

# THE STATE OF DEMOCRACY AFTER DISASTER: HOW TO MAINTAIN THE RIGHT TO VOTE FOR DISPLACED CITIZENS

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## I. INTRODUCTION

Virtually every region in the United States is vulnerable to natural disasters that have the capacity to displace significant portions of the population. A devastating earthquake on the West Coast is easy to imagine, as is a strong tornado in the Midwest, flooding and mudslides in the Pacific Northwest, and hurricanes, like Katrina and Rita, in the Gulf Coast. States that are subjected to these disasters should not be excused from their duty to administer elections that ensure all registered voters have an opportunity to participate. Voters should maintain the right to vote in their home elections regardless of where they have been involuntarily displaced, as long as they ultimately intend to return to their home.

The right to vote is considered one of the most fundamental rights afforded American citizens and warrants strict constitutional protection.<sup>1</sup> Every citizen has “a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”<sup>2</sup> But for their involuntary displaced status, displaced citizens would vote in the elections of their home districts. They are bona fide residents of their home districts because they ultimately intend to return and live there indefinitely. Thus, they have the “right to an equal opportunity for political

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<sup>1</sup> See *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965); *Reynolds v. Sims*, 377 U.S. 533, 554, 562 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>2</sup> *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (citing *Evans v. Cornman*, 398 U.S. 419, 421–22 (1970)). *Accord*. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966); *Carrington v. Rash*, 380 U.S. 89, 93–94 (1965).

representation.”<sup>3</sup> However, the question of how states can ensure a displaced person’s right to vote is up for debate.

Some might say that voters should simply register in their new location during their displacement because states should not be forced to undergo the time and expense of trying to find these voters, who are scattered throughout the nation. The essence of this argument is that a state’s border represents the boundary of that state’s power and, by that logic, displaced people must register, vote, and operate within the state they occupy. Those particularly concerned about potential voter fraud could be appeased by such a plan.<sup>4</sup>

This Note will argue that states must ensure the accessibility of voting in their home district elections to involuntarily displaced citizens.<sup>5</sup> This is an issue of state citizenship. When voters are involuntarily displaced and intend to return home, their right to vote in their home districts must be preserved. If not, that segment of the electorate effectively will be disenfranchised, unable to participate in the political process of their home district. The face of the electorate will change, perhaps dramatically, and this can easily transform the composition of representative government at every level. Since representative government is one that is elected “for the people, by the people,” when a segment of “the people” is denied their right to participate in elections of their home districts due to their displaced status, democracy fails.<sup>6</sup> When displaced voters return home, they will be subjected to governance by officials for whom they were unable to vote for or against.

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<sup>3</sup> *Carrington*, 380 U.S. at 94. Any state-imposed limitation on this right must be narrowly tailored to the state interest and the state must demonstrate that there are no less restrictive means to achieve the same result. *See, e.g., Dunn*, 405 U.S. at 350–54.

<sup>4</sup> Opponents of proposals that might secure voting rights in these unique set of circumstances often tout concerns about alleged voter fraud as one reason why these proposals should not be implemented. However, actual, documented cases of in-person voter fraud, such as impersonation of dead voters or the casting of multiple ballots, are incredibly rare. For an in-depth analysis of this issue, see Lorraine C. Minnite, *The Politics of Voter Fraud*, PROJECTVOTE.ORG, available at [http://projectvote.org/fileadmin/ProjectVote/Publications/Politics\\_of\\_Voter\\_Fraud\\_Final.pdf](http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf) (last visited Mar. 14, 2007) (“Voter fraud is extremely rare. At the federal level, records show that only 24 people were convicted of or pleaded guilty to illegal voting between 2002 and 2005, an average of eight people a year. The available state-level evidence of voter fraud . . . is also negligible.”). Regarding absentee ballot voter fraud, there is a greater risk for fraud because the vote is not cast in a setting that is observed by election officials. *See* Caltech/MIT Voting Technology Project, *Voting: What Is, What Could Be* (July 2001), available at <http://www.vote.caltech.edu/2001report.htm> (last visited June 17, 2007) (“The prospect for coercion is increased with absentee voting.”). *See also* Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STANFORD L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=976701> (“There is widespread consensus among those who study voter fraud that the greatest potential for fraud—and certainly the most reported cases of such fraud—involve absentee ballots that are cast outside the presence of election officials.”). Despite the elevated risk with absentee voting systems, many states provide this method of voting for segments of voters and it is a logical extension of their existing policies to provide more voting options for a displaced electorate.

<sup>5</sup> Displaced voters are bona fide residents of their home districts and have a verifiable connection to the locality in which they vote. For information about an organization dedicated to this proposition, see Satellite Voting Solutions, available at <http://www.satellitevoting.com> (last visited Mar. 14, 2007). Its mission statement reads: “Every American should have the right to vote for an elected official in their registered voter location, regardless of their geographic location if displaced by natural disasters, family crisis, military assignments, or any act of God.”

<sup>6</sup> *See* THE LANGUAGE OF LIBERTY: THE POLITICAL SPEECHES AND WRITINGS OF ABRAHAM LINCOLN 786–87 (Joseph R. Fornieri ed., Regency Publishing, Inc.) (2003) (quoting the Gettysburg Address, delivered on Nov. 19, 1863, in its entirety).

Voting within one's home district when outside one's home state is not a foreign idea. In the United States, certain categories of displaced voters already enjoy special allowances. For example, military personnel called on active duty and students attending institutions of higher education outside of their home state are able to vote in their home district elections.<sup>7</sup> States must expand these special allowances to voters displaced because of natural disasters. Fundamentally, when states allow individuals to maintain their state citizenship when a resident is not physically residing there, the state has a duty to protect that person's right to vote in local elections. Further, states must determine the appropriate procedure for accommodating nonresident voters and write the procedure into law so that the right to vote will be preserved as fundamental for all Americans.

Although this debate is fundamental to the democratic process, few scholars have engaged it.<sup>8</sup> Following the attacks on the World Trade Center and the Pentagon on September 11, 2001, scholars spilled much ink on the question of the continuation of the national government following a devastating attack.<sup>9</sup> The debate focused on how to operate and repopulate the federal government following mass destruction, triggering discussion of presidential succession and whether to add state actors, such as governors, to the end of the list of presidential successors.<sup>10</sup> The scholarship addressed the continuity of the federal government, leaving the discussion of state-level preparedness unmentioned at worst, and an afterthought at best.<sup>11</sup> The debate centered on the right of Americans to an elected government, not the right to vote.

This Note broadens the discussion and argues that states must be proactive and draft legislation that will ensure that all registered voters, specifically those involuntarily displaced, can participate in local elections. Part II provides a case study of Hurricane Katrina and its effect on the

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<sup>7</sup> See, e.g., Ariz. Rev. Stat. Ann. §16-543 (2006); Colo. Rev. Stat. §1-8-103 (2006); Del. Code. Ann. tit. 16, §5524 (2006); Fla. Stat. Ann. §101.698 (West 2007); N.M. Stat. Ann. §1-6-5.3 (West 2007); Okla. Stat. Ann. tit. 26, §14-135 (West 2006); Idaho Code Ann. §34-201 (2006); 25 Pa. Stat. Ann. §3146.8 (West 2006); Wis. Stat. Ann. §6.22 (West 2006).

<sup>8</sup> The Harvard Law Review Association contemplated the issue of how to operate an election with a displaced electorate. See *Developments in the Law: Voting in a Time of Crisis*, 119 HARV. L. REV. 1176 (2006). It argued that there is a lack of state-level preparedness to operate elections in this context and touched on how Hurricane Katrina exposed this reality. *Id.* at 1177, 1182–83. It gave a case study of elections in Bosnia and Herzegovina following the war in the Balkans, and how elections officials confronted the logistical problems of running elections with an electorate spread throughout the region. Finally, the article suggested methods United States officials should employ in order to avoid the problems faced in Bosnia and Herzegovina. *Id.* at 1186–88. The article opened the door to further discussion of how to operate elections from a state-level perspective, following internal displacement of citizens.

<sup>9</sup> See, e.g. James C. Ho, *Ensuring the Continuity of Government in Times of Crisis: An Analysis of the Ongoing Debate in Congress*, 53 CATH. U. L. REV. 1049; Colloquy, *The Continuation of Government*, 53 CATH. U. L. REV. 1073 (2004); Howard M. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281 (2003); Paul Taylor, *Proposals to Prevent Discontinuity in Government and Preserve the Right to Elected Representation*, 54 SYRACUSE L. REV. 435 (2004); Norman J. Ornstein, *Unprepared—Why Inauguration Day is Dangerous*, THE NEW REPUBLIC, January 17, 2005, available at [www.continuityofgovernment.org](http://www.continuityofgovernment.org) (last visited Jan. 10, 2007). See generally <http://www.continuityofgovernment.org> for the developments of the Continuity of Government Commission.

<sup>10</sup> See, e.g., Wasserman, *supra* note 9.

<sup>11</sup> For additional arguments about the shortcomings of the discussion as it relates to state-level preparation, see *Developments in the Law, supra* note 8, at 1176, 1178–81.

administration of elections in Louisiana. This discussion demonstrates the dire need for states to craft nondiscriminatory election policies for nonresident voters before disaster strikes. Part III examines elections in South Africa, Iraq, and Mexico, as each catered to a nonresident electorate. Trends from those elections highlight the important need for inclusive electoral policies that effectively address the unique needs of displaced voters. Part IV evaluates the current American state election law to determine the level of electoral preparedness for dealing with nonresident voters. Part V proposes policy recommendations that will aid states in crafting electoral policy that facilitates displaced voter participation in a nondiscriminatory way. Part VI provides some conclusions.

## II. HURRICANE KATRINA'S EFFECT ON LOUISIANA ELECTIONS

On August 29, 2005, Hurricane Katrina hit landfall and wreaked havoc on the Gulf Coast.<sup>12</sup> Louisiana was hit particularly hard by the combination of the Hurricane and the failure of its outdated and insufficient levees<sup>13</sup> to withstand the increased pressure built up by the storm. “[A]pproximately two-thirds . . . of the flooding and half of the economic losses [could] be attributed to water flowing through breaches in floodwalls and levees.”<sup>14</sup> The storm caused over twenty billion dollars in damage,<sup>15</sup> and over 1400 Louisiana residents lost their lives because of the storm and subsequent flooding.<sup>16</sup>

Cities like New Orleans were particularly devastated by the storm. The New Orleans Parish lost approximately sixty percent of its population<sup>17</sup> and “between 27% - 48% of its voting population.”<sup>18</sup> New Orleans was a majority-minority city before the storm, with African-Americans constituting over sixty percent<sup>19</sup> of the city’s population and holding a strong Democratic majority vote.<sup>20</sup> New Orleans made up most of Louisiana’s only majority African-American district.<sup>21</sup> One-third of the African-Americans in the State House and four of the nine African-Americans in the State Senate came from New Orleans.<sup>22</sup> The African-American community in Louisiana bore the brunt of the storm’s

<sup>12</sup> For a timeline of the events leading up to and directly following Hurricane Katrina, see Think Progress, *Katrina Timeline*, available at <http://thinkprogress.org/katrina-timeline> (last visited Mar. 10, 2007).

<sup>13</sup> See U.S. Army Corps of Engineers, *Performance Evaluation of the New Orleans and Southeast Louisiana Hurricane Protection System* (June 2006), vol. 1 at 7, available at <https://ipet.wes.army.mil>.

<sup>14</sup> See *id.* at 5.

<sup>15</sup> See *id.* at 8.

<sup>16</sup> See, e.g., Michelle Hunter, *Deaths of Evacuees Push Toll to 1,577: Out-of-State Victims Mostly Elderly, Infirm*, *TIMES-PICAYUNE* (New Orleans), May 19, 2006, at 1; Louisiana Department of Health and Hospitals, *Reports of Missing and Deceased*, available at <http://www.dhh.louisiana.gov/offices/page.asp?ID=192&Detail=5248>.

<sup>17</sup> See U.S. Army Corps of Engineers, *supra* note 13, at 8.

<sup>18</sup> See Press Release, Advancement Project, *Louisiana State Officials Sued for Violation of the Voting Rights Act* (Feb. 9, 2006), available at [http://www.advancementproject.org/press\\_releases/2006/020906.html](http://www.advancementproject.org/press_releases/2006/020906.html).

<sup>19</sup> See United States Census Bureau, *Census 2000 Full-count Characteristics (SF1) (2000)*, available at <http://www.gnocdc.org/orleans/people.html>.

<sup>20</sup> See Fred Brown, *Disputed Elections in La.*, *DENV. POST*, Oct. 2, 2005, at E06.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

devastation because members of this population tended to live in higher concentrations than their white counterparts within the areas most affected by the storm.<sup>23</sup> Currently, New Orleans is projected to reach slightly over fifty percent of its pre-Katrina population by the summer of 2008.<sup>24</sup>

The situation facing Louisiana politicians was bleak. After dealing with the tragedy of the storm's aftermath, they had to determine how to craft electoral policy to accommodate voters now spread throughout the country. The stakes of drafting the legislation were very high. The strong Democratic trends of New Orleans would be impacted dramatically if the displaced voters from those locations no longer participated in their home district elections. Of the approximately 400,000 registered voters who fled the state, 300,000 were from New Orleans.<sup>25</sup> The population that constituted the Democratic stronghold scattered throughout all the fifty states.<sup>26</sup> If these voters were disenfranchised from participating in their home elections, the electorate would change significantly. The changed face of the Louisiana electorate would undoubtedly change the face of the representative government. Louisiana politics could follow the Republican trends of its neighboring states, like Mississippi. The concentrated Democratic power of New Orleans could give way to the strength of the Republican majority in the northern parishes of the state. If the displaced population was unable to vote in their home district elections, one of Hurricane Katrina's lasting effects would be the white-wash of Louisiana politics; the destroyed African-American Democratic stronghold left in its wake.<sup>27</sup>

#### A. ELECTORAL OVERHAUL RESPONSIVE TO HURRICANE KATRINA<sup>28</sup>

After the storm, Louisiana's Governor Kathleen Blanco postponed all remaining elections in 2005, as well as the primary and general elections slated for early 2006.<sup>29</sup> The Louisiana Secretary of State, Al Ater, had to grapple with how to administer the delayed elections and meet the needs of displaced voters. He devised the Initial Election Plan, which expanded absentee voting to displaced voters and proposed satellite polling locations

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<sup>23</sup> See, e.g., Tomas Alex Tizon & Doug Smith, *Evacuees of Hurricane Katrina Resettle Along a Racial Divide*, LOS ANGELES TIMES, Dec. 12, 2005, Main News, at 1.

<sup>24</sup> See Kevin McCarthy, *The Repopulation of New Orleans after Hurricane Katrina*, at xiii (2006), available at [http://www.rand.org/pubs/technical\\_reports/2006/RAND\\_TR369.pdf](http://www.rand.org/pubs/technical_reports/2006/RAND_TR369.pdf) (last visited Jan. 10, 2007).

<sup>25</sup> See Frank Donze & Ed Anderson, *February Elections Planned Amid Immense Challenges*, TIMES-PICAYUNE (New Orleans), Oct. 11, 2005, Metro, at 1.

<sup>26</sup> See Haya El Nasser & Paul Overberg, *Katrina Exodus Reaches All States*, USA TODAY, Sept. 29, 2005, at A1.

<sup>27</sup> In effect, white-washing the New Orleans vote would have the same effect on Louisiana politics overall, as New Orleans constitutes the majority of the state's only African-American-majority district. See Kristen Clarke-Avery & M. David Gelfand, *Voting Rights Challenges in Post-Katrina World: With Constituents Dispersed, and Voting Districts Underpopulated, How Should New Orleans Hold Elections?* (Oct. 11, 2005), [http://writ.news.findlaw.com/commentary/20051011\\_gelfand.html](http://writ.news.findlaw.com/commentary/20051011_gelfand.html).

<sup>28</sup> For a detailed accounting of the progress of the Louisiana Secretary of State and the State Legislature to draft the post-Katrina election policy, see Rea L. Holmes, *How Section 5 of the Voting Rights Act Failed Displaced New Orleans Voters*, 43 CAL. W. L. REV. 75 (2006).

<sup>29</sup> See La. Exec. Order KBB 2005-36 (Sept. 14, 2005), available at <http://www.gov.state.la.us/assets/docs/36DelayVoting-10-15-05&11-12-05.pdf>; La. Exec. Order KBB 2005-96 (Dec. 9, 2005), available at <http://www.gov.state.la.us/assets/docs/PDFs/EO%2096.pdf>.

within the state and beyond the state's borders; particularly, in Atlanta, Baton Rouge, and Houston, where high concentrations of evacuees were found.<sup>30</sup> The Secretary of State hoped to reach as many displaced voters as possible and said, "If there are five voters in Boise, Idaho, I want to find them."<sup>31</sup> However, shortly after Ater proposed his Initial Election Plan, he soon discovered the effort required to materialize his goal—time and significant monetary demands—eventually proved his plan to be out of the state's reach.<sup>32</sup>

Upon this recognition, the State Legislature struck provisions that allowed satellite voting outside the state. Specifically, the State Senate cited concerns that the provisions would "create legal problems stemming from any alleged disparate treatment at the satellite polling places, and pointed to the state's existing displaced voters plan as a [sufficient] solution."<sup>33</sup> Angie LaPlace, the Louisiana elections commissioner, cited an inability to guarantee against voter fraud as the primary concern.<sup>34</sup> She said the process of setting up and operating out-of-state satellite voting would take a lot of time, money, manpower, and resources that the State did not have at its disposal.<sup>35</sup>

Instead, the State Legislature approved ten in-state satellite voting locations.<sup>36</sup> Additionally, the ability to cast a ballot absentee was extended to a portion of displaced voters.<sup>37</sup> This exceptional portion included only voters who had registered to vote by mail between October 5, 2004 and September 24, 2005 and who were displaced by the Hurricane and submitted a Displaced Voter Affidavit. If a voter had never voted in-person in a prior election and had registered by mail after September 24, 2005, that voter was required to return to the state to cast her vote.<sup>38</sup>

## B. WALLACE LITIGATION

Public interest organizations filed a lawsuit as an immediate response to the instituted election plan.<sup>39</sup> Inter alia, they alleged a Section 2 violation of the Voting Rights Act,<sup>40</sup> arguing that the election plan created an undue

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<sup>30</sup> See Frank Donze & Ed Anderson, *supra* note 25, at 1.

<sup>31</sup> *See id.*

<sup>32</sup> See Wallace Plaintiff's Trial Br., No. 05-5519 (E.D. La.), fn 4 (Feb. 21, 2006), available at <http://www.naacpldf.org/issues.aspx?subcontext=64> (quoting Ater's deposition testimony from Feb. 16, 2006).

<sup>33</sup> David Shucosky, *Louisiana Senate Panel Nixes Satellite Voting Centers for Katrina Refugees*, JURIST, Mar. 30, 2006, available at <http://jurist.law.pitt.edu/paperchase/2006/03/louisiana-senate-panel-nixes-satellite.php>. The "existing displaced voters plan" referred to the plan discussed below, which allowed in-state satellite voting and absentee voting for displaced voters who completed a displaced voter affidavit and registered to vote either in-person or by mail prior to September 24, 2005.

<sup>34</sup> Telephone Interview with Angie LaPlace, Louisiana Elections Commissioner (Mar. 6, 2007).

<sup>35</sup> *Id.*

<sup>36</sup> See Tracy Clark-Flory, *Whitewashing the New Orleans Vote?*, SALON.COM, Apr. 15, 2006, available at [http://www.salon.com/news/feature/2006/04/15/neworleans\\_vote/?source=newsletter](http://www.salon.com/news/feature/2006/04/15/neworleans_vote/?source=newsletter).

<sup>37</sup> See La. R. S. 18:1303, 1307; Press Release, NAACP Legal Defense and Education Fund, *LDF Joins New Orleans Voting Case* (Feb. 20, 2006), available at <http://www.naacpldf.org/printable.aspx?article=775>.

<sup>38</sup> See La. R. S. 18:115.F(1). See also 18:1308.3.

<sup>39</sup> See Wallace Plaintiffs' Complaint, No. 05-5519 (E.D. La.) (Jan. 20, 2006).

<sup>40</sup> 42 U.S.C. § 1973.

hardship on displaced voters, who were predominantly African-American.<sup>41</sup> Particularly, they argued that the in-person voting requirement for first-time voters who registered by mail after September 24, 2005 constituted an impermissible burden on the right to vote.<sup>42</sup> The Plaintiffs contended that this requirement would affect nearly 14,000 voters.<sup>43</sup> In addition, they argued that not providing out-of-state satellite voting disparately impacted the predominantly African-American displaced population, who allegedly tended to vote absentee at lower rates than their white counterparts.<sup>44</sup>

The remedies sought included the following: (1) enjoining enforcement “of the first-time in-person voting requirement under [La.] R.S. 18:115.F(1) to mail registrants otherwise eligible to vote absentee by mail;” (2) enjoining Louisiana officials to prepare and implement, after court approval, an expedited “plan for extending the satellite voting program created by 2006 1<sup>st</sup> Extraordinary Session Senate Bill 22, by establishing out-of-state satellite voting centers in jurisdictions with substantial concentrations of evacuees;” and (3) enjoining Louisiana officials to “submit a final report and analysis of the Orleans Parish municipal elections experience within 30 days following certification of election results,” which would include a breakdown of voter turnout according to method of voting, the problems experienced by election officials, how many voters applied for absentee ballots, and how many were rejected, categorized by race.<sup>45</sup>

The case came to a close after all the claims were virtually dismissed by the presiding judge.<sup>46</sup> Based on evidence proffered by the state, Judge Ivan Lemelle believed the instituted election plan did not violate Section 2 of the Voting Rights Act. He believed that the plan would have no disparate impact on African-American displaced voters and highlighted the extraordinary efforts made by state officials to accommodate the displaced electorate. To reach this conclusion, he relied upon several pieces of

<sup>41</sup> See Wallace Plaintiffs’ Trial Br., *supra* note 32, at 8–9 (“[T]he population displaced from Orleans Parish by the hurricanes was heavily African-American; that the individuals and families who have been unable—because of their financial circumstances and the damage caused by the hurricanes, as well as the slow pace of governmental response in addressing threshold questions of rebuilding—to return, since August [2005], to their homes within the Parish is heavily African-American; and that the voting-age portion of that group is likewise disproportionately minority.” Further, “African-Americans will be disproportionately affected and disenfranchised by the existing bar to their voting absentee by mail ballots.”).

<sup>42</sup> See *id.* at 5 (“[T]he requirement to travel from Houston, Dallas, Atlanta, and other locations around the country to which they were dispersed by federal and state authorities in the wake of the hurricanes, in order to have the opportunity to vote, is a callous and unwarranted burden.”).

<sup>43</sup> See *id.* at 4.

<sup>44</sup> See *id.* at 14 (“Because the preponderance of these individuals are African-Americans, the state’s refusal even to allow the Legislature to consider out-of-state satellite voting, constitutes a violation of Section 2 of the Voting Rights Act.”).

<sup>45</sup> See *id.* at 18–20.

<sup>46</sup> Judge Lemelle’s disposal of the claims at issue in the Wallace Litigation was significant and garnered national attention. See, e.g., Nagin, *Landrieu Face Run-Off in New Orleans Election, Tens of Thousands of Displaced Residents Barred from Voting*, DEMOCRACYNOW.ORG, Apr. 24, 2005, <http://www.democracynow.org/article.pl?sid=06/04/24/1346212&mode=thread&tid=25>. In a letter from the Department of Justice to Representative John Conyers, the Department cites Judge Lemelle’s opinion to bolster its decision to pre-clear Louisiana’s new policy as complying with Section 5 of the Voting Rights Act. See Letter from William E. Moschella, Ass’t Att’y Gen., U.S. Dep’t of Justice, to John Conyers, Jr., Congressman, U.S. House of Reps. (Mar. 16, 2003), available at <http://electionlawblog.org/archives/new.orleans.conyers.letter.pdf>.

evidence, including a newspaper article that determined absentee voters returned ballots at rates substantially similar to registration percentages by race.<sup>47</sup>

### C. LESSONS LEARNED FROM HURRICANE KATRINA<sup>48</sup>

Regardless of whether the Wallace Plaintiffs should have prevailed in the litigation or not, Louisiana's electoral response to its displaced voters failed to be as inclusive as possible.<sup>49</sup> If time was an overriding concern, Governor Blanco should have postponed elections further to determine a better electoral strategy. After weighing concerns of voter fraud with the reality—that such concerns tend to be unfounded<sup>50</sup>—the State could have waived the in-person voting requirement for those displaced voters who registered to vote by mail after September 24, 2005. With increased time, the State could have budgeted for satellite voting in areas of displaced voter concentrations and set policy regarding how best to operate the polling locations. That strategy could have enfranchised all displaced voters by allowing those voters to choose whether to vote by casting an absentee ballot or voting at a satellite polling location. This would have ensured the fundamental right to vote of displaced voters and the policy would not run afoul to the Voting Rights Act, as it would have been deliberately inclusive of all displaced voters.

Ultimately, had Louisiana contemplated the likely scenario of a natural disaster forcing a significant portion of the electorate out of the city, county and state lines, the state could have saved itself from its backward policymaking after the fact, in the midst of litigation. States must take what happened in Louisiana's electoral reform process as a harsh lesson and pass legislation immediately that will address the needs of a displaced electorate, before another inevitable disaster occurs.

Hurricane Katrina highlighted the issue of the voting rights of displaced Americans. However, it is imperative to remember that such a

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<sup>47</sup> See Order and Reasons, Judge Lemelle, No. 05-5519 (E.D. La.) (Apr. 21, 2006) ("Current statistics support this Court's conclusion that there is no disparate impact. Current statistics show more than 20,000 voters have voted by absentee ballot or by early voting at a parish registrar's office." Brian Thevenot, *Officials Go All-Out to Safeguard Vote*, TIMES PICAYUNE, Apr. 21, 2006, at National p.1. "The racial breakdown of those voters—65 percent black, 32 percent white, and 3 percent other—closely mirrors the breakdown of registered voters citywide." *Id.*). Further supporting this conclusion, Judge Lemelle heard testimony from the Louisiana Secretary of State. Secretary Ater said to Salon.com, "With a 39 cent stamp and by doing it by mail, I don't know how much more accessible you can get . . . . No one has been left out of this process." See Tracy Clark-Flory, *supra* note 36 ("More than 17,000 requests for absentee ballots had been received by the Tuesday deadline, according to the Orleans Parish Registrar of Voters office. Of those requests, 70 to 75 percent have come from African-Americans, according to Ater[.]").

<sup>48</sup> As time marches on, the issues raised by Hurricane Katrina seem to fade from the national consciousness, as evidenced by President Bush failing to mention the enduring problems faced by Katrina victims during the State of the Union address on January 23, 2007. See White House Press Release, *President Bush Delivers State of the Union Address*, Jan. 23, 2007, available at <http://www.whitehouse.gov/news/releases/2007/01/20070123-2.html>. However, these issues grow increasingly more relevant and important, as they have not been addressed or ameliorated, which opens the door for history to repeat itself.

<sup>49</sup> Even if the Wallace Plaintiff's Section 2 claim was entirely baseless, which of course this Note does not suggest, this assertion would still be true.

<sup>50</sup> See, e.g., Minnite, *supra* note 4.

disaster could strike in another form in any area of the United States. Natural disasters do not discriminate along ethnic, economic, social, or political lines. State administration of elections that ensure all registered voters can participate is essentially an issue of federalism.

### III. INTERNATIONAL ELECTIONS WITH NONRESIDENT ELECTORATES

South Africa's national election of 1994, Iraq's national election of 2005, and Mexico's presidential election of 2006 provide vivid examples of the challenges of administering elections with targeted electoral remedies for nonresident voters.<sup>51</sup> In these instances, the nonresident voters were expatriates who left their home countries for reasons out of their control, whether political, social or economic. Most South African expatriates fled their homes due to political strife imposed by the apartheid system. The great majority of Iraqi expatriates left Iraq in order to escape the persecution of the Saddam Hussein regime. Large numbers of Mexican expatriates left their homes to flee dire poverty, arguably in part due to trade policies such as those imposed through the North American Free Trade Agreement.<sup>52</sup>

Concededly, these examples concern administering elections under circumstances unique and distinct from those that arise in the context in which persons are displaced following a natural disaster. However, these examples are valuable because they provide signposts for maneuvering elections when a large proportion of voters are outside their home districts. Additionally, they provide invaluable lessons for American state officials tasked with drafting election policy.

#### A. SOUTH AFRICA'S NATIONAL ELECTION OF 1994

From 1948 until 1994, an apartheid government ruled South Africa and created classes of citizenship with a sliding scale of rights based on race,<sup>53</sup> and members of different ethnicities were physically segregated into their

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<sup>51</sup> Beyond American precedent, the United States is bound by international law found in treaties to which it is a party, customary international law and general principles of law. See *Burdick*, 504 U.S. at 433; *Elrod*, 427 U.S. at 373; *Harman*, 380 U.S. at 537; *Reynolds*, 377 U.S. at 554, 562; George E. Edwards, *International Human Rights Law Violations Before, During and After Hurricane Katrina: an International Law Framework for Analysis*, 31 T. MARSHALL L. REV. 356, 359 (2006). Under international law binding on the United States, the right to political participation in representative government is clear. See, e.g. OCHA Guidelines, available at [http://www.reliefweb.int/ocha\\_ol/pub/idp\\_gp/idp.html](http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html) (last visited Oct. 20, 2006) (Principle 22 includes, "[t]he right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right . . ."); United States International Covenant on Civil and Political Rights, Sept. 8, 1982, art. 25(b), 999 U.N.T.S. 175, available at <http://www.ohchr.org/english/law/ccpr.htm>. However, it is necessary to move beyond the law in abstract and evaluate international examples of elections that address the unique needs of a nonresident electorate.

<sup>52</sup> See, e.g., Oxfam, *Dumping without Borders: How U.S. Agricultural Policies Are Destroying the Livelihoods of Mexican Corn Farmers* (2003), available at [http://www.oxfam.org/en/files/pp030827\\_corn\\_dumping.pdf](http://www.oxfam.org/en/files/pp030827_corn_dumping.pdf) (last visited Mar. 20, 2007).

<sup>53</sup> The system in place was analogous to the United States Black Codes; however, the South African system included "Indians" and "Coloreds" in addition to Black and White categories.

own communities.<sup>54</sup> After decades of resistance and violent struggle against the racist system, the white government fell to the will of the majority, led by Nelson Mandela, who was imprisoned for twenty-seven years for his outspoken position against the apartheid system as a leader of the African National Congress.<sup>55</sup> The South African national election of 1994 was a hallmark of democracy and drove the final stake in the heart of the apartheid system.<sup>56</sup>

As the nation's first democratic election espousing universal suffrage, the 1994 national election was deliberately inclusive.<sup>57</sup> The Independent Election Commission administered the election.<sup>58</sup> Any South African age eighteen or older with a valid form of identification, including a birth certificate, South African identity card, or marriage certificate, could vote.<sup>59</sup> Also, the vote was extended to expatriates living throughout the world who could vote by absentee ballot at designated international polling locations.<sup>60</sup>

In the United States alone, over 130,000 people were eligible to vote in the 1994 South African election.<sup>61</sup> The Independent Election Commission set up about twenty-four polling locations within the United States.<sup>62</sup> Polling locations were chosen depending on the number of expected voters in that region of the country. In New York, five thousand ballots were

<sup>54</sup> The physical segregation is analogous to the Indian Reservation system which is still present in the United States.

<sup>55</sup> For a detailed account of Mandela's struggle, see NELSON R. MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* (1994).

<sup>56</sup> The change of hands of political power did not occur without considerable resistance from those with a vested interest in the status quo. In fact, just before the election militants bombed the South Africa International Airport. See Francis X. Clines, *The South African Vote: The Overview; After 300 Years, Blacks Vote in South Africa*, NEW YORK TIMES, Apr. 27, 1994, at A1. The violence was directed at chilling minority voters from exercising their new right to political participation. However, Mandela believed the violence served as a motivation for participation rather than in deterring voters of color from exercising their political will. See *id.*

<sup>57</sup> See Bill Keller, *The South African Vote: The Elections; As All Go to the Polls: Who, How, Where, When*, NEW YORK TIMES, Apr. 25, 1994, at A7.

<sup>58</sup> For a detailed discussion of the decision of the South African government to utilize an independent organization for the election's administration, see Vijay Padmanabhan, *Democracy's Baby Blocks: South Africa's Electoral Commissions*, 77 N.Y.U. L. REV. 1157 (Oct. 2002).

<sup>59</sup> The election was organized by Judge Johann Kriegler of the Independent Election Commission within an incredibly short period of time: four months. See Keller, *supra* note 57, at A14; Jorgen Elklit & Andrew Reynolds, *The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Research Agenda*, Working Paper #281, available at

<http://www.nd.edu/~kellogg/publications/workingpapers/WPS/281.pdf>. Kriegler organized the Commission without the aid of voter registry rolls and without reliable census data. *Id.* This made determining appropriate polling locations and allocating a sufficient number of ballots for each location exceedingly difficult because there was no means to anticipate voter turnout at any given polling place. *Id.* Also compounding the challenge of administering the election was the decision that voters within South Africa could vote at any polling location within the country. *Id.* This policy was consistent with encouraging the breaking down of racial borders between townships and cities and encouraging members of all races to mingle in the democratic process. However, practically speaking, it increased the lack of predictability of the volume of voters at each polling location. To protect against voter fraud, officials decided to mark voter identification and voter fingertips with invisible ink that could be detected by shining ultraviolet light over it, thereby preventing multiple voting by eligible voters. *Id.*

<sup>60</sup> See Editorial, *Former South Africans May Also Vote Today*, NEW YORK TIMES, Apr. 26, 1994, at A22 (quoting the South Africa Electoral Act of 1994, "for the purposes of this section a person shall be deemed to be permanently resident in the Republic if such a person is former South African Citizen.").

<sup>61</sup> See Keller, *supra* note 57, at A7.

<sup>62</sup> See Michael Marriot, *The South African Vote: Expatriates; In New York, It's a Dream Come True*, NEW YORK TIMES, Apr. 27, 1994, at A9.

printed.<sup>63</sup> Chicago prepared for one thousand voters.<sup>64</sup> Individuals traveled from across the country to participate in the election, which was viewed as an international celebration of human rights.

The problems encountered by the election within South Africa's borders were numerous.<sup>65</sup> Beyond the struggles to administer the election within South Africa's borders was the practical challenge of accommodating the extension of the voting privilege to expatriates scattered throughout the world. Expatriates had to travel to satellite voting locations in order to cast their ballot.<sup>66</sup> Although polling locations were chosen based on anticipated South African expatriate population concentrations, many expatriates likely did not vote in the election due to the time and expense it would require to vote physically at a given polling location.

The 1994 South African national election taught some important lessons.<sup>67</sup> First, South African officials did not have sufficient time to craft a comprehensive electoral policy. Judge Johann Kriegler of the Independent Election Commission had only four months to plan the entire South African election.<sup>68</sup> This was insufficient in the face of administering an election with millions of in-country voters and hundreds of thousands of expatriate voters at satellite polling locations.

Next, when crafting electoral policy that intends to include voting by an international electorate, election officials have to choose polling locations carefully, in order to accommodate the areas with the densest populations of eligible voters. The in-person voting requirement likely made it impractical for many expatriates to vote in the election, primarily due to the expense voters would have had to incur to travel to a polling location, of which there were few scattered throughout the world. The election officials overlooked providing assistance to voters not found in these dense expatriate population concentrations. It appears they did not

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<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> Wait times for voters in line at polling locations extended beyond seven hours in some areas. See Francis X. Clines, *The South African Vote: The Scene; A Joyous Day of Lining up to Vote for Many, but Disappointment for Some*, NEW YORK TIMES, Apr. 28, 1994, at A14. Some voters did not have ballots which included all the candidates, such as the Inkatha Freedom Party in the Zulu Province. After eighty million ballots were already printed, the party decided to join the race, thereby causing a logistical nightmare for Kriegler. At first, stickers were used to add the party to existing ballots, but many of the stickers did not make it on the actual ballots. Kriegler then had to authorize voters to write in the name of the party if they wished to vote for it. See Keller, *supra* note 57, at A14. Voter turnout was so high at some polling locations, that election officials had to compromise the integrity of the ballot boxes by opening them and using larger bags to house returned ballots. See *id.* Further, ballots were counted at centralized locations but there was insufficient training given to officials who were to collect and deliver the ballots to the centers and then how to accurately tabulate and report ballot returns. See Elklit & Reynolds, *supra* note 59, at 26. There was also a late discovery that a computer hacker had accessed the vote counting system. *Id.* However, the security breach apparently did not have an effect on the voting tabulation. See *id.*

<sup>66</sup> See Marriot, *supra* note 62, at A9.

<sup>67</sup> Following the election and the numerous criticisms, Judge Kriegler believed it was more important that the South African people accept the election results than get caught up in whether the election was actually 'free and fair,' given the extreme circumstances within which the election had to be administered. See Keller, *The South African Vote: The Voting; Was the Election Fair? Voting Chief is Satisfied*, NEW YORK TIMES, May 3, 1994, at A14. In the end, all contestants accepted the final election results. See Elklit & Reynolds, *supra* note 59, at 26

<sup>68</sup> See Keller, *supra* note 67, at A14. See generally Elklit & Reynolds, *supra* note 58.

consider allowing expatriates to vote absentee if they could not travel to the satellite polling location. Opening up the election to expatriates by allowing absentee voting likely would have increased expatriate voting exponentially.

#### B. IRAQ'S NATIONAL ELECTION OF 2005

The United States military invaded Iraq on March 19, 2003,<sup>69</sup> based on the premise that Iraq's President Saddam Hussein held weapons of mass destruction in violation of United Nations sanctions and therefore posed an imminent threat to the security of the United States and its allies.<sup>70</sup> The invasion and subsequent occupation of Iraq by United States armed forces has been viewed internationally with little public support.<sup>71</sup> Many critics allege that the United States had no intention of freeing the Iraqi people from Saddam Hussein's rule, but instead was more interested in siphoning its oil supply to line the pockets of American corporations.<sup>72</sup> The January 30, 2005 election in Iraq was the first democratic election in the country following the United States invasion in 2003.<sup>73</sup> The elections became a symbol of democracy finally thriving in the war-torn country. The soundness of the election could potentially redeem the United States in the eyes of the international community.

The supervisor of the Independent Electoral Commission of Iraq, Adel al-Lami, was charged with the task of putting on an election in a country still riddled with the violence of war.<sup>74</sup> Al-Lami created a broad, inclusive

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<sup>69</sup> See Press Release, The White House, President Bush Addresses the Nation (Mar. 19, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html>.

<sup>70</sup> See *id.*

<sup>71</sup> Millions of protesters marched for peace and to protest the invasion and occupation of Iraq. See, e.g., Patrick Martin, *Worldwide Protests Against US Invasion of Iraq: Millions Take to the Streets*, WSWS.ORG, Mar. 21, 2003, available at <http://www.wsws.org/articles/2003/mar2003/prot-m21.shtml>.

<sup>72</sup> See, e.g., AMY GOODMAN & DAVID GOODMAN, *THE EXCEPTION TO THE RULERS: EXPOSING OILY POLITICIANS, WAR PROFITEERS, AND THE MEDIA THAT LOVES THEM* (2004); AMY GOODMAN & DAVID GOODMAN, *STATIC: GOVERNMENT LIARS, MEDIA CHEERLEADERS, AND THE PEOPLE WHO FIGHT BACK* (2006).

<sup>73</sup> See generally Tony Karon, *Making Sense of Iraq's Vote*, TIME MAGAZINE, Jan. 31, 2005.

<sup>74</sup> See Edward Wong, *Reach of War: The Election; Iraqi Officials to Allow Vote by Expatriates*, NEW YORK TIMES, Nov. 5, 2004, at A1. For a provocative account of the Iraqi in-country voting experience, see an account of Riverbend, a female blogger from Iraq at [http://www.riverbendblog.blogspot.com/2005\\_01\\_01\\_riverbendblog\\_archive.html](http://www.riverbendblog.blogspot.com/2005_01_01_riverbendblog_archive.html) (Jan. 2, 2005). In pertinent part, she wrote:

There are several problems. The first is the fact that, technically, we don't know the candidates. We know the principal heads of the lists but we don't know who exactly will be running. It really is confusing. They aren't making the lists public because they are afraid the candidates will be assassinated.

Another problem is the selling of ballots. We're getting our ballots through the people who give out the food rations in the varying areas. The whole family is registered with this person(s) and the ages of the varying family members are known. Many, many, many people are not going to vote. Some of those people are selling their voting cards for up to \$400. The word on the street is that these ballots are being bought by people coming in from Iran. They will purchase the ballots, make false IDs (which is ridiculously easy these days) and vote for SCIRI or Daawa candidates. Sunnis are receiving their ballots although they don't intend to vote, just so that they won't be sold.

Yet another issue is the fact that on all the voting cards, the gender of the voter, regardless of sex, is labeled "male." Now, call me insane, but I found this slightly disturbing. Why was that done? Was it some sort of a mistake? Why is the sex on the card anyway? What difference does it make? There are some theories about this. Some are saying that many of the more religiously inclined families won't want their womenfolk voting so it might be

electoral strategy. Over objections by the United States and the United Nations,<sup>75</sup> he opened up voting to expatriates in other countries, so long as they were at least eighteen years of age and could prove that they or their father had been born in Iraq.<sup>76</sup>

Anywhere from two to four million Iraqis were anticipated to be living abroad,<sup>77</sup> of which at least one million were eligible voters.<sup>78</sup> Collectively, these displaced voters could constitute up to fifteen percent of the entire Iraqi electorate.<sup>79</sup> In the United States, it was projected that two hundred forty thousand voters would participate in the absentee election<sup>80</sup> out of the three hundred sixty thousand Iraqis within the country.<sup>81</sup> To accommodate this population, a total of five voting centers were planned for Chicago, Detroit, Los Angeles, Nashville, and Washington, D.C.<sup>82</sup>

The expatriate community had identifiable political affiliations. Iraqi Shiites and Kurds were in the majority of those who fled from Saddam Hussein's rule.<sup>83</sup> A strong demonstration by expatriates could have had the effect of securing a Shiite or Kurdish majority in the Iraqi national assembly.

The procedural rules put in place by Iraqi electoral authorities required two appearances by each expatriate voter.<sup>84</sup> First, the voter had to appear at the polling location to register between January 17, 2005 and January 23, 2005.<sup>85</sup> "[R]egistration occurred at 75 centers in 36 cities in 14 countries outside Iraq."<sup>86</sup> The voter then had to return to the same location between January 28, 2005 and January 30, 2005 to actually cast her vote.<sup>87</sup> After voting, the voters' fingers were marked with ink in order to prevent voter fraud.<sup>88</sup>

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permissible for the head of the family to take the women's ID and her ballot and do the voting for her. Another theory is that this 'mistake' will make things easier for people making fake IDs to vote in place of females.

<sup>75</sup> The United States and United Nations agreed that expanding the electorate would make the election vulnerable to more irregularities and opportunities for fraud, which would undermine the process.

<sup>76</sup> See Wong, *supra* note 74, at A1. The Electoral Commission was given a budget of \$92 million for its operations. See Edward Wong & Katherine Zoepf, *The Conflict in Iraq: Elections; The Last-Minute Scramble to Help Iraqis Abroad Vote*, NEW YORK TIMES, Jan. 17, 2005, at A8. Peter Erben, director of the International Organization for Migration, helped direct the expatriate component of the election. *Id.* He managed a team of 7000 workers and had less than two months to organize the voting process and reach out to the Iraqi diaspora. *Id.*

<sup>77</sup> The highest concentrations of Iraqis were in England, the United States and Iran. See Wong, *supra* note 74, at A1.

<sup>78</sup> See Caryle Murphy, *Obstacles Plague Absentee Voting For Iraqis in U.S.*, WASH. POST, Jan. 10, 2005, at A01.

<sup>79</sup> See Wong, *supra* note 74, at A1.

<sup>80</sup> See Murphy, *supra* note 78, at A01; Jodi Wilgoren, *The Reach of War: Overseas; For Iraqi Expatriates, a Chance to Savor the Vote*, N.Y. TIMES, Jan. 29, 2005, at A1.

<sup>81</sup> See Murphy, *supra* note 78, at A01.

<sup>82</sup> See *id.*

<sup>83</sup> See Wong & Zoepf, *supra* note 76, at A8.

<sup>84</sup> See Murphy, *supra* note 78, at A01; *Online NewsHour: Iraqi-Americans Prepare to Vote in Elections*, Jan. 27, 2005, available at [http://www.pbs.org/newshour/bb/middle\\_east/jan-june05/iraq\\_1-27.html](http://www.pbs.org/newshour/bb/middle_east/jan-june05/iraq_1-27.html) [hereinafter *Online NewsHour*].

<sup>85</sup> See *id.*

<sup>86</sup> See Wong & Zoepf, *supra* note 76, at A8.

<sup>87</sup> See Murphy, *supra* note 78, at A01; *Online NewsHour*, *supra* note 84.

<sup>88</sup> See Murphy, *supra* note 78, at A01.

Worldwide, around twenty-three percent of eligible expatriate voters registered to vote in the election.<sup>89</sup> In the United States, twenty-six thousand Iraqi voters, around eleven percent of those eligible, registered to vote.<sup>90</sup> Several explanations have been proffered for what was considered a low voter turnout. The double appearance requirement created an insurmountable challenge to some voters who could not afford to travel far distances, let alone travel there twice. Beyond the procedural requirements, planning was still not finalized even three weeks before the election.<sup>91</sup> Voters did not know where to vote, aside from having knowledge of the five cities designated as polling centers.<sup>92</sup> Voters traveling long distances needed to make arrangements in advance and knowing their exact polling location was crucial in making these plans. Further, voters were far removed from the process, and lacked access to much information about candidates and party platforms.<sup>93</sup> There were over one hundred political parties—the vast majority unfamiliar to voters—on the ballot.<sup>94</sup>

Challenges experienced by Iraqi expatriates offer some key lessons. First, officials must plan for the election with enough time to make deliberate, well-reasoned electoral policy. The Iraqi election officials had less than two months to plan how to reach and accommodate expatriate voters.<sup>95</sup> This is insufficient time for officials to plan an election seeking to enfranchise millions of expatriate voters spread throughout the world.

Next, requiring voters to appear twice operated as more of a disincentive than an encouragement to vote. Because the locations at which voters needed to appear were few and far between, fewer people could afford the time and expense necessary to complete the registration process itself, let alone return a second time to cast a vote. Further, there were no provisions made available to Iraqis with less financial means to enable them to cast their vote. Expenses incurred by voters incurred due to the in-person voting requirement should have been curtailed at all cost. In addition, if election officials only planned a few polling locations throughout the world, there should have been another method built into the system, such as absentee mail-in ballots to accommodate those voters who could not vote in person.

Finally, the example demonstrates that election officials must communicate effectively and efficiently with voters regarding polling locations. Because Iraqi expatriate voters were unable to receive critical information about polling locations with much advanced notice, many expatriate voters did not choose to exercise their political will in the election.<sup>96</sup> In addition to the lack of communication between election officials and expatriates, election officials provided little education about

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<sup>89</sup> See *Online NewsHour*, *supra* note 84 (stating that 280,000 Iraqis registered to vote worldwide out of an estimated 1.2 million eligible to register).

<sup>90</sup> *See id.*

<sup>91</sup> See Murphy, *supra* note 78, at A01; *Online NewsHour*, *supra* note 84.

<sup>92</sup> See *Online NewsHour*, *supra* note 84.

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

<sup>95</sup> See Wong & Zoepf, *supra* note 76, at A8.

<sup>96</sup> See Murphy, *supra* note 78, at A01; *Online NewsHour*, *supra* note 84.

the issues and candidates upon which voters could make decisions. This indicates the importance of conveying reliable, non-partisan information about candidates and issues in order to educate expatriate voters. Otherwise, expatriates who are already frustrated by the process are unlikely to cast an informed vote.

### C. MEXICO'S PRESIDENTIAL ELECTION OF 2006

Historically, Mexico has been charged with an inability to maintain free and fair elections. Responding to this poor reputation, the Mexican government made sweeping changes to ensure against voter fraud in 2000.<sup>97</sup> The Government invested \$750 million to create a system that provided individual identifications to each Mexican citizen.<sup>98</sup> The identification cards included a photograph of the citizen, a hologram, the citizen's thumbprint, the citizen's signature, and "optical character recognition."<sup>99</sup> Further, Mexico created a non-partisan, professional election administration and a fourth branch of government charged with overseeing elections, including an electoral court.<sup>100</sup>

In the planning stages for the election and after a strong lobbying effort, Mexico's Congress extended the right to vote to expatriates in the July 2, 2006 presidential election.<sup>101</sup> The Institute Federal Electoral oversaw the election.<sup>102</sup>

Officials estimated that over eleven million Mexican expatriates were eligible to vote in the election, about ten million of whom were residing in the United States.<sup>103</sup> Mexican expatriates constituted fifteen percent of the entire Mexican electorate.<sup>104</sup> In order to vote, expatriates who had Mexican-issued voter registration cards could fill out an online form to request an absentee ballot by mail or pick up the form from the consulate's local office.<sup>105</sup> Those voters needed to return the absentee ballot by registered mail by Election Day in order to be counted.<sup>106</sup> Those individuals without voter registration cards had to travel to Mexico to apply for a card and return at least two weeks later to receive the card.<sup>107</sup>

<sup>97</sup> See Robert A. Pastor, *Improving the U.S. Electoral System: Lessons from Canada and Mexico*, 3 ELECT. L. J. 584, 587 (2004).

<sup>98</sup> See *id.* at 588.

<sup>99</sup> See *id.*

<sup>100</sup> See *id.* at 587.

<sup>101</sup> See Wayne A. Cornelius, *Who Cares Where They Vote?*, LOS ANGELES TIMES, July 3, 2005; Tyche Hendricks, *Ex-Pats Hear Rules for Voting Absentee in Mexico*, SAN FRANCISCO CHRONICLE, Sept. 27, 2005, at B-8, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/09/27/BAG40EUD451.DTL>; Sonya Geis, *Registration is Low for Mexico's Absentee Vote*, WASHINGTON POST, Jan. 16, 2006, at A12, available at [http://www.washingtonpost.com/wp-dyn/content/article/2006/01/15/AR2006011500796\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/01/15/AR2006011500796_pf.html).

Mexican expatriates send billions of dollars back home yearly and have an increasing interest in Mexican politics. Unlike South Africa and Iraq, the vote in Mexico became inclusive due to political will, not simply as a gesture of the reconstruction of a country following a war.

<sup>102</sup> See Geis, *supra* note 101, at A12.

<sup>103</sup> See Sam Enriquez, *No Loud Voice for Expats in Mexican Vote*, LOS ANGELES TIMES, Jan. 14, 2006; Hendricks, *supra* note 101, at B-8.

<sup>104</sup> See Enriquez, *supra* note 103.

<sup>105</sup> See *id.*

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

<sup>107</sup> See Geis, *supra* note 101, at A12.

Of those eligible to vote in the election, only one percent of eligible expatriates requested an absentee ballot.<sup>108</sup> There are several obvious explanations for such low expatriate voter participation. An expatriate voter organizer observed that “seven or eight of every ten people lost interest when they found they could not get a voter card without leaving the United States.”<sup>109</sup> Some expatriates expressed a lack of confidence in an election that depended on Mexico’s unreliable postal service.<sup>110</sup> There was little voter education of the candidates and platforms outside the country.<sup>111</sup> In addition, the two in-person requisites for those without the identification card further dissuaded voters. However, compounded by the same time and monetary constraints as displaced voters in Iraq’s election, one deterrent was particular to Mexico: Mexicans who were undocumented and residing in the United States without a registration card had little incentive to return to Mexico to register to vote and risk re-entry into the United States.<sup>112</sup> “Apathy, poor planning, scant publicity, cumbersome procedures and a ban on campaign appearances outside the country all but sideline[d] the 15% of Mexico’s electorate who live abroad, primarily in the U.S.”<sup>113</sup>

If Mexico had relaxed its registration policies, expatriate voters could have had a more influential impact on the election. The election itself turned on less than 250,000 votes, “less than half of a percent of the 41 million votes cast,”<sup>114</sup> and will likely go down in history as one of the most contentious elections ever held.<sup>115</sup>

The experiences of Mexican expatriates provide valuable lessons. First, nonresident voters without the Mexican identification card had a disincentive to vote in the election, given the requisite double appearance in Mexico. Knowing that the Mexican government went through a very expensive overhaul of the electoral system, it makes sense that the

<sup>108</sup> See Enriquez, *supra* note 103; Geis, *supra* note 101, at A12.

<sup>109</sup> Geis, *supra* note 101, at A12.

<sup>110</sup> See Richard Clough, *Mexican Voting System Problematic*, DAILY BRUIN, Mar. 3, 2006, available at <http://www.international.ucla.edu/print.asp?parentid=40272>.

<sup>111</sup> Unlike in Iraq however, Mexican presidential candidates were expressly forbidden from campaigning outside the country, for fear of candidates finding loopholes in campaign finance rules and the like. See Enriquez, *supra* note 103.

<sup>112</sup> Geis, *supra* note 101, at A12.

<sup>113</sup> See Enriquez, *supra* note 103.

<sup>114</sup> Manuel Roig-Fanzia, *Mexican Court Declares Calderon President-Elect*, WASHINGTON POST, Sept. 2, 2006, at A01, available at [http://www.washingtonpost.com/wp-dyn/content/article/2006/09/05/AR2006090500120\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/09/05/AR2006090500120_pf.html). This election result is reminiscent of another hotly-contested election: the election of George W. Bush in 2000 to the United States presidency. In that election, Al Gore actually won the popular vote by 500,000 votes, but Bush won the election due to the way votes are tabulated according to the electoral college system. See Pastor, *supra* note 97, at 397.

<sup>115</sup> Following the announcement of Felipe Calderon as the Mexican president-elect, wide ranging protests of over one million people and resulting political unrest overtook the country. See generally, Lopez Obrador Leads Over 1.1 Million Supporters in Mexico City to Call for Presidential Vote Recount, DEMOCRACY NOW, Jul. 17, 2006, available at [www.democracynow.org/article.pl?sid=06/07/17/1424201](http://www.democracynow.org/article.pl?sid=06/07/17/1424201). Supporters of Calderon’s rival, Lopez Obrador, created a tent city extending through five miles of Mexico City’s center. See generally, Mexico Court Declares Calderon Winner of Disputed Election, Lopez Obrador Vows to Form Parallel Gov’t, DEMOCRACYNOW.ORG, Sept. 6, 2006, available at [www.democracynow.org/article.pl?sid=06/09/06/1359233](http://www.democracynow.org/article.pl?sid=06/09/06/1359233). The Mexican Electoral Court and the Federal Electoral Tribunal determined that Calderon had legitimately won the presidency. *Id.* However, that did not quash the political unrest because Obrador said “he will never recognize Calderon’s victory and has vowed to form a parallel government.” *Id.*

government would view requiring the card as an essential requirement. The identification system took Mexico out of a rut of international scrutiny to the point where scholars believe the “system has virtually eliminated voter fraud.”<sup>116</sup> That the government would wish to maintain that high standard is understandable. However, for voters who had not received the identification card, or lost theirs, or were in fear that they would not be able to return to the United States, the double-appearance requirement in Mexico posed an unreasonable burden.<sup>117</sup>

Next, Mexican officials effectively communicated the voting procedure to expatriate voters. The system may have been highly flawed from a voter perspective, but the system itself was clear and most voters seemed to understand the necessary procedure.<sup>118</sup> However, expatriates did not receive substantive communication regarding candidates and key issues on the ballot. The Mexican government decided to ban candidates from campaigning in locations within the United States.<sup>119</sup> The cited reason for such a limitation was to guard against candidates seeking loopholes from campaign finance rules by obtaining funds from international sources.<sup>120</sup> The result was that voters in the United States were forced to turn to other sources of information, such as word of mouth and the Internet.<sup>121</sup> Identical to the lesson learned from Iraq, to combat such challenges each voter must receive information which teaches them about the candidates, the issues, and the candidates’ platforms.

#### D. CONCLUSIONS DRAWN FROM THE INTERNATIONAL CASE STUDIES

The case studies provide valuable instructions for American states to follow when drafting policy that ensures displaced voters can participate in elections of their home districts. The examples indicate that American state election officials must confront the following main issues: (1) effectively communicating, both between themselves and voters and between candidates and voters; (2) securing effective procedures against voter fraud; (3) providing voting procedures that are inclusive and accommodate those who can vote in-person and those who may need to vote by absentee ballot; and (4) ensuring that officials have sufficient time and money to plan an election in this context.

#### IV. AMERICAN STATES’ ELECTION LAWS<sup>122</sup>

Turning to the United States, there are certain categories of current American law that can be used to meet the needs of displaced voters, although few states contemplate the reality of a displaced electorate.

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<sup>116</sup> Pastor, *supra* note 97, at 588.

<sup>117</sup> See Enriquez, *supra* note 103.

<sup>118</sup> *See id.*

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

<sup>120</sup> See Hendricks, *supra* note 101.

<sup>121</sup> See Clough, *supra* note 110.

<sup>122</sup> This section of the Note does not represent an exhaustive analysis of all state election codes. However, it analyzes trends in state laws and highlights some examples from states that are particularly relevant to this discussion.

## A. STATES WITH NO-EXCUSE ABSENTEE VOTING

At least thirty states now provide absentee voting as an option for voters without requiring an explanation.<sup>123</sup> States on the west coast, like Washington and California, will likely have a majority of absentee votes by its electorate in upcoming elections.<sup>124</sup> An extreme example is Oregon, which now requires voting through the mail instead of in-person voting at polling locations.<sup>125</sup>

Absentee voting is an effective method to facilitate the highest voter turnout of nonresident voters because it allows voters to cast a vote from their present location. Beyond filling out the ballot itself, absentee voting requires a mailing address for the voter which must be communicated to the Registrar of Voters, that the voter supply her address at which she is registered to vote in the election, and the voter must sign under penalty of perjury that the voter is registered to vote and is who she she claims to be.

Traditional absentee voting is inclusive and could prevent problems like those experienced in Louisiana, as mentioned in the Wallace Litigation, discussed *supra*. However, requests for absentee ballots usually must be received thirty days prior to Election Day. Thus, this provision is helpful but may not apply in an emergency context when an absentee ballot is necessary after the thirty-day deadline.

## B. STATES WITH EMERGENCY ABSENTEE VOTING

States with emergency absentee voting provisions take accommodations for voters a step farther than those that simply allow traditional absentee voting without an explanation. Some states provide emergency absentee voting for voters who are unable to vote in person because of an emergency and have otherwise missed the deadline to request an ordinary absentee ballot.<sup>126</sup> Of those states with the provision, many

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<sup>123</sup> See John Fund, *Absent Without Leave*, THE WALL STREET JOURNAL, Oct. 20, 2006, available at <http://www.opinionjournal.com/forms/printThis.html?id=110009167>.

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

<sup>125</sup> See *id.*

<sup>126</sup> See, e.g., ALA. CODE § 17-11-3 (2007) (granting the Secretary of State authority to create procedures to handle absentee applications and ballots to accommodate voters); COLO. REV. STAT. § 1-8-115 (2006) (allowing voters to vote by emergency absentee ballot if they follow the detailed procedure outlined in the statute); HAW. REV. STAT. ANN. § 11-92.3 (2007) (allowing the chief election officer or county clerk to require registered voters to vote by absentee ballot in those precincts affected by a natural disaster); IOWA CODE § 47.1 (2007) (authorizing the State Commissioner of Elections to exercise emergency powers over any election to accommodate voters); LA. REV. STAT. ANN. § 18:115(d)(i) (Supp. 2007) (allowing displaced voters to receive an absentee ballot if they complete the displaced voter affidavit and mail it to the Registrar of Voters); MONT. CODE ANN. § 13-13-211 (2005) (allowing emergency absentee voting for individuals who cannot vote in person due to an illness or health emergency); N.M. STAT. ANN. § 1-6-12.2 (LexisNexis 2007) (allowing for alternative ballots to be used if the voter missed the deadline to request an absentee ballot); OHIO REV. CODE ANN. § 3509.08 (LexisNexis Supp. 2007) (allowing absentee voting for absentee voters who are unable to vote in person due to a medical emergency); R.I. GEN. LAWS § 17-20-2.2 (2003) (providing procedure to case emergency ballots by mail when a voter misses absentee ballot application deadline); TENN. CODE ANN. § 2-6-401 (2003) (allowing for emergency absentee voting for individuals who cannot vote in person due to an illness or health emergency); UTAH CODE ANN. § 20A-3-306.5 (2003) (allowing for emergency absentee ballots for individuals in hospitals or long term care facilities); VA. CODE ANN. § 24.2-713 (2007) (granting the Secretary of State the authority to create procedures to handle absentee

require that the emergency be medical in nature, and that it require hospitalization.<sup>127</sup>

Incorporating the Uniformed and Overseas Citizens Absentee Voting Act<sup>128</sup>, states adopted special emergency voting procedures for the military<sup>129</sup> and overseas citizens<sup>130</sup> voting in federal elections. If members of the military are called on active duty or citizens find themselves overseas on Election Day and cannot otherwise vote in person and are unable to meet the deadlines to request an absentee ballot, they can vote by emergency absentee ballot.<sup>131</sup>

Colorado allows its voters who encounter an emergency that prevents them from voting in person to vote by absentee ballot, and the state statute does not qualify the application of the statute on the nature of the emergency being medical.<sup>132</sup> Under its election code, Colorado details procedures for voters to acquire an emergency absentee ballot when they fail to meet the deadline for requesting a regular emergency ballot.<sup>133</sup> The code is very accommodating in that it allows voters to request the emergency absentee ballot at the latest possible time—the application for an emergency ballot must be received before five p.m. on Election Day.<sup>134</sup> The code is also flexible in the mode of delivery of the application and the completed ballot, as it allows for the electronic transfer of the ballot, so long as it is received by seven p.m. on Election Day.<sup>135</sup> Colorado's procedure could be used to address and meet the unique needs of displaced voters, as long as the state is prepared to effectively communicate with displaced voters how to vote absentee, and as long as the state can handle an increased volume in absentee ballots.

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applications and ballots to accommodate voters); W. VA. CODE ANN. § 3-3-5(c) (2007) (allowing for emergency absentee ballots by qualified voters in a hospital or nursing home).

<sup>127</sup> See, e.g., ALA. CODE § 17-11-3 (2007); MONT. CODE ANN. § 13-13-211 (2005); OHIO REV. CODE ANN. § 3509.08 (LexisNexis Supp. 2007); R.I. GEN. LAWS § 17-20-2.2 (2003); TENN. CODE ANN. § 2-6-401 (2003); UTAH CODE ANN. § 20A-3-306.5 (2003); W. VA. CODE ANN. § 3-3-5(c) (2007).

<sup>128</sup> Uniform and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973 (1986).

<sup>129</sup> § 107 defines the "absent uniformed services voter" as:

- (A) a member of a uniformed service on active duty who, by reason of such active duty, is absent from the place of residence where the member is otherwise qualified to vote;
- (B) a member of the merchant marine who, by reason of service in the merchant marine, is absent from the place of residence where the member is otherwise qualified to vote; and
- (C) a spouse or dependent of a member referred to in subparagraph (A) or (B) who, by reason of the active duty or service of the member, is absent from the place of residence where the spouse or dependent.

<sup>130</sup> § 107 defines an "overseas voter" as:

- (A) an absent uniformed services voter who, by reason of active duty or service is absent from the United States on the date of the election involved;
- (B) a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States; or
- (C) a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States.

<sup>131</sup> See, e.g. ARIZ. REV. STAT. ANN. § 16-543 (2006); COLO. REV. STAT. § 1-8-103 (2002); DEL. CODE ANN. Tit. 15, § 5524 (1999); FLA. STAT. ANN. § 101.698 (West 2002); IDAHO CODE ANN. § 34-201 (2006); N.M. STAT. ANN. § 1-6-5.3 (LexisNexis 2003); OKLA. STAT. ANN. Tit. 26, § 14-135 (West Supp. 2007); PA. STAT. ANN. § 3146.8 (West Supp. 2007); WIS. STAT. ANN. § 6.22 (West Supp. 2006).

<sup>132</sup> See COLO. REV. STAT. § 1-8-115 (2006).

<sup>133</sup> See *id.* § 1-8-115(2).

<sup>134</sup> See *id.* § 1-8-115(1)(b).

<sup>135</sup> See *id.* § 1-8-115(5).

### C. STATES WITH AN ELECTION EMERGENCY CONTINGENCY PLAN

A few states have election emergency contingency plan procedures.<sup>136</sup> Put simply, these plans offer states a roadmap for how to operate elections during or following an emergency. Interestingly, the states with these plans do not outline the procedures within their election codes.<sup>137</sup> Instead, the election codes tend to offer only some fundamental, overarching requirements. The substance of the plan is left to the Secretary of State to determine the best procedures and how to institute them.

#### 1. Florida

In Florida, the Secretary of State, Division of Elections adopted the emergency contingency plan by rule, which has the force of law.<sup>138</sup> In the Florida election code, the legislature places three general requirements on the emergency contingency plan.<sup>139</sup> First, the plan must provide a specific procedure for state and local elections that officials can follow to ensure notice to the proper authorities.<sup>140</sup> Second, the plan must provide a procedure for the orderly conduct of a rescheduled election and coordinate efforts with election officials.<sup>141</sup> Third, the plan must provide for the release and certification of the elections returns.<sup>142</sup>

The Secretary of State's "Comprehensive Emergency Suspension of Election Plan" dictates rules regarding notification, conduct of rescheduled election, absentee ballots, voting and tabulation equipment, safety of existing poll places, and the release and certification of election returns.<sup>143</sup> While this seems like a comprehensive plan touching upon the major categories comprising each election, further review suggests the method is little more than a delegation of power to the "supervisor of elections from an affected county or the municipal clerk from an affected municipality," whose job it is to conduct the election after an emergency. While the plan does contain minimal and elementary guidance to the supervisor of elections or the municipal clerk, there is no mention of how to address the

<sup>136</sup> States which do not have these formal plans still have procedures to follow during times of natural disasters and other emergencies. For example, several states grant their governors the power to suspend state laws during emergencies, which could trigger suspension of election laws. *See, e.g.*, ARIZ. REV. STAT. ANN. §26-303 (2007); CAL. GOV'T CODE §8571 (2005); 20 ILL. COMP. STAT. ANN. 3305/7 (West Supp. 2007); IND. CODE §10-14-3-12 (2007), available at <http://www.in.gov/legislative/ic/code/title10/ar14/ch3.html#IC10-14-3-12>; MICH. COMP. LAWS ANN. §30.405 (West Supp. 2007); TENN. CODE ANN. § 58-2-107 (Supp. 2007); TEX. GOV'T CODE ANN. § 418.016 (2005); W. V.A. CODE ANN. §15-5-6 (LexisNexis Supp. 2007). Some states even allow the delay of elections at times of emergencies. *See, e.g.*, FLA. STAT. ANN. §101.733 (West 2002); G.A. CODE ANN. §21-2-50.1 (2003); HAW. REV. STAT. §11-92.3 (2006); M.D. CODE ANN. ELEC. LAW § 8-103 (LexisNexis 2003); N.Y. ELEC. LAW § 3-108 (McKinney 1998); N.C. GEN. STAT. § 163-27.1 (2005).

<sup>137</sup> *See, e.g.*, FLA. STAT. ANN. §101.733 (West 2002) (statute defers to the Department of State to put forth the emergency contingency plan and implement it); LA. REV. STAT. ANN. §§ 18:401.1, 401.3 (Supp. 2007) (statute defers to the Department of State to create the emergency contingency plan which must be approved by the state legislature).

<sup>138</sup> *See* Florida Department of State, Division of Election Rules, 1S-9.001-.005, available at <http://election.dos.state.fl.us/laws/AdoptedRules/ElectionsRules.html> (follow the link to the appropriate pdf).

<sup>139</sup> FLA. STAT. ANN. § 101.733(3) (West 2002).

<sup>140</sup> *Id.* § 101.733(3)(a).

<sup>141</sup> *Id.* § 101.733(3)(b).

<sup>142</sup> *Id.* § 101.733(3)(c).

<sup>143</sup> *See* 1S-9.005.

needs of displaced voters, except that the supervisor of elections or municipal clerk may distribute and collect absentee ballots in locations at their discretion. Overall, the plan does not contemplate or address the scenario of conducting an election where a large proportion of the electorate is displaced. Although it does not expressly consider this scenario, the plan could nonetheless be used to support an absentee election for nonresident voters.

## 2. *Kentucky*

The Kentucky Elections Emergency Contingency Plan was promulgated by the State Board of Elections in the form of an administrative regulation.<sup>144</sup> The Kentucky Elections Emergency Contingency Plan<sup>145</sup> provides different procedures for conducting elections rescheduled prior to<sup>146</sup> and after<sup>147</sup> the original Election Day. If an election is rescheduled prior to the original Election Day, the statute is silent on how to conduct a rescheduled election. If an election is rescheduled after the commencement of voting on the original Election Day, then the rescheduled election requires in-person voting by all voters, including military personnel and absentee voters.<sup>148</sup> The structure of the statute assumes that an election will be rescheduled due to an emergency. In the event that there is a disaster but the state decides to move forward with the election on the planned date, a strict reading of the statute would suggest the emergency contingency plan would not be triggered.

The plan seems cursory and does not specifically contemplate accommodating a displaced nonresident electorate. Therefore, in the event of a natural disaster requiring an election to be rescheduled, the statute provides little guidance to election officials confronted with such a reality.

## 3. *Louisiana*

A considerable discussion of the progression of Louisiana election law is established in Part II of this Note, but further discussion is included here to garner a greater understanding of the level of preparedness within the law as it stands today. Today, Louisiana's election code does provide accommodations for voters that were displaced by Hurricane Katrina. As discussed earlier, displaced individuals could vote by absentee ballot if they submitted a Displaced Voter Affidavit along with the application for an absentee ballot.<sup>149</sup> However, if voters registered to vote by mail after

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<sup>144</sup> See KY. REV. STAT. ANN. § 117.015(1)(b) (West 2006).

<sup>145</sup> See 31 KY. ADMIN. REGS. 4:160 (2007), available at <http://www.lrc.ky.gov/kar/031/004/160.htm>.

<sup>146</sup> See *id.* § 6.

<sup>147</sup> See *id.* § 7.

<sup>148</sup> See *id.* § 7(4)(c).

<sup>149</sup> See LA. REV. STAT. ANN. § 18:115(F)(2)(d)(i) (2006) ("The Legislature of Louisiana recognizes that due to a recent common disaster and state of emergency in the state, an unprecedented number of persons have been temporarily displaced from their parishes of residence for an indefinite period of time. Because the right to vote is a right that is essential to the effective operation of a democratic government, the legislature finds that the state has a compelling interest in securing the right to vote for any person temporarily displaced by a disaster or emergency who may experience greater difficulty exercising his right due to his displaced status. The legislature, therefore, enacts this Subparagraph, which shall apply to any person temporarily displaced from his parish of residence by a gubernatorially

September 24, 2005 and had never voted in a prior election in-person, then that first-time voter must cast her vote in-person.<sup>150</sup> To reiterate previous discussion, this was an issue hotly debated by the Wallace litigation, but nevertheless upheld by Judge Lemelle. In reality, these first-time voters must incur great time and expense to return home to vote, which operates as a disincentive to participating in local elections.

Louisiana also has an Emergency Election Contingency Plan in order to prepare for a future disaster. The Louisiana legislature passed legislation that outlines the procedure for planning elections after an emergency.<sup>151</sup> The legislature delegates the creation of the state's Emergency Contingency Plan to the Secretary of State.<sup>152</sup> To get to the stage of drafting the emergency contingency plan, first, the Governor must declare a state of emergency;<sup>153</sup> the Secretary of State must then determine that the emergency impairs an election and certify the facts and reasons for the impairment to the Governor, the Senate Committee on Senate and Governmental Affairs, and the House Committee on House and Governmental Affairs.<sup>154</sup> Then, the Governor and the majority of the members of each committee must agree that the emergency plan is necessary.<sup>155</sup> Following such concurrence, the Secretary of State must draft the emergency contingency plan, which proposes to address the problems that impair the election.<sup>156</sup> The Secretary of State then submits the proposal and a majority of each house of the legislature and the governor must approve the emergency plan, which has many technical requirements.<sup>157</sup>

The legislation is riddled with bureaucracy that seemingly would serve as a careful check and balance function during an emergency, when individual civil rights are easily compromised if policy is drafted too quickly. However, under this plan Louisiana election officials would require a significant amount of time to draft such a policy and obtain the required approval at the various levels of government. Elections could inevitably be postponed for months on end if there was a legislative deadlock or if the state officials were also scattered outside the state and there was not a majority present for a given period to engage in the emergency contingency planning process. Officials need to construct a more comprehensive plan that enables them to move forward after a

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declared state of emergency who registered to vote by mail on or after October 5, 2004, but prior to September 25, 2005, when he submits with the application to vote by mail an affidavit attesting that he is temporarily displaced from his parish of residence due to a state of emergency which has been declared by the governor, that he is eligible to vote in his parish of residence, and that he expects to be out of his parish of registration during early voting and on election day. He shall sign such affidavit before a notary public or two witnesses. If signed before two witnesses, the witnesses shall also sign the affidavit and such affidavit shall be made under penalty of perjury for providing false or fraudulent information. The provisions of this Subparagraph shall be effective until July 16, 2006.”)

<sup>150</sup> See *id.* § 18:115(F)(1).

<sup>151</sup> L.A. REV. STAT. ANN. § 18:401 (Supp. 2007).

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

<sup>153</sup> *Id.* § 18:401.1(B).

<sup>154</sup> *Id.* § 18:401.3(B)(1).

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

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* § 18:401.3(D).

disaster strikes, rather than create the plan amid the chaos following a disaster.

#### 4. *Mississippi*

Mississippi adopted an Election Action Plan in 2005.<sup>158</sup> The plan was inspired by the events of September 11, 2001, and attempts to “strengthen security and take preventative action in order to address emergency situations.”<sup>159</sup> Although the plan does make strides to dictate proper chains of communication in the case of electoral emergencies, it provides little more than a list of individuals to contact in case of emergency.<sup>160</sup> Specifically, it does not provide guidance regarding how to operate elections that would ensure a displaced nonresident electorate could participate in the election.

The 12-page plan focuses on defining the need for communication among state stakeholders.<sup>161</sup> It provides some “suggested emergency procedures” when the nature of the emergency is fire, medical, inclement weather, telephone bomb threat, written bomb threat, election equipment failure, and electrical blackout.<sup>162</sup> Nowhere in the plan is there language which addresses the unique needs of displaced voters.

### V. POLICY RECOMMENDATIONS

Although some states have laws which could be used to address a nonresident election following an emergency, several states have not proposed comprehensive solutions to the challenges presented by displaced voters. Louisiana leads other states in terms of having addressed the problem, as it is one of the only states that has had to confront the reality of displaced voters. However, the state’s election law still contains shortcomings. Overall, there are some good state-level attempts to prepare for disasters that affect elections. However, those efforts have not translated into the election law in a way that guarantees the right to vote as fundamental by ensuring all registered voters can participate in an election, even when they are displaced.

Of course, it is impossible to plan an electoral policy that will perfectly fit the circumstances following an emergency before the actual natural disaster displaces the electorate. Each disaster is unique, as is each state and its electorate. There is no one-size-fits-all solution. However, states can create policy that provides fundamentals and guidelines for how to respond after an emergency in a way that guarantees the right to vote for displaced voters in their home district elections. The details of the election plan will have to be determined after the emergency, but the overarching procedure

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<sup>158</sup> See Eric Clark, Secretary of State, *Mississippi Election Action Plan* (2005), available at <https://secure.sos.state.ms.us/elections/MEAP.pdf>.

<sup>159</sup> See *id.* at Introduction.

<sup>160</sup> One-fourth of the plan is dedicated to a directory of “Local Emergency Management Agency/Civil Defense.” See *id.*

<sup>161</sup> See *id.*

<sup>162</sup> See *id.*

can be drafted immediately, and would provide an invaluable roadmap to state officials when disaster strikes.

To direct states that decide to draft legislation that would address this problem,<sup>163</sup> the following are offered as guiding principles:<sup>164</sup>

#### A. OFFER OUT-OF-STATE SATELLITE VOTING AND ABSENTEE VOTING

As suggested by the Wallace Plaintiffs and several academics, states should provide both satellite voting<sup>165</sup> in areas of concentrated nonresident voters and absentee voting for those voters who are unable to vote either in their home precinct or at the satellite voting location. Voting in-person at the satellite location would be preferred: in-person voting at the satellite location most closely resembles the voting experience of non-displaced voters, which is a familiar procedure for most voters. The absentee system should be utilized primarily when voters are unable to reach the satellite location. However, absentee voting should remain unqualified, so displaced voters who wish to vote absentee for any reason should be allowed to do so.

Regardless of whether one votes at a satellite polling center or by absentee ballot, states should require that displaced voters sign an affidavit which swears, under penalty of perjury, to their identity, the address at which they are registered to vote, that they are registered to vote in the

<sup>163</sup> Several states fall under the authority of Section 5 of the Voting Rights Act. Thus, any change in election policies must be cleared by the Department of Justice, which will evaluate whether there is an impermissible burden placed on minority voters based on the change in the policy. The suggested changes to the policies will pass the preclearance retrogression standard found in *Beer v. United States*. Simply speaking, the suggestions will open up voting to all voters, with an eye towards the particular plight of minorities. See *Beer v. United States*, 425 U.S. 130 (1976).

<sup>164</sup> These suggestions are in no way revolutionary. In fact, they are basic, demonstrating how easy it is for states to craft policy now which can effectively address the unique needs of displaced voters in a way that upholds their right to vote in their home district's elections as fundamental. This Note does not suggest fanciful or lofty suggestions which are out of touch with reality. Instead, it makes practical recommendations which all states can adopt today for their own use and which are deliberately chosen to inspire debate among state election officials.

Some authors have made some suggestions of their own. Rea L. Holmes, an associate at LaFollette Godfrey & Khan, suggests the following for Louisiana: (1) Louisiana must allow displaced voters to register to vote on the same day they cast their votes; (2) the state should remove all limits placed on first time voters voting by absentee ballot; and (3) the state should provide out of state satellite voting in areas of high concentration of displaced voters. See Holmes, *supra* note 28, at 92–94. Kristen Clarke-Avery and the late M. David Gelfand offered suggestions within the New Orleans context of accommodating displaced voters. See Clarke-Avery & Gelfand, *supra* note 27. First, they argued the absentee voting process should be opened up to all displaced citizens. *Id.* Next, they argued voter identification methods should be relaxed and that forms of identification, beyond state issued photo identification, should be accepted. *Id.* They next argued that, overall, the right to vote should be protected for displaced voters until they “express a clear intent to establish permanent residency elsewhere.” *Id.* The Harvard Law Review Association suggests the following as global changes for all states: (1) states must adopt the same electronic format for their voter registries; and (2) states must develop an infrastructure for absentee voting which allows polling locations to be moved to areas of concentrated displaced voter populations. See *Developments in the Law*, *supra* note 8, at 1186–1188. The Association believed the following situation could be a reality, “[a] displaced voter would be able to visit the nearest polling location, no matter where he is. Poll workers could verify his identity using computerized and networked interstate voter registries. Next, the poll workers could update his status in the registry to ensure that his identity could not be used elsewhere. To poll workers could download his local ballot and then upload his votes so that they could be counted in his home state.” *Id.* at 1188.

<sup>165</sup> In a Vote Nebraska Initiative Report, the authors found satellite voting would encourage voter participation. See *Vote Nebraska Initiative Report* (Dec. 31, 2004), available at <http://www.nlc.state.ne.us/epubs/L3790/B056-2004.pdf>.

current election, that they are involuntarily displaced outside of their home district, and that they will return home when it is possible. States may wish to require that the affidavit also be signed by two witnesses, as is required by Louisiana election law. Such a requirement would only minimally burden voters and yet would sufficiently ensure against voter fraud concerns.

This two-choice method will encourage voters to participate at higher rates. The Wallace Plaintiffs intended to introduce evidence that African-Americans tend to vote absentee at lower rates than their white counterparts.<sup>166</sup> Whether or not that trend continues to be accurate, including this choice of voting in-person or by absentee ballot would perhaps increase the racial diversity of displaced voters that actually cast a vote. Further, this deliberately racially inclusive choice would contribute to the election plan, and sail far above the bar set by the Voting Rights Act.

Absentee voting should be available to all displaced voters regardless of whether, how, or when voters were previously registered to vote. If displaced individuals have not previously registered to vote, states must determine appropriate deadlines for registration. The most inclusive policy would allow these individuals to register at the same time they cast their vote. A slightly less inclusive, but perhaps more practical policy could be to allow voters to register by fax until a few days prior, or even until five p.m. on the day preceding the election. States must also determine an appropriate deadline for voters requesting an absentee ballot. States could allow electronic requests for an absentee ballot to be made even on Election Day, until a certain hour in the day, that would give the voter enough time to receive, fill out, and return the ballot by the time the polls close. A feasible example is found in Colorado's emergency absentee voting provision, which allows voters to return their ballots by fax until seven p.m. on Election Day.<sup>167</sup>

The satellite voting component warrants debate over some practical considerations. First, South Africa's in-country voting experience provides an example of the need for state election officials to have an accurate estimate regarding the number of displaced voters, to ensure that enough ballots or voting machines are available for voters who choose to vote in-person at the satellite voting location.<sup>168</sup>

Next, states must decide whether to use paper ballots or electronic voting at the satellite polling locations. The benefit of paper ballots is that there is a paper trail, which may give voters more confidence in the system. However, because displaced voters could be registered to vote anywhere in the state, satellite polling locations which choose paper ballots must have a sufficient number of ballots for each local election in the state. The benefit of electronic voting would be that the state could design software which

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<sup>166</sup> Louis Keller, the Orleans Parish Registrar, testified at his deposition that "in past elections during his tenure, only 5% of votes were cast by absentee ballot, including absentee by mail and early voting . . . . He also testified that African-Americans vote absentee less frequently than white voters for socioeconomic reasons." See Wallace Plaintiffs Trial Br., *supra* note 32, at 12–13 (on file with author).

<sup>167</sup> See COLO. REV. STAT. § 1–8–115 (2006).

<sup>168</sup> See Keller, *supra* note 67, at A14. See generally Elklit & Reynolds, *supra* note 59.

would make each local election ballot available electronically.<sup>169</sup> The expense of printing, transporting to and from the polling location, and counting paper ballots could be saved by electronic voting. However, transporting and maintaining electronic voting machines may ultimately be more expensive overall. States must determine which options they believe best serve displaced voters.

Following a disaster, displaced voters naturally will begin returning to their home districts over time. Gradually, states will have less nonresident voters for which to provide the unique two-choice electoral policy. As voters return home and are found in less concentrated populations, states may wish to discontinue satellite voting in favor of turning to a purely absentee voting system. States should make provisions in their election laws allowing for this transfer, and should debate at what point the transfer would be appropriate (for example, when the displaced voter volume shrinks to fifty percent of its post-disaster size). Building these benchmarks into the election law will aid states in transitioning their electoral remedies, and save states' money by discontinuing policies which no longer fit the needs of voters.

#### B. PROTECT AGAINST VOTER FRAUD

Given the experiences in South Africa, Iraq, and Mexico, it is evident that voter fraud is an important consideration when drafting policy for displaced voters. Voting by absentee ballot and at satellite locations raises new voter fraud concerns beyond those already anticipated in the traditional voting experience. Concerns for fraud in this context are certainly valid: most scholars can agree that voting by absentee ballot is a method with greater risks than in-person voting. However, most states allow for absentee voting in many circumstances, and some go as far as requiring it, such as Oregon. If states provide this option of voting, then it makes logical sense for them to allow it for displaced voters.

Further, weighing the benefits to displaced voters of the two-choice voting method and the risk of coercion or fraud, a balance must be struck in favor of accommodating the displaced voter. The duration of displacement is a relatively short period and it makes sense for states to provide specifically tailored solutions for displaced voters rather than risk

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<sup>169</sup> The Harvard Law Review Association suggested something similar, where poll workers in any state could simply download a voter's local ballot electronically and then upload the completed ballot to the appropriate state's computerized election system. See *Developments in the Law, supra* note 8, at 1188. At this point in time, this may be an advanced expectation of what states can do for voters. This Note does not go as far as to suggest this method, although the suggestion is one to which states should aspire. That method would require each state to collaborate and agree to collect and maintain voter information in one country-wide voter registry database. Also, the method would allow any voter, no matter where she finds herself on Election Day and no matter why, to vote at any polling location within the United States. The system would provide the most ease for voters but the most headache for states, because state elections are fundamentally state creatures, not ones easily expanded beyond the state's borders for any reason at all. Without federal mandate or intervention, it is unlikely that all states would quickly or readily comply with this system because it may be viewed as invading state sovereignty. Short of what the Harvard Law Review Association suggests, this Note recommends that electronic voting machines used at satellite voting locations could be programmed to contain all the local ballots for one state's elections.

disenfranchising this population. These voters have been forced from their homes, against their will, and states should make every reasonable effort to include them in the political process. There is no reason to presume that this class of voters will engage in voter fraud at a higher rate than citizens casting votes by traditional means under normal circumstances.

Displaced voters are a discrete, identifiable class of individuals who warrant greater electoral protections. Although most concerns about in-person voter fraud in the United States are unfounded,<sup>170</sup> it is important that a system that provides for the protection of displaced voters include features that help make that system secure. Voter fraud concerns can be sufficiently addressed by requiring displaced voters to sign an affidavit which swears, under penalty of perjury, to their identity, to the address at which they are registered to vote, that they are registered to vote in the current election, that they are involuntarily displaced outside of their home district, and that they will return home when it is possible. Requiring that the affidavit be signed by witnesses would provide even greater protection. States must determine the appropriate level of protections against voter fraud and weigh them against the burden they place on displaced voters in order to strike an appropriate balance.

#### C. COLLABORATION AND INFORMATION SHARING AMONG AGENCIES

To the extent possible, state election officials should partner and share information with disaster preparedness officials, such as the Federal Emergency Management Agency, that have reason to track and provide services to displaced persons. Divisions between the powers of state and federal governments, such as those that prevented an immediate relief response following Hurricane Katrina,<sup>171</sup> must not prevent the sharing of information in this context. Political turf wars cannot stand in the way of states working with each other or with the Federal government to reach displaced voters. If states can collaborate with other organizations providing services for the displaced population, states can take advantage of institutional knowledge already gained by others instead of having to duplicate efforts. For example, agencies can share information relating to the present location of displaced voters, so state election officials can determine voter concentrations and where best to locate satellite polling centers. The collaborative effort at the government level will reduce the burden on displaced residents who would otherwise have to communicate the same information to multiple different government agencies.

#### D. FLUID COMMUNICATION

States must communicate effectively with voters. Election officials must clearly relay information to voters concerning the two-choice voting methodology. Deadlines must be clear and reasonable. Satellite polling locations should be chosen based on displaced voter population

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<sup>170</sup> See generally Minnite, *supra* note 4.

<sup>171</sup> For an expose of how these divisions only contributed to further devastation of hurricane victims, see *WHEN THE LEVEES BROKE: A REQUIEM IN FOUR ACTS* (HBO 2006).

concentrations. To the extent possible, states should consider opening up voting at satellite locations several days preceding the election, mirroring traditional early voting policies. Further, to ensure there is an informed electorate, officials must determine the proper procedures to guarantee that voter information packets reach displaced voters. Voters must be aware of the candidates and the issues upon which they will be making decisions on Election Day. States should use all means of communication possible, including radio broadcasts, television appearances, directed mailings, and creation of an Internet site dedicated to displaced voter information. States must use clear communication, free of legalese and complex terms, outside the scope of the general population.

#### E. PROACTIVE POLICY MAKING AND BUDGETING

States must debate how best to craft election law under this scenario as soon as possible. If states wait until disaster strikes, they will likely have a short period of time within which to create policy, as did Iraq and South Africa. In the planning stages, state election officials must contemplate how much these elections will likely cost, depending on variables such as how many voters are affected, how many satellite voting centers need to be set up, whether to allow voting electronically or by paper ballots, and the like. To the extent possible, states should earmark funds to meet these needs, with a proviso that if the funds are unused during any given year, that they rollover into other election programming or carry over into the same fund the following year.

#### VI. CONCLUSION

States have a challenging task before them, whether they recognize it or not. State officials must pass legislation immediately that effectively addresses the reality of administering elections with a nonresident electorate. Arguments that setting up policy now would cost too much, or take too much time simply do not hold water in this discussion. States have the power to make deliberate and meaningful decisions about election policy before a disaster strikes. State officials must do what is necessary to provide elections that facilitate full participation by all segments of the electorate. They have a duty to their citizens to protect their fundamental rights, upon which our democracy depends.