

# RESPONSE

## The Price of Free Elections

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### INTRODUCTION

How much does an election cost? For a democracy as old as ours, the answer is surprisingly unclear.<sup>1</sup>

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1. Joshua S. Sellers & Roger Michalski, *Democracy on a Shoestring*, 74 VAND. L. REV. 1079, 1092 (2021) (“As a country, we have a shamefully inadequate amount of information about how our elections are paid for.”); NAT’L CONF. OF STATE LEGISLATURES, THE PRICE OF DEMOCRACY: SPLITTING THE BILL FOR ELECTIONS 2 (2018) [hereinafter NAT’L CONF. OF STATE LEGISLATURES, DEMOCRACY SPLITTING] (“Elections aren’t priceless—it’s just that no one has put a price on them yet. Does the United States spend a billion dollars a year running elections? \$10 million? No one knows.”); Martha Kropf & JoEllen V. Pope, *Election Costs: A Study of North Carolina*, in THE FUTURE OF ELECTION ADMINISTRATION 185, 185 (Mitchell Brown, Kathleen Hale & Bridgett King, eds., 2020) (noting that the amount that state and local governments spend on elections “remains a mystery to scholars and policymakers”). Even the question posed here isn’t right: “While the *cost of an election* is an important part of the cost, it is not the *cost of elections*.” Zachary Mohr, Martha Kropf, JoEllen Pope, Mary Jo Shepherd & Madison Esterle, *Election Administration Spending in Local Election Jurisdictions: Results from a Nationwide Data Collection Project* 25 (July 26–27, 2018) (unpublished manuscript), <https://esra.wisc.edu/wp->

As election officials prepared to hold the 2020 election in the midst of a pandemic, many tried to ballpark the change in resources necessary to run a safe and effective process. The Brennan Center recommended \$2 billion based on rough estimates, only to revise that estimate a month later to \$4 billion to cover the range of elections that states and localities would hold over the year.<sup>2</sup> Congress eventually provided \$400 million<sup>3</sup>—a figure so inadequate that Mark Zuckerberg and Priscilla Chan’s charitable contributions alone matched it.<sup>4</sup> Additional sums came from private philanthropy, corporate in-kind donations, and (of course) state and local funding<sup>5</sup>—not to mention a wide range of unreimbursed expenses likely incurred by election workers themselves.

Thanks to the heroic work of administrators, poll workers, and civic groups, the 2020 elections were largely a success.<sup>6</sup> But how much was ultimately spent, how much should have been spent, and how much is typically spent remains a mystery. For example, what would it have cost to ensure that no one waited longer than 30 minutes to cast a vote in 2020?<sup>7</sup> What would be the price tag for 2024? There is no central

content/uploads/sites/1556/2020/11/mohr.pdf [https://perma.cc/7A34-68ED] (paper for the 2018 Election Sciences, Reform, and Administration conference at the University of Wisconsin-Madison) (distinguishing between the “personnel, equipment, and supplies needed to conduct an election” and “the cost of all election administration that includes the cost of the election and the additional costs of maintaining and securing the voter registration database, updating it with DMV and military records, updating, testing, and securing the voting equipment, and training election officials throughout the year”).

2. Lawrence Norden, Edgardo Cortés, Elizabeth Howard, Derek Tisler & Gowri Ramachandran, *Estimated Costs of Covid-19 Election Resiliency Measures*, BRENNAN CTR. FOR JUST. (Apr. 18, 2020), <https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures> [https://perma.cc/L7ZM-CPAX].

3. Jack Brewster, *Senate Stimulus Bill: Democrats Wanted \$4 Billion In Election Assistance—They Got \$400 Million*, FORBES (Mar. 25, 2020, 11:56 PM), <https://www.forbes.com/sites/jackbrewster/2020/03/25/senate-stimulus-bill-democrats-wanted-4-billion-in-election-assistance—they-got-400-million/?sh=38e80c2151f4> [https://perma.cc/7DF6-GXAV].

4. Michael Scherer, *Mark Zuckerberg and Priscilla Chan Donate \$100 Million More to Election Administrators, Despite Conservative Pushback*, WASH. POST (Oct. 13, 2020, 6:00 AM), [https://www.washingtonpost.com/politics/zuckerberg-chan-elections-facebook/2020/10/12/0e07de94-0cba-11eb-8074-0e943a91bf08\\_story.html](https://www.washingtonpost.com/politics/zuckerberg-chan-elections-facebook/2020/10/12/0e07de94-0cba-11eb-8074-0e943a91bf08_story.html) [https://perma.cc/AM7F-B7PZ].

5. Nathaniel Persily & Charles Stewart III, *The Miracle and Tragedy of the 2020 U.S. Election*, 32 J. DEMOCRACY 159, 163–65 (2021); Bob Bauer & Dana Remus, *The Protection of the 2020 Election: The View from the Biden-Harris Campaign*, JOEBIDEN.COM, <https://joebiden.com/the-protection-of-the-2020-election/> (last visited Mar. 28, 2021) [https://perma.cc/45Y3-2S9V].

6. Persily & Stewart, *supra* note 5, at 165–70 (noting that almost every metric showed improved performance over 2016 other than in-person wait times).

7. U.S. PRESIDENTIAL COMM’N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 13 (2014) <http://web.mit.edu/supportthevoter/www/files/2014/01/Amer-Voting->

source of authoritative information to help answer these questions. “States know how much they spend on roads, health care, education and other big-ticket items, but no one knows how much they spend on elections.”<sup>8</sup>

With *Democracy on a Shoestring*, Professors Joshua Sellers and Roger Michalski step into this opening and make vital contributions.<sup>9</sup> To start, the authors give us something new: hard data. Through immense and detailed research, the authors have compiled a dataset that provides real-world insights into spending patterns in California, Arizona, Texas, and Florida. Using predictive machine learning, the authors then build on this dataset to offer detailed average spending estimates across multiple governmental units.

From these estimates, Sellers and Michalski glean important insights. First, while there is great variation both across and within states, the average spend is small.<sup>10</sup> Second, and more surprisingly, the variation in spending “is seemingly unconnected to poverty, race, and other traditional explanations of electoral disadvantage.”<sup>11</sup> Finally, the authors leverage these insights to sketch out potential policy options, doctrinal implications, and future research paths.<sup>12</sup>

Their intervention could not be more urgent. Scholarly debates, legislative policy discussions, and judicial remedies often unfold in the abstract, with insufficient attention paid to hard costs and administrative concerns.<sup>13</sup> This would be enough of a problem if all the

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Exper-final-draft-01-09-14-508.pdf [https://perma.cc/8RLW-KJN7] (suggesting 30-minute maximum wait times and providing recommendations on how to reduce wait times); see Persily & Stewart, *supra* note 5, at 169–70 (noting wait times as one negative in 2020); Kevin Quealy & Alicia Parlapiano, *Election Day Voting in 2020 Took Longer in America’s Poorest Neighborhoods*, N.Y. TIMES (Jan. 4, 2021), <https://www.nytimes.com/interactive/2021/01/04/upshot/voting-wait-times.html> [https://perma.cc/EW9T-ERX7] (showing skews in wait time by wealth and race).

8. NAT’L CONF. OF STATE LEGISLATURES, DEMOCRACY SPLITTING, *supra* note 1, at 2.

9. Sellers & Michalski, *supra* note 1.

10. *Id.* at 1102–09 (discussing variation); *id.* at 1117–19 (discussing relative and absolute spending findings); see also Mohr et al., *supra* note 1, at 1 (estimating that “the cost per voter is a little over \$8/voter for a total local election cost of about \$2 billion per year in the United States”); KATHLEEN HALE & MITCHELL BROWN, HOW WE VOTE: INNOVATION IN AMERICAN ELECTIONS 209 (2020) (observing that “[f]unding is low by any measure”).

11. Sellers & Michalski, *supra* note 1, at 1083.

12. *Id.* at 1120–32.

13. See HALE & BROWN, *supra* note 10, at 52 (providing a short list of “[e]merging research [that] examines the dimensions of system capacity, including the cost and funding of elections”); Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 455 (2008) (noting that the “election law sub-field of election administration” is “generally underexamined”); Candice Hoke, *Judicial Protection of Popular Sovereignty: Redressing Voting Technology*, 62 CASE W. RESV. L. REV. 997, 998–99 (2012) (observing the “stunning silence from the election law scholarly community” over deficiencies in voting equipment in 2012 unlike “the profuse legal scholarship” that followed *Bush v. Gore*); cf. Jessica Huseman, *How This Voting Rights Bill Could Turn the Next Election into a Clusterf\*ck*, DAILY BEAST (Mar. 30, 2021, 4:18 AM), <https://www.thedailybeast.com/how-this-voting-rights-bill-could-turn-the-next-election-into-a->

major players in the electoral system were operating in good faith. But they increasingly are not. When every small hiccup provides fodder for conspiracy theories designed to draw the outcome into doubt,<sup>14</sup> the stakes of *adequate* funding become higher than ever. And when across-the-board cutbacks risk potentially increasing the costs of electoral access for some voters more than others,<sup>15</sup> *equitable* funding becomes more important than ever.

Among the many contributions of *Democracy on a Shoestring*, then, is to spur more concrete thinking about the costs and consequences of our country's devolved and varied spending patterns and decisions—a topic that generated substantial interest after the 2000 election but has since waned. Sellers and Michalski have given us a wealth of empirical, doctrinal, conceptual, and practical information to kickstart these conversations.

In this response I offer two areas that warrant further emphasis and examination. In Part I, I highlight how many of the potential policy solutions identified by Sellers and Michalski could be far more powerful if implemented at the federal level rather than the state level. This includes the benefits of increased funding, uniform data collection, and soft consolidation of purchasing and expertise to leverage economies of scale. While the authors understandably focus on state-level action given the historically “hyper-decentralized” nature of election administration, recent elections reveal new reasons to believe the politics underlying this traditional arrangement may (and should) be shifting.

In Part II, I examine the authors' surprising finding that variations in election spending are unconnected to poverty, race, and other traditional explanations of electoral disadvantage. This finding suggests that disparate electoral opportunities are not simply a matter of unequal funding. Instead, we must look elsewhere to identify the source of these disadvantages. While Sellers and Michalski seem skeptical that electoral disadvantage may thus be attributable to variations in the relative needs of communities, I believe that this kind of “structural suppression” could be more substantial than the authors credit, and that future research should focus on rigorously examining and quantifying this phenomenon.

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clusterfck [<https://perma.cc/A6RZ-BKY3>] (critiquing relative inattention from political and reform community about administrative concerns with the For The People Act, H.R. 1).

14. See *infra* text accompanying notes 30–35.

15. See *infra* text accompanying notes 108–128.

## I. ELECTIONS DATA &amp; FEDERAL OVERSIGHT

One of the most foundational contributions of *Democracy on a Shoestring* is that it begins to transform “unknown unknowns” into “known unknowns” and points us towards the categories of information one would need to identify to even begin asking generative questions. There are so many different types of expenses covered by different actors under different allocation methods in different states<sup>16</sup> that the conceptual work necessary to begin making useful comparisons is no small feat.<sup>17</sup> And this is before differences in electoral policies and practices, training regimes, certification regimes, and purchasing regimes enter the mix.<sup>18</sup>

Given the paltry average expenditures revealed by the authors, the demands of their investigative work, and the seemingly idiosyncratic nature of the variation among jurisdictions, three immediate needs stand out: (1) the need for more funding, (2) the need for more data, and (3) the need for greater coordination and consolidation among jurisdictions. Sellers and Michalski endorse each of these suggestions in their article, yet their interventions typically target state governments rather than the federal government.<sup>19</sup>

In each of these areas, however, I want to suggest that the federal government has a more powerful and important role to play—and that this need not displace state management and local administration of elections. Nor should the political and constitutional concerns with federal involvement that the authors hint at in the piece<sup>20</sup> constitute a barrier to greater federal involvement in each area.

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16. See, e.g., NAT'L CONF. OF STATE LEGISLATURES, DEMOCRACY SPLITTING, *supra* note 1.

17. See Sellers & Michalski, *supra* note 1, at 1092–98; Mohr et al., *supra* note 1, at 7–20; HALE & BROWN, *supra* note 10, at 206; see also Kathleen Hale, Address at the N.Y. State Election Commissioners Association Summer 2018 Conference: Investing in Elections: Differences and Similarities Around the Country 13–21 (July 2018), <http://www.nyseca.com/pdfs/2018%20Summer%20Conference/NYState%20July%202018%20072218.pdf> [<https://perma.cc/B89J-QE8E>].

18. NAT'L CONF. OF STATE LEGISLATURES, DEMOCRACY SPLITTING, *supra* note 1, at 3:

Policy choices on how elections are conducted can affect overall costs. Legislators decide whether to maintain traditional Election Day, precinct-based elections, or to move toward alternatives such as using more pre-Election Day voting options—vote by mail, early in-person voting—or vote centers. The choices legislators make can affect the bottom line, even if it is often hard to make apples-to-apples comparisons.

19. See Sellers & Michalski, *supra* note 1, at 1099–1101.

20. *Id.* at 1129 n.153.

### A. More Funding

Historically, the federal government has played little role in election funding.<sup>21</sup> Following the contested election between George W. Bush and Al Gore in 2000, Congress intervened to help states and localities replace outdated voting machines,<sup>22</sup> but this was widely considered a “one-time” intervention rather than any kind of ongoing federal commitment.<sup>23</sup>

Fast forward to present day, and the need for regular, ongoing federal funding to secure an adequate baseline of electoral performance seems more apparent than ever. Even before 2016, the need for additional funding was obvious and widespread.<sup>24</sup> In 2016, however, election interference by foreign actors revealed that state and county election offices were no match for hostile nations bent on testing cybersecurity defenses and meddling with our electoral processes.<sup>25</sup> This led to federal election-security investments in 2018 and 2019,<sup>26</sup> increased coordination with federal agencies,<sup>27</sup> and a growing (if sometimes unwelcome) recognition that the federal government is a

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21. *Id.* at 1087–88 (observing that “most costs are still borne by counties and local governments, but, over time, states have increased their financial support,” and noting that “[t]he least consistent form of funding comes from the federal government”); *Elections 2020: Policy, Funding and the Future*, NAT’L CONF. OF STATE LEGISLATURES (May 10, 2017), <https://www.ncsl.org/research/elections-and-campaigns/elections-2020.aspx> [<https://perma.cc/7R5E-TXAW>] (“Most states, with some exceptions, traditionally have played a minor role in paying for elections technology or elections operating expenses . . . . For local governments, which traditionally have funded elections, elections purchases must compete with other budgetary priorities.”); *Election Costs: What States Pay*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 3, 2018), <https://www.ncsl.org/research/elections-and-campaigns/election-costs.aspx> [<https://perma.cc/5KK7-6LCA>] (noting “in most states the majority of election-related costs still are borne by counties and localities,” but increased responsibilities have fallen to state election offices following NVRA, HAVA, UOCAVA, and MOVE).

22. Amanda Buchanan, *Funding the Next Generation of Elections Technology*, NAT’L CONF. OF STATE LEGISLATURES (Feb. 2017), <https://www.ncsl.org/research/elections-and-campaigns/funding-the-next-generation-of-elections-technology.aspx> [<https://perma.cc/8X8J-HX74>] (“In 2002, Congress enacted the Help America Vote Act . . . which provided \$3 billion for states to replace punch card and lever systems with new elections technology.”).

23. See, e.g., Jessica Huseman, *How Voter-Fraud Hysteria and Partisan Bickering Ate American Election Oversight*, PROPUBLICA (July 22, 2020, 5:00 AM), <https://www.propublica.org/article/how-voter-fraud-hysteria-and-partisan-bickering-ate-american-election-oversight> [<https://perma.cc/M5UZ-D4KN>].

24. Sellers & Michalski, *supra* note 1, at 1082 (citing U.S. PRESIDENTIAL COMM’N ON ELECTION ADMIN., *supra* note 7, at 10) (“The most universal complaint of election administrators in testimony before the Commission concerned a lack of resources.”).

25. Huseman, *supra* note 23.

26. *Election Costs: What States Pay*, *supra* note 21 (noting “new HAVA funds available as of March 2018”); *Funding Elections Technology*, NAT’L CONF. OF STATE LEGISLATURES (Feb. 28, 2020), <https://www.ncsl.org/research/elections-and-campaigns/funding-election-technology.aspx> [<https://perma.cc/2LZT-9ME4>].

27. Huseman, *supra* note 23.

necessary actor in a global, networked world.<sup>28</sup> In the runup to 2020, the global pandemic and nationwide economic collapse also demonstrated that state and local needs might be at their zenith precisely when state and local governments alone are least equipped to meet them.<sup>29</sup>

Then, the 2020 election and its aftermath revealed yet another emerging dynamic warranting increased federal funding: a growing willingness among politicians at the state level to sabotage administrators and undermine public confidence in election results if doing so is politically advantageous.<sup>30</sup> State legislators might cut funding sources<sup>31</sup> or other resources because they believe such cuts will skew turnout in a favorable direction or because they believe electoral malfunctions will introduce a manipulable level of doubt and uncertainty that they can weaponize against unfavorable results. Either way these dangerous developments reflect a broader trend of democratic backsliding that has been occurring in the states and that might be expected to persist into the near future.<sup>32</sup>

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28. *Id.*:

State officials increasingly acknowledge that they have no choice but to support the EAC. After the 2016 election, they realized that their fledgling state security offices were no match for a hostile nation-state. “Honestly I just don’t know who can certify machines if not the EAC,” said one Republican state elections official. “I used to believe that there was no place in the federal government for the agency, but we need these standards. We have to have the EAC”;

CHRISTOPHER R. DELUZIO, LIZ HOWARD, PAUL ROSENZWEIG, DAVID SALVO & RACHAEL DEAN WILSON, BRENNAN CTR. FOR JUST., DEFENDING ELECTIONS: FEDERAL FUNDING NEEDS FOR STATE ELECTION SECURITY (2019) [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Defending\\_Elections.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Defending_Elections.pdf) [<https://perma.cc/MT4C-LPKW>].

29. See, e.g., Louise Sheiner & Sophia Campbell, *How Much Is COVID-19 Hurting State and Local Revenues?*, BROOKINGS INST. (Sept. 24, 2020), <https://www.brookings.edu/blog/up-front/2020/09/24/how-much-is-covid-19-hurting-state-and-local-revenues/> [<https://perma.cc/WN4F-7JJZ>] (discussing the impact of the pandemic and economic downturn on state and local budgets).

30. Perry Bacon Jr., *The Latest on Republican Efforts to Make it Harder to Vote, FIVETHIRTYEIGHT* (Sept. 9, 2020, 5:55 AM), <https://fivethirtyeight.com/features/the-latest-on-republican-efforts-to-make-it-harder-to-vote/> [<https://perma.cc/JHK4-JFYJ>] (cataloguing ways Republican legislators across the country tried to impede the voting process leading up to the 2020 election); Colby Itkowitz & Mike DeBonis, *Cruz, Cadre of Other GOP Senators Vow Not to Certify Biden Win Without Probe of Baseless Voter Fraud Claims*, WASH. POST (Jan. 2, 2021, 7:52 PM), <https://www.washingtonpost.com/politics/2021/01/02/cruz-johnson-9-other-gop-senators-say-they-will-not-vote-certify-electors-unless-audit-is-conducted/> [<https://perma.cc/6YDQ-ZZAC>]; Eugene Kiely, Lori Robertson, Robert Farley & D’Angelo Gore, *FactChecking Trump’s CPAC Speech*, FACTCHECK.ORG (Mar. 1, 2021), <https://www.factcheck.org/2021/03/factchecking-trumps-cpac-speech-2/> [<https://perma.cc/SEF9-TGL7>] (discussing Trump’s continued false claims about the 2020 elections); see also *infra* text accompanying notes 132–137.

31. See *infra* text accompanying notes 127–131.

32. See, e.g., Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217 (2019); *State Voting Bills Tracker 2021*, BRENNAN CTR. FOR JUST. (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021>

Unfortunately, such behavior does more than increase the political consequences of small mistakes and funding shortfalls—it might also create a feedback loop by pushing officials with the most institutional memory and experience out of service.<sup>33</sup> After herculean efforts, sleepless nights, and increased risks of coronavirus exposure, many election workers were rewarded with verbal abuse, physical intimidation, death threats, and a new wave of bills that would impose harsh criminal penalties and high fines on election officials found to have made mistakes.<sup>34</sup>

If experienced administrators and staff decide to leave these posts, the risk of errors and the costs of training are only likely to increase.<sup>35</sup> And if funding streams are already small, precarious, and inconsistent and state actors are increasingly willing to “starve” electoral systems into malfunctioning and to let election administration suffer for partisan gain, then the funding necessary to backstop free, fair, and accessible elections must come from somewhere other than state governments.

Nor should we depend on charitable foundations and civic groups to fill this gap, lest private donations transform into a

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[<https://perma.cc/FJ6H-3XMT>] (noting “[a]s of May 14, 2021, legislators have introduced 389 bills with restrictive provisions in 48 states”); *Heads We Win, Tails You Cheated: America’s Battle Over Election Laws*, *ECONOMIST* (Mar. 13, 2021), <https://www.economist.com/united-states/2021/03/13/americas-battle-over-election-laws> [<https://perma.cc/V22Q-8JB4>] (discussing restrictions being proposed in key swing states); Persily & Stewart, *supra* note 5, at 174–75; RICHARD L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* 74 (2020).

33. See Persily & Stewart, *supra* note 5, at 174 (“One consequence of the [2020] election may be a leadership crisis in election administration, as exhausted and frustrated officials step down and state and local governments struggle to find replacements who are equally dedicated to tireless and fair implementation of election laws.”).

34. *Id.*:

On the receiving end of hate mail and death threats, large numbers of officials who administered the 2020 election are anticipating retirement, citing the political pressures of the job as a primary reason. It remains to be seen who will replace these veterans, given the pressure, low pay, threats, and lack of support from political leaders;

Nick Corasaniti, *Jail Time and Big Fines: G.O.P. Seeks Harsh Penalties for Poll Workers*, *N.Y. TIMES* (May 15, 2021), <https://www.nytimes.com/2021/05/15/us/politics/republican-voting-bills-poll-workers.html> [<https://perma.cc/S22E-WLZS>].

35. *Election Costs: What States Pay*, *supra* note 21:

Election officials in the U.S. are often elected and may or may not have an elections background, so providing guidance or training to newly-elected or appointed officials is especially important. But so is keeping track of the election law changes each year, and ensuring that election officials have the most up-to-date information on how elections should be administered in the state;

Marie Albiges, *A New Wave of Election Directors Step in to Fill Pa.’s Many Vacancies—With Little Training and Varying Experience*, *SPOTLIGHT PA* (May 17, 2021), <https://www.spotlightpa.org/news/2021/05/pa-primary-voting-ballot-election-directors-county-training/> [<https://perma.cc/A9SU-ZWTB>].



prerequisite for holding a successful election. To be sure, we should celebrate the heroic efforts and generosity that helped election administrators across the country survive the 2020 election (given the failure of governments at all levels to provide adequate funding).<sup>36</sup> But philanthropic organizations and nonprofits have long subsidized trainings, conferences, and other resources for local officials,<sup>37</sup> and this default is risky at best. As Professor Nate Persily has said, our elections should not turn on the success of “bake sales for democracy.”<sup>38</sup> Elections are too vital to be left to chance or to the risk of subtle influence or impropriety.

And while calls for increased federal aid may have garnered minimal interest in the past,<sup>39</sup> the norms around federal funding for and oversight of elections may be slowly shifting. Congress made new (albeit limited) federal funding available in 2019 for cybersecurity and in 2020 for pandemic response. And the “For the People Act”—Democrats’ omnibus electoral reform package—passed the U.S. House in March 2021 and earned 49 cosponsors in the Senate. Although the full package ultimately failed, the bill contained numerous types of federal financial support for elections, such as support for voting

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36. Persily & Stewart, *supra* note 5, at 164:

Perhaps the most unprecedented outside effort to bolster the election infrastructure came in the form of philanthropic contributions to election offices . . . . This money was administered through a CTCL grant program to more than 2,500 election jurisdictions. It paid for staffing, mail-voting equipment, drop boxes for ballots, PPE for poll workers, election security, polling-place rentals and sanitation, staffing and real-estate costs, poll-worker training, and a host of other things. By all accounts, these added funds were critical to the successful administration of the election.

37. See, e.g., *Elections Technology Project*, NAT’L CONF. OF STATE LEGISLATURES (July 7, 2015), <https://www.ncsl.org/research/elections-and-campaigns/elections-technology-project.aspx> [<https://perma.cc/D8F5-NXDW>] (“This program is provided at no cost to participating states, with generous funding from the John D. and Catherine T. MacArthur Foundation.”); *NCSL’s The Canvass*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 18, 2016), <https://www.ncsl.org/research/elections-and-campaigns/the-canvass-april-2016.aspx> [<https://perma.cc/SLQ4-ETZE>] (“In conjunction with NCSL, funding support for *The Canvass* is provided by The Pew Charitable Trusts’ Election Initiatives project.”); *Elections 2020: Policy, Funding and the Future*, *supra* note 21:

NCSL’s project, *Elections 2020: Policy, Funding and the Future*, began in the fall of 2015. The goal is to explore the legislative role in selecting elections technology appropriate to each state’s needs, potential state and local funding options, and the web of responsibilities relating to elections technology. *Supported with a generous grant from the Democracy Fund*, this two-year project will engage legislators and legislative staff across state lines who face similar challenges. . . . This program is provided at no cost to participating states, with support from the Democracy Fund.

(emphasis added).

38. Stanford Cyber Policy Center, *Digital Technology, Social Media and the 2020 Presidential Election*, YOUTUBE (Mar. 28, 2021), <https://www.youtube.com/watch?v=li-UihCk2mc&t=11808s> [<https://perma.cc/94AZ-JMGN>].

39. See, e.g., Sellers & Michalski, *supra* note 1, at 1129 (advocating for increased state funding and, “ideally,” federal funding).

materials postage,<sup>40</sup> poll worker recruit and training,<sup>41</sup> voting-system security upgrades,<sup>42</sup> risk-limiting audits,<sup>43</sup> and competitive grants for electoral innovations.<sup>44</sup> Indeed, if there was any concern among election officials with the *funding* portion of the Act, it was that it did not go far enough, did not cover enough new spending needs created by the bill, and did not adequately provide for substantial ongoing cash flow going forward.<sup>45</sup>

Given the increasing risk that regional, national, and global dynamics can impact the operation of local elections<sup>46</sup> and the fact that local election mistakes now provide fodder for nationwide conspiracies,<sup>47</sup> there is good reason to think that the federal government should begin to play a larger (and more consistent) role in providing funding to stabilize electoral performance.<sup>48</sup>

Of course, as Sellers and Michalski note, increasing funding itself is only part of the equation. Throwing money at a problem alone will not necessarily lead to results—especially when we have so little information about what (and where) the problems are.<sup>49</sup> To “explore the

40. For the People Act, H.R. 1, 117th Cong. § 1623 (2021).

41. *Id.* § 1801.

42. *Id.* § 3001.

43. *Id.* § 3011.

44. *Id.* § 3021.

45. Huseman, *supra* note 13 (noting that the bill should provide additional funding for localities to store paper ballots and implement automatic voter registration, should improve the distribution mechanisms for funding, and should assure greater cash flow into the future).

46. *See supra* text accompanying notes 24–29.

47. *See* Li Cohen, *6 Conspiracy Theories About the 2020 Election—Debunked*, CBS NEWS (Jan. 15, 2021, 8:34 PM), <https://www.cbsnews.com/news/presidential-election-2020-conspiracy-theories-debunked/> [<https://perma.cc/6P8Z-REG4>]; Daniel Funke, *Dozens of Claims About Election Fraud, Debunked | PolitiFact*, TAMPA BAY TIMES (Nov. 20, 2020), <https://www.tampabay.com/news/florida-politics/elections/2020/11/20/dozens-of-claims-about-election-fraud-debunked-politifact/> [<https://perma.cc/JQ5S-R83T>]; *see also* Jacob M. Grumbach, *Laboratories of Democratic Backsliding* (Apr. 5, 2021) (unpublished manuscript), <https://t.co/O4DJAxizHY?amp=1> (observing that the incentives of national Republican coalitions may be leading to democratic backsliding in Republican-controlled states).

48. Sellers and Michalski, understandably, do not raise any constitutional concerns with increased federal funding. Indeed, they view increased federal support as an “ideal” aspiration. Sellers & Michalski, *supra* note 1, at 1129. For the reasons set out in Part I.A., I believe the political case for greater federal funding is more compelling than Sellers and Michalski observe given developments since 2016.

49. *Id.* at 1128, 1128 n.150 (stating that “[u]nconditional direct aid that affords local governments complete discretion is inadvisable” “[a]t least until a threshold of electoral equality is achieved”); *see also id.* at 1129 (“[T]he absence of standards for assessing election administration performance complicates our ability to make suggestions that are overly categorical.”); *id.* (noting “potential discordance between spending levels and the quality of election services.”). That said, it is perhaps better to overshoot the mark with preliminary funding and to provide funding both to the state and directly to localities, given the urgency of the issue and the fact that good data does not now exist but *could* come online as part of a broader, well-funded package. When federal funding is sent to Secretaries of State to disburse to local election authorities, the money may only

currently obscure relationship between election expenditures and election services” and to put funding to effective use, something else is needed: more data.<sup>50</sup>

### B. More Data

By beginning the difficult process of developing standardized approaches to measuring categories of electoral expenses, Sellers and Michalski have laid important groundwork necessary to make meaningful comparisons between jurisdictions.<sup>51</sup> This immense effort undertaken by the authors to painstakingly piece together a dataset highlights an equally immense deficiency in our current patchwork of electoral regimes: the lack of uniform standards for measuring, compiling, and tracking election expenditures.<sup>52</sup>

With no centralized source of information to compare approaches between and within states, there are no systematic methods for identifying best practices, squeezing out purchasing efficiencies, or testing new innovations.<sup>53</sup> And it is no surprise in this environment that even neighboring jurisdictions can have radically different spending patterns.<sup>54</sup> To quote Dean Heather Gerken: “What’s the point of having [fifty] laboratories of democracy if no one is keeping score?”<sup>55</sup> In the

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reach local administrators sporadically, if at all. Ensuring that a substantial portion of the funding goes directly to local authorities can help provide the kind of baseline support that prevents state-level manipulation and ensures adequate electoral functioning.

50. *Id.* at 1128. These need not be sequential: Congress might more freely provide initial funding with later funding and tied to incoming data. For example, H.R. 1 contemplated an increasing information-gathering role just as it contemplated sending funding out the door. *See, e.g.*, For the People Act, H.R. 1, 117th Cong. Title III, Subtitle G (2021) (report on adequacy of resources available for implementation). This learning is critical to improve allocation methods in the long run. For example, even awarding funds directly to local authorities on a per capita basis might underfund smaller counties or have other unintended racial and socioeconomic consequences. *See infra* Part II.

51. *See* Sellers & Michalski, *supra* note 1, at Part II (“Data and Methods”).

52. *Id.* at 1128 (noting that the importance of data to voting-rights claims “heightens the urgency and importance of gathering more data so that we can further explore the currently obscure relationship between election expenditures and election services”); Mohr et al., *supra* note 1, at 2 (“[N]o scholars that we know of have unearthed cost data in a systematic way nationwide.”); *cf.* HALE & BROWN, *supra* note 10, at 52 (noting that “a common understanding of terms and processes” is “critical” for jurisdictions “to compare and learn” but that “this commonality has proven to be a significant challenge” that has “stymied research about capacity building in the field”).

53. Sellers & Michalski, *supra* note 1, at 1109 (“Perhaps this is because states typically do not have overarching, statewide mechanisms to detect unequal election expenditures, let alone counteract them. Without more information and a normalizing mechanism, perhaps it is not surprising that there is massive geographic variation in election expenditures.”).

54. *Id.* at 1109–17.

55. Huseman, *supra* note 23.

arena of election administration, the sample size for experimentation is even greater: there are over 10,000 different election jurisdictions.<sup>56</sup>

This leaves incredible opportunities for innovation, efficiency, improvement, and accountability on the table. And while occasional conferences, trainings, networking, and third-party resources may help compile and circulate useful insights, the depth of analysis and breadth of adoption is likely to be fitful even with the best of intentions absent a more systematic approach.<sup>57</sup>

Some states have begun to realize the value in requiring local jurisdictions to collect and report cost information data,<sup>58</sup> but a single, national set of mandatory reporting conventions would dramatically enhance these efforts.<sup>59</sup> Paired with greater local reporting on election administration,<sup>60</sup> such publicly available data could provide fertile

56. NAT'L CONF. OF STATE LEGISLATURES, DEMOCRACY SPLITTING, *supra* note 1, at 6:

[H]istorically, states have authorized local jurisdictions to run elections on their behalf following state-specified rules. The entities that do the rubber-meets-the-road functions of running an election are typically on the county or city/town level. This means there are more than 10,000 jurisdictions that have primary responsibility for running elections in the country, and that's not counting the subdivisions within those jurisdictions.

57. Sellers & Michalski, *supra* note 1, at 1101 (“[W]e find odd local idiosyncrasies [in spending] to be the dominant feature.”).

58. NAT'L CONF. OF STATE LEGISLATURES, DEMOCRACY SPLITTING, *supra* note 1, at 4:

Require local jurisdictions to collect and report cost information data to identify areas that could be made more efficient . . . . In terms of making policy decisions and improving the administration of elections, more and better data would always be helpful. By collecting cost data in a systematic way, jurisdictions can identify the most expensive aspects of elections and identify ways to reduce costs. For example, if a jurisdiction finds that its highest cost is personnel, it may make sense to move to a vote center or all-mail model to reduce this cost. If a jurisdiction finds it is spending a lot of money on processing provisional ballots from voters who moved between the registration deadline and Election Day, the legislature could consider changing the voter registration deadline;

*Election Costs: What States Pay*, *supra* note 21:

In terms of making policy decisions and improving the administration of elections, more and (better) data would always be helpful. If there is one thing that is particularly hard to pin down, though, it's the question of how much running an election costs. . . . Efforts to collect better cost data are occurring in some states.

59. Jennifer Nou, *Privatizing Democracy: Promoting Election Integrity Through Procurement Contracts*, 118 YALE L.J. 744, 755 (2009):

Federal intervention, by contrast, can better coordinate and collect information on the extent of these costs and who should bear them to maximize efficiency and effectiveness. As it stands, very little data are available on the quantifiable costs of election administration, helping to explain the lack of systematic public attention to the issue. This lack of sustained attention, in turn, has stymied any large-scale attempt to implement a uniform methodology for reporting election-related outlays.

60. For a decade, scholars in political science and the law of democracy have sought more detailed data to provide deeper insights into electoral function. *See, e.g.*, Stephen Ansolabehere & Nathaniel Persily, *Measuring Election System Performance*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y, 445, 446, 456 (2010) (“[There has been] very little effort to evaluate the administration of elections in a

ground for rigorous study, more effective and efficient administration, and an improved experience for voters. It could also provide a set of metrics to help make election administration more durable and equitable over time, with default federal funding streams automatically indexed to address needs and iron out disparities in electoral performance as they arise.<sup>61</sup>

Despite its checkered history,<sup>62</sup> a restructured, reinvigorated, and far more aggressively funded U.S. Election Assistance Commission (“EAC”) would seem like a natural fit for this information-gathering and data-aggregating role.<sup>63</sup> While the EAC website currently hosts a

systematic way . . . . We see a need for investment in more systematic collection of data from recounts and audits and of election office information and reports.”); HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT 1 n.\* (2009) (“[I]t is difficult to make precise claims about the current state of the election system because the data are so sparse . . . . One of the main points of the book is that we should be deeply troubled by our inability to know whether the system is working or not.”). To be sure, more performance data is available today than was available in the past, but more detailed, granular, and extensive data is still required. See Sellers & Michalski, *supra* note 1, at 1094, 1097. If the EAC had more funding and a broader data collection mandate, its Election Administration and Voting Survey (“EAVS”) might prove more useful to scholars and administrators alike.

61. See *id.* at 1129 (“Aid that is tethered to local needs provides the best chance at electoral equity.”). Developing funding formulas in the long run (and more predictable methods for dispersing funds in the short term) is especially important given the issues the EAC has encountered over the years. See Nou, *supra* note 59, at 757 (“Confronted with these interjurisdictional resource disparities, a stronger federal presence could help to ensure that such inequalities do not translate into systematic deprivations of the ability to vote.”); Huseman, *supra* note 13 (“The bill authorizes the Election Assistance Commission to distribute subsequent funding as it deems necessary. It is unclear . . . why the authors would vest startlingly broad funding authority in an agency that is so dysfunctional.”); Wendy R. Weiser, Lawrence Norden, and Derek Tisler, *The Truth About the ‘For the People Act’*, BRENNAN CTR. FOR JUST. (Mar. 26, 2021), <https://www.brennancenter.org/our-work/research-reports/truth-about-people-act> [<https://perma.cc/K3CC-CKK5>] (“To the extent that Congress is uncomfortable with even limited discretion, it could ensure that supplemental funds are subject to a statutory formula.”). Creating a direct line to such funding could also limit the power of intransigent intermediary actors who might not respond to emerging trends and community needs. See, e.g., Stephen Fowler, *Why Do Nonwhite Georgia Voters Have to Wait in Line for Hours? Their Numbers Have Soared, and Their Polling Places Have Dwindled.*, PROPUBLICA (Oct. 17, 2020), <https://www.propublica.org/article/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-their-numbers-have-soared-and-their-polling-places-have-dwindled> [<https://perma.cc/8KU8-KXJW>]. Indeed, this pattern—of state authorities suppressing Black voting power by disempowering localities—has a history stretching back to Reconstruction. See Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413 (2017).

62. See Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 4 (2007); Huseman, *supra* note 13 (“While much of the EAC’s dysfunction is of its own making, it has also suffered deep and consistent funding cuts, resulting in massive staff turnover and dissatisfaction. Congress has itself to blame . . . and it is unclear—nor does the bill address—how such an agency even has the capacity . . . .”).

63. Hasen, *supra* note 32, at 11; Huseman, *supra* note 23. One restructuring option may be to “[s]et up [EAC] satellite offices in each state and territory, with a dedicated state expert and staffers to serve as a liaison between the state/territory and the EAC.” Genya Coulter, *H.R. 1: The Good, the Bad, and the WTF*, ELECTIONS DAILY (Mar. 25, 2021), <https://elections-daily.com/2021/03/25/h-r-1-the-good-the-bad-and-the-wtf/> [<https://perma.cc/6HDY-P4SD>];

smattering of resources and performance data, a more robust EAC could act as the primary clearinghouse for a wider range of data and a library of best practices. It could also offer in-house and third-party analyses for states and localities alike about the cost and impact of various policies, such as combining local elections with federal elections,<sup>64</sup> using ranked-choice voting to eliminate runoffs,<sup>65</sup> using voting centers rather than precincts,<sup>66</sup> and so on.

Sellers and Michalski endorse the need for more data and note that “[g]reater state involvement in and oversight of elections” is a common proposal.<sup>67</sup> Yet, the authors relay some hesitation around “[g]reater federal involvement . . . due to both political and constitutional constraints.”<sup>68</sup>

As a political matter, the need for increased standardization in expenditure-tracking is bound up in the need for increased federal funding and oversight. And, for the reasons stated above, the political case for the latter seems to have evolved significantly over the past five years.<sup>69</sup> To guarantee equitable, accessible, and secure elections for every American, federal involvement of some kind is increasingly required. And making concrete improvements requires the ability to track, measure, and compare inputs and outputs.

As a constitutional matter, Congress almost certainly has the power to impose standards for expenditure- and performance-tracking across federal, state, and local elections. Such informational demands arguably fall within Congress’s oversight function<sup>70</sup> and are necessary

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Their functions could include assisting local jurisdictions with compliance issues, investigating if it is more effective to disburse federal election funds based on need instead of voting age population formulas, working with state/local election officials to identify areas that need a high priority response, such as access for the disabled or assistance with ballots and election materials in multiple languages, phasing out insecure or obsolete voting systems, and determining how to collect election data that jurisdictions can actually use in the real world.

64. NCSL’s *The Canvass*, *supra* note 37 (comparing pros and cons of consolidating elections); cf. Sellers & Michalski, *supra* note 1, at 1086 (discussing roughly \$100 million cost savings from combining two primary elections).

65. See, e.g., Rob Richie, Caleb Kleppner, and Steven Hill, *Evaluation of San Francisco’s First Instant Runoff Voting Election*, FAIRVOTE (December 2004), [http://archive.fairvote.org/rcv/brochures/SF\\_Research\\_IRV\\_Success.pdf](http://archive.fairvote.org/rcv/brochures/SF_Research_IRV_Success.pdf) [<https://perma.cc/2QNN-RSZS>] (noting that the City of San Francisco saved \$1.2 million by using ranked-choice voting and avoiding the need to administer four runoff elections).

66. See, e.g., Sellers & Michalski, *supra* note 1, at 1086–87.

67. *Id.* at 1130.

68. *Id.* at 1130 n.154.

69. See *supra* Part I.

70. JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 152 (2017) (“Gathering information is not a peripheral part of Congress’s job; it is central to the legislature’s identity and function.”). Congress has broad investigatory

to vindicate its powers and enforce its obligations under the Elections Clause,<sup>71</sup> the Republican Guarantee Clause,<sup>72</sup> and the Fourteenth,<sup>73</sup> Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.<sup>74</sup> Whatever the merits of commandeering and conscription concerns<sup>75</sup> in other contexts, they should have little to no purchase in the electoral arena.<sup>76</sup>

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powers so long as the inquiry is “in aid of the legislative function.” *Kilbourn v. Thompson*, 103 U.S. 168, 189 (1881); *see also* *McGrain v. Daugherty*, 273 U.S. 135, 174–75 (1927):

[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function . . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who possess it.

The power “encompasses inquiries into the administration of existing laws, studies of proposed laws, and ‘surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.’” *Trump v. Mazars*, 140 S. Ct. 2019, 2031 (2020) (quoting *Watkins v. United States*, 354 U.S. 178, 187 (1957)).

71. U.S. CONST. art. 1, § 4, cl. 1.; Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power* 39 (Harv. Pub. L., Working Paper No. 21-07, 2021); *see also* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 108–09 (2013) (quoting *Ex parte Siebold*, 100 U.S. 371, 387 (1879), and *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932)):

[T]he level of constitutional scrutiny should drop when Congress exercises powers directly granted by the Constitution rather than powers inherited pursuant to the enforcement of the Equal Protection Clause. A long line of authority establishes broad congressional power to enforce its “general supervisory power,” including the power to supplant state regulations by “substitut[ing] its own.”

72. U.S. CONST. art. IV, § 4; Stephanopoulos, *supra* note 71, at 41–44; Carolyn Shapiro, *Democracy, Federalism and the Guarantee Clause*, 62 ARIZ. L. REV. 183 (2020); *cf.* G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After Rucho v. Common Cause*, 95 IND. L.J. 1295, 1337 n.389 (noting “Congress might rely upon the Guarantee Clause as a positive source of (currently) unreviewable authority for regulating state [elections]”).

73. U.S. CONST. amend. XIV; Stephanopoulos, *supra* note 71, at 44–46 (observing that “much of election law revolves around causes of action that stem from different kinds of violations of the Equal Protection Clause” and that the Fourteenth Amendment’s Enforcement Clause offers a way for Congress to “lawfully regulate . . . quite a lot”).

74. U.S. CONST. amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation.”); U.S. CONST. amend. XIX (“on account of sex”); U.S. CONST. amend. XXIV (“by reason of failure to pay any poll tax or other tax”); U.S. CONST. amend. XXVI (“on account of age” for citizens “who are eighteen years of age or older”); Stephanopoulos, *supra* note 71, at 46–48 (noting that the voting amendments supply Congress with the power to regulate elections when it “is trying to stop voting discrimination on the basis of race, sex, wealth, or age”); *see also* Richard L. Hasen & Leah Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress’s Power to Enforce It*, 108 GEO. L.J. 27 (2020).

75. *See generally* *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

76. *See* Issacharoff, *supra* note 71, at 109 (“Similarly, direct federal regulation is unaffected by the concern for impermissible federal commandeering of state functions presented by congressional attempts to compel state undertakings for federal programs directly.”); *see Printz*, 521 U.S. at 914 (distinguishing between state officers executing federal elections and state officers executing federal law more generally); *id.* at 936 (O’Connor, J., concurring) (“[T]he Court

Congress should provide additional funding to offset the expenses associated with developing, training, and maintaining these reporting requirements.<sup>77</sup> But Congress should provide that funding as a policy matter, not as an inducement to follow an otherwise “optional” directive.<sup>78</sup>

Of course, many policies fall in the category of “politically important and constitutionally possible” without falling in the category of “politically possible.” Generating and implementing reporting standards is a difficult sell, to say the least. And any data collection systems should be designed in close consultation with election administrators, given the potential unintended consequences that could result from publicizing more information without adequate context.<sup>79</sup>

But one of the many contributions of Sellers and Michalski’s dataset and analysis is that it gives us a glimpse of what might be possible with more data. It helps us imagine a world where electoral policy decisions can be made in a more informed way.<sup>80</sup> And this vision,

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appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities . . . are similarly invalid.”).

77. See, e.g., *Archives-Other Topics*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/research-and-data/archives-other-topics> [https://perma.cc/N3WM-8PMJ] (last visited Mar. 28, 2021) (discussing studies of the costs incurred for precinct-level data collection/reporting in pilot programs in 2009).

78. See, e.g., Thad Hall & Daniel P. Tokaji, *Money for Data: Funding the Oldest Unfunded Mandate*, ELECTION LAW @ MORITZ: DAN TOKAJI’S BLOG (June 5, 2007), [https://moritzlaw.osu.edu/blogs/tokaji/2007\\_06\\_01\\_equalvote\\_archive.html](https://moritzlaw.osu.edu/blogs/tokaji/2007_06_01_equalvote_archive.html) [https://perma.cc/2BNR-YNDH]:

What we propose is a simple trade: The federal government would provide an ongoing source of funds for state and local governments to run elections. In return, state and local officials would have the obligation to collect and provide to the federal government data on the performance of their election systems. States that provide quality precinct-level data get paid. Those that provide incomplete or inaccurate data would not get paid;

see also Stephanopoulos, *supra* note 71, at 50 (discussing Congress’s power to “affix all kinds of electoral conditions to funds offered to the states to administer their elections”).

79. One concern is that spending data might be mischaracterized and weaponized for political purposes, given that many local election administrators are elected or answer to election boards. For example, spending \$7/voter on a small election and \$1/voter on a big election might seem problematic until these figures are placed in the context of wildly divergent turnout. See, e.g., HALE & BROWN, *supra* note 10, at 206 (noting that “election officials around the country are hesitant to share cost information for fear that the media or others will misunderstand or misinterpret the information”). Working closely with election officials to develop contextualized reporting conventions and practices could help encourage local buy-in and avoid posting data in a format that could mislead observers.

80. The “federal government has played a key role in facilitating data standardization efforts” over the years, and this would extend that role to questions of funding and spending. HALE & BROWN, *supra* note 10, at 170. In the interim, however, one potentially fruitful line of inquiry would be to conduct a deep qualitative comparison of well-funded election agencies that have performed poorly and poorly-funded election agencies that have performed well.



perhaps, can help provide the necessary political will—because the equities<sup>81</sup> and costs<sup>82</sup> at stake could be substantial.

### C. More Coordination

Finally, a more robust EAC could fulfill one final function: providing opt-in procurement and professional services for interested election jurisdictions. Sellers and Michalski explain well the potential benefits of “soft consolidation” at the multi-county or state level,<sup>83</sup> but the synergies and economies of scale available at a national level would be significantly greater.<sup>84</sup>

To start, municipalities, counties, and even states forfeit an enormous amount of buying power when they make atomized election-technology purchasing decisions.<sup>85</sup> Allowing states and localities to place orders through a central federal purchasing program would enhance buying power and drive down costs, even if localities continued to make separate decisions about what kind of equipment best suits their needs.<sup>86</sup> Such a program could include a publicly available national database of pricing structures as well to help administrators compare quotes and avoid overpaying.

This kind of soft federal consolidation could also enhance the market leverage of election officials in ways that go beyond upfront costs. Along with its current role providing uniform cybersecurity standards and certifications, the EAC could address equipment

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81. See *infra* Part II.

82. See *infra* Part I.C.

83. See Sellers & Michalski, *supra* note 1, at 1131–32.

84. *Id.* at 1086 (“Technological upgrades, including new voting machines and related security measures, can also be remarkably costly.”); *Election Costs: What States Pay*, *supra* note 21.

85. Election equipment manufacturers have a fair amount of market power. See *Elections Technology Project*, *supra* note 37 (“[T]he marketplace for new equipment is limited.”); Nou, *supra* note 59, at 765:

Numerous characteristics of the private market for voting machines, however, suggest that it is unlikely to be a robust one on its own. Elections are relatively infrequent, occurring only once or twice a year. The barriers to entry in terms of start-up costs and capital can be formidable. The resulting lack of competition and new market players stymies innovation.

For this reason, consolidating purchasing can provide an important counterweight. See *Funding Elections Technology*, *supra* note 26 (encouraging election officials to “buy equipment in bulk to take advantage of economies of scale”). Sellers and Michalski suggest that states and localities may have already realized most economies of scale available through soft consolidation, *supra* note 1, at 1132, but this does not contemplate the potential economies of scale available from all localities and states nationwide having the option of consolidating orders under a federal purchasing program.

86. *Cf. id.* at 1131–32 (discussing the option of states creating “a non-obligatory program to purchase technology where municipalities can freely opt-in” to “protect local control and local agency while leveraging economies of scale”).

manufacturers' market practices as part of its negotiations and procurement requirements.<sup>87</sup> For example, maintenance and service costs can exceed the upfront cost of voting equipment.<sup>88</sup> Consolidating purchasing could enable the federal government to insist on contract terms that vendors might not be willing to accept from a more diffuse set of buyers.<sup>89</sup> Such consolidation might also deter election equipment manufacturers from trying to litigate their way to unduly large market shares.<sup>90</sup>

Setting predictable and ongoing federal funding expectations (as discussed in Section A) could also give states and localities a wider variety of options for structuring their relationships with equipment vendors. The “feast or famine” approach to federal funding typified by the Help America Vote Act (“HAVA”) arguably creates perverse incentives that exacerbate purchasing pathologies in our election system.<sup>91</sup> These pathologies include artificially pushing buyers and sellers to emphasize speed of acquisition over quality and to prioritize owning over leasing.<sup>92</sup> Moreover, these purchasing dynamics create crisis points where widespread breakdowns are more likely to cluster around particular elections rather than allowing jurisdictions to replace equipment at more frequent, staggered intervals.<sup>93</sup>

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87. Nou, *supra* note 59, at 771 (“As the federal government has become an increasingly “prominent purchaser in the private marketplace,” attaching “collateral conditions to procurement contracts” is an increasingly effective tool for shaping public policy.”).

88. Amanda Buchanan, *Ten Tips for Using a Task Force to Modernize Elections*, 25 LEGISBRIEF at no. 18 (2017).

89. By consolidating purchasing, the EAC might also be able to provide better information to localities about the relative lifetime costs of different purchasing decisions, including buying versus leasing, estimated maintenance costs, and estimated switching costs.

90. See, e.g., Jessica Huseman, *The Market for Voting Machines Is Broken. This Company Has Thrived in It.*, PROPUBLICA (Oct. 28, 2019), <https://www.propublica.org/article/the-market-for-voting-machines-is-broken-this-company-has-thrived-in-it> [<https://perma.cc/SCG5-QXVE>].

91. See Nou, *supra* note 59, at 765 (noting that the “one-time upgrade” approach reflected in HAVA “stunted whatever potential there was for proper market incentives to promote electoral integrity”); see also Huseman, *supra* note 13:

The bill provides funding for these efforts throughout but does not assure cash flow into the future. This is a common theme for election funding, which the federal government has historically dispersed in large, unpredictable blasts while ignoring the needs of election officials until the next disaster strikes. That funding model makes it impossible for election administrators to plan sustained improvements.

*But see* Weiser et al., *supra* note 61 (noting that H.R. 1 “authorizes \$175 million in each of 2022, 2024, 2026, and 2028 to ensure that election officials can continue to improve election systems and cover ongoing maintenance costs of new systems” and that S. 1 “authorizes \$500 million in funding for 2021 and additional sums in years after as may be necessary [for states to implement automatic voter registration]”).

92. See Nou, *supra* note 59, at 765–67.

93. U.S. PRESIDENTIAL COMM'N ON ELECTION ADMIN., *supra* note 7.

Beyond purchasing power, the EAC could also provide the kind of professional services and backend support that is frequently required on a systemic basis but only irregularly required on a locality-by-locality basis. For example, the EAC might retain in-house election equipment experts; ballot design experts; cybersecurity experts; general information-technology experts; line-queuing and crowd-management experts; election resource allocation experts; and legal advisors with expertise in the Voting Rights Acts, the Americans with Disabilities Act, and so on.<sup>94</sup>

Much spotty election performance might be avoidable simply by having someone “on call” to answer small, ad hoc questions.<sup>95</sup> These are the kinds of questions that might otherwise go unasked, with substantial consequences for voters.<sup>96</sup>

None of these “soft consolidation” recommendations would prevent any state or locality from going it alone if they wished. Given the benefits of coordination though, one might wonder why I have not recommended a “forced consolidation” model (especially given how common nationally administered elections are as a comparative matter).<sup>97</sup> The short answer is that we simply do not currently have enough information to know the “best” allocation of authority.

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94. Sellers & Michalski, *supra* note 1, at 1086–87 (“[I]nformation technology specialists are necessary to monitor [cybersecurity] system performance. This requires hiring new and comparatively costly election officials with the requisite technological skills.”); NAT’L CONF. OF STATE LEGISLATURES, DEMOCRACY SPLITTING, *supra* note 1, at 2 (“Security requires good protocols, well-trained staff and adequate funding. In any IT environment, security is a big component. Elections systems require protection as good as—or better than—any other government or business process or service.”); Matt Masterson, *For Trusted Elections, We Should Model 2020*, THE HILL (Feb. 21, 2021, 2:00 PM), <https://thehill.com/opinion/white-house/539600-for-trusted-elections-we-should-model-2020> [<https://perma.cc/932G-TKME>]. In fact, some of this hiring and restructuring at the EAC may already be underway.

95. To be sure, the EAC does offer general resources on its website, ranging from ballot design best practices to studies on the differences between urban and rural voting. *See, e.g.*, U.S. ELECTION ASSISTANCE COMM’N, *supra* note 77. Still, the benefits of having someone “on call” are two-fold. First, a knowledge repository is useful only if people use it, and many will not. Second, even if an official does go through the work of looking for existing resources, they may not find an answer relevant to their specific context or use case. In such case, the time spent locating the resource is for naught, and the official must now determine whether the issue is worth the continued time, effort, and expense.

96. *See, e.g.*, Fleming v. Gutierrez, No. 13-CV-222, 2014 WL 12650657, at \*3–5 (D.N.M. Sept. 12, 2014) (discussing an election official’s unsupported methods and estimates for turnout and voting machine usage, which caused an expert in line-waiting analysis to “literally laugh[.]”).

97. Sellers & Michalski, *supra* note 1, at 1130 (“The United States is an outlier in the way it manages elections. Most of the world has moved towards centralization[.]”); HASEN, *supra* note 32, at 12 (“[T]he United States should join other advanced democracies in moving towards nationalized, nonpartisan election administration.”).

As more data comes online, however, the key question will be how best to blend federal, state, and local involvement.<sup>98</sup> This is a sensitive and complex balance that implicates cross-cutting and contestable values and interests.<sup>99</sup> And it may well be that forced federal consolidation and administration does not strike the right balance, while greater subsidiarity (for example, federal oversight, state management, and local tailoring) does.<sup>100</sup>

In short, while our elections could benefit from greater coordination among local, state, and federal entities, it is the greater funding and data discussed above that will help us make informed choices and predictions about what kinds of coordination work best. The consequences for the efficiency, efficacy, equity, and accessibility of our electoral systems could be profound.

## II. THE INEQUITY OF EQUAL FUNDING

The most surprising (null) finding of *Democracy on a Shoestring* is that the authors were “unable to establish a clear connection between funding variation and variables like race, poverty, and education levels.”<sup>101</sup> “[S]ome rich counties spend less on elections than their poor neighbors; some large counties spend less than small counties. Election spending in majority-minority communities seems largely indistinguishable from spending in predominantly white communities.”<sup>102</sup> As Sellers and Michalski note, this is a startling observation that “complicates the conventional narrative in which

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98. See Justin Weinstein-Tull, *Election Law Federalism*, 115 MICH. L. REV. 747, 753 (2016); see also Farbman, *supra* note 61, at 484 (“The question is not whether localism is good or bad—the question is what local government is good for.”).

99. See Richard Briffault, *Bush v. Gore as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325, 326 (2001) (“Decentralization of election administration reflects important political values, including the opportunities for local participation and decisionmaking concerning contestable political issues, as well as protection from centralized political manipulation and abuse.”); Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1364–69 (2020) (discussing preemption of local governments’ structural authority and how this implicates important values such as administrative cost, democratic accountability, democratic deliberation, and pluralism); cf. Richard L. Hasen, *When is Uniformity of People, Not Counties, Appropriate in Election Administration? The Cases of Early and Sunday Voting*, 2015 U. CHI. LEGAL F. 193, 196 (2015) (“Yet there is a fundamental flaw in the blanket calls for uniformity across counties (or electoral jurisdictions) in the name of equal protection principles based on *Bush v. Gore*—uniformity across counties sometimes undermines the Equal Protection rights of voters because counties have different size populations.”).

100. See Weinstein-Tull, *supra* note 98, at 754 (suggesting an approach that entails federal oversight, state management, and local tailoring). Moreover, greater subsidiarity might be especially important in our current political environment of low (and fractured) institutional trust.

101. Sellers & Michalski, *supra* note 1, at 1083; see also *id.* at 1109–17 (discussing null findings in detail).

102. *Id.* at 1083.

election officials systematically underinvest in poor or minority communities.”<sup>103</sup>

And “complicates” is the right word, for the data does *not* suggest that elections are *equitably* or *adequately* funded.<sup>104</sup> “After all, it is indisputably the case that minorities . . . are often impaired by subpar election administration.”<sup>105</sup> Instead, Sellers and Michalski point out that the data only suggests that “the simplest version of the conventional narrative—that disadvantaged communities are always forced to operate with fewer resources than their peer communities—is perhaps oversimplified.”<sup>106</sup>

Indeed, one way to interpret the authors’ findings may be that if formal funding levels are *better* than expected then the structural impediments to voting are *even worse* than commonly assumed.<sup>107</sup> Thus, equal funding would be inadequate because it would not provide equitable electoral opportunities or performance.

### A. *The Sources of Structural Suppression*

If it is true that “minority voter disadvantage is seemingly *not* related to fiscal constraints,”<sup>108</sup> as Sellers and Michalski’s findings suggest, then identifying the source of this disadvantage is critical to securing free and fair elections. One possibility raised briefly by the authors is that “roughly even expenditures across counties and census tracts obscure uneven needs.”<sup>109</sup>

This explanation, which I will refer to as “structural suppression,” means that roughly even levels of funding “would prove inadequate and result in a variety of cascading problems.”<sup>110</sup> Sellers

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103. *Id.* at 1101; *see, e.g.*, Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 HOW. L.J. 717, 719–22 (2006) (noting various barriers and problems facing minority voters, including underfunding).

104. Sellers & Michalski, *supra* note 1, at 1101 (“To be clear, such underinvestment is occurring, in an unfortunate number of instances, and intentionally so, it seems.”).

105. *Id.* at 1115.

106. *Id.* at 1101. Indeed, the authors’ findings help sharpen the inquiry into what we mean by “underfunding” and whether this concept refers to equality or equity. *See, e.g.*, Persily, *supra* note 103, at 721 (“[P]erhaps the greatest obstacle to effective minority participation has been the underfunding of election administration in poorer neighborhoods with the concomitant long lines and shortage of voting booths.”).

107. *See, e.g.*, Martha R. Mahoney, “*Democracy Begins at Home*”—*Notes from the Grassroots on Inequality, Voters, and Lawyers*, 63 U. MIAMI L. REV. 1, 3–4 (2008) (noting “[n]eighborhoods reflect the effects of racial and ethnic segregation, including unequal educational levels of voters and poll workers” and that “[p]oor and minority voters are likely to face greater difficulties at the polls”).

108. Sellers & Michalski, *supra* note 1, at 1115.

109. *Id.* at 1116.

110. *Id.*

and Michalski are skeptical of this explanation, stating that it is “unlikely that minority voters have unique needs that are drastically different from others.”<sup>111</sup>

Perhaps. But it does not seem obvious that minority voters would need to have drastically different *types* of needs for small differences in *degrees* of need to compound over the course of an election and lead to distinctly different electoral opportunities for all voters in the jurisdiction on a systemic basis.

For example, one might imagine a slight percentage difference in registration issues (or list-maintenance issues) leading to a slight percentage increase in average check-in times.<sup>112</sup> One might also imagine slightly higher ballot language assistance needs,<sup>113</sup> slightly higher curbside voting or other disability-access needs,<sup>114</sup> slightly longer voting times or slightly higher spoiling rates,<sup>115</sup> and slightly higher provisional ballot needs<sup>116</sup> all placing compounding demands in the aggregate on poll workers and polling place capacity.<sup>117</sup>

Imagine, as well, how this might interact with slightly different patterns for when people in the jurisdiction vote. For example, voters in

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111. *Id.*

112. *See, e.g., id.* at 1116 n.108 (“Purges of inactive voters in Maricopa County over the past 10 years have disproportionately affected lower-income communities, where minorities make up a larger share of the population.”); Daniel P. Tokaji, *The New Vote Denial: Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 695 (2006) (discussing registration problems, including votes likely lost due to registration problems); Mahoney, *supra* note 107, at 6 (discussing “errors in voter-registration rolls”).

113. Sellers & Michalski, *supra* note 1, at 1116 (identifying possibility that “minority populations may more often require certain voting services, like ballot language assistance, than is the case for other populations”); Mahoney, *supra* note 107, at 6 (noting “[m]inority-language voters did not always receive the assistance to which they were entitled under the Voting Rights Act or other laws [in 2000]” and that “inequality affects the rate at which problems happen, with the burden falling more heavily on minority neighborhoods”).

114. Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL’Y REV. 353, 357 (2003) (discussing the millions of Americans for whom a disability impacts the voting process). Even the same disability-related needs could lead to greater delays and complications if polling places in structurally suppressed precincts pose marginally more voting impediments. *See, e.g.,* Mahoney, *supra* note 107, at 8–9.

115. *Cf.* Daniel Seligson, *Study Finds Ballots of Poor Minorities More Likely To Be Tossed*, PEW (July 9, 2001), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2001/07/09/study-finds-ballots-of-poor-minorities-more-likely-to-be-tossed> [<https://perma.cc/7ZY9-PDQB>] (finding “[r]esidents of low-income, high-minority districts are three times more likely to have their ballots tossed than those who live in wealthier and whiter, areas,” but noting that much of this may be attributable to differences in the machines used and the opportunities provided to cure ballot errors).

116. HASEN, *supra* note 32, at 61 (“[C]ities also tend to have more poor and minority voters, who are much more likely to run into a problem, requiring them to cast provisional ballots that election officials must then process by hand.”); Mahoney, *supra* note 107, at 7 (“[S]ometimes poll workers give provisional ballots to voters who actually need other problem-solving assistance.”).

117. *See* Mahoney, *supra* note 107, at 4 n.5 (noting “low-income and minority neighborhoods were more likely to have low-quality polling places and misinformed poll workers” as well).

wealthier areas might have the flexibility to adjust their work schedules and therefore spread their voting over the course of the whole day. Voters in structurally suppressed communities, on the other hand, might have less flexible work arrangements that force them to vote early in the morning, late in the day, or not at all.<sup>118</sup>

Combine increased peak usage with the compounding impediments above, and it seems plausible that an allocation of “equal” resources could interact with structural sources of suppression in dramatic ways. Every election brings tales of voters forced to wait hours on end to cast a ballot,<sup>119</sup> and many voters simply do not have the option of holding out that long. Polling suggests that a wait time of even one hour could turn away more than forty percent of registered voters.<sup>120</sup> And such delays appear to disproportionately impact poorer communities and communities of color.<sup>121</sup>

Whether voting resources come in the form of voting machines, polling booths, check-in supplies, or money, it would be the per capita allocation that causes the inequity. Such formal equality fails to recognize that private advantages in wealthy and white areas may be effectively subsidizing the operation of the polling places in those communities.<sup>122</sup>

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118. Elora Mukherjee, *Abolishing the Time Tax on Voting*, 85 NOTRE DAME L. REV. 177, 191 (2009) (“Many must vote early or in the evening if they are to vote at all.”) (quoting *Nat’l Ass’n for the Advancement of Colored People State Conf. of Pa. v. Cortes*, 591 F. Supp. 2d 757, 765 (E.D. Pa. 2007)); Mukherjee, *supra* note 118, at 239 (“At these and other peak times, lines accumulate, in part, because a polling site is generally set up to accommodate an evenly distributed stream of voters.”).

119. *See, e.g.*, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 468 (6th Cir. 2008) (noting that polling place wait times ranged from two to twelve hours).

120. Mukherjee, *supra* note 118, at 181; *see also* Boe M. Piras, Note, *Long Lines at the Polls Violate Equal Protection and Require Judicial and Legislative Action*, 6 U. ST. THOMAS L.J. 658, 660 (2009):

According to a study conducted by the Massachusetts Institute of Technology and the California Institute of Technology . . . , 44 million registered, eligible voters did not vote in 2008, the most recent federal election. Four percent of those would-be voters cite long lines as the primary reason for not voting. Of the voters who actually *attempted* to vote but did not cast a ballot, the number jumps to 8.1 [percent] who cite long lines as the primary reason for not casting a ballot.

121. Persily & Stewart, *supra* note 5, at 170; Quealy & Parlapiano, *supra* note 7.

122. Qualitative research in this area might compare (1) distant polling places in distinct communities that have very similar expenditures and (2) nearby polling places in similar communities that have very different expenditures to develop a better sense of how structural suppression does (and does not) translate into greater public financial need. For example, are poll workers in wealthier communities able to leverage external educational privileges into more efficient or informative service? Is more official training necessary in jurisdictions that have fewer informal networks for conveying institutional knowledge? Do voters in wealthier areas spread demand for voting services more evenly over the course of the day based on more favorable time-off-work policies and/or transportation options?

In fact, one might imagine that the inequities caused by equal funding could also compound year after year as election officials reallocate scarce resources based on their knowledge of local disparities and local needs. If an election official knows from prior experience that they will require X percent more voting machines and X percent more poll workers with X percent more pre-election training than a neighboring jurisdiction, the necessary increases in these spending categories might be offset by cuts in other areas.

For example, an economically privileged jurisdiction might be able to update, upgrade, and service machines regularly while an economically disadvantaged jurisdiction might need to put maintenance needs off more frequently to fund more pressing matters.<sup>123</sup> The aggregate spending of the two jurisdictions over time would be equal, but only because private resources are, again, effectively subsidizing the per capita cost of elections in wealthy communities, leaving more resources on the margins for proactive and preventive investments.

To be sure, these are all open questions based on speculation. But *Democracy on a Shoestring* helps us start targeting our questions in more productive directions.<sup>124</sup> In particular, the authors' findings contribute to a growing body of empirical and legal work that invites us to think more rigorously about how our electoral systems interact with social and economic sources of disadvantage, translating disparities in education, health, and wealth into disparities in electoral and political power.<sup>125</sup>

The need to examine these issues with greater precision also amplifies the importance of the measures discussed in Part I: increasing public funding, increasing the production and provision of data, and increasing opportunities for consolidation and collaboration. All of these would increase opportunities to interrogate how public and private funds interact to facilitate the operation of our electoral systems.

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123. A more privileged community might also command the political capital to fully replace equipment whereas a less privileged community might be forced to constantly fix existing equipment—which can sometimes be more financially burdensome over the long run than outright replacement. Similar expenditures could thus conceal very different voting opportunities and experiences.

124. Sellers & Michalski, *supra* note 1, at 1083–84 (noting “data on election expenditures can only tell us so much, and many questions remain unanswered” but that the findings “provide a foundation upon which future research can build”).

125. See, e.g., Abhay Aneja, Jacob M. Grumbach & Abby K. Wood, *Financial Inclusion in Politics*, N.Y.U. L. REV. (forthcoming) (manuscript at 18, 13) (available on SSRN) (finding “[ninety-one percent] of individual campaign contributions to state and federal candidates between 1980 and 2012 came from non-Hispanic white donors” and observing that this may create “a cyclical relationships between poverty and political underrepresentation”).



Highlighting the risks of an overly formal view of electoral equality that elides the potential structural sources of suppression could also have important political and legal ramifications.

### *B. The Politics of Structural Suppression*

Whether research reveals structural suppression to play a large or small role in electoral performance, its existence alone should encourage election officials to adopt a more context-sensitive approach to resource allocation decisions. Rather than allocating funds, machines, or personnel on a per capita basis, officials should allocate resources in a way that equalizes electoral performance. This will not be news to many election officials—but experience suggests it may be to some.

Reflecting on the role of structural suppression should also (ideally) spur policymakers to examine how laws and policies can ameliorate inequities. For example, if resource constraints require cost-cutting measures, an attention to structural suppression can help us better distinguish between two types of reforms. On the one hand, there may be reforms that cut public costs *and* cut implicit private costs, such as consolidating local and federal elections or providing for automatic voter registration. On the other hand, there may be reforms that cut public costs *but increase* implicit private costs, such as cutting back on early voting or polling hours.<sup>126</sup>

Unfortunately, policymakers today seem just as (if not more) interested in the latter: leveraging inequities for partisan advantage. As Professor Rick Hasen notes in his recent book, *Election Meltdown: Dirty Tricks, Distrust, and the Threat to American Democracy*, “Democratic-leaning cities often get their election resources from Republican-leaning state legislatures.”<sup>127</sup> Since the 2020 election, Republican legislators across the country have introduced hundreds of bills that would make voting harder, including by cutting back on voting hours and early voting opportunities and limiting the ability of jurisdictions to fund improvements with donations from non-government entities.<sup>128</sup>

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126. See Scot Schraufnagel, Michael J. Pomante II & Quan Li, *Cost of Voting in the American States: 2020*, 19 ELECTION L.J. 503, 503 (2020) (discussing how “states vary considerably in their level of restrictions or what is termed the ‘cost of voting’”).

127. HASEN, *supra* note 32, at 62.

128. Amy Gardner, Kate Rabinowitz & Harry Stevens, *How GOP-Backed Voting Measures Could Create Hurdles for Tens of Millions of Voters*, WASH. POST (Mar. 11, 2021), <https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states/> [<https://perma.cc/G3AN-3S4M>] (noting “[i]n [forty-three] states . . . Republican lawmakers have proposed at least 250 laws that would limit mail, early in-person and Election Day voting with

Structural suppression helps explain this move. The prediction by Republicans seems to be that structurally suppressed groups are more likely to vote for Democrats and so exacerbating existing disadvantages will redound to Republicans' electoral benefit. Whether or not this prediction turns out to be true, the political intuition alone suggests that this potential source of disparity should be taken seriously as a matter of study, policy, funding, and doctrine.

An attention to structural suppression also connects several related trends, painting a dire picture of where our institutions and politics may be heading next. In *Election Meltdown*, for example, Hasen introduces us to the “Weakest Link Axiom” of election administration: “the accuracy of an election system, and voters’ confidence in the system’s fairness and accuracy . . . is only as strong as the weakest parts of that system.”<sup>129</sup> Hasen laments that partisans spin conspiracy theories and “raise cries of rigged or stolen elections” in response to errors in administration that are better explained by Hanlon’s Razor: “Don’t attribute to malice what can be explained by incompetence.”<sup>130</sup>

But if partisans are attuned to the impact of structural suppression, malice and incompetence might not be so easily untwined. If Republicans know that cutbacks are more likely to lead to inadequate training before election day and breakdowns on election day, and that these dynamics will occur with greater regularity in jurisdictions facing structural constraints, then the errors that unfold are both predictable

such constraints as stricter ID requirements, limited hours or narrower eligibility to vote absentee, according to data compiled as of Feb. 19,” heralding a wave of restrictions that could “potentially amount[t] to the most sweeping contraction of ballot access in the United States since the end of Reconstruction”); Nicholas Riccardi & Michael Biesecker, *An All-Hands Moment: GOP Rallies Behind Voting Limits*, ASSOCIATED PRESS (Mar. 19, 2021), <https://apnews.com/article/legislature-voting-rights-ted-cruz-legislation-elections-6270306f67108ac16f4ee7b45a8afdb3> [<https://perma.cc/4EQD-AW6G>]; Ben Giles, *Private Donations Helped Pay For 2020 Elections. Arizona Republicans Say No More*, NPR (Mar. 11, 2021), <https://www.npr.org/2021/03/11/975746051/private-donations-helped-pay-for-2020-elections-arizona-republicans-say-no-more> [<https://perma.cc/YP6Q-8U4K>] (noting that Arizona Republicans are seeking to “ban election officials at all levels of government—city, county and state—from receiving private funds to help pay for any aspect of election operations, including voter registration”); Tierney Sneed, *GOPers Crack Down On The Private Election Grants That Helped Avoid A Pandemic Fiasco*, TALKING POINTS MEMO (Apr. 15, 2021), <https://talkingpointsmemo.com/news/gopers-crack-down-on-the-private-election-grants-that-helped-avoid-a-pandemic-fiasco> [<https://perma.cc/N78Y-6MM4>] (noting that lawmakers have proposed measures to limit private election funding in thirteen states).

129. HASEN, *supra* note 32, at 59.

130. *Id.* at 7, 49; *see also id.* at 74:

When elections are close enough to go into overtime, the news media and the interested parties seldom differentiate between incompetence and deliberate abuse—or they blur the line for partisan reasons. In these razor-thin elections, when the whole world is watching, the other administrators—the ones who have done their jobs fairly and well—may feel they have worked their asses off for nothing.

and predicted. In other words, Hanlon's Razor misses the point if the so-called "incompetence" of the poll worker directly results from the "malice" of the policymaker.<sup>131</sup>

Consider the decision by Republican legislatures in Michigan, Pennsylvania, and Wisconsin to prohibit the pre-processing of mail-in ballots before election day in the 2020 election.<sup>132</sup> Election administrators and scholars warned well in advance that this would unnecessarily drag out the ability to report results in key swing states, lead to a "blue shift" following election day as administrators finally counted mail-in ballots, and create an environment conducive to toxic and unfounded claims of fraud and conspiracy.<sup>133</sup> And that is precisely what happened.<sup>134</sup>

This kind of behavior creates a dangerous feedback loop where partisans use their power over election laws and funding to manufacture delays and induce mistakes,<sup>135</sup> weaponize those delays and mistakes into (often racist) narratives about malfeasance,<sup>136</sup> and

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131. Sellers & Michalski, *supra* note 1, at 1084 ("Overworked, undertrained, poorly supported election staff are less likely than their well-resourced counterparts to administer elections in an optimally inclusive and secure manner.").

132. Fredreka Schouten, *Why Mail-in Ballots in Michigan, Wisconsin and Pennsylvania Were Counted So Late*, CNN (Nov. 4, 2020, 5:53 PM), <https://www.cnn.com/2020/11/04/politics/why-mail-in-ballots-were-counted-late-in-states-like-pennsylvania-and-michigan/index.html> [<https://perma.cc/DR9D-VFN7>].

133. Andy Sullivan & Michael Martina, *How a 'Blue Shift in U.S. Mail Ballots Might Set Off Election Week Chaos*, REUTERS (Sept. 8, 2020, 6:04 AM), <https://www.reuters.com/article/us-usa-election-delay/how-a-blue-shift-in-u-s-mail-ballots-might-set-off-election-week-chaos-idUSKBN25Z1I1> [<https://perma.cc/J8G7-QL3J>]; David A. Graham, *The 'Blue Shift' Will Decide the Election*, ATLANTIC (Aug. 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/brace-blue-shift/615097/> [<https://perma.cc/7RDV-E4TV>]; Geoffrey Skelley, *Why Pennsylvania's Vote Count Could Change After Election Night*, FIVETHIRTYEIGHT (Oct. 29, 2020, 6:00 AM), <https://fivethirtyeight.com/features/why-pennsylvanias-vote-count-could-change-after-election-night/> [<https://perma.cc/JL8Q-XQG5>]; see also Quinn Scanlan, *How Battleground States Process Mail Ballots – And Why It May Mean Delayed Results*, ABC NEWS (Oct. 30, 2020, 8:09 AM), <https://abcnews.go.com/Politics/battleground-states-process-mail-ballots-delayed-results/story?id=73717671> [<https://perma.cc/BM7H-NTH6>].

134. Opinion, *Surprise! The Election is Unfolding as Predicted.*, WASH. POST (Nov. 4, 2020, 5:33 PM), [https://www.washingtonpost.com/opinions/surprise-the-election-is-unfolding-as-predicted/2020/11/04/2e1c53e8-1ebe-11eb-90dd-abd0f7086a91\\_story.html](https://www.washingtonpost.com/opinions/surprise-the-election-is-unfolding-as-predicted/2020/11/04/2e1c53e8-1ebe-11eb-90dd-abd0f7086a91_story.html) [<https://perma.cc/PS2R-Y7UH>]; Eliza Griswold, *Pennsylvania's Blue Shift*, NEW YORKER (Nov. 6, 2020), <https://www.newyorker.com/news/campaign-chronicles/pennsylvanias-blue-shift> [<https://perma.cc/K7Y8-9LAC>].

135. See *supra* notes 127–28 (discussing partisan changes to election laws).

136. See, e.g., Brandon Tensley, *The Racist Rhetoric Behind Accusing Largely Black Cities of Voter Fraud*, CNN (Nov. 30, 2020, 12:03 PM), <https://www.cnn.com/2020/11/20/politics/trump-giuliani-black-cities-analysis/index.html> [<https://perma.cc/GU4R-6CGQ>] (discussing racist nature of accusing largely Black cities of voter fraud); Aaron Morrison, Kat Stafford & Christine Fernando, *Trump Election Challenges Sound Alarm Among Voters of Color*, ASSOCIATED PRESS (Nov. 22, 2020), <https://apnews.com/article/joe-biden-donald-trump-race-and-ethnicity-georgia-wisconsin-a2f5155019a0c5aa09a76a82fb7d14b> [<https://perma.cc/ABX8-AK22>]; HASEN, *supra* note 32, at 61 ("It is impossible to ignore how race plays into attacks on election administration in

then leverage those narratives to double down on voter fraud conspiracies that pave the way for new restrictions and cutbacks that restart the cycle.<sup>137</sup>

In this environment, we cannot simply ask election officials to break that cycle by “upgrad[ing] their voting technologies and staff training”<sup>138</sup> because those officials’ options and funding are limited by state and local constraints. All of this underscores the urgent and growing need for the federal government to take a larger role in providing funding and support.<sup>139</sup>

### C. *The Law of Structural Suppression*

If structural suppression impacts electoral opportunities in ways more significant than previously acknowledged or anticipated, this should inform debates over election law policies and doctrines as well. As Sellers and Michalski note, most election-law doctrines operate in a vacuum that inadequately attends to resource constraints and disparities.<sup>140</sup> This reflects a broader (and growing) defect in the Supreme Court’s election-law jurisprudence; namely, a disregard of the practical and political consequences of formal doctrine and how purportedly “neutral” approaches further entrench preexisting sources of economic and political power.<sup>141</sup>

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Democratic area, and how pockets of incompetence . . . are described by many on the right as intentional acts of fraud.”)

137. See *supra* note 32 (discussing various voter restrictions).

138. HASEN, *supra* note 32, at 63.

139. See *supra* Part I.A (discussing how the government can better fund elections).

140. Sellers & Michalski, *supra* note 1, at 1089 (“Does legal doctrine account for resource disparities? The short answer is no.”); *id.* at 1132 (“Despite its significance, election funding does not meaningfully factor into election law doctrines or remedies.”).

141. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1793 (2020) (“Scholars focused on racial subordination have worked for decades to theorize the way that the state gives force to nominally private racism by selectively enabling certain kinds of choice.”); Ellen Katz, *Withdrawal: The Roberts Court and the Retreat from Election Law*, 93 MINN. L. REV. 1615, 1616, 1626 (2009) (describing the Roberts Court as withdrawing from engaged judicial review of state election laws and employing hollow formalism with “rigid focus on legal restrictions over practical effects”); Joshua A. Douglas, (*Mis*)*Trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 553 (“Without identifying a specific new rule, the Court has been unjustifiably deferring to state laws regarding election administration, thereby giving states tremendous power to regulate elections. At the same time, the Court has diminished Congress’s oversight role.”); Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111 (2019); Richard L. Hasen, *The Supreme Court’s Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50 (2020); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013). Perhaps the starkest and most recent example comes from *Brnovich v. Democratic National Committee*, in which the Court explicitly rejected the idea that inequalities in social power matter when examining whether a system is equally open under the Voting Rights Act. See 141 S. Ct. 2321, 2339 (2021) (noting that “[t]o the extent that minority and non-minority groups differ with respect

Sellers and Michalski identify election laws as another potential explanation for their null findings, noting that election regulations might “disproportionately impact minority voters *despite* sufficient election expenditures.”<sup>142</sup> In this telling, “polling place closures or cutbacks to early voting days, while very real, simply have little to do with funding.”<sup>143</sup>

As the sections above explore, however, one might expect the sources and politics of structural suppression to interact dynamically with the law. Polling place closures implemented for partisan (rather than financial) reasons might amplify the effect of minor differences in needs, further straining election systems in disadvantaged jurisdictions despite equal funding.<sup>144</sup> Testing this intuition may be challenging but doing so could offer a new source of legal leverage.

Sellers and Michalski rightfully observe that shifts in doctrine, new types of claims, and more rigorous conceptual work around notions of electoral adequacy are long overdue.<sup>145</sup> And the authors sketch out some preliminary textual and doctrinal “hooks” one might use to challenge disparities in election funding and their impact.<sup>146</sup>

Yet given the idiosyncratic nature of the article’s findings and what those findings might implicitly reveal about structural suppression, a greater doctrinal contribution may be just around the corner. Rather than discovering evidence that could give rise to legal claims that turn on resource disparities,<sup>147</sup> the authors may have found

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to employment, wealth, and education” this may “result in some predictable disparities in rates of voting,” but this “does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote”).

142. Sellers & Michalski, *supra* note 1, at 1116.

143. *Id.*

144. See *supra* Parts II.A., II.B. (discussing the sources and politics of structural suppression); Joshua S. Sellers, *Politics as Pretext*, 62 HOW. L.J. 687, 692 (2018) (“A comprehensive response to institutional and systemic discrimination requires more than simply invalidating actions in which politics is insincerely used as a pretext for discriminatory intent. A full response requires legal cognizance of how racial disadvantage is buoyed by actions that may, when taken in isolation, appear benign.”).

145. Sellers & Michalski, *supra* note 1, at 1120–28.

146. *Id.* at 1121–23 (citing Michael T. Morley, *Bush v. Gore’s Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229, 231 (2020)) (challenges based on unequal election expenditures that lead to unequal voter services under *Bush v. Gore’s* “uniformity principle”); *id.* at 1124–25 (challenges based on “electoral inadequacy” under state constitutional provisions); *id.* at 1126–27 (challenges based on electoral inadequacy under federal *Anderson-Burdick*-style claim); see also Joshua S. Sellers & Justin Weinstein-Tull, *Constructing the Right to Vote*, 96 N.Y.U. L. REV. (forthcoming 2021) (on file with author) (discussing how a robust right to vote could be constructed); Joshua S. Sellers, *Political Participation, Expressive Association, and Judicial Review*, 69 AM. U. L. REV. 1617, 1621–22 (2020) (discussing doctrinal debate over proper judicial scrutiny for state laws impacting voting and expressive association).

147. See, e.g., Morley, *supra* note 146, at 281–82 (citing *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 468 (6th Cir. 2008) and *Fleming v. Gutierrez*, No. 13-CV-222, 2014 WL 12650657 (D.N.M. Sept. 12, 2014)) (“The Uniformity Principle’s requirement of equal treatment

preliminary evidence that could rebut arguments that turn on resource equality as a categorical defense.

In other words, evidence that officials allocated resources on a per capita basis might seem like a good defense to legal challenges based on unequal opportunity (especially in the wake of *Brnovich v. Democratic National Committee*), but if research reveals in a more rigorous way that election officials *knew or should have known* that equal resource allocations were likely to create to *unequal* opportunities, perhaps this information could still be probative in some contexts.<sup>148</sup> *Democracy on a Shoestring's* unexpected null findings could be the first step in developing a body of evidence to support such an approach—and could spur more rigorous thinking about what fair and equitable methods *do* look like.

In the short term, researchers should examine and aim to quantify how structural suppression might cause equal resource

for all voters can extend down to the granular level of polling place resources.”); *Brunner*, 548 F.3d, at 468–69 (noting disparate wait times could be attributed, in part, to different numbers of voting machines being available per person at different polling places); Elliot Ergeson, Staff Member Blog Post, *An Unequal Right to Vote: Why Courts Should Hold that Disproportionate Allocations of Ballot Drop Boxes and Polling Places Violate the Equal Protection Clause*, MINN. L. REV. DE NOVO (Dec. 7, 2020) (arguing that “the disproportionate allocation of ballot drop boxes and polling places should be an Equal Protection Clause violation”); Sellers & Michalski, *supra* note 1, at 1120 (“Absent evidence of spending disparities between majority-minority and majority-white communities, Section 2 of the Voting Rights Act, which forbids any ‘standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color,’ is unviable.”).

148. Compare *supra* note 141 (discussing how *Brnovich* interpreted the Voting Rights Act to minimize the relevance of structural suppression in a discriminatory-results analysis), with *Morley*, *supra* note 146, at 261–62:

The Uniformity Principle also generally prohibits states from delegating discretion to county or local officials over policies concerning statewide elections when differences among various political subdivisions’ rules or procedures would lead to materially different voting opportunities for their respective citizens. Courts have most frequently applied the Uniformity Principle in this context to prohibit counties within a state from using different voting machines with substantially different error rates. *Courts have also invalidated substantial variations among localities’ election procedures or resources that led to disparities in voting opportunities.*

(emphasis added); Edward B. Foley, *Refining the Bush v. Gore Taxonomy*, 68 OHIO ST. L.J. 1035, 1040 (2007) (“When a central authority gives local officials explicit permission to adopt different electoral practices, the central authority necessarily knows that electoral inequalities will ensue if the local officials exercise this permission.”); Mukherjee, *supra* note 118, at 180:

The time tax may result from statewide election policy—which the plaintiffs challenged in *Cortés*—or from problematic election infrastructure, such as insufficient numbers of polling locations, voting machines, and poll workers to efficiently accommodate all those who seek to vote. *Whatever the cause*, the effect is long lines that severely burden the right to vote. Those who cannot afford to wait—say, because of work obligations, family responsibilities, or health constraints that do not pause for Election Day—are denied the right to vote.

(emphasis added); and Sellers, *supra* note 144, at 710 (discussing the role that rebuttal presumptions might play in the adjudication of Voting Rights Act claims).

allocations to produce disparate electoral opportunities. The robust public data called for in Part I would make this research easier, but the kind of targeted data collection, comparisons, and study conducted by Sellers and Michalski could also yield fruitful insights. And while voting rights plaintiffs could deploy these insights under existing doctrinal and statutory regimes in limited ways, this information could also provide critical support for reforms to strengthen and expand the scope of the Voting Rights Act.

In the longer term, election law (and constitutional law more generally) needs an overhaul. Modern doctrine's inattention to power, pretext, and structural oppression not only perpetuates injustice, it may well be hastening our democratic decline.<sup>149</sup> That is a longer topic for another day, but *Democracy on a Shoestring* cuts at this joint, suggesting novel ways to navigate existing doctrines and ground new ones.

#### CONCLUSION

Election law doctrine and scholarship have long been insufficiently attentive to issues of election administration and resource allocation. *Democracy on a Shoestring* takes these issues head on and situates its findings within broader legal and policy debates. But, as the authors themselves note, their article “only scratches the surface of what remains to be discovered about election expenditures.”<sup>150</sup>

One hopes from reading Sellers' and Michalski's work, however, that *Democracy on a Shoestring* is only the first piece in a larger project that all of us—researchers, reformers, administrators, and activists—have a responsibility to see through. After all, the price of free elections is higher than their cost alone.

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149. See Sellers, *supra* note 144, at 696–97 (noting that, in the past, the Court has “acted to rectify entrenched racial discrimination that would otherwise have gone unaddressed,” “collaps[ed] the public/ private distinction and compress[ed] the doctrinal space in which such discrimination [i]s immunized,” and this “approach is decidedly different than what is found in election law doctrines today”); Joshua S. Sellers, *Election Law and White Identity Politics*, 87 *FORDHAM L. REV.* 1515, 1517 (2019) (“By and large, election law doctrines obfuscate the degree to which race has fractured our politics. The result is a set of doctrines that set the terms of political engagement while ignoring political reality.”); James A. Gardner, *The Illiberalization of American Election Law: A Study in Democratic Deconsolidation* (U. at Buff. Sch. of L. Legal Stud., Research Paper No. 2020-003, 2021).

150. Sellers & Michalski, *supra* note 1, at 1132.