

# The Politics of Ballot Choice

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## I. INTRODUCTION

The North Carolina General Assembly presented House Bill 589 (H.B. 589), also known as the Voter Information Verification Act, to Governor Pat McCrory on July 26, 2013.<sup>1</sup> Governor McCrory signed what became known as Session Law 2013-381 on August 12, 2013.<sup>2</sup> This bill constituted a sweeping reform of the state's electoral laws. Proponents of the law contended that their purpose was to eliminate voter fraud and insure the public's confidence in the

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<sup>1</sup> H.B. 589, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013).

<sup>2</sup> See *House Bill 589 / S.L. 2013-381*, N.C. GEN. ASSEMBLY, <http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=H589> [https://perma.cc/5QJL-DKCA] (listing legislative history); see also *Voter Verification Act*, ch. 381, 2013 N.C. Sess. Laws 1505. In July of 2016, the U.S. Court of Appeals for the 4th Circuit ruled the provisions relating to voter identification, same day registration, and out-of-precinct voting unconstitutional. Robert Barnes & Ann E. Marimow, *Appeals Court Strikes Down North Carolina's Voter-ID Law*, WASH. POST (July 29, 2016), [https://www.washingtonpost.com/local/public-safety/appeals-court-strikes-down-north-carolinas-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14e0c1087f7583\\_story.html?tid=a\\_inl](https://www.washingtonpost.com/local/public-safety/appeals-court-strikes-down-north-carolinas-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14e0c1087f7583_story.html?tid=a_inl) [https://perma.cc/CX5W-CBG6]. The straight ticket provision was not, however, part of the litigation. See *id.*

integrity of the electoral process.<sup>3</sup> Opponents, pointing to the consolidation of precincts, shortening of the early voting period, and the elimination of same day registration, argued that raising the cost of voting—and hence, depressing Democratic turnout—was the real intent.<sup>4</sup> Indeed, there is scant evidence of voter fraud in North Carolina, and the bulk of the changes made by the law have no discernible connection to detecting or deterring voter fraud.

Less remarked upon, but no less consequential, was section 32.1 of H.B. 589 titled “Vote the Person Not the Party” that eliminated the straight ticket provision that allowed voters to select all of a political party’s candidates by checking one box.<sup>5</sup> Although this change to North Carolina’s electoral regime received much less attention than the provisions relating to voter identification and the consolidation of precincts, we demonstrate below that eliminating the straight ticket option promises to increase roll-off and lengthen waiting times at polling stations. Given that straight ticket voting dominates in counties where Democratic candidates run strong,<sup>6</sup> Republican legislators presumably calculated that removing the straight ticket provision would cut into Democratic margins down-ballot.

North Carolina is not alone, however, in removing its straight ticket provision.<sup>7</sup> In December of 2015, in Michigan, the Republican controlled legislature and Republican governor eliminated the straight ticket provision.<sup>8</sup> The bill passed on a near party line vote in both the House and the Senate.<sup>9</sup> Critics in the Democratic Party charged that the bill would increase the burden of voting and escalate the wait times at polling places.<sup>10</sup>

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<sup>3</sup> 2013 N.C. Sess. Laws at 1505 (describing the bill as “[a]n act to restore confidence in government . . . through education and increased registration of voters and by requiring voters to provide photo identification before voting to protect the right of each registered voter to cast a secure vote with reasonable security measures that confirm voter identity”).

<sup>4</sup> See Expert Report of Barry C. Burden, N.C. State Conf. of the NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014) (No. 1:13-cv-00658-TDS-JEP).

<sup>5</sup> § 32.1, 2013 N.C. Sess. Laws at 1547.

<sup>6</sup> See, e.g., Jack Lessenberry, *Republicans Feel the Sting After Their Ban on Straight Ticket Voting Goes Down*, MICH. RADIO (Aug. 18, 2016), <http://michiganradio.org/post/republicans-feel-sting-after-their-ban-straight-ticket-voting-goes-down#stream/0> [<https://perma.cc/QW95-KUJU>] (explaining that voting with straight ticket ballots helped Democratic candidates win in Michigan).

<sup>7</sup> Kathleen Gray, *Snyder Signs Bill Eliminating Straight-Ticket Voting*, DET. FREE PRESS (Jan. 5, 2016), <http://freep.com/story/news/politics/2016/01/05/snyder-signs-bills-eliminating-straight-ticket-voting/78302866> [<https://perma.cc/4UAE-K448>].

<sup>8</sup> Kathleen Gray, *Michigan Senate, House OK End to Straight Ticket Voting*, DET. FREE PRESS (Dec. 16, 2015), <http://freep.com/story/news/politics/2015/12/16/lansing-ready-eliminate-straight-party-ticket-voting/77411352> [<https://perma.cc/2T7H-WHXU>].

<sup>9</sup> Gray, *supra* note 8.

<sup>10</sup> *Id.*; Gray, *supra* note 7. In July 2016, a U.S. district court judge blocked implementation of the straight ticket law. *Mich. State A. Philip Randolph Inst. v. Johnson*, No. 16-cv-11844, 2016 WL 3922355 (E.D. Mich. July 22, 2016); Adam Liptak, *Supreme Court Allows ‘Straight-Ticket’ Voting in Michigan*, N.Y. TIMES (Sept. 9, 2016), <http://www.nytimes.com/2016/09/10/us/politics/supreme-court-voting-michigan-straight->

These episodes remind us of a defining feature of U.S. politics. State legislatures bear the primary responsibility for designing the nation's ballot laws.<sup>11</sup> The recent laws in North Carolina and Michigan suggest that ballot laws have become a new weapon in the quest for political power. Since 1994, eleven states have removed the straight ticket provision from their ballots leaving only ten states with such a provision.<sup>12</sup>

Despite their potential importance to election outcomes, we actually know very little about the selection of ballot formats by state legislatures. Given the ramifications for politicians and voters, it is crucial to understand the conditions that lead to changes in ballot laws and their political consequences.

In this Article we ask two questions. First, what is the political history of ballot formats, and their changes, in the twentieth and twenty-first centuries? Some states line candidates in party columns while others list candidates by office.<sup>13</sup> Some states provide for party emblems at the top of the ballot.<sup>14</sup> Others provide a box at the top of the ballot allowing voters to simply cast a straight ticket with one check mark.<sup>15</sup> Moreover, states have varied in how long they have stuck with one type of ballot.<sup>16</sup> Relying on a newly constructed dataset, we document the trends in ballot formats over time. The overwhelming trend over the last forty years has been a movement towards the office bloc ballot and the elimination of straight ticket provisions. This trend correlates with the dramatic rise in the congressional incumbency advantage over the same period.

Second, when and why have state legislatures changed their ballot laws? Our central argument is that ballot laws serve as an endogenous solution to strategic problems politicians face. The nature of these problems has varied over time, as have the solutions politicians have employed to solve them. To

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ticket.html?\_r=0 [https://perma.cc/LH26-W5TQ]. The Attorney General of Michigan appealed the ruling to the U.S. Sixth Circuit Court of Appeals. Brad Devereaux, *Schuette Fights on for Michigan Straight-Ticket Voting Ban Before Election* (Aug. 19, 2016), [http://www.mlive.com/news/index.ssf/2016/08/schuette\\_fights\\_on\\_for\\_michiga.html](http://www.mlive.com/news/index.ssf/2016/08/schuette_fights_on_for_michiga.html) [https://perma.cc/G7k9-4XZN]. The Sixth Circuit denied the Attorney General's request to stay the lower court ruling. *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656 (6th Cir. 2016); Liptak, *supra*. The U.S. Supreme Court followed by refusing to allow implementation of the straight ticket ban. *Johnson v. Mich. State A. Philip Randolph Inst.*, No. 16A225, 2016 WL 4706497 (S. Ct. Sept. 9, 2016) (mem.); Liptak, *supra*.

<sup>11</sup> U.S. CONST. art. I, § 4; *see, e.g., Straight Ticket Voting States*, NAT'L CONF. ST. LEGISLATURES (Jan. 8, 2016), <http://www.ncsl.org/research/elections-and-campaigns/straight-ticket-voting.aspx> [https://perma.cc/9GX3-3DMK] (showing the differences in ballot laws drafted by state legislatures).

<sup>12</sup> *Straight Ticket Voting States*, *supra* note 11.

<sup>13</sup> Alan Ware, *Anti-Partism and Party Control of Political Reform in the United States: The Case of the Australian Ballot*, 30 BRIT. J. POL. SCI. 1, 17–18 (2000) (discussing the five different types of ballot lists that were used between 1888 and 1917).

<sup>14</sup> John F. Reynolds & Richard L. McCormick, *Outlawing "Treachery": Split Tickets and Ballot Laws in New York and New Jersey, 1800-1910*, 72 J. AM. HIST. 835, 853 (1986).

<sup>15</sup> Ware, *supra* note 13, at 17.

<sup>16</sup> *Id.* at 21.

explore the political logic of ballot choice we rely on a series of case studies that draw from both the past (i.e., the early to mid-twentieth century) and present (i.e., contemporary North Carolina). The common theme running through these changes, however, is that they serve to strengthen the politicians in power by creating a set of institutions that help insure electoral success for those already in office.

More generally, variations in state ballot laws are a key reminder that the Constitution delegates primary responsibility for electoral laws to the states.<sup>17</sup> As a result, the experience of democracy varies considerably across states. Ultimately, how voters experience a crucial component of democracy—voting—depends primarily on the dynamics of partisan competition in states and rules enacted by strategic political actors to help them win and keep power by winning at the ballot box.

In essence, we argue that an unintended consequence of the Constitution granting states broad discretion over electoral laws is that the provision allows parties to construct democracy in ways that increase the likelihood of the dominant party staying in power. In doing so, states create and enhance political inequality through restrictions and enhancements of the voting process.

## II. HISTORY AND TRENDS IN BALLOT LAWS

Article I, Section 4 of the U.S. Constitution stipulates that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.”<sup>18</sup> States have broad discretion to create their own election law, although Congress has implemented the occasional electoral procedure—such as mandating single-member congressional districts (1842), prescribing a uniform date for House elections (1872), or prohibiting racial discrimination in voting (1965)—for the most part states have wide discretion to establish and change their own election laws.<sup>19</sup> As a result, state election procedures vary widely; from differing rules on ballot access for potential candidates, differing voting machine technology, and differing registration requirements. Though these variations are important in and of themselves, our focus here is on the ballot form employed and what factors explain the decisions of state legislatures to change the physical structure of the ballot.

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<sup>17</sup> U.S. CONST. art. I, § 4.

<sup>18</sup> *Id.*

<sup>19</sup> Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491, 491; Act of Feb. 2, 1872, ch. 11, § 3, 17 Stat. 28, 28; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10101–10702 (Supp. II 2014)); *see also* Jason M. Roberts, Bicameralism, Ballot Type, and Split-Ticket Voting 1–2 (Oct. 16, 2009) (unpublished manuscript), <http://vanderbilt.edu/csdi/archived/Bicameralism%20papers/jason%20roberts.pdf> [<https://perma.cc/HJY6-2WRE>].

In the nineteenth century, political parties were responsible for the production and distribution of electoral ballots.<sup>20</sup> Unlike modern balloting in which nominated candidates of all the parties appear on a single state printed ballot, in the nineteenth century each party constructed its own separate ballot.<sup>21</sup> The ballots were printed by the parties and handed out at polling stations or disseminated in newspapers.<sup>22</sup> Only candidates of that party, from president down to local offices, appeared on the ballot.<sup>23</sup> Moreover, voting was public.<sup>24</sup> Any interested observers, such as party operatives, could watch and monitor voters as they cast their party supplied ballot.<sup>25</sup> The ballots were also often produced in distinctive sizes and colors to help facilitate the monitoring of voters.<sup>26</sup>

In 1888, Massachusetts broke from the party balloting system and adopted what became known as the Australian secret ballot.<sup>27</sup> The new ballot consolidated all candidates onto a single ballot that was printed and distributed by the state.<sup>28</sup> Provisions also were made to allow for voters to cast a secret ballot.<sup>29</sup> Following the lead of Massachusetts, many other states quickly adopted the Australian ballot so that by 1900, most states had moved to some variant of the Australian ballot.<sup>30</sup>

Why did the strong machine-like parties of the nineteenth century willingly accede to a reform that weakened their grip over both candidates and voters? The most compelling reason is that by end of the nineteenth century, the party balloting system became increasingly difficult to manage.<sup>31</sup> The increasing urbanization of the country, coupled with massive waves of immigration, significantly increased the difficulty of state party organizations to oversee local party organizations and candidates.<sup>32</sup> Renegade local factions or candidates could use the porousness of the ballot to disrupt the candidacies

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<sup>20</sup>ERIK J. ENGSTROM & SAMUEL KERNELL, PARTY BALLOTS, REFORM, AND THE TRANSFORMATION OF AMERICA'S ELECTORAL SYSTEM 27, 30 (2014).

<sup>21</sup>RICHARD FRANKLIN BENSEL, THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY 14 (2004).

<sup>22</sup>*Id.* at 14–16.

<sup>23</sup>MARK WAHLGREN SUMMERS, PARTY GAMES: GETTING, KEEPING, AND USING POWER IN GILDED AGE POLITICS 240–41 (2004).

<sup>24</sup>See BENSEL, *supra* note 21, at 9–14 (explaining the lack of privacy at voting polls).

<sup>25</sup>See ENGSTROM & KERNELL, *supra* note 20, at 32 (stating that secret ballots removed voters “from the steady gaze and influence of party workers”).

<sup>26</sup>ALAN WARE, THE AMERICAN DIRECT PRIMARY: PARTY INSTITUTIONALIZATION AND TRANSFORMATION IN THE NORTH 34 (2002).

<sup>27</sup>Ware, *supra* note 13, at 9.

<sup>28</sup>See ELDON COBB EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES 28–29 (1917).

<sup>29</sup>See *id.* at 35.

<sup>30</sup>See L.E. FREDMAN, THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM 50–51, 95 (1968).

<sup>31</sup>ENGSTROM & KERNELL, *supra* note 20, at 185.

<sup>32</sup>*Id.* at 187, 193.

of the regular party organizations.<sup>33</sup> Because the system of printing ballots was so decentralized, state party organizations depended on the loyalty of local party workers to faithfully print and distribute ballots.<sup>34</sup> But local factions upset with the regular party organization might bolt and print up a separate ticket listing candidates of their faction.<sup>35</sup> Or renegade candidates, who failed to receive the nomination of the regular party organization, might distribute pasters that allowed the name of a party nominee to be covered up with a different name.<sup>36</sup> Parties attempted to prevent this kind of treachery but the difficulties of managing this decentralized system increased by the end of the nineteenth century.<sup>37</sup>

The Australian ballot offered a solution to these managerial problems. First, by delegating the printing of ballots to the state, party organizations could ensure that their nominated candidates appeared on the ballot.<sup>38</sup> The potential for bolting factions or candidates to sabotage the ballot quickly disappeared with a government produced and consolidated ballot. Second, the new ballot also off-loaded the costs of printing and distributing ballots to the government.<sup>39</sup> This allowed parties to reallocate party funds elsewhere.<sup>40</sup> Thus, rather than fully resisting reform, party leaders found a solution to a number of their electoral problems in ballot reform.<sup>41</sup>

While the shift to the Australian ballot has been carefully studied, less well known is that the first wave of ballot reform did not end the story—far from it.<sup>42</sup> After the initial reform, states continued to vary in the types of ballots they chose.<sup>43</sup> Some states adopted the party column ballot, which listed each party's candidates for each office in a column on the ballot (see Figure 1).<sup>44</sup> Other states chose the office bloc ballot format, which listed the candidates for each office on the ballot by office (see Figure 2).<sup>45</sup> Others provided a box at the top of the ballot allowing voters to simply cast a straight ticket with one check mark.<sup>46</sup> Moreover, states have varied considerably in how long they have stuck with one type of ballot.<sup>47</sup> As our data demonstrate, over the past century states have frequently tinkered with the ballot and continue to do so.

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<sup>33</sup> JOHN F. REYNOLDS, *THE DEMISE OF THE AMERICAN CONVENTION SYSTEM, 1880-1911*, at 126–28 (2006); Reynolds & McCormick, *supra* note 14, at 843–48.

<sup>34</sup> Reynolds & McCormick, *supra* note 14, at 843–44.

<sup>35</sup> BENSEL, *supra* note 21, at 15.

<sup>36</sup> Reynolds & McCormick, *supra* note 14, at 126.

<sup>37</sup> See BENSEL, *supra* note 21, at 17; SUMMERS, *supra* note 23, at 240.

<sup>38</sup> ENGSTROM & KERNELL, *supra* note 20, at 28.

<sup>39</sup> WARE, *supra* note 26, at 36–38.

<sup>40</sup> *Id.*

<sup>41</sup> See ENGSTROM & KERNELL, *supra* note 20, at 32; Ware, *supra* note 13, at 20–21.

<sup>42</sup> Ware, *supra* note 13, at 17–18.

<sup>43</sup> *Id.* at 17.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 21.

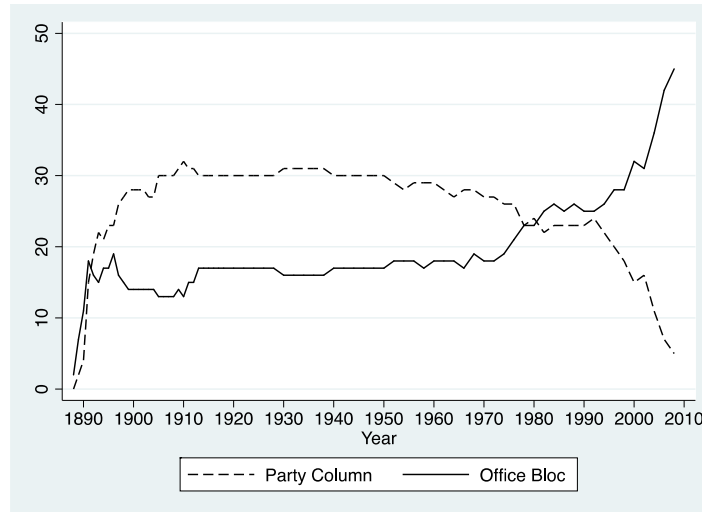
To explore the history of ballot law changes, we compiled a dataset of state ballot laws from 1888 through 2008. While data on the period between 1888 and 1940 has been readily available for decades, data on state ballot laws in the post-World War II era proved more difficult to collect. In the pre-war era, many secondary sources such as Albright and Ludington, contain these data.<sup>48</sup> In the post-war era, we were able to find data through the early 1950s from various issues of the *Book of the States*, but from approximately 1955 onward there are apparently no secondary sources that contain data on ballot laws. For the period after 1955, we relied on state statute books, historical newspapers, and interviews with selected Secretary of State offices.

This data collection effort has resulted in the first comprehensive dataset on ballot structure in American elections over the last 120 years. Hence, it is worthwhile at the outset to simply document some of the more interesting features of the data. We start by looking at over-time trends at the over-time distribution of party column and office bloc ballots in Figure 1. The first thing to note is that, for most of the period from the initial adoption of ballot reform (in the 1890s) to the mid-1960s, the majority of states opted for the party column format. Interestingly, however, the trend more recently has been toward the office bloc ballot. This trend became even more pronounced beginning in the early 2000s. (We suspect it was the product of the Help America Vote Act and the increasing use of electronic voting machines.)<sup>49</sup> Moreover, as noted in the introduction, since the 2000s a number of states have removed the straight ticket option from the ballot.

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<sup>48</sup> See generally SPENCER D. ALBRIGHT, *THE AMERICAN BALLOT* (1942) (summarizing ballot changes in the early twentieth century); Arthur C. Ludington, *American Ballot Laws, 1888-1910*, EDUC. DEP'T BULL., Feb. 1, 1911, at 5 (providing a survey of all American ballot laws from 1888 to 1910), reprinted in N.Y. STATE EDUC. DEP'T, 93RD ANNUAL REPORT ON THE NEW YORK STATE LIBRARY (1911).

<sup>49</sup> Help America Vote Act of 2002, 52 U.S.C. §§ 20901–21145 (Supp. II 2014).

Figure 1: *Ballot Type by Year, 1888–2008*

The aggregate data mask, to some degree, the extent of changes over time. Thus it is also interesting to look at the extent of ballot changes. Confining the analysis to just major changes in format from office bloc to party column or vice versa—there have been eighty total changes. The biggest cluster of changes came in the early years after the first adoption of the Australian ballot. Between 1888 and 1950 there were twenty-eight changes (and most of those happened before 1930). This initial period after ballot reform witnessed much switching between formats before things stabilized a bit. But even after 1950, although fewer per year, there were still a substantial number of changes. From 1950 to 2000 there were twenty-two changes. More recently, the period from 2000 until 2008 has seen a sea-change in ballot formats. Between 2000 and 2008 there were twenty overall changes in ballot formats, almost all towards the office bloc ballot. The most likely explanation for the large number of changes in the 2000s is the passage of the Help America Vote Act.<sup>50</sup> The difficulty of fitting a party column ballot onto a computer screen may have prompted states to switch to the office bloc. Nevertheless, as we will see in the study of North Carolina below, partisan interests continue to shape the direction of ballot format changes.

### III. THE ELECTORAL LOGIC OF BALLOT CHOICE

To examine whether parties might turn to ballot laws as a partisan tool, it is first critical to understand how ballot formats might influence election outcomes. Past research into ballot formats, while relatively sparse, has uncovered some critical consequences of ballot formats. Previous research

<sup>50</sup> See *id.*



demonstrates that the ballot form can and does affect split ticket voting, roll-off, and, ultimately, election outcomes.<sup>51</sup> Campbell and Miller, for example, demonstrated that weak party identifiers were strongly influenced by ballot type.<sup>52</sup> These voters are much more likely to vote a straight ticket when presented with a party column ballot and a straight ticket option for voting.<sup>53</sup>

In addition to split ticket voting, scholars have found a link between ballot formats and roll-off.<sup>54</sup> Walker notably demonstrated that the office bloc ballot has a strong effect on less educated and less partisan voters.<sup>55</sup> These voters tend to be less well informed about many of the choices on the ballot and hence are much more likely to not vote in these races, inducing ballot roll-off.<sup>56</sup> In contrast, the party column ballot organizes the ballot by party and thus encourages voters to weight party identification more heavily in their decision calculus thus producing less ballot roll-off.<sup>57</sup>

More recently, Engstrom and Kernell found that the initial adoption of the ballot reduced the impact of presidential coattails on congressional elections.<sup>58</sup> Moreover, the new ballot prompted less partisan redistricting, which also contributed to the weakening of presidential coattails.<sup>59</sup> In a similar vein, Carson and Roberts showed that the choice of ballot type can affect the observed incumbency advantage in the U.S. House.<sup>60</sup> Members running for reelection on an office bloc ballot are more able to deter quality candidates that emerge against them, and perform significantly better against all challenger types than do incumbents running on a party column ballot, all else equal.<sup>61</sup> This is likely due to the name recognition advantage enjoyed by incumbents over their challengers.<sup>62</sup>

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<sup>51</sup> Angus Campbell & Warren E. Miller, *The Motivational Basis of Straight and Split Ticket Voting*, 51 AM. POL. SCI. REV. 293, 311 (1957); Jack L. Walker, *Ballot Forms and Voter Fatigue: An Analysis of the Office Block and Party Column Ballots*, 10 MIDWEST J. POL. SCI. 448, 462–63 (1966); see also Jerrold G. Rusk, *The Effect of the Australian Ballot Reform on Split Ticket Voting: 1876–1908*, 64 AM. POL. SCI. REV. 1220, 1225–31 (1970).

<sup>52</sup> Campbell & Miller, *supra* note 51, at 311.

<sup>53</sup> *Id.*

<sup>54</sup> Walker, *supra* note 51, at 452.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 456–60.

<sup>57</sup> *Id.* at 462.

<sup>58</sup> See ENGSTROM & KERNELL, *supra* note 20, at 33; Erik J. Engstrom & Samuel Kernell, *Manufactured Responsiveness: The Impact of State Electoral Laws on Unified Party Control of the Presidency and House of Representatives, 1840–1940*, 49 AM. J. POL. SCI. 531, 539–65 (2005).

<sup>59</sup> Engstrom & Kernell, *supra* note 58, at 543.

<sup>60</sup> JAMIE L. CARSON & JASON M. ROBERTS, *AMBITION, COMPETITION, AND ELECTORAL REFORM: THE POLITICS OF CONGRESSIONAL ELECTIONS ACROSS TIME* 133 (Janet M. Box-Steffensmeier & David Canon eds., 2013).

<sup>61</sup> *Id.*

<sup>62</sup> Craig Baird, *Incumbency Can Be a Big Advantage in All Levels of Government*, REGINA LEADER-POST (Oct. 6, 2016), <http://leaderpost.com/news/local-news/incumbency-can-be-a-big-advantage-in-all-levels-of-government> [<https://perma.cc/WS9T-FAMP>].

In summary, there is ample reason to suspect that the office bloc leads to more roll-off, more split ticket voting, and a greater focus by voters on individual candidates. By contrast, the party column format reduces roll-off, mutes split ticket voting, and deemphasizes individual candidates. Similarly, the straight ticket option presumably adds a further dimension. Its presence should further reduce roll-off, split ticket voting, and candidate-centered voting.

From the perspective of parties writing ballot laws, these effects provide strong incentives to choose ballot formats depending on external, electoral conditions. Politicians wishing to insulate themselves from unfavorable national tides or an unpopular candidate at the head of the ticket should prefer the office bloc without a straight ticket option. By forcing voters to make candidate-by-candidate choices, and downplaying party labels, down-ballot candidates can more easily carve out local electoral niches. Conversely, down-ballot politicians wishing to link themselves with favorable national tides or a popular top of the ticket candidate should prefer the party column ballot and/or the straight ticket option.

The rest of this Article examines these expectations through a series of state level case studies and the empirical analysis of electoral data. We begin in the next Part with an examination of select ballot law battles in the early twentieth century.

#### IV. THE EARLY TWENTIETH CENTURY

##### A. *Maryland*

Maryland's initial Australian ballot law was passed in 1890 by a Democratic controlled legislature, albeit with reluctance.<sup>63</sup> The proponents of reform were a coalition of Republicans, Mugwumps,<sup>64</sup> and independent Democrats.<sup>65</sup> While the latter two groups were primarily interested in ridding the polls of corruption and vote buying, the Republican motivation was to break the grip of the Democratic machine on state politics.<sup>66</sup> Mounting public pressure for an Australian ballot law, and its successful deployment as campaign issue by the Republicans, convinced the Democratic organization to accede to reform in 1890.<sup>67</sup>

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<sup>63</sup> PETER H. ARGERSINGER, *STRUCTURE, PROCESS, AND PARTY: ESSAYS IN AMERICAN POLITICAL HISTORY* 130, 138 (1992).

<sup>64</sup> See *Mugwump*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/mugwump> [<https://perma.cc/5ANG-V59C>] (defining mugwump as "a bolter from the Republican party in 1884" or "a person who is [politically] independent . . . or who remains undecided or neutral").

<sup>65</sup> ARGERSINGER, *supra* note 63, at 141–42.

<sup>66</sup> *Id.* at 130–31.

<sup>67</sup> *Id.* at 122–38.

Democrats did not completely cave in to all of the demands of the reform movement however. In fact, the Democratic dominated legislature clearly bent the new law in a pro-Democratic direction.<sup>68</sup> Republicans had called for a “full Australian ballot”—by which they meant an office bloc layout without a straight ticket option—but the Democrats instead opted for a party column format.<sup>69</sup> One can see the partisan logic behind the Democrats’ preference for the party column. Throughout the 1880s, their statewide and presidential ticket outpolled Republicans, but not by large margins.<sup>70</sup> In this competitive environment, adopting a ballot format that might preserve the strong coattails of the old party strip ticket would help maintain Democratic majorities.

The Democrats reversed their position ten years later when, as part of a sweeping revision of the state electoral code, they switched the state to an office bloc format.<sup>71</sup> The motivation had clear partisan overtones. The Democrats had recently regained control of the state legislature in 1900 after losing it in the pro-Republican landslide of 1896.<sup>72</sup> Now back in power, the new Democratic majority publicly pledged a major overhaul of the state electoral rules.<sup>73</sup> Central to these reforms was a vow to change the ballot layout by scrapping the party column format.<sup>74</sup>

Lurking behind this change of heart was a not-so-hidden desire to disenfranchise poor whites and African-American voters.<sup>75</sup> The new office bloc format eliminated the party emblems at the top of the ballot, making it difficult for illiterate voters to discern how to vote a straight ticket.<sup>76</sup> Moreover, the new law required improperly marked ballots to be tossed out—of course having the biggest impact on illiterate voters.<sup>77</sup>

The ballot change further worked to the electoral benefit of Democrats by weakening the connection between national and state candidates. Republicans carried the state in the two previous presidential elections (1896 and 1900) and Democrats further down the ballot had suffered.<sup>78</sup> This point was made

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<sup>68</sup> *Id.* at 140.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 135.

<sup>71</sup> ARGERSINGER, *supra* note 63, at 140.

<sup>72</sup> GEORGE H. CALLCOTT, *MARYLAND POLITICAL BEHAVIOR: FOUR CENTURIES OF POLITICAL CULTURE* 51–53 (1986).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 51–52.

<sup>75</sup> *To Disenfranchise Negroes: Maryland Democrats Plan Legislation to that End—County School Boards May Be Ousted.*, N.Y. TIMES, Feb. 2, 1900, at 7 [hereinafter *To Disenfranchise Negroes*]; *Troubles in Store for Maryland Voters*, N.Y. TIMES, Oct. 6, 1901, at 11.

<sup>76</sup> *To Disenfranchise Negroes*, *supra* note 75, at 7.

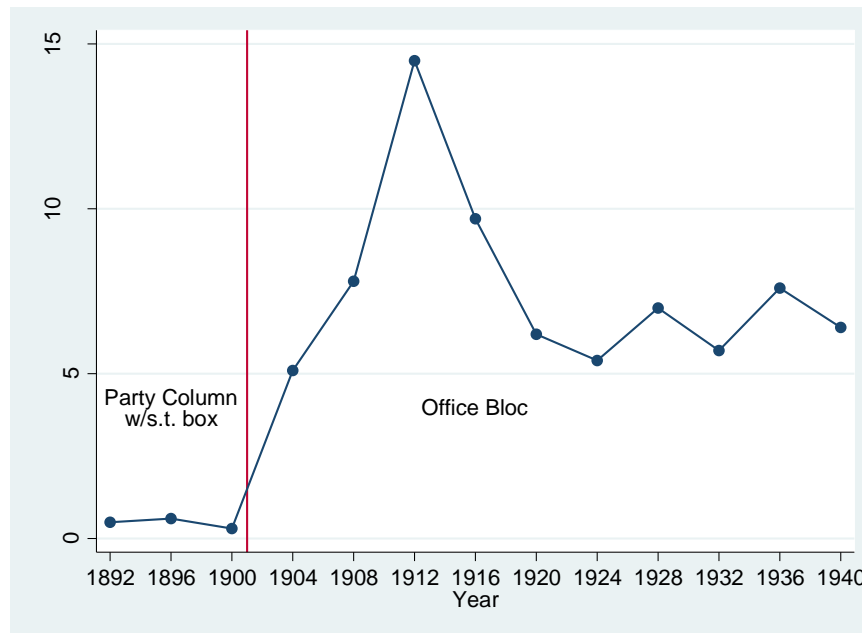
<sup>77</sup> *Id.*; *Troubles in Store for Maryland Voters*, *supra* note 75, at 11.

<sup>78</sup> See John Woolley & Gerhard Peters, *Election of 1896*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1896> [https://perma.cc/G59W-WPYT]; John Woolley & Gerhard Peters, *Election of 1900*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1900> [https://perma.cc/N6YY-2J3J].

evident during the 1900 campaign when the Democratic state boss Arthur Gorman complained about having to conduct consecutive campaigns burdened with William Jennings Bryan at the head of the ticket.<sup>79</sup> Bryan's strident emphasis on silver issues did not hold much interest or appeal for voters in urban Baltimore.<sup>80</sup> Gorman eventually supported the Democratic nominee, but Bryan's poor showing in the state, and his detrimental impact on down-ballot Democrats, prodded the Democrats to adopt a ballot format that would help detach the state ticket from burdensome presidential nominees.<sup>81</sup>

Figure 2 reveals that switching to the office bloc had the effect of increasing ballot roll-off for congressional candidates. The figure displays the percentage difference between total votes cast for presidential candidates and total votes cast for U.S. House candidates. As the figure shows, under the party column (with a straight ticket box), roll-off was negligible. The average roll-off between 1892 and 1900 was a miniscule 0.47%. Roll-off jumps sharply, and immediately, upon the switch to a pure office bloc format. From 1904 through 1940 roll-off averaged 7.54%.

Figure 2: *Ballot Roll-off in Maryland, 1892–1940*



<sup>79</sup> *Bryan Democrats in Maryland: Regulars Refuse to Put Nebraskan's Name on Primary Ticket*, N.Y. TIMES, May 18, 1900, at 7 [hereinafter *Bryan Democrats in Maryland*]; *Bryan Divides Democrats*, N.Y. TIMES, Jan. 20, 1900, at 1.

<sup>80</sup> *Bryan Democrats in Maryland*, *supra* note 79, at 7.

<sup>81</sup> *Gorman and Bryan: Ex-Senator Will Support the Silver Leader if Nominated, but Will Not Attend the Convention*, N.Y. TIMES, Apr. 9, 1900, at 1.

### B. New York

The initial adoption of Australian ballot reform generated bipartisan support in most states.<sup>82</sup> In New York, however, reform was a decidedly partisan affair.<sup>83</sup> Republicans in the state legislature pushed for ballot reform.<sup>84</sup> But the legislation was repeatedly vetoed by the Democratic Governor David Bennet Hill.<sup>85</sup> He vetoed an Australian ballot bill in 1888, 1889, and 1890.<sup>86</sup> Finally, in 1890, the Republicans passed a version of reform, but it was a very weak version of ballot reform.<sup>87</sup> Each party had its own separate ballot, albeit printed by the state.<sup>88</sup>

Republicans in the state legislature attempted again in 1894 to pass a stronger version of ballot reform, but this was again vetoed by the Democratic governor.<sup>89</sup> Following Republican victories in both the state legislative and gubernatorial elections of 1894, the Republicans finally were able to pass an Australian ballot bill.<sup>90</sup> The new ballot consolidated all offices onto a single, state printed ballot. This version of the ballot was organized in the party column format with a straight ticket option.<sup>91</sup>

The party column format remained in place until 1913 when the state switched to the office bloc format and removed the straight ticket option.<sup>92</sup> This time it was the Democratic Party leading the charge to change ballot formats.<sup>93</sup> The Democrats had lost their majority in the lower chamber during the 1913 November state assembly elections.<sup>94</sup> During a lame duck session before turning power over to the Republicans, the Democrats passed a bill providing for an office bloc ballot.<sup>95</sup>

Why were Democrats so interested in putting an office bloc ballot into place? Since 1892, no Democratic presidential candidate had received a

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<sup>82</sup> FREDMAN, *supra* note 30, at 51–52.

<sup>83</sup> *See id.* at 51–56.

<sup>84</sup> *Id.*; WARE, *supra* note 26, at 38; JOHN H. WIGMORE, *THE AUSTRALIAN BALLOT SYSTEM AS EMBODIED IN THE LEGISLATION OF VARIOUS COUNTRIES* 25–27 (2d ed. 1889).

<sup>85</sup> Reynolds & McCormick, *supra* note 14, at 852 n.35.

<sup>86</sup> *Id.*

<sup>87</sup> *See* EVANS, *supra* note 28, at 24; Ware, *supra* note 13, at 18.

<sup>88</sup> Ware, *supra* note 13, at 18.

<sup>89</sup> EVANS, *supra* note 28, at 24.

<sup>90</sup> FREDMAN, *supra* note 30, at 52–53. The bill was signed into law in 1895. *Id.* at 52.

<sup>91</sup> *Id.* at 51–52.

<sup>92</sup> Ware, *supra* note 13, at 18.

<sup>93</sup> *Glynn in Message Asks Radical Laws: Unlimited Direct Primary, Massachusetts Ballot, and Liberal Workmen's Compensation.*, N.Y. TIMES, Dec. 9, 1913, at 2.

<sup>94</sup> Walter Dean Burnham, *Partisan Division of State Governments, 1834-1985* (ICPSR 16), ICPSR, <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/16> [https://perma.cc/F8S5-YY9H] (originally released May 3, 1984).

<sup>95</sup> *How Reform Ballot Will Be Made Up: Massachusetts Type Followed in New Form to Be Used in This State.*, N.Y. TIMES, Dec. 26, 1913, at 8.

majority in New York.<sup>96</sup> Although the Democratic candidate, Woodrow Wilson, won the state's electoral votes in 1912, this was largely due to the split within the Republican Party.<sup>97</sup> So, looking forward New York Democrats had good reason to suspect the presidential election would be problematic. A switch to the office bloc ballot offered the possibility of insulating down-ballot Democrats from these adverse national forces.

Figure 3: *Ballot Roll-off in New York, 1896–1940*

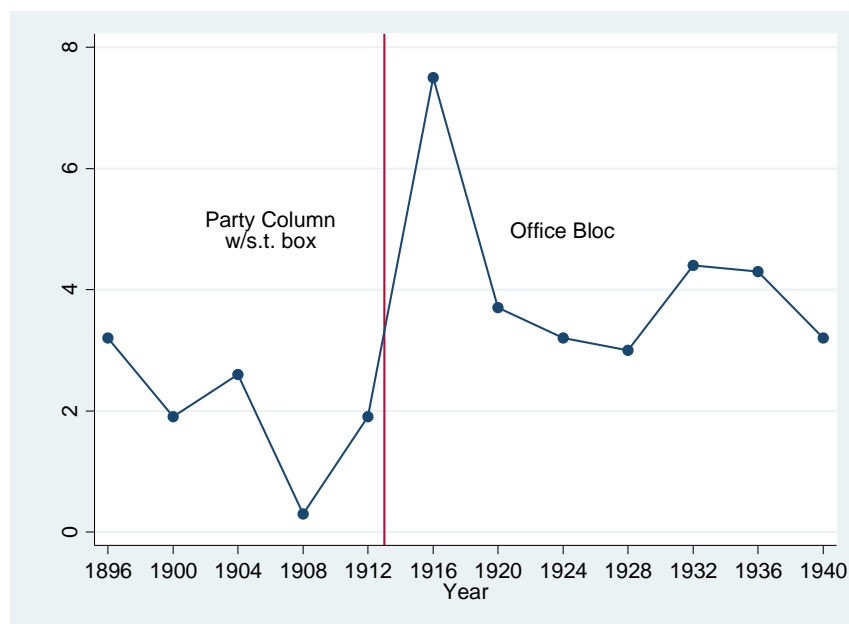


Figure 3 displays the consequences. The figure shows roll-off percentages before and after the switch to the office bloc. Similar to the pattern in Maryland, roll-off jumped sharply with the removal of the party column plus straight ticket format. Roll-off from 1896 to 1912 averaged 1.98%. After the switch to the office bloc, roll-off more than doubled to an average of 4.18% (from 1916 through 1940).

#### V. THE IMPACT OF BALLOT FORMATS ON ROLL-OFF, 1880 TO 1940

The case studies point to a compelling partisan logic behind changes in ballot formats. We can push the analysis further by using the rich variation in

<sup>96</sup> JERROLD G. RUSK, *A STATISTICAL HISTORY OF THE AMERICAN ELECTORATE* 157–59 (2001).

<sup>97</sup> *1912 Presidential General Election Results*, DAVE LEIP'S ATLAS U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/national.php?year=1912> [<https://perma.cc/8ZJZ-2LPU>].

ballot formats across states and time during this period. To do this, we examined the impact of ballot formats on roll-off for all of the states between 1880 and 1940. This time frame captures the transitional era to the Australian ballot. It also captures the period in which states were frequently altering their ballot formats after the initial adoption of the Australian ballot.

The dependent variable is voting roll-off between statewide presidential and congressional turnout. This is measured simply as the difference in turnout within a state among eligible voters for the President and the U.S. House.<sup>98</sup> The key independent variables are the format of the ballot. The four types of ballots included are: party column with a straight ticket option, office bloc with a straight ticket option, party column without a straight ticket option, and office bloc without a straight ticket option. The excluded, baseline, format is the party strip ballot that was present before Australian ballot reform. The model includes fixed effects for both states and years. The state fixed effects control for time-invariant characteristics of states that may influence ballot roll-off. The year fixed effects control for any election specific variation in ballot roll-off. The model also includes a linear time trend to adjust for the possibility of an independent over time increase in ballot roll-off. The model also controls for statewide competition—measured as the difference in vote share between the Democratic and Republican presidential candidates—and a dummy variable denoting the year when a state provided for female suffrage. The data on turnout, electoral competition, and suffrage come from Rusk.<sup>99</sup> The standard errors are clustered by state.

The differential impact of ballot formats is shown in Table 1. The office bloc ballot without a straight ticket option had the largest impact on roll-off. This format increased roll-off by 2.54%. But the party column minus a straight ticket also increased roll-off; under this format roll-off increased by 1.87%. The office bloc with a straight ticket option increased roll-off by a small amount—up 1.05%. But this difference was not statistically significant. The coefficient for the party column with a straight ticket was negligible and insignificant. The two most prominent ballot types were office bloc without a straight ticket (or pure office bloc) and party column with a straight ticket. Thus, the sharp differences between these two represent the most electorally consequential differences.

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<sup>98</sup> The data comes from RUSK, *supra* note 96, at 72–74, 97–100.

<sup>99</sup> *Id.* at 36, 72–74, 97–100, 130.

Table 1: *The Impact of Ballot Format on Roll-off, 1888–1940*<sup>100</sup>

Variable	Coefficient (Standard Error)
Office Bloc without Straight Ticket	2.54* (1.03)
Party Column without Straight Ticket	1.87* (0.66)
Office Bloc plus Straight Ticket	1.05 (0.82)
Party Column plus Straight Ticket	.40 (0.59)
Statewide Competition	0.004 (0.009)
Female Suffrage	-1.02 (1.15)
Trend	.05 (.03)
Number of Observations	612
Adjusted R-squared	.43

Given that congressional candidates typically appear near the top of the ballot, the numbers in Table 1 likely represent the lower bound of roll-off. Examining offices that appear further down the ballot (e.g., state legislators, attorney generals, lieutenant governors, etc.) would almost surely magnify the amount of roll-off when the straight ticket option is absent. For downballot politicians, notably state legislators, wanting to insulate themselves from the top of the ticket, the office bloc must have looked attractive.

## VI. BALLOT CHANGES IN THE MID-TWENTIETH CENTURY

### A. *Ohio*

Ohio passed Australian ballot reform in 1891.<sup>101</sup> They chose the party column format, which stayed in place throughout the first half of the twentieth century.<sup>102</sup> Ohio switched, however to the office bloc format in 1949.<sup>103</sup> The

<sup>100</sup> Robust standard errors, clustered by state, are in parentheses. A \* symbol indicates a p-value less than .05. State fixed effects and election year fixed effects were also included in the model but not reported.

<sup>101</sup> *Australian Ballot*, OHIO HIST. CENT., [http://www.ohiohistorycentral.org/w/Australian\\_Ballot](http://www.ohiohistorycentral.org/w/Australian_Ballot) [<https://perma.cc/F267-AFJQ>].

<sup>102</sup> See generally Ware, *supra* note 13 (discussing the implementation of the party column ballot).

<sup>103</sup> Roberts, *supra* note 19, at 1.



new format also removed party emblems from the ballot and eliminated the straight ticket option.<sup>104</sup> Unlike most other states that passed changes to the ballot via the legislature, the change in Ohio was the result of a referendum campaign to amend the state constitution.<sup>105</sup> The campaign to change the ballot was pushed by the Republican Party, and in particular, supporters of Robert A. Taft (R) who was running for reelection to his Senate seat.<sup>106</sup> The goal of these supporters was to minimize the impact of Democratic voters in urban areas.<sup>107</sup> These voters were likely to cast straight tickets for the Democrats, and so an office bloc ballot offered a way to partially boost the fortunes of Taft and other Republican statewide candidates.<sup>108</sup> Taft had narrowly won his Senate race in 1944, defeating his opponent by a razor thin 17,000 votes.<sup>109</sup>

The upcoming 1950 Senate election in Ohio coincided with the state's gubernatorial election.<sup>110</sup> In that election, the popular incumbent Democratic Governor Frank J. Lausche was running for a second term.<sup>111</sup> Supporters of Taft were therefore worried that the popular Lausche at the top of the ticket would pose problems for candidates down-ballot if the straight ticket provision remained in place. Evidence that Taft supporters saw ballot reform as integral to his reelection can be seen in the enormous sums spent on the referendum campaign. The supporters of Taft spent \$85,000 on the initiative campaign<sup>112</sup>—or \$859,453 in 2016 dollars.<sup>113</sup> Supporters of the ballot law campaign estimated that the change in ballot type would boost Taft's vote total by 100,000 votes out of the more than 3 million cast because voters would judge Taft and Lausche independently rather than casting a simple straight party ticket.<sup>114</sup>

In the 1950 election, and following the ballot change, Taft won his reelection with more than 400,000 votes.<sup>115</sup> What is telling about this victory are the outcomes in other offices around the state that year. The Democrat Lausche did indeed win the governor's race, and the Democrats also won the

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<sup>104</sup> See V.O. KEY, JR., *POLITICS, PARTIES, & PRESSURE GROUPS* 642, 644 (5th ed. 1964).

<sup>105</sup> *Id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See id.*

<sup>108</sup> *Id.* at 644.

<sup>109</sup> *Id.*

<sup>110</sup> KEY, *supra* note 104, at 644.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 642–43.

<sup>113</sup> See *Databases, Tables & Calculators by Subject: CPI Inflation Calculator*, BUREAU LAB. STAT., [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) [https://perma.cc/QA4D-HM6C].

<sup>114</sup> KEY, *supra* note 104, at 644.

<sup>115</sup> *See id.* (discussing the results of state office and legislature races in Ohio's 1950 election).

lieutenant governor's race.<sup>116</sup> Beyond that though, the Republican won every other statewide office and won substantial majorities in the state legislature.<sup>117</sup> Here, we can see the ballot format decoupling the top of the ticket from races falling further down on the ballot. From the perspective of Taft supporters, and down-ballot Republicans more generally, the money spent on the campaign to change the ballot format appears to have been a solid investment.

### B. *Other States*

In Connecticut, the battle centered on whether pulling a straight party lever would remain as a requirement for casting a ballot.<sup>118</sup> Traditionally, Connecticut voters had to pull a party lever then could “cut” individual offices if they wished to vote a split ticket.<sup>119</sup> As the Republican stranglehold on the state began to collapse in the 1960s, Connecticut legislatures sought to make the lever optional in hopes of insulating Republican candidates from national tides.<sup>120</sup> Often these changes can result in unintended consequences. Democrats in the North Carolina legislature—in an effort to insulate themselves from the popularity of Republican President Richard Nixon—changed their ballot laws so that voters who voted a straight party ticket had to then cast a separate ballot for president.<sup>121</sup> One undeniable result of this change has been a massive under-vote in presidential elections due to the fact that many fail to understand that voting a straight ticket does not register a vote for President.<sup>122</sup>

### C. *The Present: North Carolina*

As we noted in the introduction, the North Carolina General Assembly enacted comprehensive election law reform in 2013.<sup>123</sup> The law mandated a strict voter ID requirement beginning in 2016, ended straight ticket voting, reduced the early voting period, ended “one-stop” voting and registration, expanded absentee voting, and ended pre-registration for high school students.<sup>124</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Vote-Lever Issue Splits Hartford: Democrats Seek a Rider on Optional-Party Measure*, N.Y. TIMES, Apr. 11, 1965, at 96.

<sup>119</sup> *See generally id.*

<sup>120</sup> *Id.* at 96.

<sup>121</sup> Rob Christensen, *Problems Abound with N.C. Ballot*, NEWS & OBSERVER, Dec. 15, 2000, at A20.

<sup>122</sup> *Id.* In 2000 alone, more than 77,000 North Carolina voters failed to register a vote for President. *Id.*

<sup>123</sup> *See* Voter Verification Act, ch. 381, 2013 N.C. Sess. Laws 1505.

<sup>124</sup> *See id.*

Two key events presaged this development. First, in 2010 the Republican Party won majority control of both chambers of the North Carolina General Assembly for the first time since the late 1800s.<sup>125</sup> This was followed by the election of Republican Governor Pat McCrory in 2012.<sup>126</sup> Thus, the Republican Party entered 2013 with unified control of state government for the first time in more than a century.<sup>127</sup> Second, in June 2013 the U.S. Supreme Court struck down key features of the Voting Rights Act of 1965 in the landmark case *Shelby County v. Holder*.<sup>128</sup> The decision invalidated “preclearance” requirements that had applied to nine states and numerous counties and municipalities—including North Carolina.<sup>129</sup>

In addition, the Republican Party had every reason to believe that their grip on power was tenuous. Even after gaining full control over state government in 2012, the Republican Party still trailed the Democrats in registered voters by a margin of over 800,000 voters.<sup>130</sup> The 2008 and 2012 presidential contests in the state were won by razor thin margins with Barack Obama winning narrowly in 2008 and Mitt Romney claiming a narrow win in 2012.<sup>131</sup> Further, in U.S. House contests Democratic candidates gained more total votes than did Republicans, even though the Republicans won nine of the thirteen seats.<sup>132</sup> Thus, not only did North Carolina Republicans have a newfound opportunity to shape the state’s electoral practices, they also had

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<sup>125</sup> *Election 2010: North Carolina*, N.Y. TIMES, <http://elections.nytimes.com/2010/results/states/north-carolina> [<https://perma.cc/3TWF-UZB3>].

<sup>126</sup> *Election 2012: North Carolina*, N.Y. TIMES, <http://elections.nytimes.com/2012/results/states/north-carolina> [<https://perma.cc/UBF9-ABXP>].

<sup>127</sup> *See id.*; Louis Jacobsen, *The Year of Single Party Control and Supermajorities*, GOVERNING (Jan. 7, 2013), <http://www.governing.com/blogs/politics/gov-year-single-party-control-supermajorities.html> [<https://perma.cc/25SK-PH3R>].

<sup>128</sup> *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

<sup>129</sup> *Id.* Specifically, *Shelby County v. Holder* invalidated section 4(b) of the 1965 Voting Rights Act. *Id.* This provision contained the formula determining which jurisdictions were subject to preclearance before making changes to their electoral laws. *Id.* at 2619. By overruling section 4(b), states were freed from the preclearance requirement until the time Congress passes updated coverage standards. Unsurprisingly, Congress has yet to pass any new coverage formula.

<sup>130</sup> *NC Voter Statistics Results*, N.C. ST. BOARD ELECTIONS (Dec. 29, 2012), [http://enr.ncsbe.gov/voter\\_stats/results.aspx?date=12-29-2012](http://enr.ncsbe.gov/voter_stats/results.aspx?date=12-29-2012) [<https://perma.cc/Z8MA-F3CD>]. At the end of 2008, there were 2,870,500 registered Democrats, 2,005,482 Republicans, and 1,402,471 registered as unaffiliated. *NC Voter Statistics Results*, N.C. ST. BOARD ELECTIONS (Dec. 27, 2008), [http://enr.ncsbe.gov/voter\\_stats/results.aspx?date=12-27-2008](http://enr.ncsbe.gov/voter_stats/results.aspx?date=12-27-2008) [<https://perma.cc/P5YP-96X8>].

<sup>131</sup> *See Election Results 2008: North Carolina*, N.Y. TIMES (Dec. 9, 2008), <http://elections.nytimes.com/2008/results/states/north-carolina.html> [<https://perma.cc/6X8C-MZTE>]; *see also Election 2012: North Carolina*, *supra* note 126.

<sup>132</sup> Sam Wang, Opinion, *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 2, 2013), <http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html?pagewanted=all> [<https://perma.cc/V758-ECDF>].

every reason to believe that shaping election practices to enhance their vote share could be the key to holding power in the state.<sup>133</sup>

Almost all features of the North Carolina law seemed designed to suppress voter turnout particularly among younger residents and racial minorities—two groups that have been more likely to support Democrats in recent years.<sup>134</sup>

We cannot fully assess the North Carolina law as enacted, but we can begin to assess the effects of the elimination of straight ticket voting. As noted earlier, section 32.1 of H.B. 589 titled “Vote the Person Not the Party” eliminated the straight ticket provision that allowed voters to select all of a political party’s candidates by checking one box.<sup>135</sup> The 2014 election was the first one held in North Carolina without a straight ticket provision since North Carolina adopted the Australian or secret ballot in 1909.<sup>136</sup> Under the new provision, voters were required to mark the ballot for each race individually, even if they wished to vote for all of one party’s candidates.<sup>137</sup>

For many North Carolina voters this was a major change to election practice. In 2010, 1.1 million or 43.6% of North Carolina voters chose to mark a straight ticket.<sup>138</sup> In 2012, the numbers were even higher, with 2.55 million out of 4.47 million voters (57.2%) casting a ballot by choosing the straight ticket option.<sup>139</sup> As noted above, the political science research on straight ticket voting makes clear predictions about how the elimination of straight ticket voting could affect voting in North Carolina.<sup>140</sup> First, the elimination of the straight ticket or party box option can lead to more split ticket voting whereby voters choose candidates of different parties in partisan offices.<sup>141</sup> When voters go through the ballot office by office they may be more inclined to choose names that are familiar. Incumbent candidates typically have higher

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<sup>133</sup>Some Republican officials admitted that the law had partisan motivations. Buncombe County Republican Chairman Don Yelton had an infamous appearance on “The Daily Show” in which he admitted that the law would “kick Democrats in the butt.” Jose Delreal, *‘Daily Show’ Prompts Resignation*, POLITICO (Oct. 24, 2013), <http://www.politico.com/story/2013/10/nc-gop-official-resigns-after-interview-098822> [https://perma.cc/L8QS-YPQA].

<sup>134</sup>Cathleen Decker, *New Poll of Millennial Voters Shows Clear Shift Towards Democrats, Away from Trump*, L.A. TIMES (Apr. 25, 2016), <http://www.latimes.com/politics/la-na-millennial-poll-20160425-story.html> [https://perma.cc/29YU-RDKH]; *A Deep Dive into Party Affiliation*, PEW RES. CTR. (Apr. 7, 2015), <http://www.people-press.org/2015/04/07/a-deep-dive-into-party-affiliation/> [https://perma.cc/C4SX-JAMP].

<sup>135</sup>H.B. 589, 2013 Gen. Assemb., Reg. Sess. § 32.1 (N.C. 2013).

<sup>136</sup>See Dan Boylan, *End of Straight-Ticket Vote Could Mean More Incomplete Ballots*, CHARLOTTE OBSERVER (Aug. 15, 2016), <http://charlotteobserver.com/news/politics-government/election/article95746347.html> [https://perma.cc/6Y3T-XRGU].

<sup>137</sup>§ 32.1, 2013 N.C. Sess. Laws at 1547.

<sup>138</sup>Boylan, *supra* note 136.

<sup>139</sup>*Id.*

<sup>140</sup>See generally BARRY C. BURDEN & DAVID C. KIMBALL, *WHY AMERICANS SPLIT THEIR TICKETS: CAMPAIGNS, COMPETITION, AND DIVIDED GOVERNMENT* (2002).

<sup>141</sup>See generally *id.*

name recognition than nonincumbents so they tend to benefit from split ticket voting.<sup>142</sup> This was the impetus behind North Carolina changing its straight ticket practice before the 1972 election.<sup>143</sup> The Democratically controlled legislature sought to insulate itself from the candidacy of incumbent Republican President Richard M. Nixon.<sup>144</sup> The fear was that voters who came to the polls to vote for Nixon would vote a straight Republican ticket and endanger the Democratic majority.<sup>145</sup> Nixon did carry North Carolina with almost 70% of the vote and a Republican won the Senate and Governor election in 1972, but the Democratic Party maintained its control over the state legislature.<sup>146</sup>

Second, the elimination of straight ticket voting raises the costs of voting.<sup>147</sup> At a purely mechanical level, it takes more time to complete a ballot when a voter must make a selection in each partisan race.<sup>148</sup> It is also more difficult for the voter to complete the ballot correctly.<sup>149</sup> This can produce more voided ballots and more ballot roll-offs.<sup>150</sup> Long ballots that lack a straight ticket option tend to induce voter fatigue as voters struggle to wade through the ballot.<sup>151</sup> Fatigued voters often turn in their ballots before they have marked choices for all races and ballot questions, producing an under-vote in offices that are placed lower on the ballot.<sup>152</sup> Previous research on ballot roll-off finds that voters with lower levels of education and less experience voting are most likely to submit incomplete ballots.<sup>153</sup>

The prevalence of straight ticket voting varied considerably across North Carolina counties in the 2010 and 2012 election. In 2010, Dare and Graham counties were the only two counties in the state to have fewer than 20% of voters choose to cast a straight ticket.<sup>154</sup> In contrast, Edgecombe, Nash, Hertford, and Warren counties saw more than 60% of their voters choose to vote a straight ticket in 2010.<sup>155</sup> In 2012, Graham County again saw very few

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<sup>142</sup> See CARSON & ROBERTS, *supra* note 60, at 132–33.

<sup>143</sup> See Christensen, *supra* note 121, at A20.

<sup>144</sup> *Id.*

<sup>145</sup> See *id.*

<sup>146</sup> See generally *id.*

<sup>147</sup> See generally Walker, *supra* note 51.

<sup>148</sup> Liptak, *supra* note 10.

<sup>149</sup> Walker, *supra* note 51, at 456, 460.

<sup>150</sup> *Id.* at 460.

<sup>151</sup> *Id.* at 462.

<sup>152</sup> *Id.*

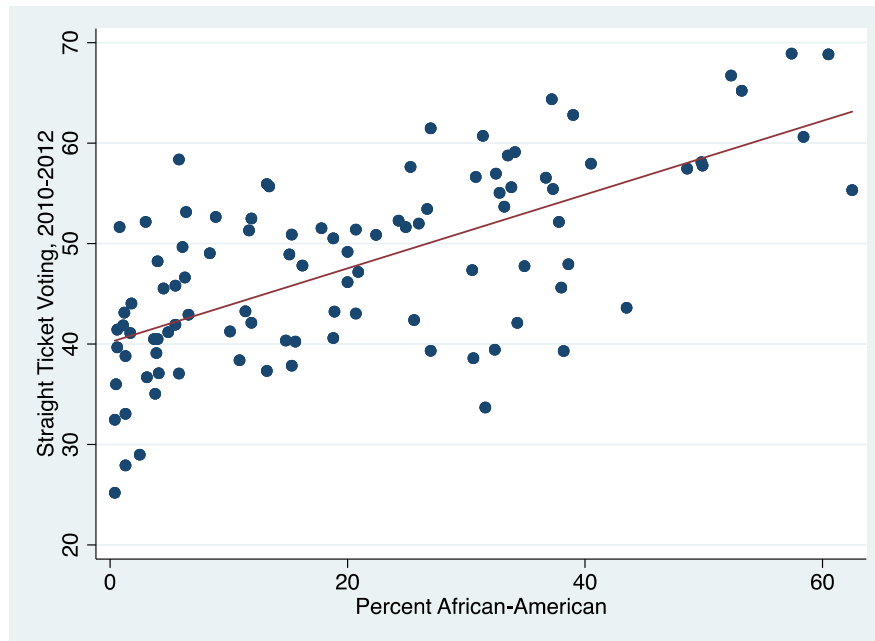
<sup>153</sup> *Id.* at 460–62.

<sup>154</sup> Data has been gathered from the North Carolina State Board of Elections website and analyzed to come to these conclusions. See *NCSBE ENRS Files*, N.C. ST. BOARD ELECTIONS, <http://dl.ncsbe.gov/index.html?prefix=ENRS/> [<https://perma.cc/8BNT-5DZA>].

<sup>155</sup> *Id.*

of its voters choose a straight ticket.<sup>156</sup> Graham and Alleghany counties were the only counties with fewer than 35% of voters choosing a straight ticket.<sup>157</sup> In contrast, a number of counties, including Edgecombe and Warren saw more than 70% of voters choose to cast a straight ticket.<sup>158</sup> As Figure 4 shows, there is a strong correlation between the percentage of the African-American population in the county and straight ticket voting.

Figure 4: *African-American Population and Straight Ticket Voting*



Further, Table 2 reveals that the most consistent predictors of usage of the straight ticket option in 2010 and 2012 were the size of the population and the proportion of the population that is African-American.

<sup>156</sup>It is worth noting that Graham County was one of the few counties in North Carolina not to have an under-vote for President in 2012. *Id.* This is not surprising given that the straight ticket did not apply to the presidential contest.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

Table 2: *Determinants of Straight Ticket Voting in 2010 and 2012*<sup>159</sup>

Variable	Coefficient (Standard Error)
Population of County in Thousands	0.01* (0.003)
Percent African-American	0.38* (0.037)
Percent Below Poverty Line	-0.14 (0.14)
2012 Election	15.66* (1.05)
Constant	33.47* (2.45)
Number of Cases	200
Adjusted R-squared	0.65

The 2014 election is not the ideal election to assess the effect of the elimination of straight ticket voting on roll-off. Most major statewide races were not on the ballot in 2014 so the partisan portion of the ballot was shorter than would be the case in a non-midterm election. However, the data does suggest a strong association between the ending of straight ticket voting and ballot roll-off in 2014. In 2010, the average level of roll-off in North Carolina counties was 11.55%, while in 2014 it was 17.79%.<sup>160</sup> In 2012, a presidential election year with a large number of statewide races, the roll-off rate was 16.33%.<sup>161</sup> We would expect to see much higher levels of roll-off in presidential years due to the longer ballot and more marginal voters turning out in those years. Given these factors, the more than 6% increase in roll-off from 2010 to 2014 is of potential concern going forward into 2016.

The increased difficulty in casting a ballot could lead many voters to leave the polling place without making a selection in all partisan races. Given the determinants of straight ticket voting, it could be that ballot roll-off will be higher in counties with larger populations and higher proportions of minority voters. In the past two presidential elections, more than 95% of African-American voters in North Carolina reported voting for the Democratic candidate, Barack Obama.<sup>162</sup> If this trend continues, Democratic candidates in

<sup>159</sup>The dependent variable is the percentage of voters choosing to use a straight ticket in the election. Cell entries are linear regression coefficients with robust standard errors in parentheses. \* =  $p < 0.05$ . Data on straight ticket voting are taken from the North Carolina State Board of Election FTP server, and demographic data are taken from the U.S. Census Bureau.

<sup>160</sup>See *NCSBE ENRS Files*, *supra* note 154.

<sup>161</sup>*Id.*

<sup>162</sup>*Election Results 2008: North Carolina: Exit Polls*, N.Y. TIMES (Dec. 9, 2008), <http://elections.nytimes.com/2008/results/states/exitpolls/north-carolina.html> [<https://perma.cc/>]

down-ballot partisan races could see fewer votes cast for them than would have been cast if straight ticket voting was still an option for North Carolina voters.<sup>163</sup>

A third potential effect of the elimination of straight ticket voting is that lines at polling places could be considerably longer than they were in past elections. The act of making a selection for each office takes considerably more time than marking a straight ticket. In precincts and counties where a high proportion of voters previously voted a straight ticket, waiting times and lines at polling places could be longer. Following the 2014 election, the North Carolina State Board of Elections conducted a survey of election officials in each North Carolina county to assess the extent of long wait times both during the early voting period and on Election Day 2014.<sup>164</sup> Table 3 below reports the results from this survey.

Table 3: *Wait Times in the 2014 North Carolina Election*<sup>165</sup>

Voting Time	Wait Time < 30 Minutes	Wait Time 30-60 Minutes	Wait Time > 60 Minutes
Early Voting	68	21	11
Election Day	69	20	11

The State Board of Elections paints this data in a positive light, noting that, in the majority of counties, there was never a wait of more than thirty minutes on Election Day or during the early voting period.<sup>166</sup> This is certainly true, but it treats all one hundred North Carolina counties equally, which ignores the variance in the number of people/voters living in each county. As Table 4 demonstrates, the counties with the longest reported waits were the counties with the largest population. Table 4 shows the average size of a county reporting a wait time of over an hour for early voting is almost 300,000, which is almost six times the size of the average county reporting wait times of less than thirty minutes. Five of the six largest counties in North

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6TVE-DRHT]; *Election 2012: Presidential Exit Polls*, N.Y. TIMES, <http://elections.nytimes.com/2012/results/president/exit-polls> [https://perma.cc/L2C6-FJ6G].

<sup>163</sup>The correlation between the percentage of African-Americans living in a county and the percentage of registered voters who are Democrats in the county is 0.88. Either variable works to predict straight ticket voting in Table 2. *See supra* Table 2.

<sup>164</sup>*See* N.C. STATE BD. OF ELECTIONS, NOVEMBER 2014: STATE BOARD OF ELECTIONS ANALYSIS OF VOTER WAIT TIMES (Mar. 2015) (available on the North Carolina State Board of Elections FTP server).

<sup>165</sup>Cell entries are the number of counties in each category. *Id.*

<sup>166</sup>*Id.* at 9 (“The 2014 midterm General Election in North Carolina was a success. Out of over 3,000 polling places, a small minority experienced issues causing voters to wait an hour or more to cast their ballots.”).



Carolina reported wait times of greater than one hour on either Election Day or during the early voting period.<sup>167</sup>

Table 4: *Wait Times in the 2014 North Carolina Election by Size of County*<sup>168</sup>

Voting Time	Wait Time < 30 Minutes	Wait Time 30–60 Minutes	Wait Time > 60 Minutes
Early Voting	50,642	104,793	298,760
Election Day	59,133	180,531	167,673

Is there a connection between previous straight ticket voting and 2014 wait times? The data suggest that there is an association. For the five counties that have both large populations and reported long wait times in 2014, the average percentage of voters choosing a straight ticket in 2010 and 2012 was 53.2%, compared to 46.3% in counties that did not report any wait times greater than thirty minutes.

Table 5 presents a more systematic analysis of wait times and straight ticket voting. The table reports results of two ordered probit models of reported wait times. The dependent variables are Election Day wait time and early voting wait time, coded 0 for less than thirty minutes, 1 for thirty to sixty minutes, and 2 for in excess of sixty minutes. The independent variables are population in thousands, percent of the population that is African-American, and the average percentage of voters casting a straight ticket in 2010 and 2012. In both models, the county population is positively related to increased wait times. In addition, Election Day wait times in 2014 are positively associated with the average percentage of straight ticket votes cast in 2010 and 2014. The data suggest there is a strong, positive association between population, straight ticket voting, and wait times in 2014. Looking ahead to 2016, these results suggest that long wait times could become a significant problem if the presidential and/or gubernatorial elections are as vigorously contested as is now expected. Voters in counties with large populations and a history of casting straight ticket ballots may encounter prohibitively long lines at polling places.

<sup>167</sup> *Id.* at 4. The six largest counties are Mecklenburg, Wake, Guilford, Forsyth, Cumberland, and Durham. *2014 Certified County Population Estimates—Ranked by Size*, N.C. BUDGET & MGMT, [https://ncosbm.s3.amazonaws.com/s3fs-public/demog/countygrowth\\_bysize\\_2014.html](https://ncosbm.s3.amazonaws.com/s3fs-public/demog/countygrowth_bysize_2014.html) [<https://perma.cc/T5KR-F388>] (last updated Oct. 8, 2015). Of these six counties, only Cumberland did not report a wait time of more than one hour. N.C. STATE BD. OF ELECTIONS, *supra* note 164, at 4.

<sup>168</sup> Data are taken from the N.C. STATE BD. OF ELECTIONS, *supra* note 164. Cell entries are the average population size of counties in each category. Population data are taken from the U.S. Census Bureau. *See also 2014 Certified County Population Estimates—Ranked by Size*, *supra* note 167.

Table 5: *Straight Ticket Voting and Wait Times in 2014*<sup>169</sup>

Variable	Early Voting Wait Time	Election Day Wait Time
Population in Thousands	0.009* (0.001)	0.002* (0.001)
Percent African-American	-0.005 (0.011)	-0.017 (0.011)
Avg. Straight Ticket Voting	0.006 (0.020)	0.051* (0.021)
Cutpoint 1	1.37 (0.83)	2.84 (0.88)
Cutpoint 2	2.43 (0.85)	3.68 (0.91)
Pseudo R-squared	0.22	0.09

## VII. DISCUSSION AND CONCLUSIONS

The data and case studies we present in this Article demonstrate that the pitched political battles we have recently seen in North Carolina and other states are not new features of American politics. Parties have contested the ballot since the onset of state printing and regulation of the form of the election ballot. Our analysis also reveals that, in almost all cases, the actors who advocate for changes to the form of the ballot pursue changes that are likely to strengthen their hold on political power.<sup>170</sup> We think these results present a number of normative and legal issues that are worthy of further exploration.

Normatively, allowing the dominant party in a state to alter election practices in ways that are conducive to keeping them in power runs afoul of democratic norms of political equality. The key feature of democratic governance is that the electorate is able to transfer its preferences to its representatives and translate those preferences into public policy.<sup>171</sup> Of course, we know that such an ideal is difficult, if not impossible, to achieve.<sup>172</sup> Nevertheless, allowing winning parties to manufacture electoral institutions potentially threatens democratic principles. One need only reflect on the history of the U.S. South before the Voting Rights Act to see how delegating

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<sup>169</sup>The dependent variables are wait times as collected in N.C. STATE BD. OF ELECTIONS, *supra* note 164. Cell entries are ordered probit coefficients with standard errors in parentheses. \* =  $p < 0.05$ .

<sup>170</sup>*See supra* notes 115–17 and accompanying text.

<sup>171</sup>*See* WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 239 (1982).

<sup>172</sup>*Id.*

responsibility for electoral laws to the states can produce incredibly harmful outcomes.<sup>173</sup>

The widespread variation in election ballot format creates a situation where citizens of different states face wide variance in the costs of voting. Long lines and long ballots combine to effectively disenfranchise citizens who do not have unlimited time to devote to the act of voting. One could certainly argue that differing provisions across states creates equal protection issues, however, the Time, Place and Manner Clause of Article I sanctions these differences as a key attribute of federalism.<sup>174</sup> Thus, it is questionable whether this would be a justiciable issue.

Congress, however, does clearly have the power to set national standards for federal elections, and this power has been exercised throughout history.<sup>175</sup> For instance, in 1842 Congress mandated single-member districts for all U.S. House elections.<sup>176</sup> In 1872 they established a uniform date for holding House elections.<sup>177</sup> A national standard for ballot formats in federal elections is appealing in many ways. It would limit the ability of state parties to lock in electoral gains and would minimize political inequality. It could also stave off ballot controversies like the one seen in Florida in 2000.<sup>178</sup> Yet, while Congress has the authority to establish a national standard, the question going forward is whether members of Congress have sufficient incentives to create such a standard.

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<sup>173</sup> See generally J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 182 (1974).

<sup>174</sup> U.S. CONST. art. I, § 4.

<sup>175</sup> See ERIK J. ENGSTROM, *PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY* 16 (2013).

<sup>176</sup> *Id.*

<sup>177</sup> See ENGSTROM & KERNELL, *supra* note 20, at 96–97.

<sup>178</sup> See generally EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 279–305 (2016); RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012).