initial processing.

officials undertake a special search for all such ballots, if those ballots would not otherwise be discovered in the normal course. It merely requires that if the ballot is discovered, and a question arises about whether that ballot represents a valid vote, that the vote be counted if the missing oval does not amount to a flaw material in determining the voter's preference.

Similarly, in a post-election process to contest disputed election results, many states provide the opportunity for litigants to present evidence regarding the validity of individual ballots, including testimony by or concerning the corresponding voters.⁸⁶ The materiality principle does not demand that states offer such an opportunity. But as long as the forum exists, the state should also welcome evidence by which voters could prove their substantive eligibility, rendering flaws from the pre-election process immaterial.

3. The Value of the Materiality Principle

The procedures above would allow the ballots of eligible voters to be cast and counted, once (and only once) there is no lingering doubt about the voter's eligibility or ballot preference. Most such manifestations of the materiality principle would take place in a relatively low-stakes context: the vast majority of elections, including a substantial number for which the outcome is effectively preordained,⁸⁷ produce a clear winner on Election Day. In these "unexceptional" elections, recognizing the dynamic nature of materiality has comparatively limited impact on the election as a whole. Still, the concept manages to fulfill the primary purposes of a decision rule for election errors better than the available alternatives.

In these "unexceptional" elections, society's interest in producing an agreed-upon representative is not at stake, no matter what rule is used to decide how to process election errors. Instead, the primary value in

⁸⁶ See, e.g., ALA. CODE § 17-16-48; ARK. CODE § 7-5-806; CAL. ELECTIONS CODE § 16502; COLO. REV. STAT. §§ 1-11-206, -209; GA. CODE § 21-2-525(b); HAW. REV. STAT. § 11-175; IDAHO CODE §§ 34-2107; ILL. STAT. ch. 10, §§ 5/23-1.8b, 5/23-14, 5/23-15; IOWA CODE §§ 58.5, 59.2, 59.3, 61.11, 62.11, 62.17; KAN. STAT. § 25-1447; KY. REV. STAT. §§ 120.165, 120.195; LA. REV. STAT. § 18:1411; MICH. COMP. L. §§ 168.747-748; MO. STAT. § 115.561; NEB. REV. STAT. § 32-1103; N.J. STAT. § 19:29-7; OHIO REV. CODE § 3515.12; TEX. ELECTION CODE §§ 221.009-.010; REV. CODE WASH. § 29A.68.050.

⁸⁷ Richard Winger reports that 39.5% of state legislative races in 2008 were not contested by one of the two major parties. Richard Winger, *Republicans, Democrats Fail to Run Against Each Other in 39.5% of State Legislative Elections This November*, BALLOT ACCESS NEWS, Oct. 24, 2008, at <http://bit.ly/VXeiz>.

holding the election and not simply anointing the presumptive winner is in ensuring that as much of the eligible electorate as possible feels like they have fully participated.⁸⁸ The static conception of materiality, which preserves the ability of a vote to be counted despite errors that appear immaterial when they are committed, realizes this goal mildly well, and better than a regime that refuses to acknowledge the immateriality of any error, or that penalizes eligible voters for their own errors even when the errors do not leave any question about their eligibility.

The dynamic conception of materiality realizes the value better still, for the simplest of reasons: it maximizes the potential to tally ballots cast by individuals who are unquestionably eligible members of the community, without compromising any safeguard to guard against ineligible voting. That is, the materiality principle increases the accuracy of the election's assessment of the eligible electorate's preferences, by taking more of those voters' preferences into account; it also increases the ability of eligible electors to participate fully in determining their representatives. Errors that leave reasonable doubt about a voter's eligibility remain preclusive. Those that do not, yield, so that more eligible members of the community can fully participate in the process.

The value of this dynamic conception of materiality increases dramatically in disputed elections. Though most elections are not close, many are, and a substantial portion are sufficiently close to run into "overtime," when the margin of victory is smaller than the margin of error. If pre-election or election day errors are shown to be immaterial in a post-election proceeding, legitimate ballots cast by eligible voters that would otherwise be discarded may be able to be counted. And because post-election proceedings are triggered by photo-finish elections, a dynamic assessment of materiality could well change the result of the

⁸⁸ To achieve the participatory goal of the election process, the voter must believe not only that she will be able to cast a ballot, but also that the ballot will be accepted and the preference recorded. That said, there are apparently limits to this value. Before election day, it is important that a voter believe that her ballot will be counted as intended, even if it is unlikely to be instrumental in the election outcome. But when voters actually run into difficulty at the polls, in unexceptional elections where the outcome is not in doubt, relatively few individuals casting provisional ballots return after election day to correct problems. The expressive benefits of the franchise are apparently sufficient for electors to confront the logistical hassles of voting once per cycle, but by the end of the evening of election day, with winners declared and the community of voters no longer engaged as tangibly in a joint endeavor, few voters overall are motivated to spend additional energy correcting mistakes. If the ultimate validity of the ballot were a more significant component of the expressive value of voting, we would expect substantially more interest in resolving provisional ballot issues in the days following even unexceptional elections.

closest races, ensuring greater accuracy in our most closely-fought contests.

For example, allowing the materiality of errors to change over time would have radically changed the analysis, and quite possibly the result, of the 2008 Franken-Coleman contest for the U.S. Senate seat from Minnesota.⁸⁹ In that race, which was ultimately certified with a margin of 312 votes out of 2.4 million cast,⁹⁰ thousands of absentee ballots remained uncounted because of alleged errors on absentee ballot envelopes. These errors primarily involved violations of two sets of procedural rules designed to ensure that absentee ballots are lawfully cast by eligible electors. The first is a requirement that the voter sign the ballot envelope in a designated space, reflecting the voter's affirmation that she cast the ballot in question and that she is an eligible elector; in order to verify the voter's identity, the ballot envelope signature must also match the signature on the application for the absentee ballot. The second is a requirement that a registered voter or notary public witness the casting of the ballot and signing of the ballot envelope, and provide certain information on the envelope to document his or her identity and participation in the process.

The focus of the contest quickly settled into a dispute about whether Minnesota law demanded "substantial compliance" or "strict compliance" with the procedural regulations of the absentee ballot process, including the two sets of rules above.⁹¹ If "substantial compliance" were the touchstone, many of the disputed absentee ballots would have been lawfully cast and therefore counted in the contest process. If, instead, "strict compliance" were required, the disputed absentee ballots would have remained excluded from the count.

Ultimately, the Minnesota Supreme Court determined that Minnesota law demanded "strict compliance" with Minnesota procedures, dependent in part on fault.⁹² Immaterial mistakes by election officials could be forgiven, but mistakes by voters, even when immaterial, would render their ballots invalid.⁹³ The absentee ballots in question revealed mistakes

⁸⁹ For a comprehensive review of the contest, see Edward B. Foley, *The Lake Wobegone Recount: Minnesota's Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 129 (2008).

⁹⁰ In re Contest of General Election Held on Nov. 4, 2008, for the Purpose of Electing a United States Senator from the State of Minnesota, 767 N.W.2d 453, 457 (Minn. 2009) [*"Coleman v. Franken Appeal"*].

⁹¹ See, e.g., *id.* at 460-62.

⁹² *Id.* at 461-62; In re Contest of General Election Held on Nov. 4, 2008, for the Purpose of Electing a United States Senator from the State of Minnesota, No. 62-cv-09-56, 2009 WL 981934, at ¶¶ 131-34 (Minn. Dist. Ct. 2009) [*"Coleman v. Franken Trial"*].

⁹³ *Coleman v. Franken Appeal*, 767 N.W.2d at 461-62.

by voters—and held to a “strict compliance” standard, they were rejected.⁹⁴

Using the materiality principle, the Minnesota courts might have found a superior resolution to the controversy,⁹⁵ without substantial further cost and without provoking future deviations from proper procedure. On election day in Minnesota, many of the errors on the disputed absentee ballot envelopes might legitimately have been material, creating doubt about the voter’s identity or eligibility, or the degree to which the ballot was cast free of coercion. On election day, the officials charged with evaluating absentee ballots were justified in declining to count the ballots, as long as reasonable doubt about the elector’s qualifications or legitimate preferences remained.

When the election returns established that the race was close enough for a postelection process, however, the opportunity kicked in for the materiality principle to do more meaningful work.⁹⁶ Individual voters gave testimony in the course of the contest litigation,⁹⁷ and in many circumstances, it is likely that the testimony reliably established that the electors in question were eligible to vote on election day and had actually cast the disputed ballots, free of undue influence.⁹⁸ Once the testimony established that the individuals were, on election day, substantively qualified to vote in the election, the earlier errors on the absentee ballot envelopes calling that eligibility into question became immaterial. Recognizing the dynamic nature of materiality would have made it possible to count the ballots in question.

Indeed, post-election procedures will often make such assessments possible. Many post-election proceedings provide a suitable forum for verifying the eligibility of voters whom errors have snagged at an earlier stage. Documentation can be examined, usually under judicial supervision.

⁹⁴ See *id.* at 462; *Coleman v. Franken Trial*, 2009 WL at ¶¶ 83-85, 92-93, 131-38.

⁹⁵ Minnesota law does not appear to permit the application of the materiality principle to absentee ballots. However, a federal statute—not raised by either party in the contest—might not only permit, but require, its application. See *infra* Section IV.B.

⁹⁶ Cf. Edward B. Foley, *State Law Issues Loom Large in Coleman v. Franken Appeal* (May 5, 2009) (contrasting the information available, and time constraints operative, for election-night determinations and for determinations during “a month-long review process conducted by an absentee ballot board.”), <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=6075>.

⁹⁷ *Coleman v. Franken Trial*, att. A n.1.

⁹⁸ See, e.g., Edward B. Foley, *Factual Points and Uncertainties Relevant to the Coleman v. Franken Appeal* (May 14, 2009) (“The process that the trial court employed permitted voters to testify that the two signatures were theirs and that the local officials had wrongly rejected their ballot on this ground.”), <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=6149>.

Candidates and parties have the incentive to deliver voters for personal testimony. Voters with the ability to ensure that their ballot—suddenly potentially decisive—is counted have the incentive to make themselves available. If flaws leave a voter’s eligibility in doubt on Election Day, the post-election process provides a reasonably structured opportunity to resolve that doubt conclusively.

Capturing this opportunity best serves the purposes of the election process. Even in an unexceptional election, the materiality principle fosters eligible electors’ sense that they have been able to participate in their own governance. In “election overtime,” the participatory value to each voter is starkly multiplied, because each is keenly aware that her disputed ballot adds tangibly and concretely to the prospect of victory for her favored candidate.

Moreover, in “election overtime,” the materiality principle fulfills an interest largely absent from unexceptional elections. In “overtime,” there is a legitimate dispute concerning the identity of the candidate who best represents the expressed preferences of the eligible electorate. The materiality principle—and particularly the dynamic reassessment of materiality—best resolves this dispute. It maximizes the accuracy of the election’s result, by maximizing the chances that an eligible elector’s ballot is able to be counted, and by definition without any associated increase in the likelihood that an unreliable ballot is tallied. The materiality principle is a comparatively low-cost means to ensure that the election results are as accurate in what they purport to measure as they can be.

4. Potential Concerns

Giving life to the materiality principle, even in an unexceptional election where the winning candidate is never in doubt, may raise several objections. I turn briefly to those concerns here.

Opportunistic behavior

First, some may believe that the materiality principle will create an opening for opportunistic behavior by voters, encouraging voters to violate procedures that are necessary to ensure a reliable election. In most circumstances, however, rational voters will not intentionally violate election procedures relying on the chance that a breach will eventually be found to be immaterial. Even when an election’s result is not in doubt,

voters want to know that their votes will count⁹⁹—and that impulse provides sufficient deterrent to knowing malfeasance or lazy fatalism. A voter will tend to attempt to follow the state’s rules to the best of her ability, because it will always be easier to attempt to comply with the rules in the first instance than to try to later dispel the doubt that a material error creates. Consider the example of a registration flaw: sending in one accurate form will always entail less effort than sending in a flawed form ... and then taking the steps necessary to understand and correct the error if it turns out to be material.¹⁰⁰ Nor do post-election proceedings present additional opportunities for the strategic presentation of falsified “corrections” to earlier errors: in the white-hot crucible of a recount or contest, all eyes are focused on the bona fides of each disputed ballot and each disputed ballot’s elector, and opportunities for fraud are, if anything, starkly diminished.

That is, for most violations of election regulations, forgiving immaterial errors does not create substantial incentives for opportunistic *ex ante* misbehavior. In some cases, however, the nature of the regulation creates an incentive for strategic actors to deviate from strict procedural rules in order to gain a meaningful tactical advantage. And in such circumstances, the materiality principle advanced in this Article is ill-advised as a decision rule for error.

Deadlines represent one such category. There are several important deadlines involved in the practical administration of elections: deadlines to register to vote, to apply for an absentee ballot, to cast a ballot in the election. And just as homework and tax forms are regularly submitted at the last possible moment, voters too act only on the brink of these deadlines ... and sometimes beyond them. Without questioning the utility or necessity of these deadlines, it is not difficult to contemplate that voters would indeed seek to capitalize on a rule forgiving “immaterial” lapsed deadlines, by intentionally complying with election procedures only belatedly. In the case of most election errors, the incremental effort required to compensate for the error is its own deterrent to intentional violation of the relevant rule; but where deadlines are concerned, there is no natural deterrent, and so the preclusive effect of a lapsed deadline may be necessary to ensure compliance in the normal course. An untimely

⁹⁹ See *supra* text accompanying note 41.

¹⁰⁰ In more formal terms, for voters who wish their votes to count, the net costs of strategic noncompliance include the cost to determine which breaches of election regulations are likely to be immaterial, and the costs to correct breaches when the voter's determination is incorrect, less the negligible savings of strategic noncompliance for breaches believed likely to be immaterial. Those costs will almost always exceed the costs of initial good-faith compliance.

registration form should not be evaluated based on the materiality principle, because ever-increasing untimeliness will result. A timely form with errors, on the other hand, may safely be treated by the materiality principle without fear of undue opportunism.

Errors in marking the ballot itself also present an unusual case, counseling for application of the materiality principle but not its dynamic incarnation. When a ballot is marked in erroneous fashion, it is one thing to evaluate that ballot on its face for questions about the materiality of the error: to evaluate whether a reasonable decisionmaker could substantially question the voter's intended choice. This is the static version of the materiality principle—and in Alaska's 2010 U.S. Senate race, with Lisa Murkowski running against Joe Miller and Scott McAdams as a write-in candidate, it would have counseled in favor of counting write-in ballots for "Lisa Murkowski" but not for "Senator M."

Reassessing dynamically the materiality of errors on the ballot—presumably by taking post-election testimony to ascertain a voter's intent—presents too large a risk that the proffered evidence will be unreliable. In every other post-election application of the dynamic aspect of materiality, the voter's ballot preferences are firmly established; the only question concerns the voter's eligibility on election day, which is not easily retroactively fabricated. Not so for ballot markings. The temptation for a voter casting a ballot for "Senator M." to change her mind in a post-election proceeding, or for a voter to vote strategically for "Senator M." in order to preserve post-election options, presents a substantial risk of opportunism not present in other circumstances. Though erroneous markings on the ballot itself present fruitful territory for a static conception of materiality, this is one category of error for which the materiality determination should be fixed in time.¹⁰¹

Cost

A second concern is that even if voters do not intentionally produce forms with flaws, some may expect that the materiality principle will substantially increase the burden on officials. In most circumstances, this fear should also remain unrealized.

As articulated here, the state's obligation under the materiality principle would be relatively modest. When faced with a voter's attempt to

¹⁰¹ Other regulatory categories with a risk of misaligned incentives if immaterial errors are forgiven include some requirements of candidates, parties, and initiative proponents. *See, e.g.*, DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW—CASES AND MATERIALS* 397–400 (4th ed. 2008) (presenting examples concerning deviations in the text of ballot initiatives and late replacements to party nominees represented on the ballot).

fulfill an election requirement, the state need not undertake any incremental procedure to test for error or seek corrective information; if error exists, it need not investigate the source of the blame (as may currently be required under states' existing fault-based legal regimes).¹⁰²

Rather, when presented initially with an apparent error, the same decisionmaker recognizing the error need only determine whether that error is material. If not, the voter or vote proceeds as if the violation had not occurred. If so, the voter enters a parallel state, in which the voter's ability to express a ballot preference is preserved but rendered provisional.

Dynamic reassessment adds little to the workload. When presented with an apparent correction, the state need merely accept the proffered information. It need not even give immediate effect to the correction. When, in the course of the election cycle, the state is otherwise obligated to assess the legitimacy of a vote of questionable validity, the state need merely account for the information it has been given, to determine whether an initial flaw remains material.

Consider a jurisdiction recognizing the dynamic nature of materiality. This jurisdiction's officials would review registration forms, just as occurs today. Given an error reasonably calling a voter's qualifications into question, it would deny her full registration, just as today. If she corrected the problem before the registration deadline, she would be registered, just as today. If she corrected the error at a later point, she would be asked to vote a provisional ballot, just as today; that ballot's validity would later be assessed, just as today. No incremental step is necessary beyond the simple task of preserving the evidence of the correction for review at the appropriate point, and creating the legal possibility of acknowledging the evidence's relevance. The materiality principle is merely an interpretive rule to gauge the validity of a disputed ballot, based on a mild expansion of the available evidentiary pool. It should not notably increase either the quantity of provisional ballots cast or the effort required of officials to resolve them.¹⁰³

¹⁰² Indeed, in other legal contexts, the state's duty to mitigate harm in a process that it controls and which directly governs fundamental rights is far more substantial. *See, e.g., supra* note 52 (describing a prosecutor's duty, under the constitution and applicable rules of professional ethics, to disclose affirmatively all evidence tending to negate guilt or mitigate the severity of the offense for punishment).

¹⁰³ In contrast, the absentee context may present modest incremental costs. The only practical means within any given election cycle to give meaning to a change in the materiality of an error on an absentee ballot application is to allow the absentee voter to cast a ballot that has the potential to be counted if the error becomes immaterial. This would likely result in a number of "provisional" absentee ballots sent by election officials and cast by voters, equal to the number of absentee applications presently rejected

Nor would the conception of materiality advanced in this Article substantially increase the volume or cost of post-election litigation. Elections in which the count of disputed provisional and absentee ballots¹⁰⁴ exceeds the margin of victory are likely to proceed to enhanced post-election scrutiny under *any* standard that permits counting a disputed provisional or absentee ballot, whether materiality is the touchstone or not. If, for example, fault is the measure by which errors are evaluated, a post-election proceeding will have to assess disputed evidence attributing blame for the error's existence. Modifying the object of the inquiry to the errors' materiality should not add substantially to either the quantum or duration of post-election proceedings. Once a case-by-case review begins, recognizing the materiality principle merely helps to get the answer right.

Bias

Third, some may anticipate that the materiality principle increases the potential for bias or perceived bias in the system. One expression of this bias concerns the affected electorate. Procedural rules theoretically apply equally to similarly-situated electors, but it may be that officials have at their disposal information to resolve eligibility questions more readily for a select portion of the electorate. That is, officials might be better equipped to render certain errors immaterial for only certain electors, or certain electors might themselves be better equipped to render errors immaterial, skewing the pool of ballots ultimately recognized as valid.

One rejoinder to this concern is empirical. With the cooperation of election officials, it should be possible to test whether there are currently significant demographic differences in the population of eligible electors who attempt to register, and who attempt to vote, and in the population

because of eligibility concerns. (As of 2011, this number is not reliably recorded nationwide. The Election Assistance Commission's Election Administration and Voting Survey—the most comprehensive proxy available—tracks the disposition of absentee ballots, but not of absentee ballot applications. *See* Election Assistance Comm'n, 2010 Election Administration and Voting Survey § C, at <http://bit.ly/oIwkdw>.)

Accommodating such ballots would require a tracking system to segregate and identify absentee ballots that are presumptively invalid, for applications with flaws that appear material. Many jurisdictions already have similar tracking mechanisms to identify absentee ballots cast by certain voters; for those that do not, giving effect to the dynamic nature of materiality entails an incremental burden.

¹⁰⁴ If jurisdictions adopt the materiality principle in the absentee context, and allow for the submission of “provisional” absentee ballots, *see supra* note 103, there may be a modest increase in the number of disputed absentee ballots, which might in turn lead to a modest increase in the number of elections for which disputed absentee ballots are potentially outcome-determinative. The absence of relevant data, *id.*, makes the size of the increase difficult to assess.

of voters whose ballots are actually counted. It would be interesting to further test whether application of either the materiality principle or the dynamic reappraisal of materiality exacerbated or mitigated any existing level of skew.

A second rejoinder to the bias concern is conceptual. As long as every voter has the legitimate opportunity to render an error immaterial, their differential ability to take advantage of this process becomes no different than any other resource more available to some voters by virtue of their socioeconomic class, or to some officials by virtue of the socioeconomic class they serve. Such differences are regrettable, and worthy of both public and private resources working toward equalizing access. But they are not reasons to deny the eligible electors who happen to be better off their legitimate opportunity to cast a valid ballot.

A different expression of bias in the system concerns the preferences of the decisionmakers themselves. Gauging the materiality of an error amounts to a judgment call, and thereby admits flexibility into the decision process. And studies have shown that in the election arena, where there is room for flexibility, bias (particularly partisan bias) has the potential to infect the judgment even of decisionmakers who perceive themselves to be acting neutrally.¹⁰⁵

This is indeed a serious consideration. The issue is mitigated by the burden of proof of the materiality inquiry, which renders the inquiry less flexible than it may at first appear. Given a violation of prescribed regulations, the question is not whether a voter *is* or *is not* eligible, but whether a reasonable decisionmaker could substantially question whether the voter is or is not eligible; not whether a voter intended to choose candidate X or Y, but whether a reasonable decisionmaker could substantially question whether the voter intended to choose X or Y. The materiality principle only provides that an error should be discounted when that error no longer leaves any reasonable decisionmaker with a substantial question about the eligibility of the voter or her choice of candidate. The relevant decision is one step removed from the ultimate answer sought, and at a fairly high threshold of certainty. That distance may provide sufficient cushion to overcome decisionmaker bias.

An additional response to this concern is that the relevant choice is not between the flexibility of a materiality standard or the inflexible (and thereby bias-resistant) application of every precise rule on the books. In practice, as described above, no jurisdiction truly adopts a zero-tolerance

¹⁰⁵ See, e.g., Kyle C. Kopko *et. al*, *In the Eye of the Beholder? Motivated Reasoning in Disputed Elections*, *POLIT. BEHAVIOR*, Aug. 6, 2010, at <http://www.springerlink.com/content/6171311p17406695>.

rule for all violations of all electoral regulations. Instead, administrative and judicial decisionmakers currently decide that certain rules are merely precatory, or that transgressions of other rules are to be forgiven if the transgressions are “minor” or “insubstantial” or not the “fault” of the voter. Each of these standards is a form of flexibility, susceptible to the bias of the decisionmaker. Indeed, to the extent that the materiality principle is grounded in concrete references to a voter’s eligibility or clear choice of candidate, the grounding provides *less* opportunity for the infection of bias than the available alternatives.

Due process

Fourth, and specific to the reevaluation of materiality in a post-election process, some might question whether allowing the materiality of an error to change after Election Day involves “changing the rules” in a manner that threatens due process.¹⁰⁶ State procedural regulations are set before the election is held, and the conception of materiality suggested in this Article would allow some citizens’ votes to be counted despite a failure to abide by these regulations. Particularly when an election is sent into overtime because of a few disputed votes, there is a strong interest in ensuring that the process to resolve the election comports with the stable rule of law. And this interest in abiding by pre-established rules may be seen to conflict with the societal interest in discerning as accurately as possible the true preference of the eligible electorate.

The dynamic conception of materiality, when acknowledged as a principle built into the regulatory structure from the outset, may help to resolve—or avoid—this “tragic choice.”¹⁰⁷ It serves as an interpretive meta-rule, recasting procedural protections for determining the eligibility of the individual voter not as fixed thumbs-up or thumbs-down moments, but as checkpoints along the road. At time t , a citizen whose eligibility is reasonably in question will have been flagged as presumptively ineligible; if, at time $t + 1$, the question has been resolved, the flag can be removed. This is no deviation from the rule of law; under the dynamic conception of materiality, the governing rules *contemplate* a conditional adjustment of status.¹⁰⁸ Such a meta-rule can and should be declared well before Election

¹⁰⁶ See *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995); see generally Richard H. Pildes, *Judging “New Law” in Election Disputes*, 29 FLA. ST. U. L. REV. 691 (2001).

¹⁰⁷ See generally GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978) (identifying circumstances forcing choices between deeply-held conflicting values).

¹⁰⁸ Similarly, a conception of material error that permits eligible voters to vote despite minor errors in procedural prerequisites should not be considered a “dilution” of the votes of those who managed to navigate procedural waters without flaw, even if the particular application of materiality is determined after the election. See, e.g., *Roe*, 43 F.3d

Day and should be implemented uniformly throughout the election cycle. A post-election rule change deviating from ex ante expectations is neither necessary nor warranted.

Bush v. Gore

The prospect of the exercise of individual judgment with respect to the counting of votes after an election also inevitably draws comparisons to *Bush v. Gore*.¹⁰⁹ It is sufficient for present discussion to recall that the case found a constitutional equal protection violation in counties' quasi-adjudicatory decisions that different standards would apply to similar ballots, both within and across jurisdictions.¹¹⁰ Indeed, the Court apparently believed that even absent differences in the declared rules applied by different decisionmakers, a general "intent of the voter" standard would be constitutionally insufficient in a post-election proceeding, without more narrowly defined, administrable standards.¹¹¹ And though virtually no procedural rule is sufficiently free of ambiguity to preclude entirely the possibility of local variation, there is little question that requiring officials to exercise judgment in determining the changing materiality of an election error expands the risk of inconsistency that so concerned the Court.¹¹²

Still, as explained above, the materiality standard is one step removed from the generalized discretion that the Court confronted in *Bush v. Gore*. The materiality standard does not ask decisionmakers to determine whether a voter is eligible, but rather to determine whether there is any significant doubt about whether the voter is eligible; it does not ask to discern the intent of the voter, but rather to determine whether there is any significant doubt about the intent of the voter. The distinction is meaningful, and likely to reduce disagreement and local inconsistency in

at 581. The voters who fall victim to errors later proved to be immaterial are by definition eligible electors. Allowing those votes to count does not dilute the votes of other eligible electors by expanding the electorate beyond any ex ante expectation held by any member of the electorate.

¹⁰⁹ 531 U.S. 98 (2000).

¹¹⁰ *Id.* at 106-07.

¹¹¹ *Id.* at 106; cf. Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Equality, and Participation*, 101 MICH. L. REV. 2409, 2514-15 (2003) (suggesting, by analogy to the jurisprudence of speech permit cases, a potential violation of equal protection principles in the delegation of overbroad discretion, even without proof of disparate practice).

¹¹² See generally Tokaji, *supra* note 111, at 2420-21 (reviewing the tension between preserving discretion and preserving equality); Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 570 (2006) (noting the conflict between "binding officials to clear rules known in advance" and "allowing officials to exercise informed discretion in individual cases").

the application of the principle. It does not eliminate the possibility that some local officials will accept evidence of eligibility (and therefore of the immateriality of an earlier error) that others discount, but the evidentiary burden embedded in the inquiry—eliminating *any* reasonable doubt caused by a procedural flaw—does limit the opportunity for wild variance. (If further indicia of consistent applicability are required, there are ways to raise the standard further still: for example, the materiality principle might be applied in post-election contests only by groups of multiple decisionmakers, and only when they unanimously conclude that an error is immaterial.)

Moreover, most post-election proceedings will be conducted under the supervision of a central judicial or administrative actor. Since 2000, such figures are highly attuned to the potential for intra- or inter-jurisdiction variance, and may be able to regulate local decisionmaking in the event that it appears likely to produce divergent results.

Perceived politicization

Bush v. Gore also invokes a related concern: the risk that post-election reassessments of eligibility, even if consistent and principled, will further the appearance that the election administration process, and judicial actors who may be overseeing post-election proceedings, are politicized.¹¹³ If an election is sufficiently close to have entered into a post-election process, individual evaluations of eligibility or ballot preference could well determine the winner. And, of course, assessments of materiality with respect to voter intent are related directly to votes counted or uncounted for particular candidates. It is difficult to be comfortable with nuanced post-election assessments of voter eligibility or intent, even if they are executed with absolute neutrality, when they will likely appear to the party on the losing end to be fraught with political favoritism.

These latter two objections—both dependent on the mild expansion of post-election exercises of judgment in the interest of arriving at a more inclusive, accurate result—are substantial, and worth serious consideration. The prevailing thrust in contemporary scholarship, certainly, is to avoid any increase in the flexibility of post-election process. Yet the only way to evaluate the overall impact of the potential inconsistency and potential politicization caused by allowing the materiality of pre-election errors to vary even after Election Day is in relation to the other options available for assessing disputed ballots.

¹¹³ See, e.g., LOWENSTEIN ET AL., *supra* note 101, at 398 (presenting the “serious danger” that when procedural rules are to be waived in cases of “substantial compliance,” the judgment of judges “will be affected by their political preferences.”).

I take as a given that the post-election process is only underway if pre-election process to resolve immaterial errors has failed to do so. The choice of decision rule is then distilled to five basic options. One, hold a new election.¹¹⁴ Two, count no votes in any way connected to a violation of established procedure, and thereby risk not only granting victory to a candidate who did not earn a plurality of the votes of the eligible electorate attempting to express a preference, but also risk public dissatisfaction in the procedural fairness of an election decided purely by technical error. Three, count some votes related to a violation of established procedure, based perhaps on fault or magnitude of the error, even when some of the rejected votes are known to be cast by eligible members of the community—with the same risk of an inaccurate result and process perceived as unjust.¹¹⁵ Four, count the votes of eligible citizens when errors are or have become immaterial, in an effort to come as close as possible to an accurate understanding of the electorate's preferences without diluting the electorate pool. Or five, acknowledge the futility of *any* attempt at accurately determining the plurality choice when an election is sufficiently close, and decide the victor by lot.¹¹⁶

In some ways, this last option presents the most serious challenge to the materiality principle. I acknowledge the substantial appeal in delivering to a random procedure those circumstances in which the margin of *irreducible* error exceeds the margin of victory. But I also suggest that once we have entrusted a selection process to a popular election, there exists a moral imperative to attempt to reduce apparent error where possible, at

¹¹⁴ See Huefner, *supra* note 5, at 283-84, 317-19 (discussing concerns with new elections); Steven J. Mulroy, *Right Without a Remedy? The "Butterfly Ballot" Case and Court-Ordered Federal Election "Revotes"*, 10 GEO. MASON L. REV. 215 (2001) (analyzing both partial and complete "revotes").

¹¹⁵ It is useful to recall the astute assessment of the Florida Supreme Court:

We first take note that the real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. . . . By refusing to recognize an otherwise valid exercise of the right to a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right. . . . [A] majority of the voters in the Second District preferred Mr. Boardman over Mr. Esteva in October, 1973. This must not be overlooked. If we are to countenance a different result, one contrary to the apparent will of the people, then we must do so on the basis that the sanctity of the ballot and the integrity of the election were not maintained, and not merely on the theory that the absentee ballots cast were in technical violation of the law.

Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1976).

¹¹⁶ See, e.g., Pitts, *supra* note 5.

least until the winner is decisively established. Even when our “capacity for accurate tabulation”¹¹⁷ makes it epistemologically impossible for us to determine the electorate’s expressed preference, we are obligated to make the attempt to the best of our ability, in order to fulfill the purpose of the election to the best of our ability. The argument applies with even greater strength to any nonrandom resolution: among comparatively equal-cost alternatives, the preferred option should be the one that yields the most accurate result. Post-election process is expensive and time-consuming, and the exercise of *any* discretion risks the appearance of politicizing the process, if decisionmakers do not conduct themselves in a manner beyond reproach. Fault- or magnitude-based decision rules are not free from this risk. Even if suboptimal, the materiality principle may be the least bad of the available alternatives.¹¹⁸

IV. SOURCES OF LAW FOR THE MATERIALITY PRINCIPLE

A. *The Federal Constitution*

As described in this Article, the materiality principle has a curious—and uncertain—constitutional status. Relatively few plaintiffs challenging state election regulations have framed their claims by contending that the

¹¹⁷ *Id.* at 746; *see also* Huefner, *supra* note 5, at 323.

¹¹⁸ In this respect, I may place different weights on the varying values of the election process than other scholars. I agree with the prevailing assessment of the benefit of resolving immaterial errors before the election whenever possible, and in the benefit of providing a forum to help voters turn material errors into immaterial ones. *See, e.g.*, Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 GEO. WASH. L. REV. 1193, 1204-05 & n.69 (2005). However, in those circumstances when an election proceeds with errors unresolved, and the result is left in doubt, several scholars seem to place greater weight on the swift declaration of a winner. *See id.* at 1203-05; Foley, *supra* note 3, at 361; Huefner, *supra* note 5, at 292-93; John Copeland Nagle, *How Not to Count Votes*, 104 COLUM. L. REV. 1732, 1762 (2004). In contrast, I would place greater weight on ensuring that the official elected represents the knowable expressed preference of the eligible electorate, even if that determination lingers.

It may also be that the difference in weighting is largely illusory, distorted by the outsized presence of the 2000 election. The above scholars’ preference for a date-certain winner may be driven by the imperatives of a Presidential contest. A contested election for President involves unique difficulties, driven by the strong need for the polity to have a recognized chief executive on Inauguration Day. In contested elections for state executives, there is less at stake in ensuring that the election’s winner is recognized by the start of a term, and the consequences of an election lingering beyond the first day of the session are still less dire when the race concerns a member of a legislative delegation. It is not clear whether the apparent preference for speed over accuracy, when (and only when) the two are irreconcilable, extends beyond the Presidential context.

federal constitution prohibits precluding the vote of an eligible elector due to immaterial errors. Even fewer courts have issued decisions on those grounds.¹¹⁹ And though courts construing state regulation to forgive immaterial errors may have been motivated by canons of constitutional avoidance,¹²⁰ they have not generally isolated a federal constitutional materiality principle as the reason for their action.

Even if not articulated as such, the materiality principle is in some ways consistent with the Court's current understanding of constitutional protections against undue infringement of the right to vote. The Court has established a balancing test to identify unconstitutional impositions on the right to vote: courts must “weigh the character and magnitude of the asserted injury” to the right to vote against “the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden [an elector’s] rights.”¹²¹ “However slight that burden may appear . . . , it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.”¹²²

In this balancing formula, the materiality principle relates primarily to the state’s interest. Once an error is revealed to be immaterial, no longer creating any reasonable doubt about the elector’s qualifications or ballot preference, there are few state interests that justify allowing that error a continuing preclusive effect.¹²³ If the constitutional balancing test is designed to ensure that eligible voters are not unnecessarily prevented from casting a valid ballot, the materiality principle seems particularly consonant with that value.

That said, there are probably more ways in which most applications of the materiality principle are not consistent with the Court’s current understanding of constitutional restraints on states. For example, the Court has rarely, if ever, endorsed such a granular approach to the state’s interests in election regulation. The analysis above depends on demanding particularly narrow tailoring of the state’s regulatory scheme: rather than

¹¹⁹ *Cf., e.g.*, Florida State Conference of the NAACP v. Browning, 569 F.Supp.2d 1237, 1256 (N.D. Fla. 2008) (refusing to find a constitutional burden when error precluded individuals from casting a valid ballot, but also refraining from discussing circumstances in which that error had been rendered immaterial).

¹²⁰ *See* Hasen, *supra* note 6, at 96-100.

¹²¹ *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal quotation marks omitted).

¹²² *Crawford v. Marion County Election Board*, 553 U.S. 181, 191 (2008) (plurality); *see also id.* at 210-11 (Souter, J., dissenting).

¹²³ *See supra* text accompanying note 45 (addressing arguments concerning the state’s interests in deterrence); *see also supra* text accompanying notes 102-103 (addressing arguments concerning the state’s interests in avoiding incremental administrative cost).

allowing the state to justify its regulations in general, abstract terms (e.g., procedure X is necessary to ensure that voters are eligible), it would focus on the state's justification under particular conditions (e.g., procedure X is necessary to ensure that voters are eligible even when there exists other, irrefutable, proof of eligibility). The Court seems to countenance such intrusive federal constitutional supervision only when the regulation in question exacts a particularly severe burden.¹²⁴ And though the appropriate constitutional measurement of burden remains in flux,¹²⁵ it is difficult to imagine, absent an egregious fact pattern, the Court of *Bush v. Gore* finding sufficient burden to validate a constitutional claim premised on the state's obligation to compensate for avoidable mistake. If the materiality principle has a constitutional home at all, it at best represents a seldom expressed and severely underenforced constitutional norm.¹²⁶

B. *The Civil Rights Act of 1964*

Fortunately, the legal imprimatur of the materiality principle does not depend on deciding whether it has or has not been—or should or should not be—constitutionalized, in whole or in part, in outcome-determinative contexts or in the normal course. Congress has taken matters into its own hands.

Section 101(a) of the landmark Civil Rights Act of 1964 contains a provision directly referencing election-related errors:

No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.¹²⁷

It is somewhat surprising how little attention this provision—the “materiality provision” of the Civil Rights Act—has received. I am aware

¹²⁴ Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PENN. L. REV. 313, 336–37 (2007).

¹²⁵ See Justin Levitt, *Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens*, 9 ELECTION L.J. 19, 32–33 (2010) (noting that courts variously assess burden based on harm to an individual, a subgroup, or the electorate as a whole, relying inconsistently on both absolute magnitude and proportion).

¹²⁶ See Hasen, *supra* note 6, at 96–100.

¹²⁷ Pub.L. 88-352, Title I, § 101(a), 78 Stat. 241, codified at 42 U.S.C. § 1971(a)(2)(B).

of no sustained scholarly examinations of the provision, and it is seldom addressed in published judicial decisions.¹²⁸

The materiality provision appears to adopt much of the vision of materiality proposed in this Article. The provision generally prohibits disenfranchisement based on certain immaterial errors, based on whether the errors cast the substantive eligibility of the elector in doubt.¹²⁹

Congress had ample reason in 1964 to be concerned by such disenfranchisement. The substantial legislative record for the materiality provision focused on techniques by which many local registrars discriminated against racial minorities. Extensive testimony showed that

¹²⁸ In part, this may be because when the materiality provision has been invoked, it is often in the context of emergency litigation shortly before an election. Such litigation is frequently resolved in practice by settlement or consent decree, e.g., Agreed Entry and Order in Resolution of Motion for Temporary Restraining Order, *Brown v. Rokita*, No. 1:08-cv-1484 (S.D. Ind. Nov. 3, 2008); Complaint ¶ 133, *NAACP v. Harris*, No. 1:01-cv-00120 (S.D. Fla. Feb. 14, 2002); Second Amended Order ex. A-E, *NAACP v. Harris*, No. 1:01-cv-00120 (S.D. Fla. Sept. 19, 2002); or by cursory determinations on hasty motions for temporary or preliminary relief, e.g., Order, *Citizens' Alliance for Secure Elections v. Vu*, No. 1:04-cv-2147 (N.D. Ohio Oct. 27, 2004); Order, *Van Hollen v. Gov't Accountability Bd.*, No. 08cv4085 (Wis. Cir. Ct. Oct. 23, 2008), and rarely analyzed by commentators or other tribunals.

¹²⁹ Initially, the provision's focus on whether the elector is "qualified under State law" may seem ambiguous: out of context, it is not clear whether this refers to substantive qualifications (i.e., the voter's personal characteristics, such as identity, age, citizenship, residence, lack of a disenfranchising conviction, etc.) or procedural qualifications (the actions that a state requires of each citizen in order to vote, such as registration).

The latter path, however, swiftly renders the provision meaningless. By definition, errors that do not impact a procedural qualification carry no risk of disenfranchisement. That is, every error for which state law would deny individuals the vote is an error in a state's procedural qualification. It follows that every error for which state law would deny individuals the vote is material to determining whether an individual is procedurally qualified to vote under state law.

If the materiality provision addressed only procedural qualifications, the analysis above shows that it would have absolutely no effect. Because every error that causes disenfranchisement is necessarily material to determining whether the voter is procedurally qualified, the provision would allow the state to disenfranchise for *every* error that causes disenfranchisement. Conversely, it would prohibit disenfranchisement only for errors that by definition do not disenfranchise. Even in the vigorous battle regarding the utility of canons of construction, the rule against surplusage, which requires that statutes be interpreted to avoid rendering a provision meaningless if at all possible, is one of the most widely accepted. *See, e.g.*, *Beck v. Prupis*, 529 U.S. 494, 506 (2000) (citing "the longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous).

Instead, if the materiality provision is to have any meaning, the inquiry must involve not procedural but rather substantive qualifications of state law: identity, age, citizenship, residency, and lack of disenfranchising felony conviction or mental incapacitation.

registrars rejected black applicants on the basis of purported “errors” on application forms that were hyper-technical, or entirely invented, while they ignored more substantial glitches entirely when the applicant was white. Among the more infamous examples was a registration application rejected because the would-be registrant, required to account for her age in years, months, and days, missed the mark by one day because the day had not yet ended.¹³⁰ Another application was rejected because the applicant’s state was misspelled as “Louiseana.”¹³¹ Still other applications were rejected because the applicant identified her skin color as “Negro” instead of “brown,” or (for a different applicant) “brown” instead of “Negro”;¹³² or based on the fact that an applicant “underlined ‘Mr.’ when [he] should have circled it.”¹³³

Though the primary motivation for the sponsors of the materiality provision was clearly racial discrimination, Congress drafted the provision to embrace errors or omissions beyond those used to discriminate based on race. Some courts have either presumed this to be an oversight, or thought a racial focus implicit given the overwhelming devotion of the Act as a whole to race, and have held the provision inapplicable to disenfranchisement absent allegations of racial discrimination.¹³⁴ It is more likely, however, that the materiality provision’s nonracial scope reflects a conscious decision befitting the general principle. The text of most other sections of the Civil Rights Act of 1964, both those concerning voting and those concerning other rights, tie the right in question to racial discrimination.¹³⁵ The text of the materiality provision does not, which is a distinction noted in the contemporaneous legislative debates.¹³⁶

¹³⁰ 110 Cong. Rec. 6499 (daily ed. April 1, 1964) (statement of Sen. Keating); Hearings on S. 1731 and 1750 Before the S. Comm. on the Judiciary, 88th Cong. 101 (1963) (statement of Robert F. Kennedy, U.S. Attorney General).

¹³¹ *Id.*

¹³² *Id.*; 110 Cong. Rec. 6309 (daily ed. March 30, 1964) (statement of Sen. Humphrey).

¹³³ 110 Cong. Rec. 1618 (daily ed. Feb. 3, 1964) (statement of Rep. Celler).

¹³⁴ *See, e.g.*, *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 839 (S.D. Ind. 2006); *Malinou v. Board of Elections*, 271 A.2d 798, 803 (R.I. 1970). *Cf.* Hearings on H.R. 7152 Before the H. Comm. on the Judiciary, 88th Cong. 2720 (1963) (statement of Robert F. Kennedy, U.S. Attorney General) (explaining that errors are immaterial if forgiven for white citizens but made determinative for black citizens); *but cf.* *Ball v. Brown*, 450 F. Supp. 4, 7 (D. Ohio 1977) (reviewing cases construing various portions of § 1971 to be applicable beyond racial discrimination).

¹³⁵ *E.g.*, Pub.L. 88-352, Title I, § 101(d), 78 Stat. 241 (providing for a three-judge court to hear cases resolving a pattern or practice of discrimination under a subsection concerning deprivations “on account of race or color”); *id.* § 201(a) (prohibiting discrimination in public accommodations “on the ground of race, color, religion, or national origin”); *id.* § 301(a) (concerning discrimination in use of public facilities “on account of [] race, color, religion, or national origin”); *id.* § 402 (concerning lack of equal educational opportunities

The scope of the materiality provision is not coextensive with the materiality principle that I propose in this Article: it is limited, for example, to errors or omissions on records or papers involved in the voting process. And in tying materiality determinations to a voter's eligibility, the provision is at best awkwardly applied to the original *Bush v. Gore* problem: errors or omissions on the face of the ballot itself.¹³⁷

That said, the provision's coverage is surprisingly broad, even beyond its race-blind application. First, though the materiality provision was motivated by disenfranchisement tied to ostensible errors by a prospective registrant, the text of the provision is not limited to errors or omissions by would-be voters. Indeed, such a limitation was removed from the bill. As passed by the House of Representatives, the provision prohibited officials from “deny[ing] the right of any individual to vote . . . because of an error or omission of such individual on any record or paper relating to any . . . act requisite to voting, if such error or omission is not material . . .”¹³⁸ As

“by reason of race, color, religion, or national origin”); *id.* § 601 (prohibiting discrimination in programs receiving federal aid “on the ground of race, color, or national origin”); *id.* § 703(a) (prohibiting employment practices discriminating “because of [an] individual’s race, color, religion, sex, or national origin”).

¹³⁶ See H.R. REP. NO. 88-914, pt. 1, at 77 (1963) (minority report); 110 Cong. Rec. 6507 (daily ed. Apr. 1, 1964) (statements of Sen. Ervin & Sen. Keating); 110 Cong. Rec. 6424 (daily ed. Mar. 31, 1964) (statement of Sen. Thurmond); 110 Cong. Rec. 5690-91 (daily ed. Mar. 21, 1964) (statement of Sen. Byrd) (quoting Virginia Comm’n on Constitutional Gov’t); 110 Cong. Rec. 1470 (daily ed. Jan. 31, 1964) (statement of Rep. Willis); 109 Cong. Rec. 4841 (daily ed. Mar. 28, 1963) (quoting 1 U.S. COMM’N ON CIVIL RIGHTS: VOTING 137-38 (1961)).

¹³⁷ These errors are on papers—ballots—that are certainly requisite to voting under the statute, and the errors seem to have no bearing on determining whether the individual in question is qualified to vote under State law. Facially, the materiality provision of the Civil Rights Act would seem to apply.

However, the provision’s express reference to the voter’s qualifications implies that its intent is to limit disputes about eligibility to those circumstances in which a voter’s qualifications are truly in question. The ballot itself has nothing to do with individual qualifications; American ballots are largely secret ballots, with no link between the face of the ballot and any given individual.

Just as the provision cannot refer to “procedural” qualifications because such a construction would preclude its application to *any* error, *see supra* note 129, the provision also cannot refer to errors on the ballot face because such a construction would require its application to *every* plausible error. Other than writing on the ballot face “I am John Smith and I am not eligible to vote,” no error on a secret ballot can be material to determining the qualifications of the individual who cast it. That is, if the materiality provision applied to errors on the ballot face, no such error could ever prevent the ballot from counting. The provision seems at best an awkward fit in such circumstances.

¹³⁸ H.R. 7152, 88th Cong. § 101(a) (as passed by House of Representatives, Feb. 10, 1964) (emphasis added).

amended and signed into law, however, the “limiting language” tying the error to the would-be voter was deleted.¹³⁹ The text enacted states that immaterial errors or omissions on any record or paper requisite to voting—whether perpetrated by the voter, an election official, or a third party—cannot be used to deny qualified individuals the right to vote.

Second, the text of the provision is also not limited to registration errors or omissions. Any immaterial error on a record or paper involved in an “act requisite to voting” falls within its facial scope. For purposes of the materiality provision, “voting” includes “all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast. . . .”¹⁴⁰ This is a federal law with substantial, though not unlimited, reach.¹⁴¹

Thus far, however, each of the few courts or commentators to have examined the materiality provision of the Civil Rights Act has artificially limited its application in one particularly pertinent respect, by failing to recognize that the materiality of a particular error can vary over time. Moreover, the oversight has fostered an understanding of materiality that is poorly suited to both the statute and the election process as a whole.

¹³⁹ 110 Cong. Rec. 12381 (daily ed. June 5, 1964) (explanation of changes made by substitute Amendment No. 656).

¹⁴⁰ 42 U.S.C. § 1971(e); 42 U.S.C. § 1971(a)(3)(A).

¹⁴¹ By referring to flaws “on any record or paper” that interfere with the vote, Congress declined to create a specific statutory remedy for the array of non-documentary glitches that impact every election. Still, there are plenty of requisite election records or papers with the potential for flaws, some of which raise intriguing questions under the statute.

Consider, for example, the absentee process. In one respect, no part of the absentee process is “requisite” to voting, because states need not offer absentee balloting at all. As long as a jurisdiction conducting elections permits in-person voting on election day, it has fulfilled its constitutional obligation. *See McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802, 807-08 (1969). Yet from a closer view of the voting process, once the state invites voters to utilize an absentee ballot procedure, it may render the individual stages of that procedure “requisite” to voting. *See, e.g., United States v. Boards*, 10 F.3d 587, 589 (8th Cir. 1993) (finding an absentee ballot application to be a “prerequisite to voting” because an *absentee voter* must first apply for such a ballot). That is, because of the compressed nature of the election cycle, the voting process is path dependent: by the time that an error in the absentee process is discovered, that process may, either legally or practically, represent the only voting option available to the citizen in question. Some jurisdictions, for example, preclude any attempt to vote on election day once an absentee ballot is mailed, even if the absentee ballot is rendered invalid due to an error. For such voters, the absentee ballot becomes a paper relating to an act requisite to voting at least at the moment it is cast. *See, e.g., N.J. STAT. 19:57-28; N.M. STAT. § 1-6-16(A); UTAH CODE § 20A-3-301(2); W.VA. CODE § 3-3-9 (b).*

Consider as an example *Florida State Conference of the NAACP v. Browning*,¹⁴² which offers the most extensive interpretation of the materiality provision to date. The case concerned a state variant on the provision of the Help America Vote Act requiring a voter to provide her driver's license or Social Security number on a voter registration form, and attempting to match that number and other information to motor vehicle or Social Security records.¹⁴³ In HAVA, mismatches can be cured by showing a range of permissible documentary identification at any $t + 1$ time. Florida instead adopted a fault-based approach: at the time of the lawsuit, mismatches caused by state error could be repaired only by showing the original driver's license or Social Security card; mismatches caused by applicant error could not be repaired after the registration deadline at all.¹⁴⁴ That is, a voter mismatched because she transposed two digits of her driver's license number on the registration form would be unable to cast a valid ballot—despite verifying her identity by showing identification at the polls—because of the earlier error in the registration process.

The Eleventh Circuit analyzed the Florida law under, *inter alia*, the materiality provision of the Civil Rights Act. The court became stymied, however, by a static construction of materiality. Despite the statutory text, the court focused on the materiality of the underlying information sought, rather than the materiality of the error on the record.¹⁴⁵ It believed that evaluating the materiality of the error itself would lead to absurd results. The only way to evaluate the materiality of an error, it presumed, was to gauge the magnitude of the mistake. Big errors would be material, small ones would not.¹⁴⁶ The only way to gauge the magnitude of a mistake, in turn, would be to compare the mistake to the accurate information. And with accurate information in hand, the original mistake (no matter how large) never impacts the determination of the voter's qualifications. Thus, reasoned the court, because no error could be deemed material once it

¹⁴² 522 F.3d 1153 (11th Cir. 2008). Full disclosure: the author of this Article was co-counsel to plaintiffs in the case.

¹⁴³ See *supra* notes 75-78.

¹⁴⁴ The law has since been amended, to allow voters to correct their own errors as well. Fla. Stat. § 97.053(6).

¹⁴⁵ Compare *Browning*, 522 F.3d at 1174-75 (“The mistaken premise in this argument is that the materiality provision refers to the nature of the error rather than the nature of the underlying information requested.”), with 42 U.S.C. § 1971(a)(2)(B) (“No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission . . . if such *error or omission* is not material in determining whether such individual is qualified under State law to vote.”) (emphasis added).

¹⁴⁶ *Browning*, 522 F.3d at 1175 n.23.

was possible to gauge the error's magnitude, the Civil Rights Act could not possibly have intended to focus on the materiality of the error.

The Eleventh Circuit was driven toward the magnitude of an error as a measurable standard for materiality only because it believed it could not find *all* errors immaterial once they are supplanted by accurate information. Recognizing the dynamic nature of materiality, though, releases the court from its own logical box: it allows decisionmakers to distinguish between meaningful errors and non-meaningful errors based not on size but on time. At the moment the erroneous information is first evaluated, it is material (and may prevent the would-be voter from voting without violating federal law) if it creates real and reasonable doubt as to whether the individual in question is qualified or not. If such an error is never corrected, it continues to be material, and may continue to block the would-be voter from casting a valid ballot. If such an error is corrected or superseded, and the accurate information revealed, the error will always become immaterial—but that is precisely what the statute should contemplate. At the time when there is no longer a doubt about the individual's qualifications, the earlier (and newly immaterial) error cannot be used as a procedural hitch to deprive the eligible individual of a vote.

That is, the fact that many of the errors on prerequisite forms can later be mooted—that errors that had once been material can be later revealed as immaterial—does not strip the materiality provision of meaning. To the contrary, because it allows eligible voters to vote when there is no longer any doubt about their qualifications, recognizing the dynamic nature of materiality would give the Civil Rights Act's materiality provision precisely the meaning that was intended.

C. *State Law*

Beyond the Civil Rights Act, federal law does not presently seem to impose the materiality principle upon states. But states might impose the principle on themselves. As mentioned above, Professor Rick Hasen has identified a “Democracy Canon” of statutory interpretation, with roots at least as early as 1885; under this canon, state courts generally favor the validity of expressed preferences of eligible voters in the interpretation of ambiguous election-related statutes.¹⁴⁷ This canon of construction would, in many ways, seek to construe state law consistent with the materiality principle where errors are at issue. Under the Democracy Canon, eligible citizens would be permitted to vote valid ballots despite violations of

¹⁴⁷ See Hasen, *supra* note 6.

procedural regulations, where there is at least some ambiguity as to the regulations' mandatory or directory nature.

Professor Hasen's descriptive account of the Democracy Canon seems accurate, and I agree with its ultimate normative goals. Nevertheless, I share the hesitation of scholars who have criticized the application of substantive canons of construction as an exercise in inconsistency.¹⁴⁸ Given the futility of squeezing all plausible ambiguity from legislative codes, the search for statutory ambiguity seems to depend largely on the will of the judge in question, and deciding when a statute is or is not sufficiently ambiguous to deploy the Democracy Canon seems not meaningfully removed from equally indeterminate estimations of "substantial" compliance with procedural regulations.¹⁴⁹

Instead of relying on canons of construction, I would prefer to see states adopt the materiality principle expressly, as a statutory basis for determining not how election procedures are construed, but when they may be applied to preclude the vote of an elector.¹⁵⁰ The materiality principle does not question the validity or propriety of any given electoral regulation in safeguarding the reliable administration of an election, and does not assert that the regulation adopts different meanings in different contexts. It merely states that the regulation in question should yield when its particular purpose in ensuring that only eligible voters cast valid ballots is no longer served. Legislative majorities that reliably represent pluralities of their communities should be eager to see such statutes in place.

¹⁴⁸ See generally, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); *id.* at 27-29.

¹⁴⁹ See *supra* text accompanying note 42; see also Hasen, *supra* note 6, at 122-23 (suggesting deployment of the Democracy Canon to count write-in votes without marked boxes next to the write-in space, despite a state election law stating that "no write-in vote shall be counted unless the voting space next to the write-in space is marked or slotted . . .").

¹⁵⁰ At least three states have already enacted such provisions, at least for some ballots in some circumstances. See, e.g., COLO. REV. STAT. § 1-8.5-105 (allowing a provisional ballot to count, despite the omission of information, if an official is able to determine that the elector was eligible); MASS. GEN. L. ch. 54, § 97 ("No [absentee] ballot . . . shall be rejected for any immaterial addition, omission or irregularity in the preparation or execution of any writing or affidavit required by [laws regulating the absentee voting process]."); NEB. REV. STAT. § 32-1002(6) (allowing a provisional ballot to count, despite errors or omissions in registration materials or on the ballot itself, if the errant or omitted "information is not necessary to determine the eligibility of the voter to cast a ballot").

CONCLUSION

Despite general concern about the aggregate decline of competitive elections,¹⁵¹ photo-finish races will not disappear. When an election heads into overtime, it tests the capacity of the infrastructure of our democracy to deliver a result that is both inclusive and reliable, and that is perceived to be both inclusive and reliable. In the 2000 presidential election, that capacity broke down in the face of numerous errors, by voters and officials, with serious and lingering consequences. Nearly a decade later, our conceptual approach to election-related errors remains inadequate, particularly in the event of races close enough to head into overtime.

This Article suggests one component of a solution, dependent on the robust application of a materiality principle found, *inter alia*, in an underrecognized provision of the Civil Rights Act of 1964. Reorienting the analytical framework for evaluating the consequences of election procedures in light of this materiality principle may be able to resolve some of the conflict between the need for regulations to administer elections and the ultimate purposes those regulations are intended to fulfill. Particularly by recognizing the dynamic nature of that materiality, it is possible to resolve election-related flaws in a manner better tailored both to the rationale for election procedures and to the more foundational reasons why we vote.

¹⁵¹ See, e.g., Samuel Issacharoff, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 OHIO ST. L.J. 1121, 1123-25 (2007); David Lublin & Michael P. McDonald, *Is It Time to Draw the Line?: The Impact of Redistricting on Competition in State House Elections*, 5 ELECT. L.J. 144, 155 (2006).